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One Project, Two Stories – Who Caused the Delay?

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EXECUTIVE SUMMARY

In the case of *ICOP Construction (SG) Pte Ltd v Tiong Seng Civil Engineering (Pte) Ltd* [2024] SGHC(A) 1 ("*ICOP v Tiong Seng*") the Appellate Division of the Singapore High Court (the "Court") affirmed several important principles concerning a contractor's delay related claims.

In particular, the Court set out on what basis it determined which programme should be relied on as the baseline programme for the delay analysis underlying a contractor's delay related claim.

The Court also held that the debate on the proper approach to concurrent delays is only relevant where both events causing delay are "*of approximately equal causative potency*" and both events must, in fact, cause critical delays (i.e., they must both affect the critical path of the project).

FACTS

In June 2016, Public Utilities Board ("PUB") engaged Tiong Seng Contractors Pte Ltd ("TSC") to construct a potable water pipeline. TSC subcontracted certain works to Tiong Seng Civil Engineering Pte Ltd ("TSCE"), the respondent, which belongs to a group of companies that includes TSC.

In around May 2017, TSCE subcontracted the micro-tunnelling works to ICOP by way of an execution of a letter of award ("LOA").

ICOP claimed that TSCE was supposed to hand over Shaft P5-2 to ICOP by 24 February 2018 but did so only on 2 April 2018, causing critical delays to the Project. TSCE rebutted that ICOP was also responsible for that delay because ICOP was unable to mobilize equipment in accordance with the stipulated timelines even after the handover of the worksite given that the primary generator and microtunnel boring machine, a machine used to install pipelines through a form of boring that creates tunnels, arrived on site on 27 April 2018.

ISSUES

The key issues concerning delay were: (i) which programme should be adopted as the baseline programme, and (ii) whether TSCE or ICOP was liable for the critical delays to the Project.

BASELINE PROGRAMME

The Parties' Arguments

a. ICOP's submission

ICOP submitted two baseline programmes: a revised work programme issued by ICOP to TSCE on 8 January 2018 (the "8 January 2018 WP") and a revised version of the 8 January 2018 WP sent on 17 August 2018 (the "17 August 2018 WP").

ICOP relied on the clause 2.2 of the letter of awards ("LOA"), which provides:

> *The tentative scheduled Completion Date: refer Appendix D.*
>
> *The parties acknowledge that the Commencement Date and Completion Date set out in Appendix D are mere tentative in nature. The actual Commencement Date and Completion Date shall subject to mutual agreement of the parties. The Main Contractor will issue a notice to proceed to you with no less than 45 days prior to the actual Commencement Date.*

On 27 December 2017, ICOP wrote to TSCE that the Project was already delayed based on the tentative schedule in the Subcontract. TSCE issued a notice to ICOP to proceed mobilization at shaft P5-2 from 15 January 2018 onwards. ICOP then prepared a revised work programme and issued it on 8 January 2018 (the "8 January 2018 WP").

On 17 August 2018, ICOP sent a revised version of the 8 January 2018 WP to TSCE, which considered TSCE's previous delays and revised the completion dates for ICOP's works accordingly. This revised version was submitted by ICOP to TSCE as the 17 August 2018 WP.

b. TSCE's submission

TSCE submitted that the applicable baseline programme should be the one issued by ICOP on 25 February 2017 (the "25 February 2017 WP"). TSCE suggested that the 25 February 2017 WP should be preferred for the following reasons:

- In a letter dated 29 March 2019, ICOP took the position that the 25 February 2017 WP was the baseline programme.

- The tentative schedule set out in the Subcontract was based on the 25 February 2017 WP, whereas the 8 January 2018 WP and 17 August 2018 WP were not compliant with the Subcontract.

ICOP's delay expert also opined that because the 17 August 2018 WP contains as-built data and events occurred before the commencement of pipe jacking, it was an inappropriate baseline programme.

