Lee Hishammuddin Allen & Gledhill

LHAG Insights

Energy, Infrastructure & Projects
and International Arbitration

ABOUT THE AUTHORS

Dato' Nitin Nadkarni
Senior Partner
Energy, Infrastructure & Projects and International Arbitration
E: nn@lh-ag.com

Teh Wai Fung
Associate
Energy, Infrastructure & Projects and International Arbitration
E: twf@lh-ag.com

9 MARCH 2022

Taking Note of Notices: EOT and L&E Claims

Disputes over extensions of time (**EOT**) and loss and expense (**L&E**) are an everyday reality of construction contracts. The often-intricate contractual procedures for such claims are a major source of these disputes. Non-compliance with what project managers, engineers or architects may regard as a "mere" formality can render ineffective a contractor's otherwise deserving EOT or L&E claim, or an otherwise legally justifiable rejection of such claims. For all construction industry players grappling with EOT and L&E, therefore, the questions will generally be: (1) what notices must be given; (2) when they must be given; and (3) what they must contain. On 1 March 2022, the Court of Appeal of Malaysia examined some of these issues in *PSI Incontrol*.[1]

Facts

The parties in *PSI Incontrol* were a main contractor ("employer") and a subcontractor ("contractor") under a construction contract. The contract adopted the Conditions of Contract for Design and Build Contract PWD Form DB (**PWD Form DB**), a standard form of the Malaysian Public Works Department. Following certain claimed events of disruption, the contractor submitted claims against the employer for an EOT and for L&E. The Project Director (**PD**) granted the EOT, but not the claim for L&E. The contractor commenced court proceedings to pursue its L&E claim.

Court of Appeal's findings

The key findings of the Court of Appeal on the PWD Form DB in this case can be summarised as follows:

- **EOT Finding 1**: The PWD Form DB requires a contractor seeking to claim an EOT to give written notice to the PD of the cause of delay, and relevant information with supporting

[1] *PSI Incontrol Sdn Bhd v Ircon International Limited* (Court of Appeal Civil Appeal No W-02(NCVC)(W)-2168-11/2019, 1 March 2022) (***PSI Incontrol***).

documents, "*forthwith*" (without delay) once the claimed delay becomes "*reasonably apparent*". On the facts of *PSI Incontrol*, the contractor's written notice approximately one month after the claimed delay event satisfied the "*forthwith*" requirement.

- **EOT Finding 2**: A contractor's EOT application does not need to specify the contractual limb/category of delay event(s) on which the contractor relies. Rather, the PD must assess whether the claimed delay event falls within these limbs. As soon as the PD grants an EOT application, the PD is deemed to accept that at least one of the limbs is fulfilled, even if the PD does not specify which limb in the EOT certificate.

- **L&E Finding 1**: Under PWD Form DB, Clause 49.2, once the PD grants an EOT application, the PD is **bound also** to grant a corresponding L&E claim (in terms of liability, subject to proof of quantum) unless the PD expressly states that the EOT is granted not pursuant to Clause 49.1(b), (d), (e), (h) or (i). (Only these contractual limbs of delay events can give rise to L&E entitlement; others, such as *force majeure*,[2] cannot.)

- **L&E Finding 2**: An L&E claim under PWD Form DB is a two-stage process:

    - First, the contractor must give written notice of its intention to make the claim, within 60 days of the claimed event. In *PSI Incontrol*, the contractor satisfied this merely by stating in its EOT application cover letter, "*We will be submitting our claim for EOT covering all direct and indirect cost in line with our contract subsequent to this letter*".

    - Second, the contractor must submit full particulars and supporting documents (among others) necessary for the PD to ascertain the L&E claim, no later than 90 days after practical completion.

- **L&E Finding 3**: The L&E clause in PWD Form DB encompasses L&E which the contractor "*has incurred **or is likely to incur***". A contractor claiming L&E which it is "*likely to incur*" can, and indeed must necessarily, rely on a projection of such costs. The fact that such costs may not have been incurred yet does not allow the PD to reject a claim for L&E "*likely*" to be incurred.

The Court of Appeal concluded by granting the contractor's L&E claim in full.

Takeaways

The outcome of *PSI Incontrol* is arguably contractor-friendly for parties to a PWD Form DB contract. PWD Form DB can be contrasted with other standard forms like those of PAM, IEM, and FIDIC. Below are four practical takeaways for construction industry players, including employers/developers, contractors and subcontractors, and contract administrators ("Engineers" or "Architects"):

(1) In PWD Form DB, if there is a dispute over whether an EOT application falls within one of the contractual limbs/categories of delay events, the burden lies on the contract administrator to

---

[2] PWD Form DB, Clause 49.1(a).

assess and expressly state that it does not. The contractor seeking the EOT does not need to specify which contractual limb/category it relies on.

This appears to loosely mirror the PAM[3] standard form, but differs from the IEM[4] and possibly the FIDIC[5] standard forms, where the contractor must specify the contractual sub-provision on which it relies.

