



Impact of COVID-19 on the Construction Industry (Part 1)

*The impact of COVID-19 on the construction industry will be dealt with in 2 parts. In **Part 1**, we discuss the control measures taken by the Singapore Government, the relief measures that have been passed into law, as well as government assistance rendered to the construction industry. In **Part 2**, we will discuss the rights and obligation under the more popularly used standard forms in Singapore, especially where they relate to time and costs issues, including the legal principles in relation to force majeure and frustration.*

INTRODUCTION

The COVID-19 pandemic has wreaked havoc on the world. As at 10 April 2020, there are a total of 1.62 million infection cases and 97.3 thousand deaths globally¹. In an attempt to control the spread of the infection, whole cities and indeed countries have gone into lockdowns, disrupting supply chains and daily life, and suspending normal business activity.

In Singapore, the Prime Minister announced on Friday, 3 April 2020 that stricter social distancing measures would be implemented from 7 April 2020 to create a circuit breaker for the spread of the disease. The COVID-19 (Temporary Measures) Act (the “**Act**”) was passed in Parliament on 7 April 2020 to provide, among other things:

- Control measures restricting the movement of people and the suspension of business activity except for essential services from 7 April to 4 May 2020, with extensions if necessary; and
- Temporary relief to parties who are unable to perform their contractual obligations as a result of the COVID-19 pandemic.

¹Source: CNN: John Hopkins University



CONTROL MEASURES FOR THE CONSTRUCTION INDUSTRY

In line with the control measures announced by the Prime Minister, the BCA issued an advisory making clear that all building and construction works as defined in the Building Control Act are required to cease with effect from 7 April 2020 to 4 May 2020 (both dates inclusive).

This work suspension must be complied with by all stakeholders of the construction industry, which include the developers, builders, qualified persons, site supervisors and construction material suppliers. Penalties for failure to comply with this mandated suspension include a fine of up to S\$10,000 or imprisonment of up to 6 months or both. Additionally, penalties such as temporary suspension of operations may also be imposed for non-compliance.

In order to ensure that building works may be suspended safely and remain safe for the full period of the work suspension, all project parties were directed by the BCA to immediately carry out all necessary works to ensure the structural safety and integrity of ongoing construction works.

For those who were unable to complete these necessary works before 7 April 2020 (0000 hours), a written request for an extension of time together with the essential information required can be made to the Ministry of Trade and Industry at <https://covid.gobusiness.gov.sg>.

Works that are deemed essential can however still continue when the work suspension is in force. Some examples of essential works include maintenance of security at the project site and environmental protection of the project site. A full list of the essential services is set out in Annex B of the BCA Advisory, a copy of which is accessible [here](#).

TEMPORARY RELIEF FOR THE PERFORMANCE OF SUPPLY AND CONSTRUCTION CONTRACTS

The supply chain disruptions for materials, labour, plant and equipment has slowed down construction activity and the control measures from 7 April 2020 to 4 May 2020 have effectively brought construction activity to a halt. These clearly have time and cost implications for the construction industry, but many of the construction and supply contracts entered into prior to the outbreak of COVID-19 may not have envisaged a pandemic or adequately provided for one. How do the different parties then address the time and cost issues caused by the COVID-19 Pandemic? The Act goes some way to provide relief as well as limit the potential mushrooming of expensive litigation.



Application of the Act

The Act only applies to Scheduled Contracts entered into before 25 March 2020 in respect of obligations that had to be performed on or after 1 February 2020. A Scheduled Contract is one that falls within the description of contracts listed in the schedule to the Act. Construction and supply contracts as defined in the Building and Construction Industry Security of Payment Act (“**SOPA**”) are Scheduled Contracts, including those to which the government is a party.

What this means is that the Act will not affect any rights or obligations accruing in respect of delays or breaches prior to 1 February 2020. However, it would be interesting to see if the Act would provide relief to a contractor, which say, was not able to perform even if there had not been a pandemic.

It also means that parties entering into contracts from 25 March 2020 must take steps to provide for the foreseeable implications of the COVID-19 pandemic in respect of the performance of the contract.



General Reliefs under the Act

Section 5 of the Act prohibits certain legal actions from being taken against a party to a Scheduled Contract (“**A**”) who is unable to perform a contractual obligation to a material extent caused by a COVID-19 event (the “**subject inability**”) and party A has served a notification to the counterparty to the contract (“**B**”) for relief (“**Notification for Relief**”), and as may be applicable, other relevant parties.

The Act defines a “**COVID-19 event**” as

- The epidemic or pandemic that is COVID-19; or
- The operation of or compliance with any law of Singapore or another country or territory, or an order or direction of the Government or any statutory body, or of the government or other public authority of another country or territory, being any law, order or direction that is made by reason of or in connection with COVID-19.

B cannot take legal action until:

- After the prescribed period ends, or
- A withdraws the Notification for Relief, or
- An assessor determines that the case does not fall within section 5 of the Act.



The Prescribed Period of relief is defined as a period not exceeding 6 months by order of the Minister in the Gazette, and may be extended or shortened, and more than once. As at 10 April 2020, no notification has been published in the Gazette as to the commencement of section 5 of the Act or as to the Prescribed Period.

