

Summarising the Covid-19 (Temporary Measures) Act 2020 For The Construction Industry

8 April 2020

Introduction

1. On 7 April 2020, Parliament passed the wide-ranging COVID-19 (Temporary Measures) Act 2020 (the “**Act**”) to provide temporary, targeted relief to alleviate the immense pressures caused to individuals, firms and businesses as a result of the COVID-19 disease.¹
2. While the reliefs provided are wide ranging and cover several both persons and industries, this article focuses on how the Act affects the construction industry, and covers the following:
 - 2.1. *Application to the Construction Industry & Commencement of Temporary Reliefs*
 - 2.2. *Period of Temporary Relief*
 - 2.3. *Types of Temporary Reliefs Provided*
 - 2.4. *No Temporary Relief from Adjudication Proceedings*
 - 2.5. *Qualifying for Temporary Reliefs*
 - 2.6. *Effects of Temporary Reliefs*
 - 2.7. *Additional Reliefs for the Construction Industry:*
 - 2.7.1. *Limitation in Calling Performance Bonds,*
 - 2.7.2. *Extension of Performance Bonds*
 - 2.7.3. *Defences to Liquidated Damages or Other Damages & Other Defences*

¹ The Act can be found at <https://sso.agc.gov.sg/Acts-Supp/14-2020/>

2.8. *Consequences of Contravening a Valid Temporary Relief Notification*

2.9. *Contesting the Temporary Relief Notification*

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Application to the Construction Industry & Commencement of Temporary Reliefs

3. The Temporary Reliefs set out in Part 2 of the Act will apply to construction and supply contracts in the construction industry,² so long as the contracts are entered into before 25 March 2020.³
4. For brevity, all construction and supply contracts will be referred to as “construction contracts” in this article.
5. At the date of this article, the Minister for Law has not notified when the Temporary Reliefs will commence under the Act, although the notification is expected to be issued soon.
6. Additionally, the details regarding the Temporary Relief procedures set out in the Act have not been announced, but they are also expected to be released soon.

Period of Temporary Relief

7. The Act prescribes a period of temporary relief for the construction industry (the “**Temporary Relief Period**”).
8. At present, the Minister for Law can order that the Temporary Relief Period last for up to 6 months, although this can be extended or reduced (as determined by the Minister for Law).⁴
9. The maximum Temporary Relief Period will be capped at one year from the Act’s commencement date.⁵

² As defined in the Building and Construction Industry Security of Payment Act (Cap 30B) (the “**SOP Act**”)

³ Section 4(1) of the Act. Exceptions are made for contracts that are renewed automatically on or after 25 March 2020, which will also be covered under the Act

⁴ Section 3 of the Act

⁵ Section 1(2) of the Act.

Types of Temporary Reliefs Provided

10. Starting from 1 February 2020, where a party (**Party A**) is unable to perform a contractual obligation for another party (**Party B**) due to a *COVID-19 Event*,⁶ Party A can obtain the following temporary reliefs against Party B (amongst others):⁷
 - 10.1. Commencing or continuing court/arbitration proceedings or against Party A (or Party A's guarantor/surety);⁸
 - 10.2. Enforcing a Court judgment, arbitral award (under the Arbitration Act), or an adjudication determination (under the SOP Act) against Party A (or Party A's guarantor/surety).⁹
 - 10.3. Enforcing any security over immovable property, or movable property used for the purpose of a trade, business or profession;¹⁰
 - 10.4. Applying for schemes of arrangement / judicial management / winding up / bankruptcy in relation to Party A (or Party A's guarantor/surety);¹¹
 - 10.5. Appointing a receiver or manager over any property or undertaking of Party A (or Party A's guarantor/surety);¹²
 - 10.6. Commencing or levying of execution, distress or other legal proceedings against the property of Party A (or Party A's guarantor/surety), except with leave of Court;¹³

(hereinafter referred to as “**Temporary Reliefs**”).

