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Ser Kim v GTMS Construction Pte Ltd & Ors SGHC(A) 34: Extension of Time for Force Majeure Events and invoking the EOT Certification scheme under the SIA Conditions

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INTRODUCTION

Ser Kim Koi concerned a construction dispute arising from a Singapore Institute of Architects' Standard Form of Contract (the "**SIA Conditions**")[1] building contract for the construction of three bungalows.

The Singapore High Court (Appellate Division) (the "**Court**") considered (i) whether the contractor was entitled to an extension of time ("**EOT**") on the grounds of force majeure, and (ii) the effects of clause 24(3)(a) of the SIA Conditions (setting out an EOT Certification scheme) on the contractor's liability for liquidated damages.

First, the Court determined what constituted a force majeure event, as the SIA Conditions did not define force majeure. The Court set out its guiding principles on how it interprets contractual force majeure provisions and what constitutes a force majeure event. The Court also commented *obiter* that the Covid-19 pandemic and its consequential impacts on a contractor's performance could constitute a force majeure event.

Second, the Court noted that the factual circumstances meant that clause 24(3)(a) of the SIA Conditions should have been invoked to prevent liquidated damages from continuing to accrue. However, neither party referenced clause 24(3)(a) in their respective pleadings. As such the Court commented obiter on what factual circumstances attract the operation of clause 24(3)(a) and its effects. The court also gave obiter guidance on the issues parties should consider when invoking clause 24(3)(a) in their pleadings.

FORCE MAJEURE

An issue on appeal was whether a power utility company's delay in notifying the architect of the need for an overground distribution box, resulting in a delay in construction works,

constituted a force majeure event, entitling the contractor to an extension of time under clause 23(1)(a) of the SIA conditions.

The employer submitted that since the building contract did not define force majeure, the *force majeure* clause as provided for under clause 23(1)(a) of the SIA Conditions was too vague to be enforceable.[1]

The events and circumstances under which the contractor is entitled to an EOT are set out in clauses 23(1)(a)-(q), and the court highlighted that the relevant events for which EOTs may have been given in this appeal were as follows[2]:

> *"23(1) The Contract Period and the Date of Completion may be extended and re-calculated, subject to compliance by the Contractor with the requirements of the next following sub-clause, by such further periods and until such further dates as may reasonably reflect any delay in completion which, notwithstanding due diligence and the taking of all reasonable steps by the Contractor to avoid or reduce the same, has been caused by:*
>
> *(a) Force Majeure; ...*
>
> *(f) Architect's instructions under Clauses 1.(4)(a), 1.(4)(b) or 1.(4)(c), 7.(1) (or otherwise in accordance with that clause), 11.(2) (where permitted under that clause) and 14 of these Conditions (but not Architect's direction under Clauses 1.(3) or 12.(5)(b), 12.(5)(c) or 12.(5)(d) of these Conditions); ...*
>
> *(o) the grounds for extension mentioned in Clauses 1.(8), 3.(3), 7, 14, 29.3(a)(ii) and 29.3(b)(ii) of these Conditions; ...*
>
> *(q) any other grounds for extension of time expressly mentioned in the Contract Documents."*

In rejecting the employer's argument, the Court highlighted that:

(a) This argument was "*disingenuous*"[3] given the ample literature under Singapore on the use and meaning of force majeure in the context of building and construction contracts;[4]

(b) Such submissions, raised in the context of the SIA Conditions, and in the wider context of other standard form construction contracts, completely ignore the background and pedigree of these sets of standard forms. These were drafted by

[1] *Ser Kim Koi*, paras 49 to 50.
[2] *Ser Kim Koi*, para 32.
[3] *Ser Kim Koi*, para 53.
[4] *Ser Kim Koi*, para 53 to 56.

> leading construction practitioners and academics, and have withstood the test of time.[5]

The Court then held that a *force majeure* event is a "*radical event*" that is: (i) unforeseeable, (ii) prevents the performance of the relevant obligation (and not merely making it more onerous), and (iii) which is due to circumstances beyond the parties' control.[6]

The Court also observed obiter that the COVID-19 pandemic and its associated impacts preventing a contractor's performance, exemplified such a "*radical event*", noting:

> "*What cl 23(1)(a) covers will therefore be […] radical external events and circumstances that prevent the performance of the relevant obligations and which are due to circumstances beyond the parties' control – for example, the COVID-19 pandemic and the "lock down" […] the shortage of labour and materials due to the COVID-19 pandemic lock-downs, the prohibition of travel between countries and the ensuing disruption of supplies and manufacture of goods and materia*l."[7]

Practical takeaway

Employers are cautioned against attempting to prevent contractors from relying on force majeure provisions by arguing that they are not enforceable for lack of a contractual definition, especially when such provisions are adopted from widely used standard form building contracts. In *Ser Kim Koi*, the Court not only decisively rejected this position, but held that advancing such arguments would attract cost consequences regardless of the outcome.

