

AIS Academy

QUESTIONS OF TIME

Why do they give rise to such difficulties in construction contracts?

Client Practice Note

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Introduction

Better three hours too soon than a minute too late – William Shakespeare.

If the construction industry can work to such regime of perseverance, discipline and hard work by doing something earlier way before the deadline, can disputes on time and delay be mitigated or, at best, effectively and carefully managed?

Problems with time are often linked to extensions and consequently, loss and expense and disruption claims. Why do questions of time continue to plague construction contracts? Is time a common issue in disputes? If the answer is affirmative, what can we do about it?

Time is money and in any construction contract, it is critical to the success of the project. Given that the approaches in dealing with time are neither simple or straightforward, this paper discusses the contractual environment on time created by the commonly used standard contract forms in Singapore¹ (namely the PSSCOC, SIA Form and REDAS DB) and also considers some of the main difficulties with time and how, from a practice perspective, they can be reduced, if not controlled.



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¹ The standard forms are published by the Building and Construction Authority (Public Sector Standard Conditions of Contract for Construction Works 2020 or PSSCOC), the Singapore Institute of Architects (SIA Building Contract 2016 or SIA Form) and the Real Estate Developers' Association of Singapore (REDAS Design and Build Conditions of Main Contract 4th Edition or REDAS DB).

The Contractual Environment

Mention about time and what comes foremost in people's minds is extension of time (and sometimes, the lack of it), delays and disruption. These issues, often bandied together, are a bone of contention in many disputes as parties in the contract argue their case for and against their respective rightful entitlements.

In the report on Rethinking Construction², the chairman of the Construction Task Force commented that "projects are widely seen as unpredictable in terms of delivery on time, within budget and to the standards of quality expected".

Interestingly, in a recent survey³ of over 950 participants comprising clients, consultants, contractors and advisers in the United Kingdom, respondents were asked what were the main issues in dispute. Half (50%) of the respondents flagged out extension of time followed by defective work (41%) and loss and expense (31%). Most of the disputes (63%) were more likely to occur during currency of the works while the remainder were after completion (37%). In 76% of the cases, the dispute was between the employer and the main contractor.

The findings corroborated with one of the key headline statistics in the CRUX Insight report⁴ on time extensions. In Asia, projects "on average, faced claims to extend the completion time" by 63.6% towards the typical planned programme.

Standard contract forms invariably provide for extension of time clauses to enable the contractual date for completion to be adjusted in the event of employer-responsible causes and specific neutral events outside the control of both parties. An extension of time provision avoids time being put at large.

The relevant clauses in the PSSCOC, SIA Form and the REDAS DB start with a list of qualifying delay events that entitle the contractor to a time extension.

It must be noted that an extension of time is not automatically given simply because a relevant event has occurred. The contractor must demonstrate that despite all diligent efforts and mitigation measures to avoid or reduce any delay, progress and completion of the works were affected.

The contractual framework for processing and dealing with time issues and a snapshot of the contractual time claim matrix under the PSSCOC, SIA Form and the REDAS DB are illustrated in Figures 1, 2, 3 and 4 respectively.

What are the Difficulties, and Why?

Time at large

The concept of time at large is often cited as a defence by contractors wanting to avoid liquidated damages. A learned author⁵ described it as a phrase "... much loved by contractors. It has about it the ring of plenty; the suggestion that the contractor has as much time as he wants to finish the works".

When the contract does not contain a mechanism for time to be extended, and "the employer commits an act of prevention, the contractor is no longer bound by the original contractual completion date, and the time for the completion of the project will be set at large"⁶.