The legal actions that are prohibited are:

- The commencement or continuation of court action, or arbitration proceedings under the Arbitration Act, against A or A's guarantor or surety;
- The enforcement of security over immovable property, or movable property used for purpose of trade, business or profession;
- Applications for a s210 scheme of arrangement, judicial management order, winding up or bankruptcy of A or A's guarantor or surety or the appointment of a receiver over the property or undertaking of A or A's guarantor or surety;
- The commencement or levying of execution, distress or other legal process against any property of A or A's guarantor or surety;
- The repossession of any goods under any chattels leasing agreement, hire-purchase agreement or retention of title agreement, being goods used for the purpose of a trade, business or profession (e.g. plant and equipment);
- Termination of a scheduled contract (being a lease or license of immovable property) whether the subject inability is the non-payment of rent or other moneys, or the exercise of a right of re-entry or forfeiture;
- Enforcement against A or A's guarantor or surety of any judgment, arbitral award under the Arbitration Act, or adjudication determination under SOPA; and
- Any other action that may be prescribed.



Additional Reliefs under the Act for the Construction Industry

In the case of construction and supply contracts, the further additional reliefs are:

- “B” may not make a call on a performance bond in relation to the subject inability for which A has given Notification for Relief until 7 days before the date of expiry of the performance bond or such extended date.

What this means is that notwithstanding any Notification for Relief, a call on a Performance Bond (which is not tainted by unconscionability or fraud) in relation to the subject inability within 7 days of its expiry will be valid, but any call before 7 days of the expiry will be null and void. The issuer of a performance bond will be ill-advised to pay out on a performance bond that is called upon earlier than 7 days before expiry. No restraining order from the Court on the grounds of fraud or unconscionable conduct is required.

- Where A makes an application to the issuer of the performance bond not less than 7 days before the expiry date to extend the term of the performance bond and serves a notice of the application on B at the same time, the term of the performance bond shall be extended to a date that is 7 days after the end of the Prescribed Period of relief or such other date as may be agreed between A, B and the issuer.

What this means is that where A has served a Notification for Relief, which is not discharged or withdrawn, A must in addition procure the extension of the Performance Bond before 7 days of its expiry or face a call on the performance bond in relation to the subject inability. This is very similar to the extend or pay obligation in relation to the provision of a performance bond.

- A freeze on liquidated damages or other delay damages arising as a result of the subject inability occurring on or after 1 February 2020 but before the expiry of the Prescribed Period of relief.

“A” has to activate the right to relief by a Notification for Relief

The relief measures under the Act do not operate automatically as parties who intend to seek relief are required to serve a Notification for Relief on the relevant parties within the period specified in regulations (yet to be promulgated).

Any party to the contract in question may, within the period specified in regulations (yet to be promulgated) and upon payment of the prescribed fee, then apply for an assessor’s determination whether the case falls within section 5 of the Act.

The appointed assessor may take into account, among other factors, the ability and financial capacity of the party concerned to perform the obligation and must

seek to achieve an outcome that is just and equitable in the circumstances of the case. It will thus be a case-by-case analysis when it comes to the question of whether these new measures are applicable to each individual.

An assessor’s determination is binding on all parties to the application and all parties claiming under or through them and may be enforced in the same manner as a judgement or an order of the court to the same effect with the leave of court. No appeal lies from an assessor’s determination. There is no right of legal representation before the assessor, and each party has to bear his own costs of the proceedings before the assessor.



SOPA proceedings

The Act does not prohibit the submission of payment claims for the purpose of SOPA. Hence, it is important that respondents submit their payment responses in time. Similarly, the Act does not prohibit the lodging of adjudication applications, and respondents will have to ensure that adjudication responses are submitted within the 7-day deadline.

It should however be noted that where the Act applies, adjudication determinations may not be enforced against A. This prohibition however should not apply to

obligations arising before 1 February 2020 or in respect of contracts made or renewed from 25 March 2020. In addition, A must have given a Notification for Relief.

As it is envisaged that there are enforcement applications under the SOPA that are not caught by the Act, the Supreme Court Registrar’s Circular No.4 issued on 5 April 2020 provides that an application under the SOPA may be considered as a matter that is essential and urgent.



GOVERNMENT ASSISTANCE

Leading up to the implementation of the circuit breaker control measures, the Singapore government has announced a slew of measures to help businesses, including the following as they relate pertinently or specifically to the construction industry:

- Foreign work levies dues for payment in April 2020 waived.
- \$750 foreign worker levy rebate for each work permit or S Pass holder, for levies paid in 2020.
- 3 months extension of levy payment for SMEs.
- Refund of unutilized Man-Year Entitlement (MYE) due to work disruptions from COVID-19, with flexibility to use the refunded MYE within 1 year to hire new workers or renew existing ones. This relief measure is for 6 months commencing from 1 April 2020.
- Allowing foreign workers to change employer if they are not needed.
- One-off advance payment for contractors in public sector construction projects during the “Circuit Breaker” period.
- Waivers allowing builders to do partial on-site installation of finishing works for Prefabricated Prefinished Volumetric Construction (PPVC) and Prefabricated Bathrooms after suspension of business activities is lifted.

CONCLUSION

It is hoped that with the above control measures taken by the government, the COVID-19 pandemic can be quickly brought under control, and that with the financial assistance and temporary relief measures, the adverse legal and financial implications for participants in the construction industry may be mitigated.

AUTHOR



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We collaborate closely with the RHT Group of Companies to provide an all-rounded integrated business solution. We believe in pushing the boundaries of what can be achieved for our clients in this evolving marketplace.

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RHTLaw Asia COVID-19 Response Team will continue to bring you further updates following developments in Parliament.

Join us for an upcoming webinar on:

**“COVID-19 (Temporary Measures) Act
– Its Legal and Practical Implications”**

**Visit our RHTLaw COVID-19
Resource Centre for more updates**