The Court's observation that the effects of COVID-19 could constitute a force majeure event might also offer comfort to contractors. However, these remarks were obiter dicta (persuasive but not binding) and made in light of a specific context, where the force majeure clause concerned was undefined and adopted from the SIA Conditions. A contract which differs in wording and context may yield different outcomes, as force majeure clauses are to be construed narrowly, by "*reference to its terms*".[8] In addition, when pursuing an extension of time claim based on force majeure, the contractor is advised to establish causation between the event and the critical delay caused by it.

CLAUSE 24(3) OF THE SIA CONDITIONS (EOT CERTIFICATION SCHEME)

In *Ser Kim Koi,* there was an overlap between: (i) the period during which the contractor was in delay and (ii) the period during which the architect issued instructions to the contractor to carry out rectification work to remedy the architect's errors.[9]

[5] *Ser Kim Koi*, para 57.
[6] *Ser Kim Koi*, para 77.
[7] *Ser Kim Koi*, para 81.
[8] *Ser Kim Koi*, para 74.
[9] *Ser Kim Koi*, para 355.

The factual circumstances would have potentially attracted the operation of clause 24(3) of the SIA Conditions, which had the effect of stopping the accumulation of liquidated damages against the contractor.[10]

In light of this, the court observed that "m*ost importantly cl 24(3) of the SIA Conditions should have been invoked to stop liquidated damages from running against [the contractor]*". [11] However, neither of the parties had referenced clause 24(3) in their pleadings.

Clause 24(3)(a) of the SIA Conditions provides:

> *"If while the Contractor is continuing work subsequent to the issue of a Delay Certificate, the Architect gives instructions or matters occur which would entitle the Contractor to an extension of time under Clauses 23(1)(f), … 23(1)(o) … and if such matters would have entitled the Contractor to an extension of time regardless of the Contractor's own delay and were not caused by any breach of contract by the Contractor, the Architect shall as soon as possible grant to the Contractor the appropriate further extension of time in a certificate known as a "Termination of Delay Certificate."*[12]

In essence, pursuant to clause 24(3) of the SIA Conditions, if a contractor, who is already in culpable delay, receives instructions from the architect or encounters qualifying events entitling it to an EOT, the architect must then issue a "*Termination of Delay Certificate*", which preserves accrued liquidated damages but suspends their accumulation during the extension. [13] If the contractor fails to complete within this period, a "*Further Delay Certificate*" triggers recommencement of liquidated damages.[14] This creates a "pause and restart" mechanism protecting the employer's rights whilst suspending damages during employer-attributable delays.

The court observed that the following should have been pleaded and made the subject of findings of fact and consequent rulings on application of the law:[15]

(a) In accordance with the underlying contract, a Delay Certificate should have been issued certifying delays in completion of the works as of the date where the contractor was in delay and liquidated damages started running;
(b) After the bungalows failed inspection, a detailed assessment of delay causation, should have been conducted including: (i) determining the duration of each rectification item; (ii) assessing the causal potency of each delay event and its impact to reach an overall cause and effect conclusion; (iii) considering whether variation

[10] *Ser Kim Koi*, para 171.
[11] *Ser Kim Koi*, para 171.
[12] As reproduced in *Ser Kim Koi*, para 165.
[13] *Ser Kim Koi*, para 166.
[14] *Ser Kim Koi*, para 166.
[15] *Ser Kim Koi*, paras 172.

works triggered the relevant contractual provisions requiring a Termination of Delay Certificate; (iv) determining whether a Further Delay Certificate was warranted; and (v) assessing the effect of these certificates on liquidated damages;

(c) A similar exercise should have been carried out on the causes for the bungalows failing subsequent inspections; and

(d) Parties should have considered the effect, if any, of the above-mentioned certificates on the liquidated damages accumulating against the contractor.

Practical takeaway

Ser Kim Koi offers practical guidance on issues parties should consider under the SIA Conditions when the factual circumstances attract the operation of clause 24(3) of the SIA conditions to prevent liquidated damages from continuing to accrue.

More broadly, parties should thoroughly examine their contract to determine whether the factual circumstances engage relevant clauses and, if so, what their effects are. Otherwise, they risk forfeiting contractual benefits or defences they could have relied upon.

In *Ser Kim Koi*, the Court noted that, notwithstanding its analysis of the proper approach, it was constrained by deficiencies in the parties' pleadings and was bound to accept the trial judge's limited findings of fact.[16] Had the parties adequately addressed the relevant issues, this would have enabled the court to determine, for instance, the EOT due for additional works and the consequent liability implications of instructing additional works at a particular stage of a project.[17] Absent proper pleadings, a judge can only deal with the case as it is pleaded.

[16] *Ser Kim Koi*, para 174.
[17] *Ser Kim Koi*, para 146.

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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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