

COVID-19 (Temporary Measures) Bill & Government Directive to Suspend All Non-Essential Activities at Workplace Premises – How will these impact the local construction industry?

On 1 April 2020, the Ministry of Law (“**MinLaw**”) announced that it will be proposing a new law aimed at protecting individuals and companies who are unable to perform their contractual obligations because of the COVID-19 pandemic (“**new law**”).¹ The COVID-19 (Temporary Measures) Bill was then passed in Parliament on 7 April 2020² and will provide reliefs to contractors against employers’ call(s) on its performance bond, imposition of liquidated damages, and claims for general damages for breach of contract. A copy of the Bill passed in Parliament can be accessed [here at the Singapore Parliament’s website](#).

In explaining the rationale behind the new law,³ MinLaw explained that the COVID-19 pandemic, and associated public health measures imposed by governments around the world, has had unprecedented and unforeseeable social and economic impact. Amongst other consequences, the most immediate impact on the construction industry is the worldwide supply chain disruptions and manpower shortages. In many cases, this has undermined the ability of individuals and businesses to fulfill their contractual obligations, for reasons not within their control.

Subsequently, on 3 April 2020, the Prime Minister’s Office announced the suspension of all non-essential activities at workplace premises to reduce the risk of further local transmission of COVID-19. The Ministry of Trade and Industry (“**MTI**”) then issued guidance on suspension of all non-essential activities at workplace premises and subsequently, the Building and Construction Authority (“**BCA**”) issued an advisory (“**BCA Advisory**”), a copy of which can be accessed [here at BCA’s website](#), requiring all works (including building works) as defined in the Building Control Act to cease effect from 7 April 2020, 0000 hours to 4 May 2020, 2359 hours (both dates inclusive) (“**affected period**”).

These will be explored categorically below.

(A) THE NEW LAW

Contracts Covered

The new law will cover five broad categories of contracts:

- a) Leases or licences for non-residential immovable property (e.g., lease for factory premises);

¹ Ministry of Law, *Temporary Relief for Inability to Perform Contractual Obligations due to Coronavirus Disease 2019 (COVID-19) Situation*, <https://www.mlaw.gov.sg/news/press-releases/temporary-relief-for-inability-to-perform-contractual-obligations-due-to-coronavirus-disease-2019-COVID-19-situation>.

² The Bill was passed in Parliament on 7 April 2020.

³ Ministry of Law, *Temporary Relief for Inability to Perform Contractual Obligations due to Coronavirus Disease 2019 (COVID-19) Situation*, <https://www.mlaw.gov.sg/news/press-releases/temporary-relief-for-inability-to-perform-contractual-obligations-due-to-coronavirus-disease-2019-COVID-19-situation>.

- b) Construction contract or supply contract (e.g., contract for the supply of materials);
- c) Contracts for the provision of goods and services (e.g., venue, catering) for events (e.g., weddings, business meetings);
- d) Certain contracts for goods or services for visitors to Singapore, domestic tourists or outbound tourists, or promotion of tourism (e.g., cruises, hotel accommodation bookings); and
- e) Certain loan facilities granted by a bank or a finance company to SMEs.

Measures Proposed

The new law will prohibit a contracting party from taking the following legal actions against a non-performing party:

- a) Court and insolvency proceedings;
- b) Enforcement of security over immovable property as well as movable property that is used for the purposes of business or trade;
- c) Call on a performance bond given pursuant to a construction contract; and
- d) Termination of leases of non-residential premises.

The measures will apply to contracts that were entered into or renewed **before 25 March 2020**, and cover contractual obligations to be performed **on or after 1 February 2020**.

Once the new law is enacted, these measures will be in place for six (6) months at first instance. Subsequently, it may be extended for up to a year from the passing of the Bill in Parliament. In this regard, the new law will not absolve or remove parties' contractual obligations, but suspend them for a prescribed period ("**relief period**"). Corollary, this means that at the end of the relief period, parties will have to continue fulfilling their contractual obligations.

This update focuses on the impact the new law will have on the local construction industry, the potential impact of the circuit breaker measures introduced by the Government to suspend all non-essential activities at workplace premises on 3 April 2020 and the BCA Advisory.

How Will the Reliefs Work for Construction and Supply Contracts?

In the case of construction and supply contracts entered into or renewed automatically before 25 March 2020, a contractor who is unable to perform an obligation will be relieved from liability for non-performance after 1 February 2020 and before the end of the relief period under the new law, *provided that it can show that such failure was caused to a material extent by COVID-19*.

It should be noted that any right or obligation under the contract that accrues or arises at any time before or after the relief period will not be affected by the new law. Further, any judgment, arbitral award, adjudication determination, compromise or settlement given or made before the service of the notification for relief will also not be affected by the new law.

The following additional reliefs apply to construction and supply contracts. This is illustrated below in the hypothetical scenario concerning two parties, namely, Party A who is a contractor unable to perform an obligation caused to a material extent by COVID-19 and Party B, the other contracting party.

