



## **AN UPDATE ON THE MEASURES BEING TAKEN TO REDUCE THE BUSINESS IMPACT IN SINGAPORE, AND AN OUTLINE OF THE WAY IN WHICH THE COURTS WILL MEET THE CHALLENGE IT POSES**

This briefing looks at the measures being taken by the Singapore government to support businesses and meet the challenges posed by Covid-19, with the introduction of the Covid-19 (Temporary Measures) Act 2020 (the Act)<sup>1</sup>, and the Registrar's Circular No, 4 of 2020: Updates on Measures Relating to Covid-19<sup>2</sup>, focussing on:

1 <https://sso.agc.gov.sg/Acts-Supp/14-2020/Published/20200407?DocDate=20200407>

2 [https://www.sicc.gov.sg/docs/default-source/modules-document/news-and-article/registrars-circular-no-4---updates-on-measures-relating-to-covid-19-\(coronavirus-disease-2019\)-from-7-april-2020---4-may-2020\\_d1303913-62fb-4368-a385-2c93c4e25f2a.pdf](https://www.sicc.gov.sg/docs/default-source/modules-document/news-and-article/registrars-circular-no-4---updates-on-measures-relating-to-covid-19-(coronavirus-disease-2019)-from-7-april-2020---4-may-2020_d1303913-62fb-4368-a385-2c93c4e25f2a.pdf)

- **The court restrictions on litigating in the Singapore courts from 7 April to 4 May; and**
- **The temporary relief from liability caused by an inability to perform contracts.**

## Court restrictions during the pandemic

### Hearings:

In recognition of the impact Covid-19 will have on the courts' ability to hear cases, and in accordance with the Registrar's Circular No. 4 of 2020: Updates on Measures Relating to Covid-19 (the Circular) hearings scheduled for 7 April to 4 May (the Relevant Period) will be postponed unless the matter is assessed to be essential and urgent, in which case the hearing will proceed remotely via video conference links, unless directed by the court.

The matters which may be considered essential and urgent are set out in Schedule 1 to the Circular, and include applications:

- for urgent injunctions or search orders
- to set aside an injunction or search order
- for the arrest or release of a vessel
- for the discharge of dangerous or perishable cargo
- for the judicial sale of a vessel, where the safety of the crew is a concern
- under the Building and Construction Industry Security of Payment Act
- for extensions of time or variation of court orders relating to insolvency and restructuring matters
- for stay of execution of a civil judgment

The Circular does provide for judicial discretion to hold hearings not covered under Schedule 1 where for example, the matter is time sensitive, but the Circular expressly states that convenience of the parties is not a factor to be considered.

The Circular provides:

*"Any request for the urgent hearing of any matter which does not fall within Schedule 1 must be accompanied by*

*reasons explaining why the matter is essential and urgent. In making such a request, parties should note the following:*

- *In determining whether a matter is essential and urgent, the Court will have regard to, among other things, whether the determination of the outcome of the matter is time sensitive, and whether there is any legal requirement for the matter to be heard within any timeframe;*
- *A matter is not essential and urgent merely because it is convenient for the parties to have the matter heard early or as scheduled; and*
- *Parties should not make the request if the preparation, presentation and conduct of the hearing will entail parties breaching safe distancing measures (e.g. if lawyers will have to come into close physical proximity with one another, their staff or their clients). Parties will be required to satisfy the Court that measures are in place to avoid this."*

### Filing documents with the court:

The Circular provides that parties are not permitted to visit the court during the Relevant Period, and provides that documents should instead be submitted electronically, and encourage the use of the eLitigation filing system.

### Time limits:

The Circular provides that where the hearing is rescheduled parties should seek a time extension for relevant stages; and

For all other stages timelines will continue to apply, but the parties are at liberty to seek a time extension if needed.

HFW/AsiaLegal has already obtained a specific time-limited exemption for our lawyers go into the office for the purposes of working on an application for an arrest of cargo.

## The COVID-19 (Temporary measures) act 2020 (the Act)

- **In Summary:** The Act was passed by the Singapore Parliament on 7 April 2020 and commenced on the same day.

