GAR KNOW HOW CONSTRUCTION ARBITRATION

Singapore

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AUGUST 2018

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Legal system

1 Is your jurisdiction primarily a common law, civil law, customary law or theocratic law jurisdiction? Are the laws substantially derived from the laws of another jurisdiction and, if so, which? What instruments have legal force and effect? Who are the lawmaking bodies? How and where are new laws published? Can laws be passed with retrospective effect?

The Republic of Singapore is a common law jurisdiction. As is typical in common law Legal systems, cases decided by the Singapore courts have precedent value. As a commonwealth nation, the laws of England have significantly influenced the development of the law in Singapore and to-date the Singapore courts still often refer to English case law for guidance (in particular in areas of contract, tort and restitution).

Statutes (ie, laws and regulations) passed by the legislative arm of the government (ie, Parliament) have legal force and effect. Lawmaking bodies in Singapore include the Singapore parliament, government ministries as well as other administrative agencies such as government departments and statutory boards that pass subsidiary legislation under the authority of a statute. New laws and regulations are gazetted and published in the Government Gazette. Laws cannot be passed with retrospective effect in Singapore.

Contract formation

2 What are the requirements for a construction contract to be formed? When is a "letter of intent" from an employer to a contractor given contractual effect?

A construction contract, like other contracts under common law, is formed by an offer and an acceptance of that offer, which must be supported by consideration (from both parties) and the parties must have an intention to create legal relations.

Whether a "letter of intent" is given contractual effect depends on the particular facts and circumstances of each case as well as the intention of the parties. Ultimately, the full effect of any letter of intent depends entirely on the objective meaning of the language used as well as the context in which it was given (see *Fongsoon Engineering (S) Pte Ltd v Kensteel Engineering Pte Ltd* [2011] SGHC 82). Some matters to take into consideration include whether the letter of intent has wording to the effect that it is binding, whether the parties have shown intention to act on the letter of intent, whether the parties have already acted in accordance with the letter of intent even before the formal contractual documents are executed, etc.

Choice of laws, seat, arbitrator and language

3 Are parties free to choose: (a) the governing law of their contract; (b) the law of the arbitration agreement; (c) the seat of the arbitration; (d) any arbitral rules; (e) anyone to act as arbitrator; and (f) the language of the contract and the arbitration? If not, what are the limitations on choice and what happens if the parties act contrary to them?

Yes, parties are free to determine all of the above. Implied terms

4 How might terms be implied into construction contracts? What terms might be implied?

Terms may be implied in the following manner:

- terms implied in fact give effect to the presumed intention of the parties; and
- terms may be implied by law into construction contracts either under the applicable common law or by statute. Terms are also implied in a contract by operation of statutes – such as the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 revised ed) in Singapore.

The most recent authoritative word on implied terms in contract is the Court of Appeal's decision in Sembcorp Marine v PPL Holdings [2013] SGCA 43. In this case, the Court of Appeal identified the following key principles in relation to implied terms:

- The courts will seek to give effect to the parties' presumed intentions. The court will imply a term only if the parties did not contemplate the issue at all and so left a gap. The court will not imply a term if the gap is intentional or if the parties mistakenly thought that express terms of the contract has adequately addressed the issue.
- The prevailing approach has been and will still be that of business efficacy (ie, that it is necessary in the business or commercial sense) and the officious bystander tests (ie, obvious to the parties at the time the contract was made), and that it must be reasonable and equitable to imply that term.
- The courts have laid down a three-step test for implication of terms in fact:
  - (a) The first step is to ascertain how the gap in the contract arises. Implication will be considered only if the court discerns that the gap arose because the parties did not contemplate the gap.
  - (b) At the second step, the court considers whether it is necessary in the business or commercial sense to imply a term in order to give the contract efficacy.
  - (c) Finally, the court considers the specific term to be implied. This must be one which the parties, having regard to the need for business efficacy, would have responded "Oh, of course!" had the proposed term been put to them at time of the contract. If it is not possible to find such a clear response, then, the gap persists and the consequences of that gap ensue.

Specifically in the construction context, terms may also be implied into a construction contract by operation of statutes, such as the Building and Construction Industry Security of Payment Act (Cap 30B).

Other possible terms that might be implied in construction contracts, include:

No.	Type of Term	Examples/Elaboration
1.	Terms ordinarily implied in construction contracts	Non-prevention and cooperation Adequate possession of the site Relevant planning permission Non-interference Positive implied term to perform duties
2.	Payment	Unless expressly stated otherwise, costs incurred to be reimbursed are reasonable and properly incurred
3.	Accuracies of information provided	Unless expressly stated otherwise, ground conditions would be accurate
4.	Standard of workmanship	Work to be carried out in 'good and workmanlike manner' Standard of skill would depend on circumstances
5.	Merchantability and fitness for purpose of materials	Merchantable/good quality of the material supplied
6.	Fitness for purpose of completed works	Ensure fitness for purpose of his completed work if he has expressly or impliedly undertaken the design
7.	Construction and sale of a dwelling	Reasonably fit for habitation
8.	Time for completion	If no completion date is specified or time has gone 'at large', completion of works will be implied to be within a reasonable time
9.	Terms implied by statute	Sales of Good Act 1979 Supply of Goods and Services Act 1982

Certifiers

5 When must a certifier under a construction contract act impartially, fairly and honestly? To what extent are the parties bound by certificates (where the contract does not expressly empower a court or arbitral tribunal to open up, review and revise certificates)? Can the contractor bring proceedings directly against the certifier?

A certifier (eg, an architect) under a construction contractor often wears two hats: one as the employer's agent and one as an independent certifier. While acting as a certifier, for example, in certifying payments and/or the completion of works, he must always exercise his or her duties in an impartial, fair and honest manner to the best of his uninfluenced professional judgement, notwithstanding the fact that he or she may have been engaged by the employer.

Unless specifically provided in the contract that a certificate is final and binding, parties may submit a certificate to be reviewed or revised by a court or arbitral tribunal. However, until a final judgment or award is given out, and in the absence of fraud, improper pressure or interference, the certificate shall be given full effect. This means that certificates have temporary finality and should be honoured whether for payment or otherwise (see *Aoki Corp v Lippoland (Singapore) Pte Ltd* [1995] 1 SLR(R) 314.

