

SOCIETY OF CONSTRUCTION LAW (SINGAPORE)

SINGAPORE CONSTRUCTION LAW NEWSLETTER

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Newsletter

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CHAIRMAN'S MESSAGE

This has indeed been an intense year so far for practitioners in the construction industry. Some of the main features have been the launch of the Integrated Resorts projects, the building of various new iconic buildings and the general upsurge in property development all round the island. This is notwithstanding the problems with sand supplies, which is the subject of a feature article in this issue of the Newsletter.

As the Society's committee members have been extremely busy with their "day-jobs" tending to their respective clients and projects, it is thus a challenge for them to be involved in a regular basis with the activities and concerns of the Society on a day-to-day basis. This, of course, is the story of all professional societies. Thankfully, though, we have been assisted by an able and happy bunch of members in the Management Committee, as well as an efficient and well-organised Secretariat. I am also thankful to the supportive attendance of members at our events and in our activities.

Working Committees on Construction Issues

The Society has taken up the Attorney-General's suggestions, given in his insightful Key-Note speech at our International Conference in October last year, to form working groups to look into three current concerns of the construction industry, namely: (1) Review of the Standard Forms of Contract, so as to minimise disputes (2) the costs involved in dispute resolution and (3) the possibility of codes of practice for consultants. Pursuant to the recommendations of the Steering Committee on the terms of reference of each of these Working Groups, the Society recently invited members by email to join any of the three working groups looking into each of these areas. This is indeed "heavy-work", which involves looking at these issues from various perspectives, but which we hope to complete and make recommendations on in the course of the next year or so.

Seminars

Our recent seminars have well-attended by enthusiastic members and their guests.

On 7 February, we were honoured to have Nicholas Gould, Chairman of the Society of Construction Law (UK) deliver his paper on "NEC: The Construction Contract of the Future". No doubt we will be hearing more and more of this relatively new form of contract in the coming years.

On 21 March, Michael Cohen and Roger Trett from the Academy of Experts presented a seminar on "In Search of the Perfect Expert Witness".

Other Events

The annual networking Cocktail Evening on 15 May 2007 provided an excellent opportunity for members, guests and guests-turned-members to catch up with each other. Our special guests this year included representatives from other

continued next page

construction-related organisations such as the Institute of Planners and the Singapore Contractors Association.

We look forward to meeting our members again at other seminars being planned for the year, as well as the Joint Annual Conference with the Law Society of Singapore on 17 July 2007; and at the Annual General Meeting on a date tentatively set as 24 August 2007. Do mark these dates on your calendar.

Variety is the spice of life, and we are thus planning future seminars on a series of subjects, such as delay-analysis, workplace safety, contracts and dispute resolution. In the pipeline is

also a joint-conference with the SCL in Malaysia, as well as joint activities with the Department of Building at the National University of Singapore. Indeed, at the next phase of the development of this relatively young society, we are looking at collaborations with other organizations engaged in the construction industry in Singapore, to provide further platforms for networking and for learning to our members.

Naresh Mahtani
Chairman

INVITATION TO JOIN WORKING GROUPS ON CONSTRUCTION ISSUES

The Attorney-General (AG) in his key-note address at the Society of Construction Law (Singapore)'s International Conference held on 15 to 17 October 2006, had invited the Society to look into certain concerns he highlighted regarding the construction industry.

The Society had late last year set up a Steering Committee, chaired by council member Mohan Pillay, to consider the AG's speech in detail and to make recommendations on the way forward to study these concerns and related issues, which are indeed matters of current interest to our members and the construction law industry in general.

Pursuant to the Steering Committee's recommendations, the Society has constituted the following 3 Working Groups and adopted their respective Terms of Reference as follows:

A. 'Review of Standard Forms of Contract' Working Group

Terms of Reference:

1. Investigate the nature and causes of disputes that most frequently arise under the standard forms of contracts most commonly used by the Singapore construction industry.
2. Recommend changes to their structure and provisions to minimize the incidence of such disputes.

