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Variations and Back-charges

Singapore Appellate Division of High Court takes Commercial Approach

Introduction

Construction contracts often contain detailed procedures for the various aspects of the working arrangement between the parties. These may include the agreed mechanisms for making payment claims or for variation and rectification works, as well as details such as notification periods or approval processes. Such arrangements allow for the parties to allocate their respective risks and to set out the applicable procedures with certainty.

However, where parties do not comply with the agreed mechanisms, what is the effect upon the relevant contractual claims? When does it bar the claim entirely, and when will the claim be allowed to proceed? The Appellate Division of the Singapore High Court ("**Court**") had the opportunity to consider this question in *Vim Engineering Pte Ltd v Deluge Fire Protection (S.E.A) Pte Ltd* [2023] SGHC(A) 2.

The Appellant sub-subcontractor in a construction project had brought claims against the Respondent subcontractor for, among others, variation works. The Respondent counterclaimed for the costs of rectifying defects and for back-charges.

The Court allowed the Appellant's claim for variation works, overturning the decision of the High Court Judge. This was despite the non-compliance with the contractual requirement to obtain written instructions from the Respondent for variation works to be carried out, as the Respondent was found to have waived the requirement. Conversely, while the Respondent was allowed to continue with its claim for rectification and back-charges despite allegedly failing to comply with the contractual requirement to provide due notice, the Respondent's entitlement to the claimed sum was substantially reduced as it had not provided sufficient evidence to prove its claims.

The decision is a reminder to the construction industry to be aware of the mechanisms for claims and works in their contracts, the procedural and substantive requirements therein, and whether non-compliance with such requirements will bar subsequent claims.

The Appellant, previously represented by another firm, had engaged Rajah & Tann Singapore LLP for the appeal, and were successfully represented by Avinash Pradhan, Jasmine Thng and Nikolas Tong.



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Brief Facts

The Respondent had been engaged by the main contractor on a project as a subcontractor. By way of a Subcontract, the Respondent had engaged the Appellant to carry out certain plumbing and sanitary works. The relevant provisions in the Subcontract were as follows:

- **Clause 16** – Any variation works... shall be carried out only with written instruction[s] from [the Respondent's] Project Manager.
- **Clause 19** – If, under the provisions of this Subcontract, [the Appellant] is notified by [the Respondent] to correct defective or non-conforming Subcontract works, and [the Appellant] states or, by its actions, indicates that it is unable or unwilling to proceed with the Subcontract works or corrective action..., [the Respondent] may, upon written notice, perform or procure the performance of the redesign, repair, rework or replacement of nonconforming or non-performed Subcontract works by any reasonable means available at [the Appellant's] cost.

Due to disagreements between the parties, the Appellant eventually left the project site before works were completed. The Appellant subsequently brought a suit against the Respondent for the balance amount payable for the main works under the Subcontract and for variation works it had performed. The Respondent counterclaimed for the costs of rectification works to complete the main works and rectify defects, and for back-charges.

The High Court Judge allowed the Appellant's claim for the balance amount payable for the main works, but rejected the Appellant's variation claims on the basis that, among other things, the Subcontract provided that variation works could only be carried out with written instructions from the Respondent's project manager, and that such instructions had not been obtained by the Appellant. The Judge allowed the Respondent's counterclaims.

The Appellant appealed against the Judge's decision to dismiss its claim for variation works and to allow the Respondent's claim for rectification works and back-charges.

Holding of the Appellate Division of the High Court

The Court found in favour of the Appellant, allowing most of its appeal.

Variation

Despite the Appellant's non-compliance with Clause 16 of the Subcontract, which required written instructions from the Respondent's project manager in order for variation works to be carried out, the Court allowed the Appellant's claim for variation works.

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In reaching its decision, the Court set out the following principles in determining whether to allow a claim for variation works:

- **Whether the works are a variation** – To claim for work as a variation under a contract, a claimant needs to establish that:
 - the work is an "extra";
 - there is an express or implied promise to pay for the work;
 - the work was instructed by a person with authority to vary the contract; and
 - any condition precedent to payment has been fulfilled.
- **Compliance with contractual mechanisms** – Contracts must be construed on their particular terms, and unless the provisions require strict compliance failing which a variation claim will fail, failure to comply may not amount to an absolute bar against a right to claim for payment of the variation. Such provisions may be overcome if the claimant can prove estoppel or waiver of the relevant requirement.

In its construction of Clause 16, the Court found that the provision was not drafted in a stringent manner such that the Appellant would forfeit payment for variation works in the absence of written instructions from the Respondent's project manager. The Appellant's claim for variation works was thus not barred by non-compliance with Clause 16.