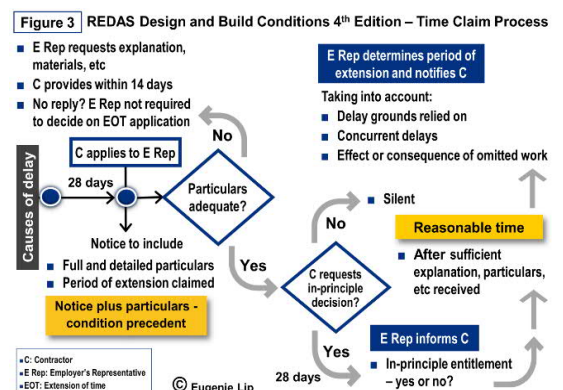
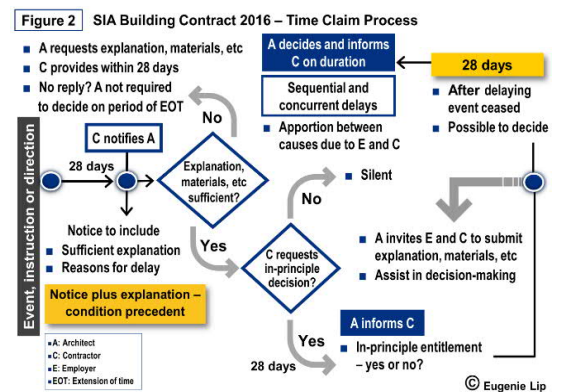
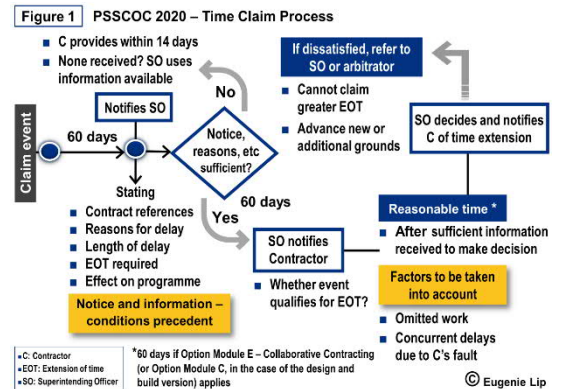


Figure 4 Time Claim Matrix

	PSSCOC	SIA FORM	REDAS DB
Relevant events	Clause 14.2	Clause 23(2)	Clause 16.1
Is notice a condition precedent?	Yes – within 60 days	Yes – within 28 days	Yes – within 28 days
Notice on whether event qualifies for extension of time	Yes – by Superintending Officer	Yes – by Architect	Yes – by Employer's Representative
Decision-making	Within reasonable time	Within 28 days from cessation of delaying event provided sufficient information received and possible to decide	Within reasonable time

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² Sir John Egan, Rethinking Construction (July 1998), at 7.

³ Royal Institute of British Architects, RIBA Construction Contracts and Law Report 2022.

⁴ HKA Sixth Annual CRUX Insight Report, August 2023, at 29-30. For the Asia region, the research analysed 115 projects in 24 countries with an average CAPEX of US\$5.32 billion.

⁵ Brian Eggleston, Liquidated Damages and Extensions of Time in Construction Contracts, Second Edition (1997), at 29.

⁶ Crescendas Bionics Pte Ltd v Jurong Primewide Pte Ltd [2019] SGHC 4 at 353.

Time can also be at large where the extension of time provisions have been improperly applied or administered, or where the original time for completion has been waived.

Time at large has the following consequences:

- The contractor is no longer bound by the original completion date.
- The contractor is only obliged to complete the works within a reasonable time.
- The liquidated damages clause is rendered inoperative.
- Failure to complete the works within a reasonable time makes the contractor liable for general damages which will require the employer to prove its actual losses that flow from the contractor's default.

Extension of time clauses preserve the employer's right to levy liquidated damages. Provided the contract administrator properly exercises its power under the contract to extend time, a new date for completion can be established and is enforceable.

As it is not possible to particularise all types of delay, standard contract forms commonly include a "catch-all" expression as a relevant event to ensure the employer's right to liquidated damages is protected. It is now less likely (with the exception of bespoke forms which do not have similar provisions) that events within the control of the employer could not be contemplated under the contract.

Examples of such "catch-all" provisions can be found in the following standard contract forms:

- PSSCOC clause 14.2(n): Any act of prevention or breach of contract by the Employer not mentioned in this Clause.
- SIA Form clause 23(2)(p): Any act of prevention or breach of contract by the Employer ...

