

International **Comparative** Legal Guides



Construction & Engineering Law **2021**

A practical cross-border insight into construction and engineering law

Eighth Edition

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1 Making Construction Projects

1.1 What are the standard types of construction contract in your jurisdiction? Do you have: (i) any contracts which place both design and construction obligations upon contractors; (ii) any forms of design-only contract; and/or (iii) any arrangement known as management contracting, with one main managing contractor and with the construction work done by a series of package contractors? (NB For ease of reference throughout the chapter, we refer to “construction contracts” as an abbreviation for construction and engineering contracts.)

Singapore predominantly uses lump-sum contracts. As many domestic projects are for building works, these are mostly tendered on a ‘build-only’/‘construct-only’ procurement model, followed by ‘design and build’ procurement models where the contractor’s specialist experience is more critical.

‘Design-only’ contracts are rare, as such arrangements are typically undertaken by consultants. If a contractor is to carry out design work, this would typically be under a design and build arrangement. Design and build contracting is becoming more common.

Management contracting is also rare and there is limited familiarity with this model in Singapore. It is not preferred, as the risk in such an arrangement remains primarily with the employer even if it has the potential to reduce the price. Most employers would prefer to engage a single main contractor who tenders for the whole works and selects its sub-contractors, with the employer retaining the option to nominate sub-contractors (for example, where a specific sub-contractor with specialist experience and knowledge is desired).

1.2 How prevalent is collaborative contracting (e.g. alliance contracting and partnering) in your jurisdiction? To the extent applicable, what forms of collaborative contracts are commonly used?

This is rare in Singapore. However, the Building Construction Authority (“BCA”) is currently exploring and piloting a set of standard clauses to implement collaborative contracting in selected public sector projects, although the clauses themselves have not been publicly released.

1.3 What industry standard forms of construction contract are most commonly used in your jurisdiction?

The most commonly used standard forms of contract in Singapore are the Singapore Institute of Architects (“SIA”), Real Estate Developers’ Association of Singapore (“REDAS”) and Public Sector Standard Conditions of Contract (“PSSCOC”) standard form contracts.

1.4 Are there any standard forms of construction contract that are used on projects involving public works?

Yes. The PSSCOC is typically used for public works, although some government bodies have developed their own standard forms – the most notable being the Land Transport Authority’s Conditions of Contract.

1.5 What (if any) legal requirements are there to create a legally binding contract (e.g. in common law jurisdictions, offer, acceptance, consideration and intention to create legal relations are usually required)? Are there any mandatory law requirements which need to be reflected in a construction contract (e.g. provision for adjudication or any need for the contract to be evidenced in writing)?

Singapore follows the ‘offer and acceptance’ model of contract formation adopted in common law countries. Consideration is rarely an issue in construction contracts, but the parties’ intention to create legal relations may be disputed in the context of letters of intent (“LOIs”), when parties are ultimately unable to reach agreement on the formal contract or where a decision is made to pull the plug on a project before a formal contract is executed.

There are no mandatory legal requirements that need to be reflected in a construction contract for validity.

However, failure to have a written contract may result in the statutory adjudication provisions in the Building and Construction Industry Security of Payment Act (“SOP Act”) becoming inapplicable (Section 4(1) provides that the SOP Act only applies to contracts in writing, albeit with a fairly expansive definition of when a contract is ‘in writing’). In addition, failure to make provision for the various matters addressed by the SOP Act often results in draconian ‘default’ provisions being imposed by statute (for example, reducing the time period provided for an employer to respond to a payment claim).

1.6 In your jurisdiction please identify whether there is a concept of what is known as a “letter of intent”, in which an employer can give either a legally binding or non-legally binding indication of willingness either to enter into a contract later or to commit itself to meet certain costs to be incurred by the contractor whether or not a full contract is ever concluded.

Yes, the concept exists but the treatment of LOIs falls under the offer and acceptance rubric which applies to contracts generally. They may be binding or non-binding depending on the intentions of the parties and the stage at which the LOI is issued – for example, an LOI may be intended:

- to provide ‘comfort’ to the contractor’s bankers without any binding commitment on either party;
- to make provision for payment and other matters relating to a limited scope of work but not otherwise (typically for ‘early’ or ‘preparatory’ works where the employer wishes to expedite the work while negotiating the formal contract); or
- to commit the parties to a binding contract for the whole works, to be superseded when a subsequent contract agreement is negotiated (typically at a late stage, operating as more of a ‘letter of award’ rather than as a strict LOI).