The Court further found that the Respondent had waived compliance with the requirement to obtain written instruction. This was inferred from the fact that the Respondent's representatives had signed on the majority of the variation work claims by the Appellant, and had included comments on the forms that the claims would be subject to the main contractor's approval, instead of disallowing or rejecting the claims for lack of compliance.

Finally, the Court found that the Appellant's variation claims had been adequately substantiated with photographs, acknowledgements, and rates that the Respondent did not object to. Further, the variation works were found to fall outside the scope of the main works under the Subcontract and were accordingly variations.

Therefore, the Court allowed the appeal against the Judge's decision to reject the Appellant's variation claims.

Rectification and back-charges

The Court found that the Respondent's non-compliance with Clause 19 (in that proper notice was not given of certain defects) did not bar its claim for rectification works and back-charges. However, the Court substantially reduced the sum awarded to the Respondent under this claim due to insufficient proof.

The Court set out some guiding principles regarding defects clauses and the notice requirement.

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- **Purpose of notice** – The notice requirement gives the contractor an opportunity to cure or remedy the defect, as the contractor is usually in the best position to carry out remedial work at a lower cost.
- **Failure to give proper notice** – Failure to comply with a notice requirement in a defects clause may preclude an employer from relying on the defects clause against the contractor. However, the employer's right to damages in respect of the cost of repairs is not extinguished.
- **Scope of damages** – Where the employer does not provide the contractor with a contractual opportunity to rectify defects, the employer can still recover the cost of repairing the defects. However, the sum recoverable may be limited to how much it would have cost the contractor to rectify the defects.

While the Court found that the Respondent's failure to comply with Clause 19 did not materially affect its claims, it held that the Respondent had not provided sufficient evidence to establish its claim. The Court highlighted that the burden of proof in this regard was firmly on the Respondent.

- **Rectification** – Regarding the claim for rectification, the Court found that the Respondent's evidence was a bare allegation without any of the necessary particulars like what part of the Appellant's work was defective, why or how was it defective, how it was rectified or repaired, or by whom it was rectified. The award for this claim was thus set aside.
- **Back-charges** – Regarding the claim for back-charges, they consisted of general allegations without the requisite particulars. The Respondent was only able to show that a limited number of the back-charges were attributable to the Appellant. The Respondent's entitlement under this claim was thus substantially reduced from S\$858,604.36 to S\$41,788.80.

The Court highlighted that the proper approach for determining a contractor's liability for defects and rectification work is not the "global" approach adopted by the Judge in the High Court, which did not distinguish between delays caused by the Appellant and delays caused by Respondent or others. In determining the Appellant's liability for the back-charges claimed, the Court applied the following four-step framework to determine each of the individual back-charges claimed by the Respondent:

- The Respondent has to first be able to provide sufficient evidence to show that back-charges were an expense that had actually been incurred by it. In the present case, such evidence would be either the relevant site memoranda or other documentary evidence.
- If the relevant back-charge was indeed incurred by the Respondent, the Court should then consider if the scope of the back-charge fell within the terms of the Subcontract.
- Should the Respondent be able to cross both the threshold requirements above, the Court should then consider if the evidence was also sufficient to show that the claimed loss had been

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caused solely by the Appellant.

- The burden would then shift to the Appellant to provide evidence to persuade the Court why the respective back-charge should not be imposed on it.

Concluding Words

The decision highlights the importance of risk allocation at the contract drafting stage. Parties should ensure that the requirements for claims and works are clearly set out in the contractual provisions, and if such requirements are intended to act as a condition precedent and bar non-compliant claims, to specifically set out the intended consequences.

The judgment also demonstrates that claims in construction disputes must be adequately supported by sufficient evidence. Bare allegations will not suffice to discharge a claimant's burden of proof.

For further queries, please feel free to contact our team below.

Contacts



Avinash Pradhan
Deputy Head, International
Arbitration
Construction & Projects

T +65 6232 0234

avinash.pradhan@rajahtann.com



Sim Chee Siong
Head, Construction & Projects

T +65 6232 0227

chee.siong.sim@rajahtann.com

Please feel free to also contact Knowledge and Risk Management at eOASIS@rajahtann.com

Our Regional Contacts

RAJAH & TANN | *Singapore*

Rajah & Tann Singapore LLP

T +65 6535 3600
sg.rajahtannasia.com

CHRISTOPHER & LEE ONG | *Malaysia*

Christopher & Lee Ong

T +60 3 2273 1919
F +60 3 2273 8310
www.christopherleeong.com

R&T SOK & HENG | *Cambodia*

R&T Sok & Heng Law Office

T +855 23 963 112 / 113
F +855 23 963 116
kh.rajahtannasia.com

RAJAH & TANN | *Myanmar*

Rajah & Tann Myanmar Company Limited

T +95 1 9345 343 / +95 1 9345 346
F +95 1 9345 348
mm.rajahtannasia.com

RAJAH & TANN 立杰上海

SHANGHAI REPRESENTATIVE OFFICE | *China*

**Rajah & Tann Singapore LLP
Shanghai Representative Office**

T +86 21 6120 8818
F +86 21 6120 8820
cn.rajahtannasia.com

GATMAYTAN YAP PATACSIL

GUTIERREZ & PROTACIO (C&G LAW) | *Philippines*

Gatmaytan Yap Patacsil Gutierrez & Protacio (C&G Law)

