



D DREW & NAPIER

LEGISLATIVE UPDATE

COVID-19
(TEMPORARY
MEASURES) ACT
2020

9 April 2020

LEGAL UPDATE

In this Update

In this article, following the official enactment of the COVID-19 (Temporary Measures) Act 2020, we set out the policy considerations underpinning the COVID-19 (Temporary Measures) Act 2020, as well as further details on the operation of the Act.

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OVERVIEW

On 7 April 2020, the COVID-19 (Temporary Measures) Act 2020 (“**COVID-19 Act**”) was passed by Parliament. The COVID-19 Act follows from the Ministry of Law’s announcement of 1 April 2020 of its intentions to offer temporary relief to businesses and individuals who are unable to fulfil their contractual obligations because of COVID-19. This relief seeks to complement the financial measures announced in the Resilience Budget.

In this article, following its official enactment, we set out the policy considerations underpinning the COVID-19 Act, as well as further details on its operation. For further details, please refer to our related client updates issued on [1 April 2020](#) and [3 April 2020](#).

The effect of temporary relief under the COVID-19 Act is to freeze legal actions for breaches of certain types of contracts. In order to provide temporary relief to businesses and individuals impacted by the COVID-19 situation, contracting parties in scheduled contracts would be prevented from taking certain enforcement actions where non-performance is due to subject inability, defined as the inability to a material extent caused by a COVID-19 event.

POLICY CONSIDERATIONS

KEYPOINT

The policy considerations underpinning the COVID-19 Act are (i) to provide businesses with breathing space to assess their position and consider options; and (ii) to encourage businesses to reach reasonable and equitable positions with contracting counterparties.

The sanctity of contracts underpins our economy and the free market. However, policy-makers have realised that freedom of contract should not be absolute. Considering that most businesses would not have been prepared for the scale of the COVID-19 crisis, non-intervention would likely result in bankruptcies and insolvencies. The corresponding knock-on effects will result in large-scale unemployment. Small and medium-sized enterprises that account for 72% of the employment in Singapore may go under.

The government has sought to provide businesses with breathing space to assess their position and consider what actions to take in light of the COVID-19 situation. The COVID-19 Act seeks to introduce temporary relief for businesses that are unable to make payments or perform their

contractual obligations. The relief is not intended to cover businesses that have suffered but remain able to perform their obligations.

At the same time, the COVID-19 Act also reflects the need for all Singaporeans to co-operate. Businesses should not only look out for their narrow self-interests, but rather consider how economic participants can navigate the crisis together. Businesses are encouraged to come to reasonable and equitable positions with their contracting counterparties. This will be achieved by:

- (a) not taking advantage of individuals who are not able to proceed as planned; and
- (b) passing on benefits such as rebates and remissions.

TIME FRAME

Temporary relief provided under the COVID-19 Act would be available for contracts entered into or automatically renewed before 25 March 2020 with contractual obligations to be performed on or after 1 February 2020.

These measures in the COVID-19 Act will be in place for 6 months and may be extended or shortened, depending on the COVID-19 situation.

CONTRACTS THAT QUALIFY FOR TEMPORARY RELIEF

It has to be noted that only certain contracts qualify for temporary relief, and the relief is subject to certain conditions being fulfilled.

The criteria to qualify for temporary relief are as follows:

- (a) a party to a scheduled contract is unable to perform an obligation in the contract ("**Party A**"), which is to be performed on or after 1 February 2020;
- (b) the inability to perform is to a material extent caused by a COVID-19 event; and
- (c) Party A has notified the other party to the contract ("**Party B**"), and any guarantor for Party A's obligation, that it is seeking relief.

Scheduled contracts include the following:

- (a) A contract for the grant of a loan facility by a licenced bank or a licenced finance company to an enterprise, where such facility is

wholly or partially secured against (i) any commercial or industrial property located in Singapore; or (ii) any plant, machinery or fixed asset that are located in Singapore and used for manufacturing, production or other business purposes;

Additionally, an enterprise that is eligible refers to any body corporate or unincorporate that is incorporated, formed or established and carries on business in Singapore with at least 30% of its ownership interest held by Singapore citizens and/or Singapore permanent residents and a turnover that does not exceed \$100 million in the latest financial year.

