COVID-19: GOVERNANCE: NEW LEGISLATION PROVIDES TEMPORARY RELIEF FROM PERFORMANCE FOR SELECTED SINGAPORE-RELATED CONTRACTS (SINGAPORE)

08 April 2020 | Singapore
Legal Briefings – By **Alastair Henderson, Tomas Furlong, Gitta Satryani, Gerald Leong and Reshma Nair**

On 7 April 2020, the Singapore Parliament passed the COVID-19 (Temporary Measures) Bill (the **COVID Act**), which, amongst others, offers temporary reprieve to qualifying parties or qualifying contracts: found here.

The COVID Act is a bold move by the Singapore government to pre-emptively manage the foreseeable increase in legal proceedings for enforcement of contractual rights. The Act creates an additional option of relief for parties who have difficulty performing their obligations in these challenging times i.e. in addition to standard arguments for relief such as force majeure or frustration.

The COVID Act covers specified contracts which (1) involve a Singapore business, at least 30% of which is owned by a Singaporean national or permanent resident, (2) require performance to be in Singapore, or (3) involve Singapore properties or events. These contracts are referred to in the COVID Act as "Scheduled Contracts": their scope and how the COVID Act impacts those contracts are discussed in Parts 1 and 2 **below**, and also summarised in the **accompanying flowchart**.

Nevertheless, as the legislation only provides temporary and limited relief, parties to Scheduled Contracts should carefully weigh the relative benefits of this option and how it might complement other avenues for relief under the contract and applicable law.

It therefore remains important for contracting parties to audit the scope and extent of their contracts concerning force majeure, and how such provisions may be effectively invoked either by or against them (or where such provisions are not available, what other "defences" may be relied on). This is discussed further in Part 3.

1. SCHEDULED CONTRACTS: WHICH CONTRACTS QUALIFY FOR RELIEF UNDER THE COVID ACT?

The relief provided under the COVID Act applies to, for the moment, eight categories of contracts, all of which must have been entered into prior to 25 March 2020.

The first two categories cover loan facilities extended (1) by a Singapore-licensed bank (2) to a Singaporean enterprise, that is a body corporate or unincorporate that carries on business in Singapore, where not less than 30% of its ownership interest is held by a Singapore citizen or permanent resident or both, and (3) secured by Singapore-based assets.

The next three categories are construction-related contracts within the meaning prescribed in the Building and Construction Industry Security of Payment Act (**BCISP Act**), namely construction contracts, supply contracts and performance bonds.

Although not expressly stated in the COVID Act, the reference to definitions found in the BCISP Act suggests that the COVID Act is likely intended to cover only contracts relating to projects in Singapore, as the BCISP Act does not apply to contracts dealing with construction work, or the supply of goods or services, outside Singapore (Section 4(2)(b), BCISP Act). This will also be consistent with the limitations put on the types of loan facilities that qualify for protection.

The final three categories cover event contracts, tourism-related contracts, and leases or licences of non-residential properties.

For the avoidance of doubt, there is **no cap** on the value of the contracts that are subject to the COVID Act.

The legislation appears to be targeted at contracts that require performance to be in Singapore (even when such contracts are governed by foreign law) – in particular, the COVID Act is not intended to apply or extend to contracts which have no nexus to Singapore other than the parties' selection of Singapore law as the governing law. This is consistent with the type of legal and enforcement proceedings which COVID Act seeks to suspend and provide relief from (see Part 2 below).

In circumstances where the COVID Act has no application, contracting parties must look to their contracts or applicable laws to determine if they are entitled to any relief from performance on account of the COVID-19 pandemic. This is discussed further in Part 3 below.

2. SCOPE OF THE COVID ACT: WHAT RELIEF DOES THE LEGISLATION OFFER TO SCHEDULED CONTRACTS?

A party to a Scheduled Contract can seek relief from having to perform its contractual obligation if:

> The party is unable to perform an obligation that is due to be performed on or after 1 February 2020;
>
> The inability is "*to a material extent*" caused by:

The COVID-19 pandemic; or

Compliance with any legal regulation[1] (whether of Singapore or otherwise) that is made in connection with COVID-19.

While whether the above is the material cause of a party's inability to perform its obligations is fact specific, the government has clarified that it need not be the sole or dominant cause of the inability.[2]

To obtain relief, a party must serve a **notification for relief** on the other contracting party, as well as any guarantor of the non-performing party. The non-performing party is expected to serve the notification within a certain time limit, which has yet to be announced.

Types of relief available

If the non-performing party qualifies for relief, upon serving the necessary notification, the non-performing party and its guarantor become entitled to a **moratorium** on the commencement or continuation of the following types of legal proceedings (among others):

An action in the Singapore courts;

A Singapore-seated domestic arbitration[3] (notably, Singapore-seated international arbitrations[4] are excluded, see further comments below);

Enforcement of security;

Insolvency proceedings; and

Enforcement of a judgment or award against the non-performing party.

In this regard, existing legal proceedings are stayed once a party lodges a copy of the notification with the court or arbitral tribunal.

While the COVID Act seeks to provide relief from actions in Singapore courts, it does not limit the operation of the doctrine of frustration and any force majeure clause in a contract, as is expressly noted in the Act. Therefore, the non-performing party retains the option of seeking relief through these avenues (see also Part 3 below).