- REDAS DB clause 16.1.3: Any act of prevention, breach of contract, delay or impediment caused by the Employer.

With the wide and expansive range of delay causes described in most well-drafted standard contract forms, there is less scope for time at large allegations where the employer finds itself without an enforceable date for completion of the works.

No time is specified

Difficulties can arise when the contract does not state a time for performance albeit it does not prevent the formation of a contract. That the contract contains no completion time does not mean a contractor can disregard the time factor.

When no time for completion is specified or as discussed earlier, the time had become at large, an obligation to complete within a reasonable time may generally be implied. This then begs the question of what is "reasonable time"?

In *Crescendas Bionics Pte Ltd v Jurong Primewide Pte Ltd*⁷, the following principles were applied to determine a reasonable time:

- It is a question of fact.
- An appropriate balance must be made between:
 - "Not allowing the employer to take advantage of its own fault"; and
 - "Not giving the contractor any other additional time other than that caused by the employer's delay".
- A simple addition of the employer's delay to the contractual completion time is purely a guide on calculating reasonable time.

Additionally, a "holistic approach"⁸ must be made. It should consider these factors.

- The actual conduct of the parties that caused the delay.
- Reasonableness of the parties' initial agreed completion timeline.
- Experts' opinion on the timeline in consideration of the actual scope of works.
- The actual delay caused by the contractor.

Notices

It is common to find the requirement for notices to be given in standard contract forms. Such "contractual terms requiring a contractor to give prompt notice of delay serve a valuable purpose; such notice enables matters to be investigated while they are still current"⁹. It serves as a warning of a forthcoming situation and gives the employer the opportunity to withdraw instructions and take necessary mitigation measures before it is too late.

The difficulty with notices is in their timing, accepted mode of delivery and the formalities. Failure to give a notice or comply with the prescribed time limits or requirements on the contents has been used as a basis to reject extension of time claims.

Mandatory notices characterised by the words "condition precedent" must be observed by the contractor in form, content and the specified set period, failing which its entitlement to an otherwise perfectly valid claim would be at risk and may be lost. "There is good reason for making the timely notification by the contractor of a delay event a condition precedent to extension of time. This is to enable the employer or the architect to verify the claim for extension and to monitor the event and its impact on the progress of the works"¹⁰. The procedures will also set out to whom the notices are to be sent, and by whom.

The PSSCOC requires the mandatory condition precedent notice to be given within 60 days of the occurrence of the delay event if the contractor opines

⁷ *Crescendas Bionics Pte Ltd v Jurong Primewide Pte Ltd* [2019] SGHC 4 at 357.

⁸ *Crescendas Bionics Pte Ltd v Jurong Primewide Pte Ltd* [2019] SGHC 4 at 360.

⁹ *Multiplex Constructions (UK) Ltd v Honeywell Control Systems Ltd (No 2)* [2007] EWHC 447 (TCC) at 103.

¹⁰ *Aoki Corp v Lippoland (Singapore) Pte Ltd* [1995] 2 SLR 609 at 14.

that the progress or completion of the works "is or will be or has been delayed" by any of the specified events. The contractor may serve the notice when he reasonably believes (that is, when he becomes aware or ought to have become aware) there is a possibility the particular event may delay such progress or completion.

In the SIA Form, the condition precedent notice must be given within 28 days of any event, direction or instruction which the contractor considers as justification for an extension of time.

The REDAS DB contractor has 28 days after the cause of delay has arisen to make a condition precedent application to the employer's representative for an extension of time.

Another difficulty is the question on when time begins to run for the 60-day (or in the case of the SIA Form and the REDAS DB, 28-day) notice requirement.

In Panther¹¹, the judge, departing from Obrascon¹², said that the "28 days for giving notice of the claim runs from the time the Contractor becomes aware, or ought reasonably to have become aware, of that event or circumstance and its potential to delay completion". The focus, from the analysis in Panther, was not so much on the delay itself but the occurrence of the event (or direction or instruction) giving rise to the delay.

Concurrent delays

What is concurrency of delay?