1.7 Are there any statutory or standard types of insurance which it would be commonplace or compulsory to have in place when carrying out construction work? For example, is there employer’s liability insurance for contractors in respect of death and personal injury, or is there a requirement for the contractor to have contractors’ all-risk insurance?

Generally speaking, the following types of insurance are required by statute and/or typically purchased for a construction project:

- work injury compensation insurance;
- contractors’ all-risk insurance;
- public liability insurance; and/or
- professional indemnity insurance (where design work is part of the contractor’s scope).

The Ministry of Manpower (“**MOM**”) now also requires employers to purchase additional COVID-19 medical insurance for foreign workers before they arrive in Singapore, in order for approval to be granted for such workers to enter Singapore.

1.8 Are there any statutory requirements in relation to construction contracts in terms of: (a) labour (i.e. the legal status of those working on site as employees or as self-employed sub-contractors); (b) tax (payment of income tax of employees); and/or (c) health and safety?

Yes. For example:

Labour

- The MOM imposes restrictions on source countries, age and maximum period of employment for foreign workers, in addition to quotas on certain types of foreign workers (measure by reference to ‘man-year entitlements’), in addition to requiring a security bond and medical insurance for such workers.
- The BCA also imposes requirements on Class 1 General Builders to deploy a minimum number of skilled construction personnel for large projects valued at more than S\$20 million as part of their licence conditions.

Tax

- Companies are required to report employee earnings and, in the case of foreign employees, may be required to withhold tax on payments/salaries due to them.

Health and safety

- There are a number of health and safety requirements imposed by statute, including obligations to maintain work injury compensation insurance for workers and to ensure a safe workplace under the Work Injury Compensation Act and the Workplace Safety Act respectively. Specific areas may be addressed by other legislation or regulations, such as the Workplace Safety and Health (Work At Heights) Regulations 2013 and the Hazardous Waste (Control of Export, Import and Transit) Act.
- The BCA has also imposed additional COVID-19-specific regulations to implement safe management measures for construction workers (for example, the COVID-Safe Restart Criteria were put into place after the Circuit Breaker was lifted), requiring measures such as segregation of teams and placing workers on the same project in cohorts together within dedicated accommodation.

1.9 Are there any codes, regulations and/or other statutory requirements in relation to building and fire safety which apply to construction contracts?

Yes. The Fire Safety Act and the Fire Code apply to construction contracts. In particular, the Act and Code impose requirements as to fire safety that could apply not only to construction sites generally but also to temporary buildings used for construction (such as warehouses, site offices and temporary workers’ quarters).

1.10 Is the employer legally permitted to retain part of the purchase price for the works as a retention to be released either in whole or in part when: (a) the works are substantially complete; and/or (b) any agreed defects liability period is complete?

Yes. Such an arrangement is quite common under the current standard form construction contracts – for example, under the SIA forms of contract, a stipulated percentage of ‘retention monies’ is withheld against every progress payment up to a specified limit, with 50% of these monies released upon substantial completion and the remainder after the defects liability period is over and the final accounts have been drawn up.

1.11 Is it permissible/common for there to be performance bonds (provided by banks and others) to guarantee the contractor’s performance? Are there any restrictions on the nature of such bonds? Are there any grounds on which a call on such bonds may be restrained (e.g. by interim injunction); and, if so, how often is such relief generally granted in your jurisdiction? Would such bonds typically provide for payment on demand (without pre-condition) or only upon default of the contractor?

Yes, it is common for projects of a significant value to require contractors to tender performance bonds by a financial institution – or in some cases, e.g. the PSSCOC, even a cash deposit – to guarantee performance by the contractor.

It is common for such bonds to be provided in an ‘on-demand’ format which does not require proof of default, rather than conditioned on proof of default by the contractor.

Calls on such bonds may be restrained by interim injunction on the basis of fraud or unconscionability, although parties may validly contract out of the unconscionability ground. The threshold for granting such injunctive relief is high, as the Singapore courts lean in favour of upholding such contractual arrangements, particularly as the performance bond is considered to be separate and distinct from the construction contract.