B. 'Costs of Dispute Resolution' Working Group

Terms of Reference:

1. Investigate whether the costs of construction arbitration is becoming prohibitive, and if so to make appropriate recommendations to remedy the situation.
2. To the extent that adequate access to information is available, to conduct appropriate case studies.

C. 'Code of Practice' Working Group Terms of Reference:

1. Consider and draw up a code of practice reflecting appropriate standards of professional and ethical conduct for construction industry professionals involved in contentious work, in particular the provision of claims consultancy services on a contingency fee basis.
2. Recommend appropriate methods to encourage, if not secure, compliance with such a code.

The SCL Committee wishes to invite members to join any of the Working Groups, to contribute your ideas and recommendations, and to generally assist in the work of these sub-committees.

All members are also welcome to provide any feedback or information to the Society or any of the Working Groups in relation to any of the above or related subjects.

If you are interested in joining any of the Working Groups, please email the SCL Secretariat at secretariat@scl.org.sg to indicate which Working Group you wish to participate in. In order that the Working Groups can commence work on their respective subjects soon, we look forward to your early responses.

Contributions

We welcome observations and comments from members on matters relevant to the construction industry. If you wish to submit a contribution, please email it to the Chief Editor at ho.chienmien@allenandgledhill.com. If you would like to submit an article for publication, please contact the Chief Editor to discuss the proposed subject and length of the article.

PHOTOS FROM RECENT EVENTS

Seminar on "In Search of the Perfect Expert Witness"



Michael Cohen, Chairman Emeritus of the Academy of Experts, addressing the audience



Participants at the seminar on "In Search of the Perfect Expert Witness"

Seminar on "NEC 3: The Construction Contract of the Future"



Participants at the seminar by Nicholas Gould on "NEC3: The Construction Contract of the Future"



Nicholas Gould, Chairman of the Society of Construction Law (UK), next to Naresh Mahtani, Chairman of the Society of Construction Law (Singapore)

Annual Cocktail Evening at the Fullerton Waterboat House



Chairman's welcome speech at Annual Cocktail Evening



Members enjoying drinks at the Fullerton Waterboat House

IMPACT OF THE INDONESIAN BAN ON SAND EXPORT¹

2007 – STARTING OFF WITH A BAN(G)

The construction industry started off this year with somewhat of a bang. On 23 January 2007, the Indonesian government announced a ban on the export of land sand. Before the ban, Indonesia was the chief source of sand for construction in Singapore. About a month thereafter, the Indonesian authorities stepped up their checks on barges carrying granite aggregates and dust to Singapore, resulting in further disruptions to the supply chain. Since these events, the prices of sand, granite and later ready-mixed concrete have increased leading to various contractual issues between the various parties involved.

This article addresses the initiatives taken by the Singapore government in response to these recent events, the contractual implications of the sand ban, and the possible ways to move forward. Specifically, the issues raised for the construction industry are whether the sand ban amounts to a *force majeure* event; whether contractors can claim extensions of time and additional costs arising from the sand ban; and how to deal with the fluctuations in the prices of sand and other key construction materials.

SAND BAN – INITIATIVES BY THE SINGAPORE GOVERNMENT

To date, the Singapore government has either planned or put in place the following initiatives:

- Releasing stockpile sand at an initial price of \$25 per tonne and since March at \$60 per tonne (up from the average market price of \$14 to \$20 per tonne before the ban) and granite at \$70 per tonne (up from its previous price of about \$20 to \$25 per tonne).
- Releasing granite aggregates from its stockpile to alleviate the disruption in the supply chain.
- Procuring both sand and granite aggregates from alternative sources, and encouraging private importers to do the same. In this regard, the Myanmar government has indicated during Singapore's Foreign Minister George Yeo's visit to Myanmar that it may be a long-term supplier of sand.
- Sharing of up to 75 percent (%) of the price increase in sand and granite to help local construction firms. Similarly, the government has also urged the industry players to cooperate to cope with disruptions and private developers to make progress payments on shared price increases.²
- Exploring the reopening of a former granite quarry on P. Ubin.
- Working with the construction industry to diversify sources for construction materials. In this connection, the Housing Development Board will institute measures to build public housing with alternative materials.