T +632 8894 0377 to 79 / +632 8894 4931 to 32
F +632 8552 1977 to 78
www.cagatlaw.com

ASSEGAF HAMZAH & PARTNERS | *Indonesia*

Assegaf Hamzah & Partners

Jakarta Office

T +62 21 2555 7800
F +62 21 2555 7899

Surabaya Office

T +62 31 5116 4550
F +62 31 5116 4560
www.ahp.co.id

RAJAH & TANN | *Thailand*

R&T Asia (Thailand) Limited

T +66 2 656 1991
F +66 2 656 0833
th.rajahtannasia.com

RAJAH & TANN LCT LAWYERS | *Vietnam*

Rajah & Tann LCT Lawyers

Ho Chi Minh City Office

T +84 28 3821 2382 / +84 28 3821 2673
F +84 28 3520 8206

RAJAH & TANN | *Lao PDR*

Rajah & Tann (Laos) Co., Ltd.

T +856 21 454 239
F +856 21 285 261
la.rajahtannasia.com

Hanoi Office

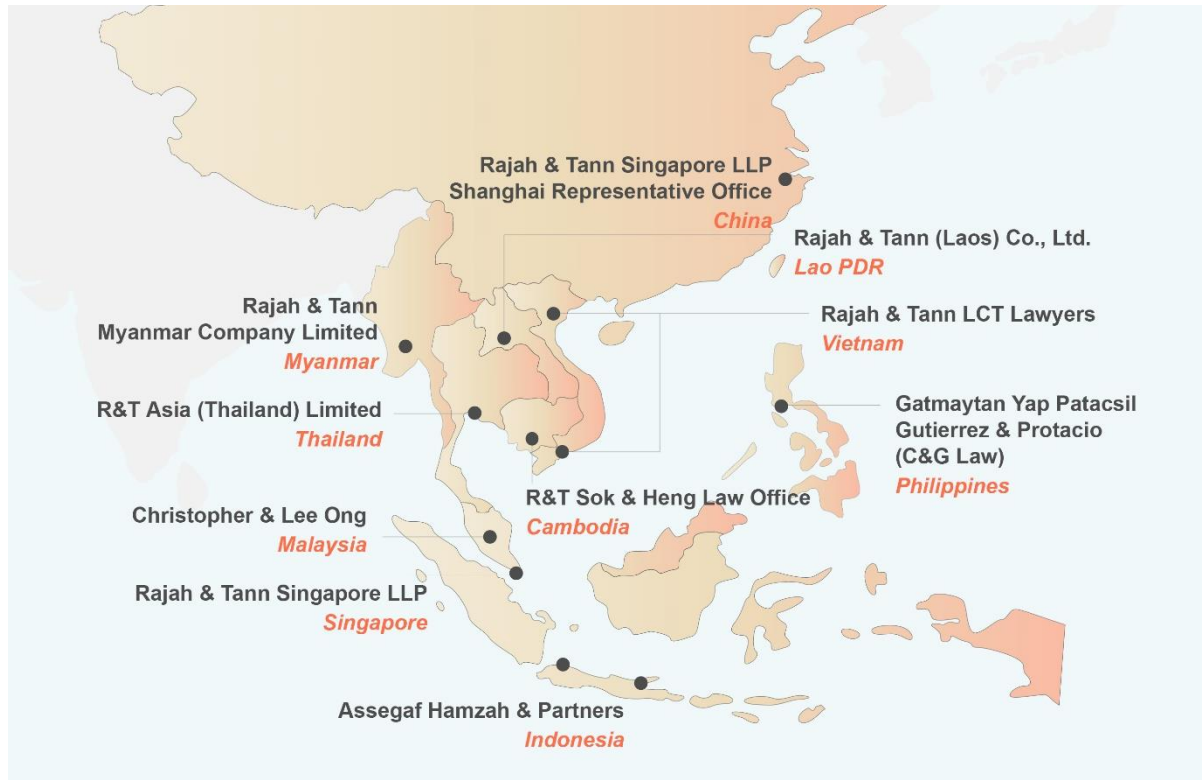
T +84 24 3267 6127
F +84 24 3267 6128
www.rajahtannlct.com

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