Specific provisions imposing restrictions on calls on performance bonds, as well as provisions permitting extensions of performance bonds, have also been enacted in Section 6 of the COVID-19 (Temporary Measures) Act 2020.

1.12 Is it permissible/common for there to be company guarantees provided to guarantee the performance of subsidiary companies? Are there any restrictions on the nature of such guarantees?

Yes, it is permissible to require a parent company guarantee as a guarantee for performance. However, this is generally required mainly for higher-value projects where there is doubt as to whether the contracting entity has sufficient means to perform its contractual obligations and/or to meet any claims relating to non-performance – for example, where a major foreign contractor uses a local subsidiary company to design and construct an oil refinery. There are no restrictions on the nature of such guarantees.

1.13 Is it possible and/or usual for contractors to have retention of title rights in relation to goods and supplies used in the works? Is it permissible for contractors to claim that, until they have been paid, they retain title and the right to remove goods and materials supplied from the site?

Yes, this is possible, but not common. Most construction contracts will include vesting clauses expressly providing for property to pass from the main contractor to the employer until the works are completed and all defects have been made good, along with provisions requiring the main contractor to ensure that similar provisions are incorporated in all its subcontracts.

This is subject to the contractor's statutory right to exercise a lien over unfixated and unpaid goods where the employer has not paid amounts awarded in adjudication under Section 25 of the SOP Act.

2 Supervising Construction Contracts

2.1 Is it common for construction contracts to be supervised on behalf of the employer by a third party (e.g. an engineer)? Does any such third party have a duty to act impartially between the contractor and the employer? If so, what is the nature of such duty (e.g. is it absolute or qualified)? What (if any) recourse does a party to a construction contract have in the event that the third party breaches such duty?

Yes, it is common. Typically, the contract administrator/supervisor is engaged by the employer and acts both as agent for the employer in some matters and certifier/neutral third party in others. When acting as a certifier or neutral third party, he is required to exercise these functions in good faith and to the best of his uninfluenced professional judgment.

A contractor's recourse is generally against the employer rather than the certifier, in that the contractor will seek to reopen the certificate/decision in litigation or arbitration. Generally, the

certifier does not owe duties in contract or tort to the contractor. Most forms also provide for certificates to have temporary finality such that they are easily enforceable by summary judgment, and the certifier's breach of this duty may result in the certificate being tainted and invalidated.

The employer is similarly not barred from reopening the decisions of the certifier in arbitration, although he also has the option of proceeding against the certifier for negligence or breach of contract, given that he is in a contractual relationship with the certifier.

2.2 Are employers free to provide in the contract that they will pay the contractor when they, the employer, have themselves been paid; i.e. can the employer include in the contract what is known as a "pay when paid" clause?

The SOP Act applies to all construction contracts apart from those which are specifically excluded (for example, contracts for construction work or goods/services for projects carried out outside Singapore – see Section 2(b)(ii) of the SOP Act). Under the SOP Act, such 'pay when paid' clauses are unenforceable.

Whilst the SOP Act renders unenforceable 'pay when paid' arrangements, it does not absolve a party of its payment obligations owed to the other.

2.3 Are the parties free to agree in advance a fixed sum (known as liquidated damages) which will be paid by the contractor to the employer in the event of particular breaches, e.g. liquidated damages for late completion? If such arrangements are permitted, are there any restrictions on what can be agreed? E.g. does the sum to be paid have to be a genuine pre-estimate of loss, or can the contractor be bound to pay a sum which is wholly unrelated to the amount of financial loss likely to be suffered by the employer? Will the courts in your jurisdiction ever look to revise an agreed rate of liquidated damages; and, if so, in what circumstances?

Parties are permitted to agree on liquidated damages for delay to completion. The main restriction is that the sum should not offend the rule against penalties and should be a genuine pre-estimate of loss likely to be suffered by the employer for delay, following the traditional *Dunlop* approach. Clauses providing that the contractor is to pay a sum which is wholly unrelated to the amount of financial loss likely to be suffered by the employer are unlikely to be enforceable.

If a clause offends the rule against penalties, it will be struck down. The courts will not revise the agreed rate of liquidated damages and there has been no reported decision stipulating otherwise. The employer is left to prove his loss in general damages once the liquidated damages clause is struck down.