FORCE MAJEURE

In considering whether the sand ban amounts to a *force majeure* event, it is necessary to understand what this French expression (which translated literally means some physical or material restraint) amounts to in law. As a matter of law, *force majeure* has been described as a contractual term by which one (or both) of the parties is excused from performing the contract in whole or in part or is entitled to suspend performance or to claim an extension of time for performance, upon the happening of a specified event beyond his control.³ The general burden lies with the party relying on the *force majeure* clause to prove the occurrence of a *force majeure* event; that he was prevented, hindered or delayed from performing due to the event; that he could not have reasonably foreseen the event; and that it was beyond his control.⁴

Most standard form of contracts such as the Singapore Institute of Architects (SIA), Public Sector Standard Conditions of Contract (PSSCOC), Real Estate Developers Association of Singapore (REDAS) and Joint Contracts Tribunal (JCT) forms have specific provisions on *force majeure* under the extensions of time clause. As such, the *force majeure* clause may be defined by the contract. For example, the REDAS form has the term *force majeure* defined in its clause 18.2 to include "industrial action by workmen, strikes, lockouts or embargoes affecting directly the works."

WHERE DO DEVELOPERS AND CONTRACTORS STAND?

Whether the current sand ban falls within the scope of a particular *force majeure* clause is determined by the terms of the contract in question. In the local case of *Sato Kogyo (S) Pte Ltd v RDC Concrete Pte Ltd* [1997] 1 SLR 707, the Court held that the defendant was entitled to rely on the *force majeure* clause to justify non delivery due to the shortage of raw materials. This decision was based on a clause in the relevant contract which specifically defined *force majeure* as including "market raw material shortages."

Even if the sand ban falls within the definition of a *force majeure* event, the contractor may not necessarily succeed in its reliance on the *force majeure* clause. As supplies from alternative sources have been made available or released from existing stockpiles, the contractor may not have been prevented from fulfilling its contractual obligations, notwithstanding the current Indonesian sand ban.

In respect of claims for prolongation costs, the standard forms of contract do not normally allow such claims as the delays due to the sand ban are not attributable to the fault of the employer. In this regard, it should be noted that obtaining an extension of time on the basis of *force majeure* does not necessarily mean that the contractor is contractually entitled to additional payment. As for claims for additional raw material costs, contractors are not likely to be entitled to the cost of any increase in the price of materials where they have entered into contracts based on a firm price lump sum which excludes price adjustments for fluctuations in material prices.

PROPOSALS FOR MOVING FORWARD

Set out in this section are proposals for resolving issues that may arise from individual projects. Our proposals are as follows:

- Where appropriate, claims for extension of time, prolongation costs and raw material costs can be resolved on a purely ex gratia basis. Any such ex-gratia payment should be limited to costs incurred through no fault of the contractor. When claiming for such payments, contractors should be required to submit detailed drawings showing the various work items, measurements showing the net quantities (whether net or gross would depend on the agreement between the employers and contractors), and delivery orders setting out the date of delivery verified by employers' site representatives.