⁶ Section 5(1)(a) of the Act

⁷ Section 5(3) of the Act

⁸ Section 5(3)(a)-(b) of the Act

⁹ Section 5(3)(n) of the Act

¹⁰ Section 5(3)(c) of the Act

¹¹ Section 5(3)(e)-(h) of the Act

¹² Section 5(3)(i) of the Act

¹³ Section 5(3)(j) of the Act

11. As an example, such contractual obligations that have been materially affected by the *COVID-19 Event* could include construction companies which:
 - 11.1. Supply construction materials from Malaysia and have been severely restricted by Malaysia's movement control order.¹⁴
 - 11.2. Supply workers but whose workers are faced with a quarantine order.¹⁵
 - 11.3. Stopped all non-essential work in Singapore from 7 April 2020 to 4 May 2020.¹⁶
12. Any Temporary Relief however, is limited only to those directly affected by a *COVID-19 Event*.
 - 12.1. For example, if there are court proceedings that comprise of both a *COVID-19 Event* and non *COVID-19 Event*, the non *COVID-19 Event* can continue.¹⁷
 - 12.2. Similarly, enforcement of any security that is not affected by a *COVID-19 Event* can continue.¹⁸
13. A *COVID-19 Event* is defined as:¹⁹
 - 13.1. the COVID-19 epidemic or pandemic; or
 - 13.2. the operation of or compliance with laws, orders or directions (in Singapore or elsewhere) that have been made in relation to COVID-19.

¹⁴ "Malaysia bans travel abroad, shuts schools and businesses over coronavirus spread; lockdown till March 31" - <https://www.straitstimes.com/asia/se-asia/malaysia-to-impose-lockdown-from-wednesday-to-march-31>

¹⁵ "Record 120 new coronavirus cases in Singapore, 2 foreign worker dormitories gazetted as isolation areas" - <https://www.straitstimes.com/singapore/coronavirus-record-120-new-covid-19-cases-in-spore-two-foreign-worker-dormitories-gazetted>

¹⁶ COVID-19 (Temporary Measures) (Control Order) Regulations 2020

¹⁷ Section 5(5) of the Act

¹⁸ Section 5(6) of the Act

¹⁹ Section 2 of the Act

No Temporary Relief from Adjudication Proceedings

14. Notably, adjudications under the SOP Act are not included under the Act and can continue.²⁰
15. This is notwithstanding the practical difficulties arising from the restriction of movement of people and that non-essential businesses can only work from home from 7 April 2020 and 4 May 2020.²¹
16. However, any enforcement of the adjudication determination may be constrained as they are covered under this Act.²²

Qualifying for Temporary Reliefs

17. In order to qualify for the Temporary Reliefs set out in paragraph 10, Party A must:²³
 - 17.1. Ensure that Party A's inability to perform a contractual obligation is one that starts from 1 February 2020 and is materially due to a *COVID-19 Event*; and
 - 17.2. Serve a notification for temporary relief in accordance with s 9(1) and s 19 of the Act ("**Temporary Relief Notification**") on (a) the other parties to the contract, (b) any guarantor or surety for Party A's obligation in the contract; and (c) such other person prescribed under the Act.
18. Once Party B receives Party A's Temporary Relief Notification, Party B will not be able to take any action set out in paragraph 10 (notwithstanding Party B's contractual or legal right to do so). The limitation on Party B will last until:²⁴
 - 18.1. The expiry of the Temporary Relief Period;
 - 18.2. Party A withdraws the Temporary Relief Notification; or

²⁰ The Singapore Academy of Law announced on 6 April 2020 that Security of Payment Act: Services remained unchanged. Parties may continue to file their applications as per the usual operating hours (9am to 4.30pm, Monday to Friday). See <https://info.sal.org.sg/salCovid-19>

²¹ Regulation 11 of the COVID-19 (Temporary Measures) (Control Order) Regulations 2020

²² Section 5(3)(n) of the Act

²³ Section 5(1)(b)-(c) of the Act

²⁴ Section 5(2) of the Act

- 18.3. An assessor determines that Party A's application for Temporary Relief was not one to which the Act applied.

