



Performance Bond Call – *Where should the contractor first go to seek a remedy?*

Reflections on the remedies available in Singapore

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EXECUTIVE SUMMARY

It is generally challenging for a contractor to prevent an on-demand performance bond from being called on or to prevent a bank from making payment after an on-demand bond call. Nonetheless, if the call on such a bond is fraudulent or unconscionable, Singapore law allows the contractor to apply to a court for a permanent injunction or temporary restraining order to prevent the employer from calling on the bond.

With the introduction of the SIAC Rules 2025, an emergency arbitrator is now equipped with the power to issue protective preliminary orders ("**PPO**"). Where an employer and contractor had agreed to arbitration pursuant to the SIAC Rules 2025, there arises a question as to whether a contractor who seeks to stop a bond call from being called has to first apply for a PPO, before applying for a court-ordered interim measure under Singapore Arbitration Act 1994 ("**IAA**").

This article seeks to review the interplay between the PPO procedure (a new feature in the SIAC Rules 2025) and the availability of court-ordered interim measure under the IAA, in preventing an employer from making a call on a performance bond.

Although a court decision specifically deciding this issue is yet to be seen, the authors' view is that generally (i) if the bond call is imminent (but has not occurred), a PPO would and should be the first option to be taken if sought to be applied against the employer, whereas (ii) if the bond has been called on, a court-ordered interim measure would be more ideal especially if intended to be addressed to banks.



RULES GOVERNING CALLS ON ON-DEMAND PERFORMANCE BONDS

An on-demand performance bond is an undertaking by the bond issuer (usually a bank) to pay a specified sum to the beneficiary on receipt of a compliant demand. As it is issued by the bank, and as per the terms set out in the bond itself, it is normally treated independently from the underlying contract between the contractor and the employer.

As confirmed by the Singapore Court of Appeal in *Star Engineering Pte Ltd v Pollisum Engineering Pte Ltd & Anor* [2024] SGCA 30, under Singapore law, a call on a performance bond may generally be restrained by a permanent injunction or temporary restraining order if the contractor can show that the demand is made fraudulently (on the ground that “fraud unravels all”), or where it would be unconscionable for the party to make a demand under the performance bond (unless the parties agree in advance to exclude unconscionability as a ground for preventing a bond call; see *Star Engineering Pte Ltd v Pollisum Engineering Pte Ltd & Anor* [2024] SGCA 30).

In practice, proving fraud or unconscionability to stop a bond call is often not easy. However, if there is strong *prima facie* evidence that one of the two circumstances exists, a contractor could seek a court permanent injunction or temporary restraining order in Singapore to prevent an employer from making a call on a performance bond.

Specifically, when an employer makes a demand for payment under the performance bond, a contractor may seek a court permanent injunction or temporary restraining order (i) against the employer to prevent the employer from making a call on a performance bond, and (ii) against the bank to prevent the bank from making payment of the guaranteed sum after a bond call has been made.

Given the urgency, seeking a remedy from a court has been considered the most effective and appropriate remedy for a contractor to protect itself from a fraudulent or unconscionable performance bond call. The Singapore courts have shown to be efficient in dealing with these issues.

THE INTRODUCTION OF PPO PROCEDURE UNER THE SIAC RULES 2025

Coming into force on 1 January 2025, the SIAC introduced the 7th edition of its set of arbitration rules, the SIAC Rules 2025. The new rules contain a number of new or expanded provisions that are intended to enhance the effectivity and efficiency of its arbitral procedures. Noteworthy are also some additional features available to an emergency arbitrator.

Under the SIAC Rules 2016, a party could file an application for emergency interim relief as early as with the filing of the Notice of Arbitration. If the application is accepted by the SIAC President, an Emergency Arbitrator would be appointed in one day, who will make an order as to the requested interim relief within 14 days from its appointment.



The SIAC Rules 2025 maintains the emergency arbitrator procedure but expands such provisions with the new and additional PPO procedure. Under this procedure, a party may file an *ex parte* application ("**Application**") to seek both an interim measure and a PPO directing a party not to frustrate the purpose of the requested interim measure.

If the Application is accepted by the SIAC President, the Emergency Arbitrator procedure above will apply. Concurrently, within 24 hours after its appointment, the Emergency Arbitrator will determine the PPO application. According to the SIAC Rules 2025, Schedule 1, para. 33, a PPO granted by an Emergency Arbitrator expires 14 days after the date on which it was issued.