- (b) A performance bond or equivalent that is granted pursuant to a construction contract or supply contract;
- (c) A hire-purchase agreement or conditional sales agreement where (i) any plant, machinery or fixed asset located in Singapore, and used for manufacturing, production or other business purposes or (ii) commercial vehicle (goods vehicle, excursion/private/private hire/school bus, private hire car, taxi, engineering plant) is hired or conditionally sold under the agreement;
- (d) An event contract;
- (e) A tourism-related contract;
- (f) A construction contract or supply contract; and
- (g) A lease or licence of non-residential immovable property (such as commercial or industrial properties).

Scheduled contracts with the Government also qualify for temporary relief.

On a separate note, for agreements that fall outside the scheduled contracts, parties should consider whether non-performance is due to force majeure.

TEMPORARY RELIEF FOR SCHEDULED CONTRACTS

As part of the temporary relief measures, section 5(3) of the COVID-19 Act bars contracting parties from commencing certain legal actions, including the following:

- (a) commencing or continuing action in court or arbitral proceedings in relation to defaults materially caused by COVID-19;
- (b) enforcing any security over any immovable property;

- (c) enforcing any security over any movable property (e.g. plant/ machinery) used for the purpose of a trade, business or profession;
- (d) applying for a meeting of creditors to approve a compromise or an arrangement, a judicial management order, winding up, bankruptcy, or to appoint a receiver or manager;
- (e) commencing execution, distress or other legal process against any property except with the leave of the court;
- (f) repossessing any goods under any chattels leasing agreement, hire-purchase agreement or retention of title agreement, used for the purpose of a trade, business or profession;
- (g) terminating a scheduled contract, which is a lease or licence of immovable property, in the event of non-payment of rent or other moneys; and/or
- (h) exercising the right of re-entry or forfeiture under a scheduled contract, which is a lease or licence of immovable property, or the exercise of any other right which has a similar outcome.

ADDITIONAL RELIEF

There may be additional relief for certain specific contracts, as stated below. A breach of the COVID-19 Act could result in a criminal conviction and a fine of up to \$1000. In addition, any court or arbitral proceedings commenced in breach of section 5(2) of the COVID-19 Act must be dismissed by the court or tribunal.

Construction or Supply Contract

The COVID-19 Act applies to both “construction contracts” and “supply contracts” (as defined in the Building and Construction Industry Security of Payment Act (“**SOP Act**”)), as well as performance bonds or the equivalent granted pursuant to a construction or supply contract. Our Construction & Engineering update on 3 April 2020 addresses the impact of the COVID-19 Act on the Construction Industry in Singapore.

The COVID-19 Act defines a “construction contract” and “supply contract” by reference to section 2 of the SOP Act. Given that section 4 of the SOP Act excludes contracts which deal with construction work or supply carried out outside Singapore (without incorporating this as part of the definitions in section 2), it is likely that the COVID-19 Act would similarly be interpreted as not covering such contracts, even where such contracts are governed by Singapore law. In such cases, parties would have to rely on any Force Majeure provisions in the contract or the contract law doctrine of frustration.

For a consideration of how COVID-19 is dealt with in Force Majeure clauses or frustration, please see our earlier [update](#).

The other reliefs described in this update also apply to construction and supply contracts. In summary, the following are the specific effects of the COVID-19 Act on the construction sector:

- (a) The COVID-19 Act allows contractors who have served a notification for relief on the employer to apply to the performance bond issuer for an extension of the term of the bond or the equivalent so that they remain valid up to 7 days after the end of the prescribed period or such other date that may be agreed between the parties (section 6(3));
- (b) The COVID-19 Act prohibits a call on the performance bond or equivalent in relation to the 'subject inability' (meaning an inability to perform a contractual obligation materially caused by a COVID-19 event) at any time earlier than 7 days before (a) the date of expiry of the performance bond or equivalent; or (b) the extended date of expiry if the term of the performance bond or equivalent has been extended (sections 6(2) and 6(3)). Calls on a performance bond made in breach of these provisions are void (section 8(4)(b));
- (c) The COVID-19 Act prohibits the commencement and continuation of court proceedings, arbitration proceedings under the Arbitration Act, enforcement of an adjudication determination or court judgment or award, amongst other actions (section 5(2) and 5(3)). However, there is no express prohibition against the commencement or continuation of adjudication proceedings under the SOP Act;
- (d) For calculating liquidated damages or assessing other damages in respect of the 'subject inability' (which must occur on or after 1 February 2020 and before the end of the prescribed period), the period for which the 'subject inability' subsists will be disregarded in determining the period of delay in performance by the party who has served a notification for relief (sections 6(5) and 6(6));
- (e) It is a defence to a claim of breach for contract if the inability was to a material extent caused by a COVID-19 event, despite anything in the contract, although this will not affect any rights or obligations which arose before 1 February 2020 or after the expiry of the prescribed period, and/or any judgment award, adjudication determination, compromise or settlement issued or made before service of a notification for relief (sections 6(6) and 6(7)).