Effects of Temporary Reliefs

A. Extension of Statutory Limitation Period

19. Upon Party A serving the Temporary Relief Notification, any statutory limitation period will be extended from the Temporary Relief Notification's date of service until the earlier of:²⁵
 - 19.1. The expiry of the Temporary Relief Period;
 - 19.2. Party A's withdrawal of the Temporary Relief Notification; or
 - 19.3. An assessor's determination that Party A's application for Temporary Relief is not one to which the Act applies.

B. Stay of Legal Proceedings

20. Additionally, any pending court proceedings or arbitration (under the Arbitration Act) will be stayed once Party A lodges the Temporary Relief Notification with the Court or arbitral tribunal.²⁶ These proceedings will be stayed until the earlier of:²⁷
 - 20.1. The expiry of the Temporary Relief Period;
 - 20.2. Party A's withdrawal of the Temporary Relief Notification; or
 - 20.3. An assessor's determination that Party A's application for Temporary Relief is not one to which the Act applies.
21. Having said that, it is presently unclear as to how quickly the assessment process will take as the relevant regulations have not been issued as of the date of this article.

²⁵ Section 5(7) of the Act

²⁶ Section 5(8) of the Act. Other proceedings may be stayed if prescribed under the Act

²⁷ Section 5(8)(d)-(f) of the Act

Additional Reliefs for the Construction Industry

22. In addition to the Temporary Reliefs set out at paragraph 10, the construction industry has been provided with three additional reliefs, which are set out below.

A. *Limitation in Calling Performance Bonds*

23. For one, where Party A is unable to perform its contractual obligations due to a *COVID-19 Event*, Party B cannot call on the performance bond (even if contractually allowed to) at any time:²⁸

23.1. Earlier than 7 days before the performance bond's expiry date;
or

23.2. Where the performance bond is extended under this Act, earlier than 7 days before the performance bond's extended expiry date.

24. Party B's limitation in calling on the performance bond will end and Party A will not be entitled to extend the performance bond under the Act if:²⁹

24.1. Party A withdraws the Temporary Relief Notification; or

24.2. An assessor determines that Party A's application for Temporary Relief is not one to which the Act applies.

B. *Extension of Performance Bonds*

25. Notwithstanding its contractual terms, Party A can also extend the performance bond to 7 days after the Temporary Relief Period or alternatively, a date as agreed between Party A, Party B, and the performance bond issuer.³⁰

26. In order to extend the performance bond, Party A must:³¹

26.1. Apply to the performance bond's issuer to extend the said performance bond 7 days before its expiry; and

26.2. Serve a notice of the application on Party B at the same time.

²⁸ Section 6(2) of the Act

²⁹ Section 6(4) of the Act

³⁰ Section 6(3) of the Act

³¹ Section 6(3) of the Act

C. *Defences to Liquidated Damages or Other Damages & Other Defences*

27. Party A will not be liable to pay liquidated damages or other damages under the contract for the duration that Party A is unable to perform its obligations (starting from 1 February 2020) due to the *COVID-19 Event*. This will apply until the end of the Temporary Relief Period.³²
28. Additionally, Party A will have a defence to a claim for breach of contract if its inability to perform its obligations (starting from 1 February 2020 until the end of the Temporary Relief Period) is to a material extent caused by the *COVID-19 Event*.³³
29. However, Party A's defence to any breach of contract (as set out in paragraph 28) will not any affect any party's contractual right/obligation before 1 February 2020 and after the Temporary Relief Period.³⁴
30. Party A's defence to any breach of contract (as set out in paragraph 28) will also not affect any court judgment, arbitral award, adjudication determination or settlement made before Party A serves the Temporary Relief Notification.³⁵

Consequences of Contravening a Valid Temporary Relief Notification

31. Any party that contravenes any Temporary Reliefs set out in paragraph 10 after receiving a valid Temporary Relief Notification shall be liable on conviction to a fine not exceeding \$1,000, unless that party had a reasonable excuse in doing so.³⁶
32. Additionally, any proceedings in breach of the Temporary Reliefs will be dismissed upon lodgment of the Temporary Relief Notification with the court/arbitration tribunal.