In cases where there is no direct contractual relationship between the certifier and contractor, any claim which the contractor has against the certifier would be in tort. To this end, the two-stage test for establishing a duty of care is employed: proximity and policy considerations (see the Court of Appeal's landmark decision in *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR 100, which was affirmed more recently in *Anwar Patrick Adrian and another v Ng Chong & Hue LLC and another* [2014] SGCA 34).Where the contractor has recourse under a contract against the employer, the certifier is unlikely to owe a corresponding duty in tort to the contractor.

Competing causes of delay

6 If an employer would cause (eg, by variation) a two-week critical delay to the completion of the works (which by itself would justify an extension of time under the construction contract) but, independently, culpable delay by the contractor (eg, defective work) would cause the same delay, is the contractor entitled to an extension?

There is no direct Singapore authority on this point, but it is likely that the Singapore position is similar to that in England, ie, where there is a situation of true concurrency, the contractor is entitled to an extension of time for the period of the excusable delay irrespective of whether the contractor may have actually been in delay him or herself. It should be noted that the closest Singapore decision that deals with this point is the Court of Appeal decision of *PPG Industries (Singapore) Pte ltd v Compact Metal Industries Ltd* [2013] SGCA 23 at [9]-[11] where concurrent delay was found and the contractor was entitled to an extension. Entitlement to an extension also depends upon the interpretation of the extension of time clause (if any) although it has been suggested that there is a general rule (absent clear words to the contrary) that the contractor would be entitled to an extension of time (but not to its losses caused by the delay).

Disruption

7 How does the law view "disruption" to the contractor (as distinct from delay or prolongation to the completion of the works) caused by the employer's breaches of contract and acts of prevention? What must the contractor show for a disruption claim to succeed? If an entitlement in principle can be shown (eg, that a loss has been caused by a breach of contract) must the court or arbitral tribunal do its best to quantify that loss (even if proof of the quantum is lacking or uncertain)?

Disruption is an interruption to the regular flow, sequence and continuity of the works as planned, which brings about disorder to works and loss of productivity. In other words, disrupted work is work that is carried out less efficiently due to the disruption.

On the other hand delay to the completion of works, is when the progress of the works falls behind the progress expected in a construction programme or when there is a difference between the time taken for the works to be actually completed and the duration allowed for completion under the contract.

In order for a disruption claim to succeed, the contractor must show actual damage, that the damage was caused by the employer's wrongdoing, that the damages are not too remote, and that the contractor has reasonably mitigated its losses (see question A27 regarding assessment of damages).

If an entitlement in principle can be shown, the court or tribunal must still do its best to determine as a question of fact whether it can be demonstrated that the damages sought by the contractor are reasonable.

Acceleration

8 How does the law view "constructive acceleration" (where the contractor incurs costs accelerating its works because an extension of time has not been granted that should have been)? What must the contractor show for such a claim to succeed? Does your answer differ if the employer acted unreasonably or in bad faith?

A contractor's entitlement to claim for costs associated with acceleration of the works will depend on the circumstances under which the acceleration measures were prompted. For such a claim to succeed, it has to fall under either of three heads: (i) where the measures have been taken at the initiative of the contractor in order to recover the time lost through culpable delay, (ii) where the measures are implemented at the express request (or instruction) of the employer (or his or her architect or engineer), (iii) where, following a dispute relating to a claim for time extension, the contractor decides to accelerate the works to avoid or reduce his liability for liquidated damages.

If the employer acted unreasonably or in bad faith in breach of the contract, this will likely strengthen the contractor's claim for constructive acceleration, especially where an engineer or architect has simply refused to consider any time extension application or where there is some overt act on the part of the employer to intervene or prevent the architect from performing his or her certification role properly.

Force majeure and hardship

9 What events of force majeure give rise to relief? Must they be unforeseeable and to whom? How far does the express or implied allocation of risk under the contract affect whether an event qualifies? Must the event have a permanent effect? Is impossibility in performing required or does a degree of difficulty suffice? Is relief available where only some obligations (eg, to make a single payment or carry out one aspect of the works) are affected or is a greater impact required? What relief is available and does it apply automatically? Can the rules be excluded by agreement?

There is no general rule as to what event would give rise to a situation of force majeure. It depends on what the parties, in their contract, have provided for. Where particular events have been stipulated within the force majeure clause, those would give rise to relief. Where the relevant events have not been stipulated, the availability of relief would depend on the precise construction of the clause (which would clarify its precise ambit andscope) as well as specific factual inquiry (see [57], [53] – [54] of *RDC Concrete Pte Ltd v Sato Kagyo*) [2007] 4 SLR(R) 413).

The events must be unforeseeable to both parties.

If there has been express or implied allocation or risk under the contract, then the event does not qualify as a force majeure event.

The event does not have to have permanent effect.

Impossibility in performing is not required. However, it is unlikely that a degree of difficulty will suffice, if the party is able to perform its obligation although at a much higher cost, such an event is insufficient to amount to force majeure.

Relief is available even though only some obligations are affected.

The relief available is dictated by the agreement between the parties.

The parties are allowed to exclude the rules by agreement as long as both parties agree, unless there's a statute or common law rule that says otherwise. It could be done through the use of limitation of liability clauses, exclusion clauses or collateral agreements.

10 When is a contractor entitled to relief against a construction contract becoming unduly expensive or otherwise hard to perform and what relief is available? Can the rules be excluded by agreement?

A contractor may wish to rely on the doctrine of frustration to discharge it from further performance of its duties under the contractor. To do so, the contractor must be able to prove that the events that have occurred after the formation of the contractor render the contract physically or commercially impossible to fulfil the contract or transforms the obligation to perform into a radically different obligation from that undertaken at the time the contract was entered into. The general principles in this regard are as follows:

- A mere increase in costs per se does not result in frustration, although an astronomical increase in cost may.
- It must be shown that the obligation in the contract has become "radically or fundamentally different" from the one agreed to, although literal impossibility is not required.

(See Court of Appeal decision of *Alliance Concrete Singapore Pte Ltd v Sato Kogyo Pte Ltd* [2014] 3 SLR 857).