3 Common Issues on Construction Contracts

3.1 Is the employer entitled to vary the works to be performed under the contract? Is there any limit on that right?

Most construction contracts will provide for an express power on the part of the employer to vary the works to be performed under the contract, whether by himself or through someone specifically authorised under the contract to do so (often the contract administrator).

While the scope of what can be considered a variation is quite wide, there are limits on this power. It is difficult to prescribe a bright line to determine what a variation is, but examples of the limitations of such a clause include situations where the works are so different from what was originally contemplated that it cannot properly be considered to have been within the definition of ‘variation’ in the contract, therefore falling outside the contract.

If the contract does not contain a power permitting the employer to instruct variations, he cannot validly do it within the contract or compel the contractor to comply with the variation instruction.

3.2 Can work be omitted from the contract? If it is omitted, can the employer carry out the omitted work himself or procure a third party to perform it?

Yes, variation provisions in the Singapore standard forms typically cover omissions of work as variations (for example, see Clause 12(2)(b) of the SIA Lump Sum Contract (9th Ed) and Clause 19.1 of the PSSCOC (Construction Works) 2020). However, where the purpose of the variation is to omit work from the contract and award it to another contractor at a cheaper price, this will not be permitted – the basis being that the contractor has both the duty and the right to carry out the work he tendered for.

The variation provisions must be exercised *bona fide* for the purpose of the works, and this likely extends to prohibiting the employer from omitting work for the purpose of doing it himself.

3.3 Are there terms which will/can be implied into a construction contract (e.g. a fitness for purpose obligation, or duty to act in good faith)?

A construction contract is a contract like any other, and is capable of having terms implied into it – these can span a very wide gamut. This would include the implied duty on both parties to cooperate, in the sense that they should do all that is necessary for the carrying out of the contract.

In the specific context of employer delay, this is embodied in the ‘prevention principle’: the employer is under a duty not to do anything which would impede, hinder or prevent the contractor from completing by the contractual completion date, failing which the contractual time for completion may be set ‘at large’.

Other important terms include the warranties implied into contracts for work and materials, that the materials used will be of good quality and that the materials are reasonably fit for their purpose.

3.4 If the contractor is delayed by two concurrent events, one the fault of the contractor and one the fault or risk of the employer, is the contractor entitled to: (a) an extension of time; and/or (b) the costs arising from that concurrent delay?

There are few judicial pronouncements on the proper treatment of concurrent delay in Singapore. As such, it is presently not clear which way the courts are inclined on this issue.

It is possible that Singapore will follow the *Malmaison* approach adopted in the UK where, in cases of true concurrent delay, the contractor is entitled to an extension of time but not costs arising from the concurrent delay.

The alternative to the *Malmaison* approach is that of apportioning the delay between the event entitling the contractor to an extension of time and employer delay, which has been adopted in the Scottish courts (but rejected in the UK).

The Singapore standard forms of contract currently make no provision for the treatment of concurrent delay.

3.5 Is there a statutory time limit beyond which the parties to a construction contract may no longer bring claims against each other? How long is that period and when does time start to run?

Generally speaking, the Limitation Act provides for a period of six years from when the cause of action first accrued for claims in contract or tort. For some claims, an alternative period of three years after obtaining the requisite knowledge to bring a claim for ‘latent’ damage (broadly, damage that was not discovered when the cause of action accrued) may apply.

Depending on what the claim in question is, the time when the clock starts running for the purposes of limitation can vary significantly.

Limitation periods can be extended in a number of ways (for example, see Section 5(7) of the COVID-19 (Temporary Measures) Act 2020).

3.6 What is the general approach of the courts in your jurisdiction to contractual time limits to bringing claims under a construction contract and requirements as to the form and substance of notices? Are such provisions generally upheld?

Parties should comply with contractual provisions imposing time limits for bring a claim and/or requiring notices to be given in writing/in a particular form to ensure that there are no difficulties faced in bring such claims.

This is because Singapore courts have upheld such requirements – for example, in one case, a claim for extension of time was dismissed on the basis that the plaintiff had not complied with a clause requiring written notice to the contract administrator as a condition precedent to an extension of time.

3.7 Which party usually bears the risk of unforeseen ground conditions under construction contracts in your jurisdiction?