As admirably enunciated by the appellate court, "concurrent delay is

defined as a period of project overrun which is caused by two or more effective causes of delay which are of approximately equal causative potency"¹³.

In other words, it refers to a situation where two or more occurrences caused by different parties, operating at the same time, have the potency to cause delay in completion of the works.

When there are concurrent delays, can the employer deny the contractor an extension of time on the basis that since the contractor had also contributed to the situation, it would have been delayed anyway?

As exemplified by the judge in Ser Kim Koi, if a variation is instructed during a period of culpable delay by the contractor, he is "entitled to an extension of time for the period of delay caused by the variation even if it is concurrent with a period of culpable delay by the contractor"¹⁴.

When assessing extensions of time under the PSSCOC, SIA Form and the REDAS DB, the contract administrator is respectively expected to take into account concurrent delaying events which are caused by the contractor.

In the SIA Form, the architect is required to apportion "equitably" (presumably in a fair and reasonable manner) when deciding on the length of extension of time to be given the "conditions and events" entitling the contractor to a time extension and those which are contractor-default causes.

Dealing with concurrent delays can be exceedingly complex and perplexing,

and contract administrators who found themselves entangled in time claims with concurrent delays know that in practice, the task of unravelling it is not so straightforward.

Unsurprisingly, the use of express provisions in the contract on concurrent delay exclusions is beginning to gain traction following the decision in the English court of appeal¹⁵ which confirmed that such express clauses would be upheld and not offend against the prevention principle. Concurrent delay exclusion clauses provide that a delay attributed to both the contractor-caused event and the employer-caused event would not be taken into consideration in the computation of the period of extension of time.

Variations for additional works during delay period

Can variations ordered during the contractor's culpable delay put time at large, resulting in the employer losing its right to recover liquidated damages?

The criticism of standard forms failing to deal specifically with the ordering of variations during the delay period is well elucidated by the learned author¹⁶ in Hudson's Building and Engineering Contracts. He questioned "why there should be any limitation on the power of an owner to order variations during this period, or why the operation of the liquidated damages clause should be invalidated".

In Balfour Beatty Building Ltd v Chestermount Properties Ltd¹⁷, the court held that the clause (in the contract) entitled the architect to grant an extension of time using the

¹¹ Panther Real Estate Development LLC v Modern Executive Systems Contracting LLC [2022] DIFC CA 016 ("Panther"). This was a case before the Dubai International Financial Centre Court of Appeal which involved a delay claim and termination dispute based on the FIDIC Contract 1999 (Red Book). One of the key issues was when time starts to run for giving notice of the delay claim.

¹² Obrascon Huarte Lain SA v Her Majesty's Attorney General for Gibraltar [2014] EWHC 1028 (TCC) ("Obrascon") at 312. In Obrascon, the judge appeared to suggest that time could start to run from the moment, usually later in time, that delay to completion of the works in fact occurred or started to occur.

¹³ Ser Kim Koi v GTMS Construction Pte Ltd [2022] SGHC(A) 34 at 171 ("Ser Kim Koi").

¹⁴ Ibid.

¹⁵ North Midland Building Ltd v Cyden Homes Ltd [2018] EWCA Civ 1744 at 39 where the court of appeal ruled that the concurrent delay exclusion clause in the contract was "clear and unambiguous" and there was no basis for it to be "struck down or rendered inoperable". That was the "allocation of risk which the parties were entitled to agree".

¹⁶ Ian Duncan Wallace, Hudson's Building and Engineering Contracts, Eleventh Edition Volume 2 (1995), para 10.094 at 1194.

¹⁷ Balfour Beatty Building Ltd v Chestermount Properties Ltd (1993) 62 BLR 12 at 27, QBD. As the judge said, "if the architect then gave an instruction for the most trivial variation ... the employer would thereby lose all rights to liquidated damages for the entire period of culpable delay up to practical completion".

“net” method (that is, by adding to the date fixed for completion the time taken as considered fair by the architect for carrying out the additional variations ordered). This is the approach used in the PSSCOC¹⁸ and also in the REDAS DB¹⁹.