Performance Bond

Party B may not make a call on the performance bond provided by Party A in relation to Party A's inability to perform its contract at any time earlier than seven (7) days before the expiry date or extended expiry date of the performance bond.

Further, Party A may make an application to the issuer of the performance bond to extend the term of the performance bond not less than seven (7) days before the expiry date of the performance bond. At the same time, Party A should serve a notice of application on Party B.

Example 1

Party B engaged Party A to construct a building, to be completed on 31 March 2020. By the terms of the contract, Party A procured a bank to issue a performance bond in favour of Party B.

Party A had placed orders for construction materials from several overseas factories. However, these factories suspended operations in early February 2020 due to the COVID-19 pandemic. As a result, Party A was unable to complete the construction of the building by 31 March 2020.

Party A may serve a notification for relief on Party B. Once served with the notification for relief, B may not make a call on the performance bond at any time before 7 days of the original expiry date of the bond or the extended expiry date of the bond.

Liquidated Damages / General Damages

For the purposes of calculating liquidated damages payable under the contract, Party B has to disregard the period of delay in performance by Party A during the relief period, where the subject inability occurs on or after 1 February 2020 and before the expiry of the prescribed period.

Party A's inability to perform the contract to a material extent which is caused by COVID-19 is a defence to a claim for a breach of contract.

Example 2

Party B engaged Party A to install fittings in Party B's building. The contract provides for Party A to complete the work by 10 March 2020.

On 15 February 2020, Country X closed its borders to curb the spread of COVID-19. Party A's employees who were in Country X were therefore not allowed to return to Singapore. Because of this, Party A did not have sufficient employees to complete the works by 10 March 2020.

Party A is not liable for liquidated or other damages for the period of the delay before the expiry of the prescribed period insofar as the delay was caused to a material extent by the fact that Party A's employees were not allowed to return to Singapore.

Adjudication proceedings under the Building and Construction Industry Security of Payment Act ("SOPA")

One issue which arises is whether developers and main contractors are still exposed to adjudication proceedings or applications by their suppliers and sub-contractors.

One glaring omission from the new law is the lack of provisions governing proceedings under the SOPA. Although the new law specifically deals with the enforcement of a determination by an adjudicator under the SOPA, there is no mention at all of the commencement of new proceedings and/or continuation of existing proceedings under SOPA. This represents a significant loophole which may be taken advantage of by opportunistic contractors / sub-contractors.

Based on the Registrar's Circular No. 4 issued on 5 April 2020⁴ ("**Circular**"), an application under the SOPA is listed as one of the matters which is essential and urgent in Schedule 1 of the Circular which can continue to be heard by way of video conferencing and telephone conferencing.⁵

At the time of preparing this update, we understand that the Authorised Nominating Body, the Singapore Mediation Centre ("**SMC**"), remains operational from 4 April 2020 to 7 May 2020 for purposes of adjudication proceedings.

A potential problem envisaged is the service of payment claims / payment responses. Whilst service by electronic mail is a recognised form of service under the SOPA, what happens then if the office of the company being served is closed during that period of time? Will the timelines prescribed under the SOPA continue running, given that there are no provisions governing such proceedings under the new law? If so, then one can certainly expect a lot of contractors / sub-contractors to be caught out by such timelines, especially if their offices are mandated to be closed and/or their staff are not working during the affected period.

It is certainly troubling that this aspect has not been addressed and we await further clarifications on this issue by MinLaw. In the meantime, players in the construction industry should err on the side of caution and ensure that precautions are taken to comply with timelines.

Notification for Relief Requirements

If Party A intends to seek any of the above reliefs, it must within the period specified in the regulations made under Section 19 of the new law, serve a

notification for relief that contains the prescribed information on:

- a) Party B or other parties to the contract;
- b) Any guarantor or surety for Party A's obligation in the contract; and
- c) Such other person as may be prescribed.

Such notification requirement applies whether or not there is prior demand for performance by Party B.

Upon receiving the notification for relief, Party B cannot take any prohibited action against Party A during the relief period. Proceedings relating to a prohibited action that have already commenced must be stayed. Further, non-compliance in relation to a prohibited action will be an offence.

At the time of this update, MinLaw has yet to announce the exact details of the regulations made under Section 19 pertaining to the period for serving the notification of relief, manner of service of document, the forms to be used, and information or documents to be furnished etc. It is expected that such details will be announced in the coming weeks.

In the meantime, it would be prudent for contractors to ensure that they properly document, amongst other things, the impact of COVID-19 event on their ability and financial capacity to fulfil their obligations in question, the delays caused to their work and whether the delays are critical and additional costs due to COVID-19. These will include any claims made by sub-contractors and suppliers. Companies may also wish to consider putting in place, where possible, a protocol and a dedicated team to deal with the preparation of and/or responding to notifications made under the new law.