The parties are allowed to exclude the rules by agreement.

Impossibility

11 When is a contractor entitled to relief if after the contract is concluded it transpires (but not due to external events) that it is impossible for the contractor to achieve a particular aspect of the contractual specification? What relief is available?

At first consideration and absent express contractual provision, the contractor is not entitled to relief in these circumstances. A contractor that agrees to carry out and complete work described in the contract usually impliedly warrants that it can do so.

However, there are some relief or measures available to the contractor:

- Depending upon the wording of the contract, however, the contractor may be able to argue that the employer is under an obligation to issue a variation in order to remove the impossibility.
- The impossibility doctrine permits a contractor to walk away from a contract without penalty if the contractor can demonstrate that performance is impossible or is so impracticable as to be virtually impossible. Where this can be shown, the contractor may then be entitled to relief from liability.
- The contractor may seek to rely on or propose the following:
    - discharge by agreement, which may excuse parties from further performance if they mutually agree to do so;
    - the doctrine of frustration which may permit supervening events to excuse complete performance;
    - force majeure events, which may allow an extension of time to the party in default or there may be cancellation of the contract on the option of one party or the defaulting party's duty to perform the contract will be suspended; or
    - illegality, which allows the contract to be void ab initio and unenforceable.

Clauses that seek to pass risks to the contractor for matters it cannot foresee or control

12 How effective are contractual provisions that seek to pass risks to the contractor for matters it cannot foresee or control, for example making the contractor liable for: (a) a specified event of force majeure; (b) ground conditions that no reasonably diligent contractor could have foreseen; or (c) errors in documents provided by the employer, such as employer's requirements in design and build forms?

Such provisions are effective to the extent that the agreement is validly entered into and are clearly worded.

Duty to warn

13 When must the contractor warn the employer of an error in a design provided by the employer?

There are no fixed instances where the contractor has a duty to warn, and each case will be judged on its individual facts.

However, it should be noted that section 10 of the Workplace Safety and Health Act (Cap 354A) expressly provides that a contractor must, as soon as practically possible, warn the employer of any foreseeable design risk that he knows the structure poses or will pose to affected persons. Therefore, the contractor should warn the employer of an error in design regardless of whether there is an express contractual provision to do so.

The contractor must warn the employer where there is an express contractual provision that the contractor has such an obligation. If there is no express provision, then such a duty may be implied into the contract where it is reasonable to do so. This is especially so when the defects in design may be potentially dangerous. The court will assess each case on its facts but can look at the size, nature and details of the works, experience and perceived expertise of the contractor and any other relevant factors of the relationship between the contractor and other construction professionals. However, it can be said that courts may be unwilling to imply an excessively wide duty to warn for the contractor.

Further, contractors should be mindful that they also own a duty to warn in tort. The courts in this respect will consider a variety of factors including but not limited to whether the contractor was a sub-contractor, their relevant expertise, and whether the other party relied on the contractor's skill and experience.

Good faith

14 Is there a general duty of good faith? If so, how does it impact upon the following (where they are otherwise permitted under the construction contract): (a) the level of intervention in the works that is allowed by the employer; (b) a party's discretion whether to terminate or suspend the contract; or (c) the employer's discretion to claim pre-agreed sums under the contract, such as liquidated damages for delay?

Unlike in civil law countries, there is no duty of good faith in Singapore. In *Ng Giap Hon v Westcomb Securities Pte Ltd* [2009] 3 SLR 518, the Court of Appeal held that until the theoretical foundations and structure of the doctrine of good faith were settled, the Singapore courts would not endorse an implied duty of good faith. This was more recently affirmed in *AREIF (Singapore I) Pte Ltd v NTUC Fairprice Co-operative Ltd and another matter* [2015] 2 SLR 630 at [64].

Time bars

15 How do contractual provisions that bar claims if they are not validly notified within a certain period operate (including limitation or prescription laws that cannot be contracted out of, interpretation rules, any good faith principles and laws on unfair contract terms)? What is the scope for bringing claims outside the written terms of the contract under provisions such as sub-clause 20.1 of the FIDIC Red Book 1999 ("otherwise in connection with the contract")? Is there any difference in approach to claims based on matters that the employer caused and matters it did not, such as weather or ground conditions? Is there any difference in approach to claims for (a) extensions of time and relief from liquidated damages for delay and (b) monetary sums?

If such provisions are stipulated as a condition precedent to a claim, the lack of validly notice would likely bar such claims.

Sub-clause 20.1 of the FIDIC Red Book relates to the procedures a contractor has to follow in order to put forth a valid claim for extension of time. In situations where such procedure is expressly stated in the contract, there is usually no scope for bringing claims outside the express terms of the contract. For example, in *Ho Pak Kim Realty Co Pte Ltd v Revitech Pte Ltd* [2010] SGHC 106, the High Court had to consider the operation of clause 23(2) of the SIA Conditions of Contract which required the contractor to provide a request within the time stipulated in the provision as a condition precedent to an extension of time. It was held that in making a request for an extension of time, the requirements under clause 23(2) were required to be complied with.

A particular example in Singapore would be clause 23 of the Public Sector Standard Conditions of Contract for Construction Works, where the procedure for making claims is expressly set out in the contract.

To the extent that express provisions are set out in the contract for any types of claims (including claims based on adverse weather and ground conditions or claims for extensions of time or delay), the procedures set out in the contract would have to be followed in order for the contractor to bring forth a valid claim.

Suspension

16 What rights does the employer have to suspend paying the contractor or performing other duties under the contract due to the contractor's (non-)performance, or the contractor have to suspend carrying out the works (or part of the works) due to the employer's (non-) performance?

The general position is that the employer, unless specifically provided in a contract, does not have a right to suspend payment or performance due to the contractor's non-performance.

Likewise, a contractor does not have the general right at common law to suspend work if he is not being paid. However, under the Building and Construction Industry Security of Payment Act (Cap 30B), a contractor may, after providing the required notice, suspend work if he has not been paid the adjudicated amount. The contractor's right to suspend work can also be conferred by the terms of the contract. A contract may confer on the contractor a right to suspend work when there is a serious breach by the employer. Such breach usually relates to the certification and payment terms of the contract.