Event or Tourism-Related Contract

Party B may not forfeit any part of the deposit paid by Party A on the basis of subject inability and any deposit forfeited must be restored as soon as practicable once a notification for relief has been served. Party A should

also not be required to pay a cancellation fee where the inability to perform an obligation on or after 1 February 2020 was due to subject inability.

OBTAINING RELIEF

To obtain relief, Party A must inform the other parties to the contract and any guarantor or surety for Party A's obligation in the contract.

Assessors appointed by the Minister for Law will resolve any disputes and will decide whether the inability to perform contractual obligations was due to COVID-19. In deciding the particular question whether there is an inability to pay, the assessors will look at a company's previous year's tax returns, accounts and may ask for additional information. Assessors will also consider whether the business is merely taking advantage of the situation.

The assessor may make further determinations to achieve a "just and equitable" outcome including requiring a contracting party to do anything or pay any sum of money to discharge any obligation under the contract or requiring the party to return the goods or give possession of the immovable property to the other party.

In the case of an event or tourism-related contract, the assessor may determine that the deposit should be forfeited, restored, or make further determinations to achieve a just and equitable outcome.

An assessor's determination is binding on all the parties to the application and all the parties claiming under them and no appeal will be allowed. Parties will not be represented by their lawyers before the assessor and must bear their own costs.

TEMPORARY MEASURES FOR REMISSION OF PROPERTY TAX

Part 6 of the COVID-19 Act imposes on property owners who benefit from a prescribed remission of property tax, an obligation to pass the benefit on to a tenant of the property

The tenant could be a prescribed lessee or a prescribed licensee of the owner. The owner must pass on the benefit in the manner, in the amount or to the extent, and in the time, prescribed. The owner must also keep records evidencing that the owner has so passed on the benefit. Failure to pass on the benefit, or to keep the records, is an offence.

Under the COVID-19 Act, the manner in which the benefit must be passed may be:

- (a) a single method;
- (b) a combination of methods, including (but not limited to): (i) a payment of money (whether as a lump sum or by way of instalments), or (ii) an offset against or a reduction of the whole or any part of any rent or licence fee payable by the tenant to the owner.

The COVID-19 Act also provides the tenant with an avenue of redress should the owner fail to pass on the benefit, or if there is a dispute over whether the COVID-19 Act applies.

As currently contemplated in the Resilience Budget announced on 26 March 2020, qualifying non-residential properties will be granted property tax remission for the period of 1 January 2020 to 31 December 2020. Commercial properties badly affected by COVID-19 such as hotels and serviced apartments, shops and restaurants and premises of tourist attractions are intended to receive 100% tax remission, while other non-residential properties such as offices and industrial properties will get a 30% remission.

COMMENTS

KEYPOINT

Businesses should note that there are certain criteria for temporary relief under the COVID-19 Act - the COVID-19 Act should not be taken to be *carte-blanche* to halt performances of all contractual obligations.

The COVID-19 is a novel legislation borne out of necessity in light of the challenging global circumstances. In spite of these measures, businesses should continue to perform their contractual obligations where it is still possible to do so. These measures should not be taken as a right for businesses to halt the performance of all contractual obligations as the relief is only available where failure to perform is to a “material extent” caused by a COVID-19 event.

Further, businesses should determine whether they meet the criteria for temporary relief as not all contracts and agreements are covered under the COVID-19 Act. Parties are encouraged to come to a common understanding and only approach the assessors if resolution is not possible, as parties would be less able to determine the outcome of the dispute once they approach an assessor.

It should also be noted that the assessors possess very broad powers to determine a dispute to achieve a “just and equitable” outcome. The COVID-

19 Act is a novel legislation and how determinations will be made remains to be seen. Further, parties should also be aware that no appeal will be allowed once the assessor has made a final decision. Accordingly, parties should consider the issue in dispute carefully and be sure of the outcome they seek to achieve before raising any representations.

Should you require specific guidance or advice on the above points, please do not hesitate to contact us.

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