The latter standard form provides for the employer’s representative to issue a revised delay certificate in the event the contractor is entitled to receive further extension when it is in culpable delay and certain events occur which are not due to its fault. Upon such issuance, the earlier delay certificate is revoked.

The SIA Form sets out a regime requiring the architect to issue a termination of delay certificate to prevent accumulation of liquidated damages if subsequent to the issue of the delay certificate, instructions are given or certain matters occur entitling the contractor to an extension of time. After the further extension of time given under the termination of delay certificate expires and the works still remain incomplete, the architect issues a further delay certificate to re-activate the accrual of liquidated damages.

How can Difficulties with Time be Reduced, if not Controlled?

“No construction project is risk free. Risk can be managed, minimised, shared, transferred or accepted. It cannot be ignored”²⁰.

The key initiatives²¹ announced by the Building and Construction Authority (BCA) under the Built Environment Industry Transformation Map (BE ITM) to accelerate transformation in the areas of integrated planning and design, advanced manufacturing and assembly, sustainable urban systems and more collaborative contracting

across the built environment sector are laudable, timely and will go some way to set the baseline for a more balanced allocation of risks among industry stakeholders and imbue time efficiency-centric design and construction processes.

The overall development time of a project from inception to completion is of significance to a client. Not surprisingly, any approaches and devices to reduce time disputes and potential time overruns (cost overrun being the other main concern) are welcome.

Some of the more important approaches are discussed here.

Encourage collaborative contracting²²

Conflict and inertia to resolve disputes, blame-culture, them-and-us syndrome, misaligned commercial interests, silo thinking and fragmented working – these are well-publicised and commonly associated with the construction industry.

The impetus for collaborative practices within the construction industry is greater in more recent times than ever as projects become increasingly complex and dynamic. Understandably, collaboration, or nuances of it, has evolved over time and taken various forms and labels.

In a traditional procurement model, parties from different disciplines and different backgrounds are often brought together at various stages in an ad hoc arrangement to work on a project without regard to whether they have the right chemistry to get along with each other and work together with cooperation, trust and respect.

Advocates of collaborative arrangements propound that it is

human-to-human relationships that are “collaborated” – not the project.

With the collective support and client-driven leadership from all stakeholders under the BE ITM umbrella, the construction industry is not only transforming but transformation there must be if parties are to work together by consensus rather than by conflict.

The built environment sector has now more option clauses to consider when adopting collaborative contracting through the PSSCOC Option Module²³ or the newly launched NEC4 Y(SG) clauses²⁴ for use with the NEC4²⁵ contract in Singapore.

Select the right procurement route

The choice of the “best-fit” procurement route is an important decision as it is not only crucial to the success of the project but also fundamentally affects the particularity of the documentation to be produced, the relationship between those involved in the initiation, design and construction of the project, how they are appointed, the nature of their roles and the extent of their responsibility.

A good knowledge and clear understanding of the various procurement methods available is essential. It takes into consideration the client’s expected completion timeline and an optimum balance of time, cost and quality to deliver the project in the shortest possible time frame, within the approved budget for cost certainty and with the most economical design solution. These are the hallmarks of a successful procurement strategy.

An inappropriate procurement method can set back the client’s business case in terms of funding availability and readiness, the desired time for completion, functional performance

¹⁸ See clause 16.4.

¹⁹ See clause 19.1.4.

²⁰ Sir Michael Latham, *Constructing the Team* (Final Report July 1994), para 3.7 at 14.

²¹ Building and Construction Authority – Industry Workplan 2024, BuildSG LEAD Summit 2024, 29 April 2024.

²² For a detailed discussion on collaborative contracting, see Eugenie Lip and Fong Siew Hui, So, Do We Need to Collaborate?

Commentary Note on Collaborative Contracting, AIS Client Practice Note, September 2023, obtainable at <https://www.asiainfrasolutions.com/wp-content/uploads/2024/01/AISClientPracticeNote-CollaborativeContractingCommentaryNote-Sept2023.pdf>.

²³ See Option Module E – Collaborative Contracting (or Option Module C in the design and build version).