The Court's Findings

a. Lower Court's decision

The lower court Judge did not accept the evidence submitted by ICOP that TSCE accepted the new 17 August 2018 WP. That said, the Judge accepted ICOP's reliance on clause 2.2 of the LOA, excluding the possibility of the 25 February 2017 WP as the applicable baseline programme for two reasons. First, LOA clause 2.2 states that Appendix D is tentative. Since Appendix D is based on the 25 February 2017 WP, this schedule was found not to be probative. Second, clause 2.2 requires the Notice to Proceed to be issued "no less than 45 days prior to the actual Commencement Date". The timing of the Notice to Proceed necessitated changes to the programme in the 25 February 2017 WP, further dismissing it as an applicable baseline programme.

After a process of elimination, the 8 January 2018 WP (as submitted by ICOP) was considered as the applicable baseline programme.

b. Appellate Division of High Court decision

In the appellate division, the Court maintained that the 8 January 2018 Programme (as submitted by ICOP) should be seen as the applicable baseline programme. To agree on the most accurate reflection of the parties' baseline programme, the Court considered the following:

- Clause 2.2 of the LOA states that the schedule of the Subcontract Works depends on TSCE issuing the Notice to Proceed "no less than 45 days prior to the actual Commencement Date" which indicates that the timing of when the Notice to Proceed was issued is crucial in determining the applicable baseline programme.
- The Commencement Date stated in the 8 January 2018 Programme was 47 days after the Notice to Proceed. This was broadly consistent with the agreement under clause 2.2 of the LOA of the parties.

Practical Takeaway

The identification of the baseline programme is important to carry out a proper delay analysis. As a matter of principle, a reliable baseline programme would be "*a construction programme which sets out the start and end dates of works, the planned duration of those works, and the sequence in which they are to be carried out. It serves as the*

schedule against which progress is tracked and also, conversely, the schedule against which delays are assessed".[1]

In order to determine the applicable baseline programme, it is important to consider all the relevant circumstances. For example, the relevant contractual clause(s) that would indicate or support which baseline programme be given weight, and the parties' conduct regarding the baseline programme especially in light of the relevant contractual clause.

In this regard, even the terms of an LOA could be of importance from a Singapore law point of view. Therefore, the terms of a draft LOA relating to the schedule of the project should be reviewed carefully as this could potentially have wider implications on the baseline programme to be relied on for a later delay claim.

CONCURRENT DELAY

Treatment of concurrent delay in different jurisdictions

Different jurisdictions have taken different approaches to the treatment of concurrent delay. Under English law and Singapore law, the "time-but-no-money" approach, or the *Malmaison* approach is prevalent. In contrast, under the laws of Scotland, the apportionment approach is widely accepted. This is also followed in other jurisdictions, such as Hong Kong and the United Arab Emirates ("UAE").

<u>England and Wales – the Malmaison approach and the "first-in-time approach"</u>
Under English law, the *Malmaison* approach, named after the decision of *Henry Boot Construction Ltd. v. Malmaison Hotel* [1999] 70 Con LR 32A, is generally followed. In situations where there are two concurrent causes of delay, one attributable to the contractor and the other to the employer, unless agreed otherwise, the contractor will be entitled to an extension of time for the period of delay caused but not to loss or expense incurred during the extended period - hence the contractor receives time but not money.

Under the *Malmaison* approach, the contractor could claim time but not money. In contrast, the "first-in-time approach", as reflected in the *Saga Cruises v Fincantieri* [2016] EWHC 1875 (Comm.) case, provides that a contractor would not be entitled to benefit from the employer's delay if the contractor was already in delay and the employer's delay had no actual impact on the completion date.