Singapore construction contracts invariably impose a duty on the contractor to inspect and satisfy itself of the form and nature of the site, including subsoil conditions, before tendering. However, some types of contract may entitle the contractor to additional loss & expense where adverse conditions could not be foreseen despite such due diligence.

In private sector contracts, the risk of unforeseen ground conditions or ‘adverse subsoil conditions’ is typically placed on the contractor. The major private sector standard forms (being the SIA and REDAS forms) grant no entitlement to loss & expense arising from such conditions.

The situation is different for public sector contracts using the PSSCOC, which includes express provisions permitting claims for extensions of time and loss & expense associated with unforeseeable adverse physical conditions. The rationale for including such a provision is generally thought to be that shifting subsoil risk permits the employer to benefit from lower bid prices.

3.8 Which party usually bears the risk of a change in law affecting the completion of the works under construction contracts in your jurisdiction?

There is no clear Singapore authority on this issue. The Singapore standard forms do not address whether changes in the applicable laws entitle a contractor to claim additional payment. This is unlike the International Federation of Consulting Engineers

(“FIDIC”) standard form contracts, which generally allow for adjustments to the contract price on account of such changes.

That said, the Singapore standard forms generally provide for the contractor’s entitlement to extensions of time for compliance with applicable laws. They also impose broad obligations requiring the contractor to comply with applicable laws and/or permitting variation claims where variations are necessitated to comply with changes in law (except for the REDAS forms).

In the absence of any express statutory or contractual provisions granting an entitlement to additional payment on account of such compliance, to the extent such loss cannot be included as part of a valid variation to the scope of work, the position is likely to be that the loss lies where it falls.

3.9 Which party usually owns the intellectual property in relation to the design and operation of the property?

It is quite common for the consultant/construction contracts in Singapore to provide that intellectual property in the design typically remains with the design consultant/design and build contractor, although the employer will be granted a licence to use the design for the works.

3.10 Is the contractor ever entitled to suspend works?

In the absence of an express contractual or statutory right, the contractor is not entitled to suspend work under Singapore law. For example, there is a statutory right to suspend work under Section 26 of the SOP Act where the claimant has not been paid amounts awarded in adjudication.

The current standard form contracts in Singapore do not provide for any right on the part of the contractor to suspend work.

3.11 Are there any grounds which automatically or usually entitle a party to terminate the contract? Are there any legal requirements as to how the terminating party’s grounds for termination must be set out (e.g. in a termination notice)?

Apart from termination rights at common law, most contracts will provide for the employer’s right to terminate in situations involving abandonment of the project, failure to commence or proceed with the works with due diligence or expedition, insolvency, corruption and/or failure to comply with a notice to correct breaches under the contract. Some forms also provide for ‘no fault’ termination, also known as ‘termination for convenience’.

Courts typically take the view that the termination remedy is a draconian one and therefore require the party seeking to terminate to strictly comply with any contractual requirements. While there is some leeway afforded where a party did not comply with a trivial requirement, provisions designed to protect the other party by ensuring it was aware of the invoking of the termination remedy are invariably considered to be critical and mandatory to comply with, for a valid termination.

3.12 Do construction contracts in your jurisdiction commonly provide that the employer can terminate at any time and for any reason? If so, would an employer exercising that right need to pay the contractor’s profit on the part of the works that remains unperformed as at termination?

Yes. Such ‘termination for convenience’ clauses are common in the standard form contracts for both private and public sector

projects. Such ‘no fault’ termination invariably requires the employer to pay the contractor for loss and damage arising out of the termination; including, in particular, loss of profits on the uncompleted parts of the works, except for the PSSCOC where Singapore courts have held that loss of profits on uncompleted work is not claimable.

3.13 Is the concept of *force majeure* or frustration known in your jurisdiction? What remedy does this give the affected party? Is it usual/possible to argue successfully that a contract which has become uneconomic is grounds for a claim for *force majeure*?

Singapore recognises the doctrine of frustration, but not *force majeure* as it is known in civil law jurisdictions. The frustration of a contract automatically brings the contract to an end and discharges both parties from further performance, whereas *force majeure* is typically considered only in the context of *force majeure* clauses setting out the parties’ contractual agreement on how to resolve outstanding obligations upon specific events occurring (typically of a nature that would otherwise justify a finding of frustration if not specifically provided for in a contract).

