**BRIEFING NOTE**

# Establishing 'Loss' and 'Damage' When Pursuing a Claim under a Construction All-Risks Insurance Policy

**Justyn Jagger & Sinyee Ong**
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## Introduction

We have observed a noticeable interest amongst contractors in pursuing claims under their CAR insurance policies. Contractors often need guidance on whether 'loss' or 'damage' has occurred (triggering the indemnity) and policy coverage (the amount of the indemnity) for the cost of repairing or replacing such 'loss' or 'damage'.

When determining policy coverage and interpreting the policy, it is important to remember that insurance policies are no different from other forms of commercial contracts. Below, we discuss the definitions of 'loss' and 'damage', whether contractors will be indemnified for such 'loss' or 'damage' and if so, the amount payable.

## Interpretation and Intention

Like any other contractual term, 'loss' and 'damage' are subject to interpretation. There are times when contractors may hear from insurers (and their panel lawyers) that the policy wording was not intended to cover certain 'loss' or 'damage'.

Contractors should bear in mind that interpretation of a CAR policy, like that of any contract, is not based on the subjective intention of the insurer (or the policyholder/contractor, for that matter). Under the principles of English and Singapore law, the Court will interpret policy terms in accordance with what a reasonable person – with knowledge of the factual background of the parties at the time of policy inception – would have considered the meaning of the language used in the policy. This is an objective, not subjective, test.

## Defining 'Loss' and 'Damage'

The terms 'loss' and 'damage' are often prefaced by the term 'physical'. That is, it is the cost of repairing or replacing physical 'loss' or 'damage', not any economic or financial losses, that may be covered. Insofar as economic or financial losses are suffered, these may be covered by that section of the CAR policy that deals with the financial cost of any delay in the completion of the project (which is beyond the scope of this briefing note). Below, we outline only the general principles of 'loss' and 'damage', as legal precedents on these terms depend very much on the factual circumstances of each case.

'Loss' often gives the impression of a sense of permanence. It is not uncommon for contractors to think that insured property must be permanently lost (i.e., absolutely

impossible to pinpoint its whereabouts and in any event, completely irrecoverable). This is not necessarily so. The definition of 'loss' can vary depending on the overall construction of the policy wording. There are situations whereby insured property was deemed physically lost even though it is possible to locate the equipment (albeit access to such property was extremely difficult). Or, deemed physically lost even when such 'loss' was temporary (albeit it was uncertain that such property could be recovered).

As for 'damage', one would think that 'damage' refers to occurrences that are catastrophically observable. For example, the collapse of structural support during tunnelling works. Again, this is not necessarily so. It may come as a pleasant surprise to contractors that there are precedents whereby less-observable occurrences are considered 'damage'. For example, adverse changes to the physical condition of concrete, not visible to the naked eye, may constitute 'damage' to the concrete.

Staying on 'damage', it may be difficult to distinguish between 'damage' and 'defect'. 'Damage' requires some physical change to the condition of the insured property. 'Defect', however, does not require the same physical change to the insured property. Being aware of this distinction is important because 'damage' is usually insured whereas 'defects' are usually excluded. More importantly, a 'defect', which is excluded, may give rise to 'damage', which is covered. Claims have been rejected on the basis that there is 'defect' but not 'damage'. The contractor may simply take the insurer's rejection at face value. As specialist insurance lawyers, we help clients analyse what has (or has not) happened during the policy period to establish whether there has (or has not) been a physical change (and therefore, 'damage') to the insured property. And if there has been 'damage', we assist with seeking indemnification.

**<u>'Loss' or 'Damage' to be 'Unforeseen' and/or 'Sudden'</u>**

Having established 'loss' or 'damage', the next hurdle for contractors is to determine whether the 'loss' or 'damage' occurred in accordance with policy requirements. It is common for insuring clauses to require that the occurrence of 'loss' or 'damage' was 'unforeseen' and 'sudden'. If these policy conditions cannot be fulfilled, then insurers will not be liable to indemnify the contractor.

'Unforeseen' is a relatively simple concept. The contractor must not have foreseen the occurrence of the 'loss' or 'damage'. *Pacific Chemicals Pte Ltd v MSIG Insurance (Singapore) Pte Ltd & Another* [2012] SGHC 198 ("**Pacific Chemicals**") confirmed that "*the inquiry is a subjective one, ie whether the loss or damage was foreseen by the insured*". This factual enquiry depends on documentary support and recollections of the contractor's personnel. Given the dependence on factual witnesses, contractors should retain (instead of let go of) key personnel whenever 'loss' or 'damage' occurs. Or, at least, obtain a signed statement from such personnel before their departure. Doing so will simplify the claims process.

'Sudden' is a restrictive concept. It is clear that if structural support to tunnelling works were to collapse in a matter of seconds, such 'damage' is likely to have occurred 'suddenly'.

Unfortunately, not all 'loss' or 'damage' in the construction industry occurs so quickly. For example, highway construction failures may occur over hours or days. Further, legal precedents suggest that 'sudden' need not mean a matter of seconds. In *Pacific Chemicals*, the judge determined that "*I do not think the word "sudden" necessarily requires the damage to be "instantaneous"*". The court or tribunal will determine this question on a case-by-case basis. However, having to depend on a court or tribunal introduces uncertainty to the claims process. For example, in *Pacific Chemicals*, the court decided on one hand that "*solidification [that] took place over a period of time*" "*was not sudden*" but decided on the other hand that "*at around midday, personnel noticed that [the Tank] was starting to buckle, this occurring quite rapidly*" was "*sudden*". How rapidly must an occurrence take place to be deemed 'sudden'? From our experience as insurance specialists, contractors may be better off negotiating away the 'sudden' requirement when purchasing policy cover.

## Exclusions

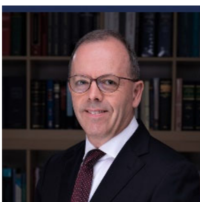
Even after ascertaining 'loss' or 'damage', as well as fulfilling the policy requirements of 'unforeseen' and 'sudden', contractors still have to look out for exclusions. These are clauses that limit the operation of the insuring clause.

There are two classes of exclusion wordings: the 1995 Design Exclusion Clauses ('DE' Clauses) and the 1996 London Engineering Group Clauses ('LEG' Clauses). By and large, they work in similar ways. The widest exclusion (that conversely provide the most limited coverage) excludes any 'loss' or 'damage' that is caused by defective material, workmanship, design, plan or specification. The narrowest exclusion (that conversely provide the most extensive coverage) excludes only the cost of rectifying the defect. For example, the cost of utilising an improved design when repairing or replacing the 'loss' or 'damage'). When purchasing a policy, or working under a policy purchased by the owner, contractors are advised to check the exclusions that may apply to the works.

## End Word

At times, insurance claims are complicated by arguments raised by the insurance market to reduce the amount of indemnity or avoid liability. The insurance market is well served by panel lawyers who routinely deal with insurance claims. On the other hand, contractors are often at a disadvantage as they may not be advised by specialist insurance lawyers. The regrettable result being that good claims are settled at a discount or given up altogether.

**Justyn Jagger**



justyn.jagger@sjlaw.com.sg
65 6694 7282
65 9154 9695

**Sinyee Ong**

sinyee.ong@sjlaw.com.sg
65 6694 7281
65 9148 5059