²⁴ Building and Construction Authority, Circular on the Launch of NEC4 Y(SG) Clauses for NEC4 Contract in Singapore, 29 April 2024.

²⁵ First published in 1993, the current edition of the New Engineering Contract (NEC), NEC4, was released in 2017.

and the initial capital cost versus running or operating costs. It may even lead to a re-think on whether to proceed with the project.

Involve the contractor early

Whatever the preferred route, be it a designer-led traditional build-only or design and build where design is combined with construction, there are certain key phases that a project undergoes to reach handover and completion albeit the sequence, risk allocation and responsibility may vary.

The commonality in such arrangements is that the contractor is typically brought in only upon execution of the contract and when physical construction starts on site. But must it be so? Can the contractor be involved earlier and invited to participate in design development?

Early contractor involvement engages the contractor during the initial phases of the project to work with the client and its consultants. Appointing the contractor early in the project delivery stage instead of following the rigid linear design-bid-build sequence can be of benefit in controlling and managing time obligations.

The contractor's active participation and input at the early stage and contributions to the design process and on buildability and sequencing can often help to avoid construction difficulties and changes in scope often emanating at design and design-construction interfaces and with it, the inevitable arguments on adjustments in time and cost. As reported in the CRUX analysis²⁶ for the Asia region, scope changes and late design information ranked the two topmost causes of claims or disputes respectively.

The early involvement of the contractor with the project consultants in a collaborative team environment encourages innovations upfront and identifies potential risk outcomes as early as possible, thus enabling more accurate and sensible pricing before work is authorised to start on site.

Be realistic in time obligations

Getting a building built is not a single event but consists of an amalgam of processes to define, construct and put to use construction work. All projects go through the same basic stages although the sequence, risk allocation and responsibility may vary.

Quite understandably, a client wants the contractor to be on site as soon as possible. Pre-contract processes are hastened without sufficient time for proper planning, design development and sign-offs.

The push for higher productivity, digitalisation, sustainability strategies and purposeful and decisive collaborative contracting under the BE ITM framework will be an important catalyst in alleviating unrealistic time and performance targets which place unwarranted pressures on the project and construction teams.

Conclusion

Delays and disruption in construction contracts are as ubiquitous as the hard hat – but does it need to be so?

Commendable efforts in collaborative working to build relationships, team-working and incentivised benefit-sharing have fostered mutual trust and cooperation, openness and a meeting of minds.

Given that time problems in construction contracts will not vanish, the parties must come to grips in reducing if not controlling some of the undesirable effects. Early contractor involvement, proper selection of the procurement method, an ethos of working collaboratively and realistic time obligations are but some of the areas only that could be explored.

We may not totally create a dispute-free construction contract despite the best draftsmanship but at least we can be in a better position to manage them by recognising and dealing with the issues promptly, fairly and effectively at the outset.

About Asia Infrastructure Solutions

Asia Infrastructure Solutions is a leader in delivering sustainable design, engineering, project and programme management, cost management, business advisory and consultancy solutions for the infrastructure, building and environmental markets.

The company has a strong and diversified team of project managers, construction managers, programme managers, cost managers, sustainability consultants and various disciplines of engineering professionals with a long track record in the infrastructure, building and environmental markets delivering the future for the built and natural environment.

About AIS Academy

AIS Academy is a dedicated learning and development division within AIS. Spearheaded by AIS leaders, its core objective is to train and upskill AIS' professional staff through its unique MasterClass pedagogy on construction contracts, procurement and project delivery strategies, standard contract forms, claims management and in all aspects of contract administration and professional practice.

Beyond nurturing internal talent, the academy also engages with the wider built environment academia, client organisations, consultant groups, professional institutions and universities in thought leadership events on contract advisory work, best practices, lessons learnt and on the latest developments in contractual issues. Through insightful thought leadership contributions and shared expertise, AIS Academy aims to enhance awareness, imbue continuing professional learning and build competencies within the broader built environment realm.

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²⁶ HKA Sixth Annual CRUX Insight Report, August 2023, at 29.