<u>Scotland – the apportionment approach</u>
In other jurisdictions, the apportionment approach is favored. The Scottish court in *City Inn Limited v. Shepherd Construction Limited* [2010] CSIH 68 did not follow the *Malmaison* approach and instead adopted the apportionment approach. Under this approach, where there are two competing causes of delay, but it is not possible to determine which of them is the dominant cause of delay, the delay would be apportioned between the contractor and the employer, in a fair and reasonable manner, based on the relative culpability of the factors that caused the delay. Other jurisdictions, such as Hong Kong and the UAE, have approved and adopted the apportionment approach.

[1] *ICOP Construction (SG) Pte Ltd v Tiong Seng Civil Engineering Pte Ltd* [2002] SGHC 257 at [58]

Under Singapore Law
Singapore generally follows the English approach – the *Malmaison* approach. Hence, in principle, the contractor will be entitled to an extension of time for the period of delay caused but not to loss or expense incurred during the extended period.

If the Extension of Time ("EOT") clause, however, permits the apportionment of delay, the Singapore court held that delay will be apportioned fairly and reasonably (*CAJ v. CAI* [2021] SGCA 102).

Court's finding

In *ICOP v Tiong Seng*, at the lower court, the two parties argued on two different approaches: *Malmaison* approach and "first-in-time approach". The court held that ICOP was responsible for the delays that occurred between 24 February 2018 to 6 April 2018. ICOP appealed against the lower court's finding that TSCE was not responsible for any critical delay to the progress of ICOP's works between 24 February 2018 to 6 April 2018.

The appellate court found the debate on the appropriate approach to be irrelevant to the present case. It held that the threshold question should be whether there is a concurrent delay – before discussing how concurrent delay should be dealt with. In this regard, it held that in the *ICOP v Tiong Seng* case, as a matter of fact, there was no true concurrency, and hence the issue of how concurrent delay should be treated would not be engaged. The Court followed the strict definition of concurrent delay as set out in *Keating on Construction Contracts* which states that "*there is only true concurrency where both events cause delay to the progress of the works and the delaying effect of the two events is felt at the same time and each is critical to completion*".

In particular, on the basis that the 8 January 2018 Programme was decided as an applicable work programme, it held that any delays caused between 24 February 2018 to 5 April 2018 were not considered as critical delays. As a predecessor activity to ICOP commencing pipe jacking works, the task on the critical path was TSCE obtaining the Authorities' Approvals. As of 22 May 2018, however, the worksite had been handed over and equipment had been mobilized, ready to commence pipe jacking. Thus, when TSCE obtained Authorities' Approvals on 25 June 2018, any issues regarding the delay in TSCE's worksite handover or ICOP's mobilization were not on the critical path. The Court thus concluded that there is no need to consider different approaches to concurrent delays for this period and dismissed the appeal.

PRACTICAL TAKEAWAY

In a construction dispute, concurrent delay is often raised by the employer as a defense to a contractor's prolongation claim. In order to pursue this defense under Singapore law, the employer would have to establish first, both factually and relying on expert evidence, that the delay events are truly concurrent. Otherwise, Singapore courts would generally not engage with the issue of how to treat concurrent delay unless it is first established that there is true concurrency.

This could be different if the parties were to define 'concurrent delay' in the contract to encapsulate events that are not necessarily truly concurrent. However, for a contractor, such a contractual clause defining concurrent delay wider than usual could result in restricting the contractor from pursuing prolongation claims against the employer so long as the employer could loosely identify a parallel activity by the contractor (not impacting the critical path) that was delayed. Therefore, a careful legal analysis should be conducted by contractors before agreeing on clauses defining 'concurrent delay' in a particular fashion.

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ABOUT PETER & KIM

Peter & Kim is a specialist arbitration firm with offices in Geneva, Zurich, Sydney, Seoul, Perth and Singapore. We support clients globally through a cohesive cross-border team structure offering a depth of common and civil law expertise that is grounded in decades of combined experience at partner level in international arbitration proceedings (including ISDS cases) and in advising and representing commercial and government clients in arbitration-related proceedings before State Courts.

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