Omissions and termination for convenience

17 May the employer exercise an express power to omit work; or terminate the contract at will or for convenience, so as to give work to another contractor or to carry out the work itself?

Where the contract is silent, the employer cannot exercise its power to omit work or terminate the contract at will, in order to give the work to another contractor or to carry out the work itself. In the absence of express provisions in the contract to the contrary, power to omit work cannot be exercised when the purpose of such omission is to prevent the contractor from carrying out the work under the original terms of the contract or for the contract to give the work to another contractor.

However, the employer may do so where there is sufficiently express provision or wording. Such clauses are usually termed 'termination for convenience' type clauses. However, the power to omit work must be exercised bona fide, for the purpose of the works, either because the omitted part of the work is found to be no longer required or has to be substituted. Where the clause is exercised instead for an improper purpose or via an abuse of discretion, the contractor will not be prevented from claiming damages on the basis that the employer has breached and/or repudiated the contract.

Termination

18 What termination rights exist? Can a construction contract be terminated in part? What are the practical and financial consequences?

Rights of parties to terminate a contract and the consequences of termination are governed by common law principles as well as the terms of the contract. To the extent that the rights of termination are not provided for in the contract, parties' positions will be preserved under common law.

It is perhaps helpful to summarise the four situations identified in the Court of Appeal case of *RDC Concrete Pte Ltd v Sato Kogyo (S) Pte Ltd and another appeal* [2007] 4 SLR(R) 413, entitling an innocent party to terminate a contract. The four situations are:

1 Where the contractual term in question clearly and unambiguously states that an event or certain event occurs, the innocent party would be entitled to terminate the contract (Situation 1);

2 Where a party by its words or conduct, simply renounces the contract inasmuch as it clearly conveys to the innocent party that it will not perform its contractual obligations at all (Situation 2);

3 Where the term breached by is a condition of the contract, that is, a term so important that any breach regardless of its actual consequences will entitle the innocent party to terminate the contract (Situation 3(a));

4 If a term is a warranty (instead of a condition), where a breach deprives the innocent party, of substantially the whole benefit which it was intended to obtain under the contract (Situation 3(b)). Whether a construction contract can be terminated in part depends on the construction of the terms of the contract. If the contract can be construed as consisting of several obligations, then it is likely to be able to be terminated in part. However, if the contract is construed as an entire obligation, it is unlikely that it would be able to be terminated in part.

Practically, several issues have to be considered before one proceeds to terminate a contract. An attempt to terminate a contract is likely to be strongly resisted. If the termination is wrongful or invalid, such termination of a contract will be considered a repudiatory breach.

Also, one would have to consider the business implications arising from the termination of a contract. Both parties are likely to suffer damage to their reputation and goodwill. For both the owner and the contractor, the termination is likely to generate negative publicity within the industry, which can affect parties' ability to secure new projects. Termination can also affect the financing costs of the termination project as well as other projects.

19 If the construction contract provides for the circumstances in which each party may terminate the contract but does not expressly or impliedly state that those rights are exhaustive, are other rights to terminate available? If so, what are they and what are the practical and financial consequences?

Yes, other rights to terminate are available at common law and they arise in the following circumstances:

Where there has been repudiation by the other party, that is, when the other party declares an unequivocal intention, by words or conduct, to abandon further performance of the contract, or an intention not to perform some essential aspect of the contract (see *SGCA Case of Brani Readymixed Pte Ltd v Yee Hong Pte Ltd and Another Appeal* [1995] 1 SLR 205).

Where there has been a breach of a condition of the contract by the other party, that is, a breach of a vital term (see *SGCA case of Sports Connection pte ltd v Deuter Sports GmBH* [2009] 3 SLR(R) 883).

Where there has been a "sufficiently serious" breach of a contractual term by the other party, ie, when a party commits a breach, the consequences of which will deprive the innocent party of substantially the whole benefit which it was intended that the innocent party should obtain from the contract (see *SGCA decision of Sports Connection pte ltd v Deuter Sports GmBH* 3 SLR(R) 883).

Where when a supervening event occurs after the relevant contract was formed that renders a contractual obligation radically or fundamentally different from what was agreed in the contract (ie, the doctrine of frustration).

Practically, if the ground for termination also exists at common law, the party will be able to claim for substantial damages. However, if the ground for termination is purely contractual, then the party seeking to terminate will be entitled to only nominal damages.

Further, if the cause for termination coincides with the circumstances for termination stated in the contract, it may be more expedient for the party seeking to terminate to do so. In this event, it will be a straightforward process that will be less costly.

20 What limits apply to exercising termination rights?

The limits to exercising termination rights include:

- where the innocent party is found to have waived his rights to terminate the contract, he will be estopped from doing so; and
- where the party seeking to terminate the contract may be benefiting unjustly or unconscionably by a strict enforcement of its contractual rights.

Completion

21 Does the law of your jurisdiction deem the works to be completed (irrespective of what the contract says) if, say, the employer takes beneficial possession of the works and starts using them?

It can be argued that when the employer takes possession of the works and use them as intended that the works are deemed to be substantially completed.

22 Does approval or acceptance of work by or on behalf of the employer bar a subsequent complaint? What constitutes acceptance? Does taking over the work by the employer constitute acceptance? Does this bar subsequent complaint?

Usually approval or acceptance of work by or on behalf of the employer does not bar a subsequent complaint from the employer. A particular example in Singapore is clause 2.1(2) of the Public Sector Conditions of Contract, where it is provided that 'the Superintending Officer shall have no authority to relieve the Contractor of any of his obligations under the Contract.'

Liquidated damages and similar pre-agreed sums ('liquidated damages')

23 To what extent are liquidated damages for delay to the completion of the works treated as an exhaustive remedy for all of the employer's losses due to (a) delay to the completion of the works by the contractual completion date; and (b) delays prior to the contractual completion date (in the absence of, say, interim milestone dates with liquidated damages for delay attaching to them)? What difference does it make if any critical delay is caused by the contractor's fraud, wilful misconduct, recklessness or gross negligence? If so, what constitutes such behaviour and can it be excluded by agreement?

Liquidated damages clause usually serves as an exhaustive remedy in respect of delay-related claims.