³² Section 6(5) of the Act

³³ Section 6(6) of the Act

³⁴ Section 6(7)(a) of the Act

³⁵ Section 6(7)(b) of the Act

³⁶ Section 8(1) of the Act

33. Other actions taken after receiving a valid Temporary Relief Notification will also be void, including:³⁷
- 33.1. Appointment of a receiver or manager over any property or undertaking of a person;
 - 33.2. A call on a performance bond or equivalent;
 - 33.3. Forfeiture of a deposit or part of a deposit; and
 - 33.4. Enforcement of any security.³⁸

Contesting the Temporary Relief Notification

34. Party B to the construction contract (or any party to the contract dissatisfied with Party A's Temporary Relief Notification³⁹) can apply for the appointment of an Assessor to determine whether Party A is entitled to the Temporary Reliefs.⁴⁰

A. Application for an Assessor's Determination

35. An application for an assessor's determination must:⁴¹
- 35.1. Comply with the form and manner specified by the Act's regulations;
 - 35.2. Be accompanied by the prescribed fee; and
 - 35.3. Be served on (a) the other parties to the contract; (b) any guarantor or surety for Party A's obligations in the contract; and (c) other prescribed persons.

³⁷ Section 8(4) of the Act

³⁸ Section 8(3) of the Act. An exception applies where the party seeking to enforce is a bona fide purchaser for value without notice of the Temporary Relief Notification.

³⁹ Section 9(1) of the Act.

⁴⁰ Section 13 of the Act

⁴¹ Section 12 of the Act

36. In making a determination, the Assessor can consider various factors^{42,43}
- 36.1. Party A's ability and financial capacity to perform the obligation that is subject of the application, and other prescribed factors; and
 - 36.2. The Assessor must seek to achieve an outcome that is just and equitable in the circumstances of the case.
37. No party may be represented by lawyers in the proceedings with the Assessor, and each party must bear its own costs.⁴⁴

B. Effect of an Assessor's Determination

38. Importantly, the Assessor's determination is non-appealable and binding on all the parties to the application and all parties claiming under or through them.⁴⁵
39. If the Assessor finds that Party A's Temporary Relief Notification is valid, the Assessor may make *further* determinations in order to achieve a just and equitable outcome, including:⁴⁶
- 39.1. Requiring a party to the contract to do anything or pay any sum of money to discharge any contractual obligation; and
 - 39.2. Other further determinations which are not expressly stated in the Act but which achieves a just and equitable outcome.
- (hereinafter referred to as a "**Further Determination**").
40. The Assessor's Further Determination may (with the court's leave) be enforced in the same manner as a judgment or court order.⁴⁷
41. Any party who fails to comply with a Further Determination without reasonable excuse for such non-compliance shall be liable on conviction to a fine not exceeding S\$1,000.⁴⁸

⁴³ Section 13(2) of the Act

⁴⁴ Section 14-15 of the Act

⁴⁵ Section 13(9) of the Act

⁴⁶ Section 13(3) of the Act

⁴⁷ Section 13(7) of the Act.

⁴⁸ Section 13(11) of the Act.

Conclusion

42. Parliament has moved quickly to react to the COVID-19 pandemic that has caused widespread delay to construction projects, due to various movement control measures across the world which has affected manpower availability, often through no fault of the various construction parties. Similarly, supplies of construction material have also been materially affected due to the worldwide supply disruption.
43. In light of the severity of these issues, the Act is timely in providing the far-reaching reliefs to the construction industry and targets the drastic cash-flow issues that the construction industry is likely to face in this COVID-19 pandemic.

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