

SINGAPORE - COVID-19: TEMPORARY MEASURES ACT AND ITS IMPACT ON THE CONSTRUCTION INDUSTRY

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INTRODUCTION OF THE COVID-19 (TEMPORARY MEASURES) ACT

The COVID-19 (Temporary Measures) Act (No. 14 of 2020) (the "**Act**") was enacted and passed on 7 April 2020. Together with the financial measures announced across the three budgets (most recently in the Solidarity Budget of 6 April 2020), the Act aims to provide targeted and temporary relief to individuals and businesses that have been facing unexpected stresses due to the COVID-19 situation. A link to the Act can be found [here](#).

The Act complements the Singapore Government's "circuit breaker" measures that took effect on 7 April 2020 by suspending various forms of legal action arising out of contractual obligations (i.e. a "legal circuit breaker") for the effective duration of the Act.

As stated in our previous blog: [COVID-19: Singapore introduces temporary measures to give relief from contractual obligations](#), the measures in this Act will cover relevant contractual obligations to be performed on or after 1 February 2020 and for contracts entered into or renewed before 25 March 2020 until (i) the prescribed period expires, (ii) the applicant withdraws its notification for relief, or (iii) assessor's determination that the relief does not apply to the case in question (the "**Relief Period**"). While the effective periods of parts of the Act may be extended and certain provisions may be amended by the Minister for Law, the overall duration of the Act must not exceed one year.

In this blog, we will focus on the impact of the Act on Singapore's construction industry.

SUMMARY OF THE KEY PROVISIONS IN THE ACT

1. What is the definition of "construction" and "supply" contracts?

Construction and supply contracts in the Act have the same meaning given to them in the Building and Construction Industry Security of Payment Act (Cap. 30B) ("**SOPA**"). The definitions of "construction work", "goods" and "services" can be found in Section 3 of SOPA (which would likely by extension apply).

Effectively, the Act applies to construction-related contracts such as (i) contracts for the carrying out of construction works, (ii) contracts for the supply of goods and materials used in construction and (iii) contracts for the provision of consultancy services.

2. What is a “COVID-19 event”?

This refers to the COVID-19 epidemic or pandemic itself or the effects of laws or administrative orders passed by any country (not limited to Singapore) due to or in relation to the COVID-19 situation.

Where the inability to perform a contractual obligation for a construction and supply contract (being an obligation that is to be performed on or after 1 February 2020) is to a material extent caused by a COVID-19 event during the Relief Period, this is called a “subject inability” in the Act.

3. What types of reliefs are available to the non-performing party when there is a “subject inability”?

Based on Section 1 of the Act, Part 2 – which provides relief from non-performance of contractual obligations due to COVID-19 events – will be in effect from the date nominated in the Gazette. This Part is not in force yet as no date has been nominated, but will apply retrospectively once it is in effect.

Section 6 of the Act provides measures specifically targeted at the construction industry:

- a contractual party is prohibited from calling upon a performance bond in relation to the subject inability until the end of the Relief Period subject to the contractor making the relevant application for extension of the duration of the bond.
- for the purposes of calculating liquidated damages or other damages in respect of the subject inability (“**Damages**”), any period for which the subject inability subsists during the Relief Period shall be disregarded in determining the period of delay.
- a subject inability is a defence to a claim for breach of contract.

Section 5 of the Act also provides general relief against:

- court actions;
- arbitral proceedings under the Arbitration Act (Cap. 10);
- insolvency proceedings;
- enforcement of security; and
- enforcement of:
 1. court decisions;
 2. domestic arbitral awards; and
 3. adjudication determinations under SOPA.

There is no prohibition against commencing and proceeding with adjudication applications under SOPA.

It is important to note that the Act does not affect any taking of actions under the Frustrated Contracts Act (Cap. 115) or pursuant to a force majeure clause within the construction contract.

4. What is the process for relief?

Pursuant to Section 9 of the Act, a party seeking relief has to serve a notification on (i) the parties to the contract, (ii) any guarantor or surety for the relief-seeking party’s obligation in the contract and (iii) any other persons as may be prescribed.

In an application for an assessor’s determination (where required), Section 12(2) provides that the party seeking relief shall serve a copy of the application on the same parties as mentioned above. The Registrar will then appoint an assessor and serve a notice of appointment on the parties involved.