Critical delay caused by the contractor's fraud, wilful misconduct, recklessness or gross negligence will not normally affect the position in regard to liquidated damages but may provide grounds for termination of the contract.

Fraud cannot be excluded by agreement. However, wilful misconduct, recklessness and gross negligence can be excluded by agreement between the parties, to the extent that third parties are not affected.

24 If the employer causes critical delay to the completion of the works and the construction contract does not provide for an extension of time to the contractual completion date (there being no "sweep up" provision such as that in sub-clause 8.4(c) of the FIDIC Silver Book 1999) is the employer still entitled to liquidated damages due to the late completion of works provided for under the contract?

In the above-mentioned situation, from when the employer causes critical delay, the completion date is said to become "at large", such that the contractor is required to complete the work within a reasonable time. When this happens, the liquidated damages provision can no longer operate and the employer must prove its resultant losses insofar as the contractor failed to complete within a reasonable time. The contractual time for completion is no longer binding on the contractor, and there will thus be no definite date from which liquidated damages can run. In such a situation, the employer will have to prove his entitlement to general damages in order to claim against the contractor.

25 When might a court or arbitral tribunal award less than the liquidated damages specified in the contract for delay or other matters (eg, substandard work)? What factors are taken into account?

On the assumption that liquidated damages represent genuine pre-estimates of the loss which will likely flow from the breach of contract, the court or tribunal is unlikely to inquire into the actual loss suffered. However, as explained at question 25, the court or arbitral tribunal may consider arguments as to whether the liquidated damages amounts to a penalty (ie, are the specified sums "extravagant and unconscionable" in relation to the greatest loss that could be suffered by the claimant). If so, the liquidated damages would be considered a penalty and become void and unenforceable. Nevertheless, the claimant will still be able to claim for general damages even if the liquidated damages clause is void and unenforceable for being a penalty clause.

26 When might a court or arbitral tribunal award more than the liquidated damages specified in the contract for delay or other matters (eg, work that does not achieve a specified standard)? What factors are taken into account?

The court or arbitral tribunal is unlikely to award more than the liquidated damages specified in the contract because the specified liquidated damages are generally taken to be genuine pre-estimates of the loss suffered by the innocent party. However, if the claimant is able to show that its claim does not come within the liquidated damages clause, it may still be entitled to claim additional damages at general law.

Assessing damages and limitations and exclusions of liability

27 How is monetary compensation for breach of contract assessed? For instance, if the contractor is liable for a defect in its works is the employer entitled to its lost profits? What if the lost profits are exceptionally high?

The general position is that the damages are intended to put the innocent party in as good a position as if the contract had been performed subject to a number of qualifications. The injured party has to prove (i) there was actual damage; (ii) the damage was caused by the defendant; (iii) the damage was not too remote from the defendant's breach; and (iv) the injured party has taken reasonable steps to mitigate its losses.

Whether a contractor is liable for lost profits of the employer due to a defect in its works depends on whether the lost profits were reasonably considered to arise naturally from the defendant's breach of contract. If the lost profits are exceptionally high, such damages would be awarded only if the parties had special knowledge at the time of contracting for them to have contemplated that such a loss would have been made (see seminal case of *Hadley v Baxendale* [1854] EWHC J70, which application in Singapore was reaffirmed by the Court of Appeal in *Robertson Quay Investment Pte Ltd v Steen Consultants Pte Ltd* [2008] 2 SLR(R) 623).

28 If the contractor's work is technically non-compliant, is the contractor liable for remedying it if the rectification cost is disproportionate to the benefit of the remedy? Can the parties agree on a regime that is stricter for the contractor than under the law of your jurisdiction?

If the rectification costs are disproportionate to the benefit of the remedy, the contractor may be liable only for the difference in the value of the building as it would be had the contract been properly performed and the value of the building with the defects (ie, diminution in value. See, for example, *Sonny Yap Boon Keng v Pacific Prince International Pte Ltd* [2009] SLR 385).

To the extent that the agreement is validly entered into, parties are free to agree on a regime that is stricter for the contract than under general law.

29 If there is a defects notification period (DNP) during which the contractor must or may remedy any defect in its works that appears during a certain period after their completion, if the construction contract is otherwise silent, does it affect the employer's rights to claim for any defects appearing after the DNP expires?

No, it would not extinguish the contractor's liability nor the employer's right to claim damages.

30 What is the effect of a construction contract excluding liability for "indirect or consequential loss"?

Such clauses are generally upheld as long as they are expressed in clear words. Any ambiguity or lack of clarity will generally be resolved against the party who drafted it. The effect of such a contractual term is that the parties to the contract would be able to claim only for direct losses arising from a breach of the contract by either party. Examples of indirect losses are claims for loss of profits, opportunity or chance arising from delays in completion or breach of the construction contract. Such losses are distinct from those that arise naturally and/or directly from any breach, which include costs of repairs and/or replacement arising from defective fixtures or fittings to be delivered under the contract.

31 Are contractually agreed limits on – or exclusions of – liability effective and how readily do claims in tort or delict avoid them? Do they not apply if there is fraud, wilful misconduct, recklessness or gross negligence: (a) if the contract is silent as to such behaviour; or (b) if the contract states that they apply notwithstanding such behaviour? If so, what causation is required between the behaviour and the loss?

Contractually agreed exclusions of liability are usually effective to the extent that the contract is validly entered into. However, such exclusions of liability can be challenged under section 3 of the Unfair Contract Terms Act (Cap 396) (UCTA), which provides that a party cannot exclude any liability when he himself is in breach of contract, unless the term satisfies the test of 'reasonableness' (under section 11 of the UCTA).

There is no concept of delict under common law. Claims in tort are likely to be able to avoid the exclusions because parties are not allowed to exclude liability for negligence under section 2(2) of the UCTA.

Liens

32 What right does a contractor have to claim a lien (or similar) in the works it has carried out? If so, what are the limits of the right if, for example, the employer has no interest in the site for the permanent works? How is the right recognised and enforced?

Generally, a contractor does not have the right to claim a lien on the works it has carried out, unless such a right is expressly stipulated in a contract.