It would be unlikely for a court to find that a contract was frustrated merely because the contract has become uneconomic or less profitable to perform – the impact of the frustrating event must be such as to fundamentally or radically alter the parties’ obligations in the contract so that it can no longer be properly said to be the same contract.

3.14 Is there any legislation or court ruling that has been specifically enacted or handed down to provide relief to parties to a construction contract for delay, disruption and/or financial loss caused by the COVID-19 pandemic? If so, what remedies are available under such legislation/court ruling and are they subject to any conditions? Are there any other remedies (statutory or otherwise) that may be available to parties whose construction contracts have been affected by the COVID-19 pandemic?

The COVID-19 (Temporary Measures) Act 2020 contains various provisions affording relief for parties to construction or supply contracts. The basic relief is set out in Section 5 of that Act, where the party which is unable to perform any obligation in the contract may serve a notification for relief on the other party.

Upon doing so, the Act provides for a number of temporary restrictions on various actions being taken by that other party as a result of the breach in question.

Apart from this general relief, specific reliefs have been provided for in relation to construction contracts, as follows:

- restraining parties’ rights to call on performance bonds (Section 6(2));
- effectively providing for an extension of time by disregarding delays caused by a COVID-19 event when calculating liquidated damages (Section 6(5));
- providing a general defence to breach of contract where the inability to perform was caused by a COVID-19 event (Section 6(6)).

In addition, parties may still be able to seek relief under the *force majeure* provisions of their construction contracts, depending on the specific wording of the contracts in question.

Parties in public sector projects may also have benefited from government policies providing for *ex gratia* grants of extensions of time (“EOTs”), co-sharing of prolongation costs caused by COVID-19 and advance payments.

3.15 Are parties, who are not parties to the contract, entitled to claim the benefit of any contractual right which is made for their benefit? E.g. is the second or subsequent owner of a building able to claim against the contractor pursuant to the original construction contracts in relation to defects in the building?

Generally speaking, the rule of privity of contract provides that a non-party to the contract cannot rely on or claim to be entitled to benefits under a contract. The rule is subject to a number of exceptions:

- The Contracts (Rights of Third Parties) Act permits non-parties to enforce terms of a contract if the contract expressly provides for the non-party to do so or purports to confer a benefit on that non-party. However, parties typically contract out of the application of this Act.
- In the specific case of claims for defects, the issue may be circumvented by having the original employer claim on behalf of the subsequent buyer who has suffered the actual loss/damage from the defective work where it was within contemplation that ownership of the building might be transferred to the subsequent buyer after the contract had been entered into and before the contractor's breach occurred.

3.16 On construction and engineering projects in your jurisdiction, how common is the use of direct agreements or collateral warranties (i.e. agreements between the contractor and parties other than the employer with an interest in the project, e.g. funders, other stakeholders, and forward purchasers)?

There is a preference for a single point of legal responsibility in Singapore, with the effect that employers generally prefer to deal with a single large main contractor and have the main contractor procure and provide collateral warranties from its subcontractors for various parts of the works.

Direct agreements are less common and tend to be used where the employer is itself a fairly sophisticated player in the industry, or for cases of specialist or boutique subcontractors with a direct relationship with the employer. In the former case, such arrangements might be implemented under a construction management or management contracting procurement model.

3.17 Can one party (P1) to a construction contract, who owes money to the other (P2), set off against the sums due to P2 the sums P2 owes to P1? Are there any limits on the rights of set-off?

Construction contracts typically provide for the employer to have the right to set off claims or amounts owing by the contractor against payments due to the contractor under the construction contract, with no equivalent right granted to the contractor.

Apart from contractual stipulations, parties may seek to avail themselves of legal and equitable set-off rights in general, subject to any express contractual stipulation to the contrary – for example, a provision requiring payments to be made without deduction or set-off.

In the case where a party becomes insolvent, insolvency set-off may also be available.

3.18 Do parties to construction contracts owe a duty of care to each other either in contract or under any other legal doctrine? If the duty of care is extra-contractual, can such duty exist concurrently with any contractual obligations and liabilities?

Yes, such duties can be owed pursuant to an express contractual clause. For example, there could be a stipulation that the contractor will complete the works with due care and diligence. Such duties can also be owed in tort, typically in the context of defects in negligence cases – the content of which can be informed by a duty imposed by statute.