5. What will the assessor consider in determining whether the applicant is entitled to relief?

Under Section 13 of the Act, the assessor has to determine whether this is a case where Section 5 applies. This means the assessor must determine if:

- the party seeking relief is unable to perform an obligation (to be performed on or after 1 February 2020) in a construction contract;
- the inability is to a material extent caused by a COVID-19 event; and
- the party seeking relief has served a notification for relief in accordance with Section 9(1).

The assessor is to take into account the ability and financial capacity of the party who has to perform the application in coming to a just and equitable outcome for the parties.

WHAT DOES THIS MEAN FOR EMPLOYERS AND CONTRACTORS?

	Employers	Contractors
Performance Bond (“PB”)	<ul style="list-style-type: none"> → Bereft of security afforded by PB during Relief Period. → Potential difficulty in motivating contractors to perform. → Interim payments remain an effective incentive to contractors who are reliant on the cash flow. → However, PB may still be called for reasons unrelated to subject inability. 	<ul style="list-style-type: none"> → Automatically entitled to prohibition against calls on PB for Relief Period, where non-performance is due to subject inability. → However, contractor must apply to issuer of bonds to extend its term if the PB is expiring.
SOPA	<ul style="list-style-type: none"> → Consider and promptly file notifications for relief where eligible to obtain relief against enforcement of adjudication determinations. The notification for relief must be filed <u>prior</u> to the rendering of the adjudication determination. 	<ul style="list-style-type: none"> → Adjudication applications can be commenced. → Enforcement may be prohibited during Relief Period if employer files for a notification for relief.
Levies and rebates available	<ul style="list-style-type: none"> → Waivers of foreign worker levy and enhanced property tax rebates announced in the various budgets. 	<ul style="list-style-type: none"> → Advance payment for public sector construction contracts based on the Building and Construction Authority’s Circular of 7 April 2020 found here. → Passing down of foreign worker levy rebate.

	Employers	Contractors
Relief measures under the Act	General relief measures in Section 5 of the Act are available to <u>both</u> employers and contractors who are unable to meet contractual obligations due to subject inability and have filed a notification for relief.	
Reliefs under the contract	Consider alternative options such as force majeure clauses in the contract or the Frustrated Contracts Act (Cap. 115) if the reliefs available under the contract i.e. time and cost reliefs, suspension / termination of the contract, are more suitable than those provided under the Act.	
General suggestions	<ul style="list-style-type: none"> → Keep detailed records and documentation of the works carried out by contractors and any issues that may arise, in particular to distinguish delays/disruptions to a COVID-19 event from those arising out of other reasons. → Familiarise itself with the additional administrative procedures introduced by the Act (i.e. notifications for relief), adjudication, and any other formal notice provisions (e.g. responding to requests for extensions of time) under the contract, and to establish a system to respond appropriately and in a timely manner. → Consider other clauses in the contract which allow the expedition of works or omission of works to another contractor (if practical / as permitted under the contract) so that works can be completed in as timely a manner as possible. 	<ul style="list-style-type: none"> → Keep detailed records and documentation of the time and cost impact of COVID-19 events on their ability to do work and any mitigation measures adopted. → Comply strictly with all necessary notice requirements and formalities under the contract, notwithstanding the suspension of certain legal actions under the Act. Reliefs under the contract would still require contractor's compliance with procedure. → Consider and promptly file notifications for relief where applicable. This may have an impact on whether a relief is later available to the contractor. → A COVID-19 event is defined very broadly and includes changes in laws and regulations both inside and outside of Singapore. Contractors should consider whether there are changes in law in other countries which could assist in their seeking relief.

WHAT HAPPENS AFTER?

Since the Act only temporarily suspends legal actions, the question that presents itself is what happens after the effective period of the Act. Should we expect an onslaught of legal actions coming out of defaulted contractual obligations?

Well, businesses are legal entities and cash flow is its lifeblood. Contracts are the capillaries running through and between businesses that enables cash to flow. The Act is ultimately a “legal circuit breaker” aimed at placing the interconnected web of contracts in Singapore in a suspended animation to prevent them from collapsing at this very crucial point in time. The budgets announced are blood transfusions for businesses.

The hope is that, given some breathing space during these difficult times, businesses will be able to come out of this period of stasis relatively intact and able to resume servicing its contractual obligations – instead of pursuing legal action. Whether the government has played an equitable hand in what is intended to be a contractual allocation of risk is a question for another day, but ultimately it may not be remiss to say that it is in the parties’ better interests to come to a common understanding at this juncture, instead of commencing legal action against the other.

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