In Singapore, decisions made by an arbitral tribunal in an international arbitration are generally enforceable in the same manner as if they were orders made by a court. According to Section 2(1) of the IAA, the definition of an arbitral tribunal "includes an emergency arbitrator appointed pursuant to the rules of arbitration agreed to or adopted by the parties". It is not entirely clear from this language that *ex parte* applications, such as a PPO, would automatically or certainly be deemed enforceable under these provisions. However, given that a PPO is issued by an emergency arbitrator, the authors' view is that a PPO would also likely be deemed enforceable under the IAA.

DOES THIS INTRODUCTION OF THE PPO IN THE SIAC RULES 2025 REQUIRE A CONTRACTOR TO EXHAUST THIS REMEDY PRIOR TO APPLYING FOR AN INTERIM MEASURE WITH THE SINGAPORE COURTS?

Arguably, the availability of the enhanced institutional mechanisms in the 2025 SIAC Rules, such as the PPO, could potentially narrow the already limited scope of the court's interference with a payment under a performance bond.

Section 12A of the IAA provides the Singapore courts the power to grant interim measures in aid of arbitration proceedings. In this regard, Section 12A(4) and (6) of the IAA only allows the Court to grant interim measures in urgent cases, and only where the arbitral tribunal or institution has no power or is unable for the time being to act effectively.

Whether the Singapore courts will thus expect and indeed require from the contractor to exhaust this PPO procedure first will have to be seen. However, it would be prudent for a contractor to firstly consider utilizing the PPO procedure before seeking a court-ordered interim measure, or at least concurrently applying for a PPO together with a court-ordered interim measure.

For a contractor seeking a court-ordered interim measure, it would have to prepare an explanation to the Singapore court as to why the arbitral tribunal or institution has no power or is unable to act effectively for the remedy sought.

Nonetheless, a court-ordered interim measure could still be beneficial in certain instances, where a measure is intended to be applied in a foreign jurisdiction or beyond 14 days (see section V. below), or applied against the issuing bank (see section VI. below).



SEEKING A COURT-ORDERED INTERIM MEASURE TO RESTRAIN AN EMPLOYEE FROM CALLING ON THE BOND

When demanding payment arising from a performance bond, it is important to consider against whom that interim measure is sought.

Given that a PPO could be considered enforceable in Singapore, a PPO would generally be suitable if an interim relief is sought to be applied urgently and against the employer based in Singapore.

In that case, a contractor may apply for a PPO to prevent the employer from making a call on the bond (provided that the fraudulent or unconscionable circumstances are established) or if the employer has made a call and received the payment, to safeguard the sum it has received.

However, a PPO would likely be ineffective in the following circumstances: First, if a measure is intended to be applied in a jurisdiction that does not recognize the enforceability of interim measures or emergency orders (the treatment of the two can be different in certain jurisdictions), there is a risk that the PPO is deemed unenforceable in these jurisdictions. Second, if a measure has to last for more than 14 days, obtaining a PPO may not be a sufficient remedy, since a PPO will only be effective for 14 days.

In such cases, a court-ordered interim measure could be beneficial. The potential non-enforceability and the limited duration of the PPO could be relied on as an explanation to the Singapore court why even if obtained, a PPO would not be an effective remedy pursuant to Section 12A of the IAA, and hence a court-ordered interim measure is sought. Again, how the Singapore court would react to the above is yet to be seen.

SEEKING A COURT-ORDERED INTERIM MEASURE TO RESTRAIN A BANK FROM MAKING PAYMENT FOLLOWING A BOND CALL

The issuing bank of a performance bond is most likely a non-party to the construction contract (containing the arbitral clause) between the employer and the contractor.

If a contractor intends to take legal action binding on the banks, then a decision by an arbitral tribunal or emergency arbitrator would not be available. The Tribunal or the emergency arbitrator would have no jurisdiction over a remedy sought against such bank since the bank is not party to the arbitration agreement. Any interim relief ordered pursuant to 2025 SIAC Rules can only bind the parties to the arbitration agreement and not third parties.

Hence, for a contractor to stop the bank from making payment after a fraudulent or unconscionable bond call has been made, a court-ordered temporary restraining order would likely be the only option remaining to the contractor. The contractor should be able



to do so in parallel with seeking a PPO against the employer (if deemed necessary in the circumstances).

For information or inquiry, please consult our team if you need further guidance.

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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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