Extra-contractual duties of care can exist concurrently with contractual duties of care, except to the extent that such a duty is limited or excluded by the contract.

3.19 Where the terms of a construction contract are ambiguous, are there rules which will settle how that ambiguity is interpreted?

Ambiguity is resolved through principles similar to those that apply to contracts generally. While the subject is too broad to be properly summarised here, extrinsic evidence can be considered as an aid to interpretation, and various presumptions and canons of construction may be employed by the courts to discern the meaning of the contractual clauses in question.

In construction contracts in particular, a well-drafted contract will often include a hierarchy or precedence clause, providing for the order of priority in interpretation between documents. The aim of such clauses is to provide a framework for addressing inconsistencies and ambiguities in the contract, and would generally be given effect to, where necessary, to resolve a clear and irreconcilable discrepancy (although courts would generally be slow to resort to such a clause).

3.20 Are there any terms which, if included in a construction contract, would be unenforceable?

Yes, terms may be rendered unenforceable for a variety of reasons. Examples include:

- 'pay when paid' clauses (where the SOP Act applies);
- clauses which infringe on the rule against penalties;
- limitation or exclusion clauses which are unreasonable (as contemplated in the Unfair Contract Terms Act); and
- provisions which purport to restrict or contract out of stipulations in the SOP Act.

3.21 Where the construction contract involves an element of design and/or the contract is one for design only, are the designer's obligations absolute or are there limits on the extent of his liability? In particular, does the designer have to give an absolute guarantee in respect of his work?

Such contracts typically include detailed provisions addressing the various duties and aspects of liability which could result from defective design. In particular, these could include duties to exercise reasonable skill, care and diligence, contractual warranties that the design would meet certain requirements or specifications, as well as fitness for purpose obligations, both general and specific.

The content and ambit of such contractual duties and obligations is largely a matter for negotiation although, in practice, designers will often seek to exclude obligations which are in the nature of 'absolute' guarantees.

3.22 Does the concept of decennial liability apply in your jurisdiction? If so, what is the nature of such liability and what is the scope of its application?

No, the concept of decennial liability does not apply in Singapore.

4 Dispute Resolution

4.1 How are construction disputes generally resolved?

Construction disputes arising out of a contract are generally resolved in arbitration, given that all the standard forms of contract in Singapore provide for arbitration. Disputes arising out of a tortious claim (for example, for defects or negligence) or in connection with ‘enforcement’ of certificates are typically resolved in court litigation.

4.2 Do you have adjudication processes in your jurisdiction (whether statutory or otherwise) or any other forms of interim dispute resolution (e.g. a dispute review board)? If so, please describe the general procedures.

Yes, under the SOP Act. The SOP Act operates in tandem with the contractual machinery and broadly provides for a ‘rough and ready’ means of resolving payment disputes, such rough and ready justice being in the interests of promoting cashflow to downstream contractors and subcontractors.

Broadly, contractors are permitted to serve payment claims for progress payments at least once a month, with employers being required to provide certain formal responses to payment claims – failure to provide reasons for withholding or deducting any amount from the claimed amount in these responses within the stipulated timelines may result in the employer being barred from relying on such reasons in adjudication. Contractors dissatisfied with the amount which the employer proposes to pay are given the right to commence adjudication proceedings with a view to speedy resolution of any disputes over payment.

Amounts awarded by an adjudicator can be enforced by way of court proceedings or by certain statutory self-help remedies (such as the right to suspend work or exercise a lien over unfixed goods and materials). However, an adjudicator’s determination will only be binding until the dispute in question is finally determined in dispute resolution proceedings or settled by agreement of the parties.

Parties are not permitted to ‘contract out’ of the provisions of the SOP Act.

4.3 Do the construction contracts in your jurisdiction commonly have arbitration clauses? If so, please explain how, in general terms, arbitration works in your jurisdiction.

Yes, construction contracts in Singapore such as the SIA and PSSCOC standard form contracts do provide for arbitration as the method of dispute resolution.

In Singapore, arbitration is consent-based, meaning that there must be an agreement between the parties to refer disputes to arbitration (whether *ad hoc* or by incorporation of an appropriate arbitration clause). Procedures in arbitration do not need to

follow court procedural rules and norms, although international guidelines by arbitral institutions and other bodies are often used as guidelines by tribunals.