However, if the contractor has a right to payment pursuant to an adjudication determination (pursuant to the adjudication process prescribed Under the Building and Construction Industry Security of Payment Act (Cap 30B)), the contractor has a right to exercise a lien if the employer has failed to pay the whole or any part of the adjudicated amount. The lien would be limited to goods supplied by the claimant to the respondent under the contract that are unfixed and that have not been paid for. The contactor has no right to exercise the lien if the goods concerned are owned by some person other than the claimant or the respondent.

Subcontractors

33 How do conditional payment (such as pay-when-paid) provisions operate under the law of your jurisdiction (including interpretation rules, any good faith principles and laws on unfair contract terms)?

Conditional payment provisions are unenforceable in Singapore. Section 9 of the Building and Construction Industry Security of Payment Act (Cap 30B) renders all "pay-when-paid" provisions, regardless of the name it is given in the contract, unenforceable.

34 May a subcontractor claim against the employer for sums due to the subcontractor from the contractor? How are difficulties with the merits and proof of the subcontractor's claim addressed, including any rights the contractor has to withhold payment? What if aspects of the project suggest that the law of your jurisdiction should not apply (eg, the parties to both the main contract and the subcontract have chosen a foreign law as the governing law)?

A subcontractor would generally not be able make a claim against the employer for sums due to the subcontractor from the contract based on the contract between the employer and the contractor because there is no privity of contract.

35 May an employer hold its contractor to their arbitration agreement if their dispute concerns a subcontractor (there being no arbitration agreement between the contractor and the subcontractor or no scope for joining two sets of arbitral proceedings) or can the contractor, for example, require litigation between itself, the employer and the subcontractor? Does it matter if the arbitration agreement does not have its seat in your jurisdiction?

Yes, the employer may still hold the contractor to the arbitration agreement. The contractor cannot require litigation between itself, the employer and the subcontractor.

No, it does not matter if the arbitration agreement does not have its seat in our jurisdiction.

Third parties

36 May third parties obtain rights under construction contracts? How readily can those connected with the employer (such as future or ultimate owners) bring claims against the contractor in respect of (a) delays and (b) defects? To what extent are exclusions and limitations of liability in the construction contract relevant?

There are a few ways in which third parties may obtain rights under construction contracts:

- As mentioned at question 34, third parties may obtain rights through collateral warranties.
- Third parties may be able to obtain rights pursuant to the Contract (Rights of Third Parties) Act (Cap 53B), eg, where the terms of the subcontract purport to confer benefits to subsequent purchasers of the property.
- Under the common law, the original owner can claim against the contractor for the cost of repairing defects incurred by the subsequent owner on behalf of the subsequent owner even though the original owner suffered no loss (see Family Food Court v Seah Boon Lock [2008] 4 SLR(R) 272; Chia Kok Leong v Prosperland [2005] 2 SLR(R) 484; Alfred McAlpine Construction v Panatown Ltd [2001] 1 AC 518; Darlington Borough Council v Wiltshier Northen Ltd (1994) 69 BLR 1).
- Procedurally, a third party can be joined to the proceedings under O 15 r 6 of the Rules of Court if the court see its expedient or just to do so.

37 How readily (absent fraud, wilful misconduct, recklessness or gross negligence) can those connected with the contractor (such as affiliates, directors or employees) face claims in respect of (a) delays (b) defects and (c) payment? To what extent are exclusions and limitations of liability in the construction contract relevant?

It is highly unlikely that those connected with the contractor can face the abovementioned claims because the contractor is a separate legal entity from its employees, directors, affiliates (including subsidiaries) and other connected entities. Since this is the case, exclusions and limitations of liability are largely irrelevant, though parties are not prevented from including such exclusions and limitations of liability. Limitation and prescription periods

38 What are the key limitation or prescription rules for claims for money and defects (and insofar as you have a mandatory decennial liability (or similar) regime, what is its scope)? What stops time running for the purposes of these rules (assuming the arbitral rules are silent)? Are the rules substantive or procedural law? May parties agree different limitation or prescription rules?

The Limitation Act (Cap 163) prescribes a time limit for filing a claim for money and defects. The rules are substantive law, and parties are not allowed to exclude the provisions of the Limitation Act in their contract. However, if parties wish to expose themselves to longer liability then what is stated in the Limitation Act, parties can include the same in the contract. Other key laws

39 What laws apply that cannot be excluded or modified by agreement where the law of your jurisdiction is the governing law of a construction contract? What are the key aspects of, say, the FIDIC Silver Book 1999 that would not operate as its plain words suggest?

Generally, where the law of Singapore applies to the contract, it is not possible to exclude or modify the operation of the said laws. In the context of construction contracts, this includes the application of the Building and Construction Industry Security

of Payment Act (Cap 30B). Section 36 of this Act holds that any provisions that purport to exclude, modify, restrict or in any way prejudice, or has the effect of excluding, modifying, restricting or prejudicing the operation of this Act is voided. Any provision that is construed as an attempt to deter a person from taking action under this act is also deemed void.

40 What laws of your jurisdiction apply anyway where a foreign law governs a construction contract? What are the key aspects of, say, the FIDIC Silver Book 1999 that would not operate as its plain words suggest?

Assuming that the project is situated in Singapore, but is contractually governed by foreign law, Singapore laws and regulations would continue to govern key aspects of the project. Such examples include: workplace safety laws, environmental laws, employment laws, dispute resolution laws (eg, adjudication under the Building and Construction Security of Payment Act (Cap 30B)).

A particular example is the Building and Construction Security of Payment Act (Cap 30B), which applies to any construction works carried out in Singapore regardless of what law the contract is governed under. Section 4 of the Act specifically states that it will apply to any contract that is made in writing on or after 1 April 2005, whether or not that contract is expressed to be governed by the law of Singapore.

Enforcement of binding (but not finally binding) dispute adjudication board (DAB) decisions

41 For a DAB decision awarding a sum to a contractor under, say, sub-clause 20.4 of the FIDIC Red Book 1999 for which the employer has given a timely notice of dissatisfaction, in an arbitration with its seat in your jurisdiction, might the contractor obtain: a partial or interim award requiring payment of the sum awarded by the DAB pending any final award that would be enforceable in your jurisdiction (assuming the arbitral rules are silent); or interim relief from a court in your jurisdiction requiring payment of the sum awarded by the DAB pending any award?