⁴ Supreme Court of Singapore, Registrar' Circular No. 4 of 2020, [https://www.supremecourt.gov.sg/docs/default-source/module-document/registrar/circular/rc-4-2020---updates-on-measures-relating-to-covid-19-\(coronavirus-disease-2019\)-from-7-april-to-4-may-2020.pdf](https://www.supremecourt.gov.sg/docs/default-source/module-document/registrar/circular/rc-4-2020---updates-on-measures-relating-to-covid-19-(coronavirus-disease-2019)-from-7-april-to-4-may-2020.pdf) (accessed 6 April 2020).

⁵ Supreme Court of Singapore, Registrar' Circular No. 3 of 2020, <https://www.supremecourt.gov.sg/docs/default-source/module-document/registrar/circular/rc-3-2020---information-on-measures-and-other-matters-relating-to-covid-19-for-court-users-and-visitors-to-the-supreme-court.pdf> (accessed 6 April 2020).

Dispute Resolution before a Body of Assessors

In the event that both parties are in dispute, they may raise the dispute for an assessor's determination. When making a determination, the assessor will decide if the inability to perform contractual obligations was due to COVID-19. The assessor will also take into account of Party A's financial capacity to perform the contract, and grant relief that is just and equitable, in the circumstances of the case.

The process will be affordable, fast, and simple. Parties will not be allowed to be represented by lawyers, and there will be no costs orders. The assessor's decision will be final and is not appealable.

(B) BCA ADVISORY FOR THE CONSTRUCTION INDUSTRY

The BCA has clarified that all work, including all building works as defined in the Building Control Act, are required to cease with effect from 7 April 2020, 0000 hours to 4 May 2020, 2359 hours (both dates inclusive), or as extended if necessary.

The work suspension applies to all stakeholders of the construction industry, without exception. These would include developers, builders, qualified persons, site supervisors and construction material suppliers. Penalties will be imposed for failure to comply with such suspension, which include a fine of up to S\$10,000 or imprisonment of up to six (6) months or both. In addition, penalties such temporary suspension of operations may also be imposed on those who fail to comply.

The BCA has directed that all necessary works (as set out at Annex A of the BCA Advisory) must be carried out immediately to ensure the structural safety and integrity of ongoing building works, in order to ensure that building works may be suspended safely and remain safe for the full duration when the work suspension is in force. The

list of what constitutes necessary works include concreting the last pile, installation of temporary supports to enhance the stability of structural precast components and works to protect excavation surface. Such works are to be completed before the work suspension takes effect, that is, before 7 April 2020, 0000 hours.

Where such works are unable to be completed, a request for extension of time can be submitted to MTI at <https://covid.gobusiness.gov.sg>. The essential information required are as follows:

- a) The outstanding necessary works that cannot be completed when the work suspension comes into force;
- b) Reasons for failure to complete the works before the work suspension comes into force; and
- c) The amount of time required for completion of outstanding works.

Essential services, however, can continue during the period of time the work suspension is in force. The full list of what constitutes essential services is set out at Annex B of the BCA Advisory. Examples of such services include provision and maintenance of security at the project site and the provision of vector control. For workers who stay on site, safe distancing measures continue to apply and employers are deemed to be responsible for the daily needs of these workers.

Concluding Remarks

Amidst the continuing uncertainties caused by the COVID-19 pandemic, the new law will be a welcome move by the Government to provide the much-needed temporary relief for many contractors who may be facing cash flow issues during this critical period. Anecdotally, we understand that contractors are experiencing shortage of workers and materials, resulting in additional time and costs implications to their projects.

The exact details of the notification for relief requirements and the dispute resolution mechanism before an assessor have yet to be announced. It is expected that these details will be announced in the coming weeks.

Contractors seeking the protection under the new law should nonetheless note that the prescribed period for relief under the new law is six (6) months or up to one (1) year (in the event the measures are extended). Thereafter, parties' contractual rights shall be in full force and effect.

In terms of the mandatory work suspension, all players in the construction industry have to

continue to be mindful to observe safe distancing measures and to ensure the requisite works are completed before the work suspension period commences.

Readers may also wish to refer to our earlier update [here](#) where we examined contractors' right to invoke the force majeure clause and entitlement to claim for additional time and money with reference to the SIA Conditions and Building Contract and Public Sector Standard Conditions of Contract for Construction Works.⁶

This update is accurate as of 7 April 2020.

If you would like information on this or any other area of law, you may wish to contact the partner at WongPartnership whom you normally work with or any of the following partners:



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⁶ WongPartnership LLP, *The Coronavirus (COVID-19) Outbreak - A contractor's guide to force majeure and its entitlement to additional time and money*, <https://www.wongpartnership.com/insights/detail/the-coronavirus-COVID-19-outbreak-a-contractor-s-guide-to-force-majeure-and-its-entitlement-to-additional-time-and-money> (accessed 1 Apr 2020).

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