Court proceedings brought in breach of an agreement to refer disputes to arbitration can be stayed on application to the Singapore courts unless the agreement is null, void or inoperative. The general approach of the Singapore courts is otherwise non-interventionist, with minimal curial interference in the process, consistent with global norms for arbitration.

Arbitration clauses may also provide for the use of institutional arbitration rules (which provide a more detailed procedural framework) as well as providing for an arbitral institution to administer the arbitration. Each of the prevailing standard forms does so to different degrees, although the PSSCOC is a notable exception insofar as it does not designate any specific arbitral rules.

4.4 Where the contract provides for international arbitration, do your jurisdiction’s courts recognise and enforce international arbitration awards? Please advise of any obstacles (legal or practical) to enforcement.

Yes. Singapore is a signatory to the New York Convention 1958 and has generally aligned its laws with the Model Law. As such, recognition and enforcement of arbitral awards made in another Convention country is relatively straightforward (entailing an almost administrative process of authentication of an award and applying for leave to enforce), whereas arbitral awards made in a non-Convention country can still be enforced at common law and/or under Section 46(3) of the Arbitration Act.

Recognition and enforcement of arbitral awards may be refused on the same grounds as set out in Article V of the New York Convention 1958.

4.5 Where a contract provides for court proceedings in your jurisdiction, please outline the process adopted, any rights of appeal and a general assessment of how long proceedings are likely to take to arrive at: (a) a decision by the court of first jurisdiction; and (b) a decision by the final court of appeal.

The Singapore court process is adversarial and not inquisitorial in nature.

Court proceedings are typically commenced by issuing and serving an originating process on the defendant(s). Once served, the parties then proceed to exchange pleadings sequentially, followed by discovery/disclosure of documents and the filing of affidavits of evidence-in-chief by witnesses *in lieu* of oral examination (this saves court time). In technical matters, these include affidavits by both factual and expert witnesses, with the court having the discretion to adopt specialised processes for examination of expert witnesses. The matter then proceeds to trial, with witnesses being subject to cross-examination.

Timelines very much depend on the nature and complexity of the dispute, the availability of the courts, counsel and witnesses, as well as any special need for urgency which may be present in any given case. It is therefore not possible to set down any specific timeline which would apply to such court processes, except to say that a decision can be obtained in many cases within one to two years.

4.6 Where the contract provides for court proceedings in a foreign country, will the judgment of that foreign court be upheld and enforced in your jurisdiction? If the answer depends on the foreign country in question, are there any foreign countries in respect of which enforcement is more straightforward (whether as a result of international treaties or otherwise)?

Generally speaking, foreign court judgments may be recognised and enforced in Singapore. Enforcement is typically more straightforward where the judgment is from a jurisdiction that is party to a reciprocal enforcement convention ratified by Singapore and implemented in legislation – for example, the Reciprocal Enforcement of Commonwealth Judgments Act, the Reciprocal Enforcement of Foreign Judgments Act and the Choice of Court Agreements Act.



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Don has acted in a number of high-value arbitrations concerning construction, technology and telecommunications projects outside of Singapore, involving complex areas such as delay analysis, variations, defective technology, *force majeure* and wrongful termination claims. In one case, he assisted with defending a liquidated damages claim for delays to works on 352 distinct sites.

Domestically, he advises and represents both employers and contractors in payment disputes, as well as assisting with reviewing and preparing claims submissions. Don has expertise with the major construction forms in Singapore, as well as internal standard forms such as the FIDIC forms in EPC projects outside Singapore.

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Drew & Napier LLC has been providing exceptional legal service since 1889 and is one of the largest full-service law firms in Singapore. The firm has three senior counsel. It is pre-eminent in dispute resolution, international arbitration, competition and antitrust, corporate insolvency and restructuring, intellectual property (patents and trade marks), tax, and telecommunications, media and technology, and has market-leading practices in mergers and acquisitions, banking and finance, and capital markets. Drew & Napier has represented Singapore's leaders, top government agencies and foreign governments in landmark, high-profile cases. It is also appointed by Fortune 500 companies, multinational corporations, and local organisations. The firm is experienced in international disputes before the Singapore

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