Yes, even if the employer has filed the notice of dissatisfaction within time, which renders DAB's award binding but not final, in the conduct of an arbitration the arbitrator award an interim award requiring the payment of the sum awarded by the DAB. Similarly, the Singapore courts can issue a judgment to enforce the award on application by the relevant party. Courts and arbitral tribunals

42 Does your jurisdiction have courts or judges specialising in construction and arbitration?

There are a number of judges in the High Court of Singapore who are designated to hear construction and/or arbitration-related matters.

43 What are the relevant levels of court for construction and arbitration matters? Are their decisions published? Is there a doctrine of binding precedent?

Generally, there are two levels of courts in Singapore – the Supreme Court and the State Courts. Cases with claims that exceed S$250,000 must be commenced in the Supreme Court. The decisions of the Supreme Court and State Courts are generally published and/or are publicly available.

In January 2015, the Singapore International Commercial Court (SICC) was established. It currently exists as a division of the High Court. It has jurisdiction to hear claims that are international and commercial in nature. A panel of international judges have been appointed to hear matters referred to the SICC. Renowned judges renowned for their expertise in construction law include The Honourable Justice Vivian Ramsey who served as judge in charge of the Technology and Construction Court of England and Wales, and the Honourable Justice Anselmo Reyes whose specialisation include construction, arbitration, commercial and admiralty matters.

Yes, there is a doctrine of binding precedent.

44 In your jurisdiction, if a judge or arbitrator (specialist or otherwise) has views on the issues as they see them that are not put to them by the parties, can they raise them with the parties? Is the court or arbitral tribunal permitted or expected to give preliminary indications as to how it views the merits of the dispute?

Under Singapore law, the scope of the powers of the arbitrator to decide on a dispute is determined by the arbitration agreement, the notice of arbitration and the pleadings in the arbitration. Thus, if the parties did not raise the dispute to the arbitrator, then the arbitrator is not allowed to raise the issues with the parties. For a recent authoritative pronouncement on the importance of pleadings in arbitration, please see the Court of Appeal case of *PT Prima International Development v Kempinski Hotels SA* [2012] 4 SLR 98.

However, a judge sitting in court is allowed to give views on issues that are not put to them by the parties. However, the said views are usually not given the status of binding precedent (ie, obiter dicta).

The court and tribunal are usually not expected to give preliminary indications as to how it views the merits of the dispute. From experience, if parties expressly agree, the tribunal may be empowered to provide indications without affecting its power to hear the matter.

45 If a contractor, say, wishes to arbitrate pursuant to an arbitration agreement, what parallel proceedings might the employer bring in your jurisdiction? Does it make any difference if the dispute has yet to pass through preconditions to arbitration (such as those in clause 20 of the FIDIC Red Book 1999) or if one of the parties shows no regard for the preconditions (such as a DAB or amicable settlement process)?

The employer may not bring proceedings on the same dispute to court/ arbitration in Singapore if there is an ongoing arbitration on the same dispute. Proceedings must be stayed. Alternatively, an anti-suit injunction should be sought from the courts. Parallel proceedings may however be to seek orders from the court in respect of the following matters:

- giving of evidence by affidavit;
- the preservation, interim custody or sale of any property which is or forms part of the subject matter of the dispute;
- samples to be taken from, or any observation to be made of or experiment conducted upon, any property which is or forms part of the subject-matter of the dispute;
- the preservation and interim custody of any evidence for the purposes of the proceedings;
- securing the amount in dispute;
- ensuring that any award which may be made in the arbitral proceedings is not rendered ineffectual by the dissipation of assets by a party; and
- an interim injunction or any other interim measure.

46 If the seat of the arbitration is in your jurisdiction, might a contractor lose its right to arbitrate if it applied to a foreign court for interim or provisional relief?

Subject to the rules of *res judicata*, such a contractor is unlikely to lose its right to arbitrate.

Expert witnesses

47 In your jurisdiction, are tribunal- or party-appointed experts used? To whom do party-appointed experts owe their duties?

Both tribunal and party appointed experts may be used. The party-appointed experts owe their duties to the tribunal, or to the court, as the case may be.

State entities

48 Summarise any specific limitations or requirements that apply when the employer is a state entity or public authority (including, for example, public procurement rules, limits on rights to suspend or terminate, excluded lien rights and arbitrating – as well as enforcing an award – against such an employer)?

Contracts with the government are governed by the Government Contracts Act (Cap 118).

Public bodies are governed by the Government Procurement Act (Cap 120) and the subsidiary legislation under this act such as the Government Procurement Regulations, Government Procurement (Challenge Proceedings) Regulations and the Government Procurement (Application) Order (the Government Procurement Laws).

Public construction works must adopt the tendering process according to Government Procurement Laws. Procurement operations in Singapore are standardised by the requirement that all procurement operations starting from the announcement of a tender to the awarding of a contract must be made through GeBIZ (www.gebiz.com.sg), an online portal where all the public sector's invitation for quotations and tenders are posted.

For public construction works, the standard government conditions of contract is the Public Sector Standard Conditions of Contract, 2014, seventh edition. It provides a common platform for use in all public sector construction works.

Settlement offers

49 If the seat of the arbitration is in your jurisdiction, on what basis can a party make a settlement offer that may not be put before the arbitral tribunal until costs fall to be decided?

Based on the common law, parties to the arbitration are entitled to put in sealed offers that are to be opened only after the tribunal has made its award on the merits, and before the issue of costs is determined.

Privilege

50 Does the law of your jurisdiction recognise "without prejudice" privilege (such that "without privilege" communications are privileged from disclosure)? If not, may it be agreed that a sum is payable if communications to try to achieve a settlement are disclosed to a court or arbitral tribunal?

Yes, it is recognised. Without prejudice communications are usually protected and cannot be admitted as evidence in court. However, such evidence can be admitted to determine whether the parties had reached a compromise (*Quek Kheng Leong Nicky v Teo Beng Ngoh* [2009] 4 SLR(R) 181).

51 Is the advice of in-house counsel privileged from disclosure under the law of your jurisdiction? Is the relevant law characterised as substantive or procedural law?