We understand that relief from the commencement and continuation of **international arbitrations** have been deliberately excluded from the COVID Act.[5] Such arbitrations include:

- Contracts involving at least one party that has its place of business outside Singapore, the contract is not governed by Singapore law, but the seat of arbitration is Singapore;
- Contracts involving at least one party that has its place of business outside Singapore, the contract is governed by Singapore law, and the seat of arbitration is Singapore;
- Contracts involving all Singapore-based parties, but a substantial part of the contractual obligations is to be performed outside Singapore, even if the contract is governed by Singapore law and the seat of arbitration is Singapore.

The moratorium will last until (whichever is earlier):

- The expiry of the **prescribed period** (which is presently fixed at six months, but can be extended by the Singapore government);
- The withdrawal of the non-performing party's notification for relief; or
- An assessor determines that the non-performing party does not qualify for relief under the COVID Act (see below on resolution of disputes before a panel of assessors).

There are **additional reliefs** for **construction** and **supply contracts relating to construction**:

The non-performing party has a substantive defence to any breach of contract claim in respect of the prescribed period;

The counterparty cannot call on a performance bond during the prescribed period; and

The period between 1 February 2020 and the expiry of the prescribed period shall not be taken into account for calculation of liquidated damages.

Panel of assessors to resolve disputes relating to COVID Act

If there is a dispute as to whether a party is entitled to relief under the COVID Act, any party to the contract can submit the dispute to a newly-formed panel of assessors. An assessor will be assigned by the government to determine each dispute. The panel of assessors will comprise lawyers and other professionals, such as accountants.

Unlike a court or tribunal whose role is to determine the disputants' legal rights, the assessor will seek to achieve a just and equitable outcome, taking into account the ability and financial capacity of the non-performing party.

Parties cannot be represented by practising lawyers, and no costs orders will be made. In addition, the assessor's determination cannot be appealed. However, the government has clarified that each determination must be in accordance with natural justice, failing which, it can be subject to judicial review.[6]

In effect, once a party serves a relief notification, the COVID Act creates a standalone dispute resolution mechanism that supersedes any choice of forum by the parties for the duration of the prescribed period. If the other party disagrees that the COVID Act applies and seeks to commence any legal proceedings that is covered by the moratorium, it must file a challenge before an assessor, whose decision cannot be appealed.

3. WHAT OTHER PROTECTIVE STEPS SHOULD CONTRACTING PARTIES TAKE DURING THE COVID-19 OUTBREAK?

A party that does not qualify for relief under the COVID Act would have to seek recourse under its applicable contractual or legal rights, which typically are the force majeure provisions (if any) and the doctrine of frustration, respectively.

Parties to Scheduled Contracts now have a third, and distinct, option of seeking relief under the COVID Act. However, with the exception of construction and supply contracts, the COVID Act only provides a temporary procedural "pause button" for the party that is unable to perform. It does not create a substantive defence to liability and legal proceedings for non-performance can continue once the prescribed period ends. Therefore, it is still advisable for parties to Scheduled Contracts to review other available contractual and legal defences.

Parties should audit their contracts to determine if there are force majeure provisions. Depending on how the provision defines force majeure and its consequence, the non-performing party may have a substantive defence for its failure to perform. A party seeking to declare force majeure must be sure to follow the required notice provisions set out in the contract. It should also maintain an evidence/audit trail of:

- Evidence that the situation qualifies as force majeure;
- Efforts by the non-performing party to mitigate the impact of force majeure; and
- The continuing impact of the situation showing that force majeure conditions persist.

A party that receives a force majeure notice should carefully check that it complies with the contract. If the receiving party believes there are deficiencies in the notice, it should state so or expressly reserve its rights so that it is not later taken to have waived its right to challenge the invocation of force majeure.

Similarly, where a non-performing party seeks to rely on the doctrine of frustration, it should confirm that the doctrine of frustration is available under the governing law of the contract. As a matter of common law, the doctrine operates to terminate a contract automatically when a subsequent event occurs, which is (1) unexpected; (2) beyond the control of the parties; and (3) makes performance impossible, or renders the relevant obligations radically different from those contemplated by the parties at the time of contracting.

If you have any questions, or would like to know how this might affect your business, please feel free to reach out to our key contacts.

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1. The COVID Act broadly provides relief to those affected by the operation of or compliance with any law, order or direction of Singapore, any other country or government, and of any statutory body or public authority of any country, so long as that law, order or direction was made by reason of or in connection with the COVID-19 pandemic.

2. Speech by Minister of Law on the Second Reading of the COVID Act, 7 April 2020.

3. i.e. a Singapore seated arbitration involving Singapore based parties, subject to Singapore's Arbitration Act.

4. i.e. as defined in Singapore's International Arbitration Act.

5. Speech by Minister of Law on the Second Reading of the COVID Act, 7 April 2020.

6. Speech by Minister of Law on the Second Reading of the COVID Act, 7 April 2020.

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.

ALASTAIR HENDERSON
MANAGING PARTNER, SOUTHEAST ASIA, SINGAPORE
+65 68688058
Alastair.Henderson@hsf.com

TOMAS FURLONG
PARTNER, SINGAPORE
+65 6868 8085
Tomas.Furlong@hsf.com

GITTA SATRYANI
PARTNER, SINGAPORE
+65 68688067
Gitta.Satryani@hsf.com

GERALD LEONG
ASSOCIATE, SINGAPORE
+65 6868 8015
gerald.leong@hsf.com

RESHMA NAIR
ASSOCIATE,
SINGAPORE
+65 6868 8002
reshma.nair@hsf.com

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