(2) Once a contract administrator grants an EOT, then under PWD Form DB, the contract administrator must also **either** specify that the EOT is granted under limbs which do not also give rise to L&E entitlement, **or** recognise L&E entitlement in terms of liability (but still subject to proof of quantum[6]). This seems to mirror the IEM[7] standard form, but to differ from the position under the PAM[8] and FIDIC[9] standard forms.

Practically, employers/developers sometimes bargain to forgo claims for liquidated damages, in exchange for a contractor forgoing L&E claims. To record such a "bargain", employers/developers may prefer a separate or supplemental "settlement" agreement which is expressly independent of the original contract's EOT and L&E provisions.

(3) For PWD Form DB, a contractor can satisfy the first stage of an L&E claim (the notice of intention to claim within 60 days of the event) with a single, generic sentence. This is considerably less demanding than the PAM,[10] IEM[11] and FIDIC[12] standard forms, where the initial notice of intention to claim must state (for example) the claim amount or estimate supported by calculations, the clause relied on, and/or details or a description of the event giving rise to the L&E claim.

The PWD Form DB's position is positive for contractors who may be facing a continuous cause of delay and may not know their exact L&E incurred (including their own mitigation) until after practical completion. However, employers/developers without even an estimate may be left in prolonged suspense and uncertainty about the scale of the L&E ultimately payable (potentially a year or two later) which may complicate financial/cashflow planning.

(4) For the second stage of a PWD Form DB L&E claim (particulars and supporting documents within 90 days of practical completion), where an L&E clause encompasses L&E incurred **or** "*likely*" to be incurred, the contractor can rely on a projection of "*likely*" L&E without proof of actual incurrence. This arguably

---

3 PAM Contract 2018 (Without Quantities), Conditions of Contract (**PAM**), Clause 23.1(a) and (b) and 23.4.

4 IEM Form of Contract for Civil Engineering Works (Second Edition, July 2011, IEM. CE 2011) (**IEM CE**), Clause 44.2(2)(a).

5 FIDIC Conditions of Contract for Construction (Second Edition, 2017) (**FIDIC Red Book**), Clauses 8.5 and 20.2.

6 The Court of Appeal in *PSI Incontrol* was not required to discuss proof of quantum in detail.

7 IEM CE, Clauses 6.4(1)(b), 12.2(1)(b), 17.1(5)(b), 17.2(2)(b), 24.2(3)(b), 26.2(3)(b), 33.1(9)(b), 41.2(1)(b), 42.2(1)(b), 57.2(4)(b), 57.2(7)(b), 57.4(8)(b), 58.4(5)(b). See also Clause 4.3(1).

8 PAM, Clause 24 on L&E; cf Clause 23 on EOT.

9 FIDIC Red Book, Clause 20.2.5, which uses "*and/or*".

10 PAM, Clause 24.1(a).

11 IEM CE, Clause 53.1(3).

12 FIDIC Red Book, Clause 20.2.1.

sets a relatively low threshold for contractors to meet, since a projection is unlikely to involve the same degree of precision as an account of L&E actually incurred.

A related question not in issue in *PSI Incontrol* is whether a contractor can still rely on the "*likely to incur*" limb with only a projection, if submitting L&E particulars only after practical completion.

Notably, unlike the PAM[13] standard form, the IEM[14] and FIDIC[15] standard forms appear not to expressly provide for claims for L&E merely "*likely*" to be but not yet incurred (though they do recognise interim claims where the relevant event has a "*continuing effect*"[16]).

In considering these remarks, construction industry players must nevertheless bear in mind the fundamental principle that a contract is ultimately interpreted both based on its words, and against its specific factual background. Considerations for a particular standard form may be less useful for a bespoke contract. An identically worded clause may even operate differently between contracts, where the underlying project is exceptionally unique. In all projects, what is universally important is to read, study and understand the terms of the applicable contract — even as early as the tender stage — and to seek appropriate advice where needed.

Teh Wai Fung (twf@lh-ag.com)

If you have any queries, please contact the author or team partners **Dato' Nitin Nadkarni** (nn@lh-ag.com) and **Crystal Wong Wai Chin** (wwc@lh-ag.com).

LH AG ADVOCATES AND SOLICITORS

Head Office
Level 6, Menara 1 Dutamas
Solaris Dutamas
No. 1, Jalan Dutamas 1
50480 Kuala Lumpur
Malaysia
Tel: +603 6208 5888
Fax: +603 6201 0122

Johor Office
Suite 21.01
21st Floor, Public Bank Tower
No.19, Jalan Wong Ah Fook
80000 Johor Bahru, Johor
Tel: +607 278 3833
Fax: +607 278 2833

Penang Office
18-33-A3 Gurney Tower
Persiaran Gurney
10250 Georgetown
Pulau Pinang

Email
enquiry@lh-ag.com

Website
www.lh-ag.com

Published by the Energy, Infrastructure & Projects and International Arbitration Practice

13 PAM, Clause 24.1.
14 IEM CE, Clauses cited in footnote 7 above and Clause 53.1.
15 FIDIC Red Book, Clause 20.2.4.
16 IEM CE, Clause 53.3(3)–(4); FIDIC Red Book, Clause 20.2.6.