The advice of in-house counsel is likely to be privileged from disclosure as long as they relate to legal as opposed to administrative matters.

Guarantees

52 What are the requirements for a guarantee under the law of your jurisdiction? Are oral guarantees effective?

Pursuant to section 6(b) of the Civil Law Act (Cap 43), a guarantee being a "special promise to answer for the debt, default or miscarriage of another person" must be in writing and signed by the guarantor in order to be enforceable under the law of Singapore. Oral guarantees are not effective.

53 Under the law of your jurisdiction, will the guarantor's liability be limited to that of the party to the underlying construction contract, if the guarantee is silent? Can the guarantee's wording affect the position?

The extent of the guarantor's liability is limited to what was undertaken based on the wording of the guarantee.

The guarantor's liability is usually limited to that of the party to the underlying contract. The extent of the guarantor's liability always depends on the terms of the contract of guarantee.

54 Under the law of your jurisdiction, in what circumstances will a guarantor be released from liability under a guarantee, if the guarantee is silent? Can the guarantee's wording affect the position?

There are a number of situations in which a guarantor may be discharged from liability under a guarantee, including but not limited to:

- discharge of the principal debtor – collateral liability is essential to a guarantee, thus if the principal debtor is discharged, so will the guarantor be;
- discharge by creditor's conduct:
- variation of principal contract – if the guarantor did not consent to the variation of the principal contract, he will be discharged;
- alteration of terms of the guarantee – if the creditor alters the instrument of guarantee without the consent of the guarantor, the latter will be discharged;
- creditor's breach of the terms of the guarantee;
- agreement to give time to the principal debtor;
- agreement with principal debtor to give time to the guarantor;
- release of principal debtor;
- release of guarantor;
- release of co-guarantor;
- release or loss of securities;
- negligent realisation of the guarantee;
- avoidance of guarantee;
- non-disclosure;
- misrepresentation, undue influence, and unconscionability; and
- vitiating conduct.

As a guarantee is basically a contractual obligation, the law of contract would apply. Accordingly the wording of the guarantee, like a contract, may be able to alter the position above.

On-demand bonds

55 If an on-demand bond is governed by the law of your jurisdiction on what basis might a call be challenged in your courts as a matter of jurisdiction as well as substantive law? Assume the underlying contract is silent on when calls may be made.

An on-demand bond may be challenged on the basis that the call was unconscionable or was fraudulent (see *JBE Properties Pte Ltd v Gammon Pte Ltd* [2010] 2 SLR 47, which was followed in the Court of Appeal decision of *BS Mount Sophia Pte Ltd v Join-Aim Pte Ltd* [2012] 3 SLR 352, *CKR Contract Services Pte Ltd v Asplenium Land Pte Ltd and Another* [2015] 3 SLR 1041 at [15]) and *York International Pte Ltd v Voltas Ltd* [2013] 3 SLR 1142).

56 If an on-demand bond is governed by the law of your jurisdiction and the underlying contract restrains calls except for amounts which the employer is entitled to (like sub-clause 4.2 of the FIDIC Red Book 1999), when would a court or arbitral tribunal applying your jurisdiction's law restrain a call if the contractor contended that: (i) the employer does not have an entitlement in principle; or (ii) the employer has an entitlement in principle but not for the amount of the call?

A court or arbitral tribunal is unlikely to restrain a call on a performance bond unless it can be proven that the conditions for calling on the bond are not satisfied. See also question 55.

However, the contractor may later claim for (i) the entire sum back if the contractor is able to prove that the employer does not have an entitlement in principle or (ii) the amount of the bond that exceeds the employer's damages if the contractor can prove that the employer was not entitled to the entire amount of the call.

Further considerations

57 Are there any other material aspects of the law of your jurisdiction concerning construction projects not covered above?

No.

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Soh Lip San is a partner with the firm's international arbitration and construction practice and has been named as a Senior Accredited Specialist for Building and Construction Law in the inaugural batch of the Singapore Academy of Law's Specialist Accreditation scheme. Lip San's clients span the full spectrum of the industry, including, government and government bodies, developers, contractors and supplies of various tiers, consultants and building industry professionals and other stakeholders. His areas of practice include both contentious and non-contentious work for the building and engineering industry, and he also deals with insurance matters, construction insolvency and completion law. In the course of his work, Lip San has dealt with a wide variety of contracting platforms ranging from traditional lump sum/measurement models to design and build projects to guaranteed maximum price models to public private partnerships. Lip San has experience in traditional building projects as well as specialised infrastructure projects such as sewage treatment plants, desalination plants, mass transit and light rail systems, combined cycle power plants, oil and gas pipelines, telecommunication cables, ports and container yards. Lip San contributed to the 12th edition of Hudson's Building and Engineering Contracts and authored Workplace Safety and Health – A Practical Guide. He is a Fellow of the Singapore Institute of Arbitrators, has been recognised in The International Who's Who of Construction Lawyers and also ranked as a construction lawyer in Chambers Asia Pacific.

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Shannon is a partner in Rajah & Tann LLP's International Arbitration and Construction Projects practice group. Shannon's areas of practice include various contentious as well as non-contentious works in the area of building and construction law, mining contracts, oil and gas contracts, concession agreements, employment issues as well as insurance.
She has acted for a broad range of clients including developers, contractors, sub-contractors, specialist contractors, suppliers and government bodies. She has represented clients from many jurisdictions, including Singapore, Indonesia, Maldives, People's Republic of China, the Middle East and India. On the contentious front, Shannon has been involved in a broad spectrum of civil and commercial disputes both in court litigation as well as in arbitration, with a particular focus on infrastructure as well as energy sector disputes, particularly in the areas of long term mining and gas supply contracts. She has also acted as counsel in several adjudication proceedings under Singapore's Building and Construction Industry Security of Payment Act (SOPA). Shannon also sits as an arbitrator and is on the Singapore International Arbitration Centre (SIAC) reserve panel. On the non-contentious front, Shannon has been involved and is also familiar with the drafting and review of construction and engineering contracts. She is familiar with the various standard form contracts such as the PSSCOC, SIA, NEC, FIDIC, etc. Shannon is also co-author of the book Workplace Safety and Health – A Practical Guide

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