- In view of present situation, contractors are likely to factor in the risk of price increases of raw materials in their future tenders. To ensure more acceptable price increases, employers should consider the inclusion of fluctuation clauses for pre-determined key construction materials. However, no upward adjustment should be permitted if the Contractor fails to complete the works by the completion date (or extended completion date).
- At present, employers can on a purely ex gratia basis consider sharing of costs due to the increase in sand price at such ratios as agreed between the parties. Additional costs due to the increase in the price of sand depend on the size, standard/class of project, site constraints, method of construction and the stage of project. The Singapore government estimates that the higher cost of sand and granite will add about 1% to 3% to construction cost⁵ which equates to an estimated rise of about 2% of overall project cost.

$$C_v = Q_v \times \frac{P}{100} \times (I_v - I_0) \times SP_{Emp}$$

In relation to cost sharing measures, the Building and Construction Authority has recently published monthly sand and granite price indices indicating the movement of the prices of concreting sand and granite products. The base indices for concreting sand and granite products are derived from prices on 23 January 2007 and 12 to 21 February 2007 respectively. With these indices, the adjustment for the price increase for concreting sand and/or granite products ("Materials") for each valuation period (v) to which the price index relates, may be computed by the following formula:

Where

- C_v ... The amount of the adjustment for the material price increase during the valuation period.
- ... Quantity of Materials incorporated into the permanent works during the valuation period
= volume of concrete (m³) x qty of materials per cubic metre of concrete (ton/m³). The ratio of amount of sand per cubic metre of concrete (ton/m³) shall be ascertained by the structural engineer.
- Q_v

- P_{100} ... BCA's published base price of Materials
- I_v ... BCA's published price index of Materials for the month of valuation period
- I_0 ... BCA's published base index of Materials
- ... Cost sharing percentage (proportion borne by employer)

IN CONCLUSION

It is only prudent for all relevant parties to adopt an approach that will allow projects to be completed with the least amount of disruption. In line with initiatives taken by the Singapore government which are supported by REDAS, employers should consider extensions of time and payments being granted on an ex gratia basis. Ultimately, what is of paramount importance is a balanced and level-headed approach which would show the strength and perseverance of the members of the construction industry to stand together and maintain resilience.

- 1 First published by Davis Langdon & Seah Pte Ltd in their *DLS Consultancy - Executive Summary Volume 7*. Issue 1 – March 2007. The present form takes into account subsequent events and has been adapted for publication in the SCL Newsletter.
- 2 These measures were announced in Parliament on the 9 April 2007 by the Minister of State for National Development Ms Grace Fu.
- 3 *Chitty on Contract*, 27th Edition, Volume 1, at page 704
- 4 See *China Resources (S) Pte Ltd v Magenta Resources (S) Pte Ltd* [1997] 1 SLR 707
- 5 DLS's estimates are, however, slightly higher.


DLS Contract Advisory & Dispute Management Services Pte. Ltd.

NEW MEMBERS

We warmly welcome the following new members:

Tan Kee Cheong
Lim Tat
Matthew Yew Wei Chew
Raymond Chan
Yong Siew Lod
Kevin Attrill
Tania Wee
Goh Chee Ning, David
Audrey Perez
Kelvin Goh, Ken Jin
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Tan Ai Leen
Chen Guang Feng
Jerry Dyeo Koek Yin
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Khor Hong Ching Eileen
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New Title

Everything you need to know about Statutory Adjudication in Singapore

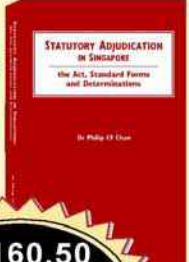
Dr Philip CF Chan

Statutory Adjudication in Singapore: the Act, Standard Forms and Determinations provides an analysis of the process, role and impact of adjudication under the Construction Industry Security of Payment Act 2007 (SOP Act) and the relevant standard forms.

This book conveniently presents, within a single resource, information and analysis relating to the SOP Act, together with related standard forms of building contract. Determinations under the adjudication process, a new dispute resolution option introduced by the SOP, are also discussed.

What's in this book?

- As the regime introduced by the SOP Act is still fairly new in Singapore and the demand for text on related topics, one of which is statutory adjudication, is high, this book fulfills a crucial element in that demand.
- This book adopts a novel approach to the treatment of the topic – to allow SOP Act to be read together with the standard forms of building contracts.
- Discussion of available adjudication determinations which have emerged since SOP Act was passed.



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