- The Act is intended to recognise the burden placed on corporates who encounter difficulty meeting their contractual obligations as a result of Covid-19, and will:
  - prevent parties from issuing proceedings for certain claims for the next 6 to 12 months;
  - limit certain bankruptcy and insolvency proceedings;
  - give flexibility to formal corporate meetings;
  - enable court hearings to be heard remotely (as described above)
- The Act provides for the following key temporary measures:
- Relief will apply only to certain defined *scheduled* contracts entered into on or before 24 March 2020, where the obligation is to be performed on or after 1 February 2020.
- Temporary relief from the inability to perform contractual obligations under certain contracts, if that inability is *materially* caused by a COVID -19 event (our emphasis).
- changes to bankruptcy and insolvency laws to increase the debt thresholds for winding up and bankruptcy, and give a safety net to allow businesses to continue to trade while *technically* insolvent.
- Allow the conduct of certain meetings, such as AGMs, to continue using alternative arrangements to avoid the need for personal attendance.
- The key consideration is what is meant by "*material*". No guidance is given and so it is expected that consideration will have to be had to general case law on exceptions and or force majeure or similar clauses that provide for "material" breach or "materiality". From comments made by the Minister of Law in Parliament it may be interpreted that the intention is to confine the protection to where because of the impact of Covid-19 it would not be 'fair' to hold one party to their obligations without relief.
- The freeze on arbitral proceedings only applies to the local Arbitration Act. International commercial arbitrations, which are governed



by the International Arbitration Act, do not appear to be covered by the Act and therefore can still be initiated or continued.

- To claim relief, a contracting party must give notice to the other party, who is then prohibited from certain actions including: commencing or continuing legal action, eviction due to non-payment of rent, or repossession of goods used for business.

### Assessors

The Act enables the Ministry of Law to appoint a panel of independent assessors to determine any disputes relating to whether the Act applies or relief should be granted and if so in what manner.

The assessor will determine if the inability to perform contractual obligations was due to COVID-19, or in respect of event or tourism contracts, whether it is reasonable for any deposit or part of a deposit to be forfeited.

It is not yet known what qualifications assessors will have and that will follow in further guidelines or legislation, but it is anticipated that they will have legal and or adjudication experience in the relevant sectors.

The assessor's ruling will be binding on the parties and will not be

appealable and failing to comply with an assessor's determination is a criminal offence. Parties appearing before assessors have no right to legal representation and will each bear their own costs. These rules highlight the need for speed and efficiency, perhaps at the expense of due process, but which is a reflection of a scheme introduced as part of emergency measures.

### To which contracts does it apply?

- Relief only applies to certain *scheduled* contracts entered into before 24 March 2020.
- Loan or finance contracts provided to small and medium enterprises (SME) where the facility is secured by fixed commercial or industrial assets located in Singapore, including plant or machinery, which are used for business purposes providing:
  - the borrower carries on business in Singapore;
  - At least 30 per cent of the SME's shares or interests are held by citizens or permanent residents of Singapore; and
  - the turnover of the group to which it belongs is not more than \$100 million, in the latest financial year.

- Construction and supply contracts.

- Hire-purchase agreements for commercial vehicles, plant, machinery or fixed assets located in Singapore, which are used for business purposes Contracts or services relating to "events, including the provision of a venue, accommodation, amenities, transport, entertainment, catering, or other goods or services".
- Contracts or services relating to "tourism", defined to mean contracts for:
  - the international carriage of passengers by sea or land;
  - the provision of transport, short-term accommodation, entertainment, dining, catering, tours or other tourism-related goods or services for visitors to Singapore, domestic tourists or outbound tourists; or
  - the promotion of tourism in Singapore or the distribution for the purposes of trade or retail of products related to such tourism.

### The nature of the relief:

- The object of the Act is to put a freeze on taking legal action for

# “Parties appearing before assessors have no right to legal representation and will each bear their own costs.”

breach of the relevant contracts for the next 6 and possibly up to 12 months. The most important thing to note is that the measures are only temporary and will cease either when the Act expires in one year, or if the Act is repealed earlier.

- The Act does not affect the underlying contractual obligations; it only freezes the rights to enforce those obligations, for the prescribed period of time.
- The Act does not operate automatically. Those wishing to seek its protection must serve a notice to invoke the temporary relief. Parties should note that assessors are required to take into account “*the ability and financial capacity*” of a party to perform their obligations. Applicants are likely to be treated differently according to their financial standing, even if they are within the same supply chain.
- If a notice for relief is served then the counterparty is prohibited from:
  - Commencing or continuing court or arbitration proceedings against the party, their guarantor, or surety.
  - Issuing bankruptcy or insolvency action against the party, their guarantor, or surety.

- Enforcing security over any property used for the purpose of trade, business, or profession.
- Repossessing goods under a leasing, hire-purchase or retention of title agreement.
- Terminating a property lease or licence for the non-payment of rent.
- Enforcement of a court judgment, domestic arbitral award, or adjudication under the Security of Payment Act.[13]

## The impact on specific industries:

**Construction Contracts:** Construction contracts or supply contracts, as defined by reference to section 2 of the Building and Construction Industry Security of Payment Act (“Security of Payment Act”).

- Generally the Act does not affect the underlying contractual obligations; it only freezes the rights to enforce those obligations, for a period of time. There are two exceptions of liquidated damages for construction and supply and non-refundable deposits for event and tourism-related contracts.
- Specific relief is provided to construction contracts including a bar on calls on performance bonds arising as a result of a

COVID-19 event until 7 days before the date of expiry of the relevant bond. A contractor who is concerned that this 7 day period is approaching can make an application to the issuer of the bond for an extension, in which case the Act intervenes to automatically extend the bond to a date 7 days after the period of temporary relief.

- In addition, the Act provides that liquidated or other delay damages are not payable during the period of temporary relief and, indeed, regardless of the contractual allocation of responsibility, where a party becomes unable to perform a contractual obligation and such inability was caused “to a material extent” by a COVID-19 event, the Act provides a defence to any claim for breach of contract.
- The underlying construction contract will deal with a situation such as this where the works are effectively stopped by Government Order and it is important for contractors and suppliers who have been affected by the cessation order to look at their rights under the applicable law and contract in their entirety before deciding how to proceed.

- It may well be that contractual remedies, such as force majeure or applicable contractual clauses given entitlement to additional time and money and so may be more beneficial than the temporary relief provided by the Act.

### Shipbuilding

- As noted above, under section 2 of the Security of Payment Act, it is only construction or supply contracts to that are covered.
- Temporary relief or protection under the Act will not extend to parties to contracts in the marine or shipping sector (e.g. shipbuilding contracts, charterparties, supply of commodities, etc.) as yet, since none of these fall under or appear to be covered under the Act. That said, suppliers involved in the sale and supply of construction materials may find themselves affected if they are involved in trades with construction companies in Singapore.

### Cruise Ships

- Cruise ship companies may have to return deposits if served with certificates of relief. They may also be prevented from charging cancellation fees. The definition of “*tourism-related*” contracts includes “*a contract for the provision of transport... for visitors to Singapore, domestic tourists or outbound tourists*”.
- At present relief has not been extended to include types of contracts such as charterparties or commodity contracts in the marine and shipping sector. Parties remain able to seek arrest in Singapore, but will be required to evidence the claim and urgency.

### Insolvency

- The Act refers to the Insolvency, Restructuring and Dissolution Act (IRDA). The IRDA is not yet in force, but it is anticipated that the IRDA may come into force sometime this year when the Act may still have effect.
- The Act will provide temporary relief to individuals and businesses

which are badly affected by the COVID-19 pandemic. The Act is aimed at providing companies with an opportunity to work out their imminent current difficulties.

- The Act provides temporary relief for businesses, firms and individuals in financial distress, by making the following modifications to Singapore’s Bankruptcy and Insolvency laws:
  - The debt threshold for personal bankruptcy is increased from \$15,000 to \$60,000, and under a debt repayment scheme, and the avoidance of bankruptcy from \$100,000 to \$250,000;
  - The monetary debt threshold for corporate insolvency is raised from \$10,000 to \$100,000; and the period for responding to demands from creditors before there is a presumption of insolvency is increased from 21 days to 6 months.
- Company directors and officers will be temporarily relieved from their obligations to prevent their companies trading while insolvent, but directors will remain criminally liable if debts are fraudulently incurred.

### In conclusion

The Act will offer protection to parties seeking to delay payment under the terms of their contracts, but will equally prevent parties from enforcing those payment terms—we therefore anticipate their being winners and losers under the Act, and recommend all parties to review their contracts so as to understand which will apply and to then ensure they are in the best possible position if they need to use the Act or protect themselves from a party seeking to invoke it against them.

Parties should review their contracts to determine whether:

- the date of the contract falls within the prescribed period; and
- they contain force majeure clauses, or are otherwise governed by the Frustrated Contracts Act 1959 (as amended), as these may

negate the protection offered under the Act.

Consideration should also be given to carrying out due diligence on current and new counterparties, especially where credit terms are being agreed as the Act allows parties to continue trading despite being technically insolvent.

For further COVID-19 related resources, please see our dedicated COVID-19 hub<sup>3</sup>.

For further information, please contact:



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