

CORONAVIRUS & THE CONSTRUCTION INDUSTRY: BILL TO GRANT TEMPORARY RELIEF FOR INABILITY TO PERFORM CONTRACTUAL OBLIGATIONS

On 1 April 2020, the Ministry of Law in Singapore announced the introduction of the COVID-19 (Temporary Measures) Bill (the "**Bill**"; when passed, the "**Act**"), a piece of legislation designed to provide temporary relief to businesses and individuals who are unable to perform contracts because of the Coronavirus pandemic.

A draft copy of the Bill was published on 3 April 2020 (available [here](#)) and the Bill is likely to be passed in Parliament in a single seating on 7 April 2020. In this briefing, we give a brief overview of the key features of the Bill and consider how it may assist or affect parties in the construction industry. (For a broader overview of issues faced by the construction industry in light of the Coronavirus, please refer to our previous briefing, [Coronavirus: Issues for the Construction Industry](#).)

1. OVERVIEW OF THE BILL

The economic impact of the Coronavirus has been severe, disrupting supply chains and causing manpower shortages. This has resulted in the inability of parties to fulfil contractual obligations. The Bill is intended to complement measures announced in the Resilience Budget under which the Singapore Government has set aside S\$48.4 billion to tackle the economic and social impact of the Coronavirus. The new Bill seeks, through its measures, to provide temporary cash flow relief for businesses and to reduce the number of individuals and companies at risk of bankruptcy and insolvency respectively.

2. CONTRACTUAL OBLIGATIONS COVERED UNDER THE BILL

The Bill covers contractual obligations to be performed on or after 1 February 2020 for contracts entered into or renewed before 25 March 2020. This should mean that (subject to the terms of the relevant contract(s)) parties remain

Key issues

- Legislation will provide temporary relief for inability to fulfil contractual obligations due to the Coronavirus
- The Bill covers contractual obligations to be performed on or after 1 February 2020 for contracts entered into or renewed before 25 March 2020 and the prescribed relief period will last for six months in the first instance
- Moratorium on calls on a performance bond given pursuant to a construction contract or supply contract until 7 days before the expiry or extended date
- Statutory and contractual limitation periods extended upon service of a notification for relief
- Construction companies will not be liable for liquidated damages or delays arising from the Coronavirus
- Monetary threshold for insolvency for companies will be increased from S\$10,000 to S\$100,000 and the statutory period to respond to demands from creditors will be lengthened to 6 months

liable for, and can pursue claims for, defective or non-performance of contractual obligations that fell to be performed before 1 February 2020, and/or contracts entered into or renewed after 25 March 2020.

In any event, the measures will be in place for six months from the commencement of the Act at first instance and may be extended for up to a year (the "**prescribed relief period**"). In other words, relief provided under the Bill is temporary, though it will have both a retrospective and prospective effect.

Construction contracts, supply contracts (including for the supply of materials), contracts for the provision of goods and services and leases or licenses for non-residential (including commercial and industrial) immovable property are covered under the Bill.

However, the precise scope of "construction contract" under the Bill remains to be seen, in particular with regards to whether it could conceivably apply to cross-border projects governed by Singapore law. This is because the Bill defines "construction contract" as a contract under which a party undertakes to carry out construction work for, or supply services, to one or more other parties (by reference to section 2 of the Building and Construction Industry Security of Payment Act (the "**SOP Act**")), and "construction work" and "services" (as defined in section 3 of the SOP Act) are not confined to work or services performed in Singapore. However, one may argue that the Act is not intended to apply extra-territorially and seek to rely on Section 4 of the SOP Act, which excludes the application of the SOP Act from construction work carried out outside Singapore.

A non-performing party wishing to rely on the Bill for temporary relief must serve a notification for relief on: (a) its counterparty, (b) any guarantor or surety for his obligation; and (c) such other person as future regulations may prescribe (section 19 of the Bill provides that further regulations may be passed to give effect to the Bill). The notification requirements under the Bill are not expected to be onerous, with the Senior Minister of State for Law suggesting that a text message stating an inability to make a contractual payment "due to the COVID-19 situation" can suffice.

3. LEGAL EFFECT OF THE BILL ON THE CONSTRUCTION INDUSTRY

Under section 5 and 6 of the Bill, a contracting party is prohibited from taking certain actions against a non-performing party. Specifically, no action may be taken to enforce security over immovable property used for the purposes of business or trade, call on a performance bond given pursuant to a construction contract, terminate a lease of commercial property or initiate or continue court proceedings, insolvency proceedings and domestic arbitral proceedings under the Arbitration Act. Any party in breach of the moratorium on proceedings may be liable to pay a fine.

While the Bill does not prohibit the commencement or continuation of SOP adjudications, the enforcement of such adjudication decisions is prohibited. The Bill also does not prohibit arbitrations under the International Arbitration Act or mediations.

Section 6 of the Bill provides for moratorium on calls on a performance bond given pursuant to a construction contract or supply contract until 7 days or less before the date of the expiry of the bond or any extension of that date. Where

the defaulting party applies to the issuer and serves notice of the application on the other party to the contract, the term of the performance bond is automatically extended for a period of (a) 7 days after the prescribed relief period, or (b) such other date as agreed between the contracting party, non-performing party and the issuer.

Upon service of a notification for relief, the Bill will extend both statutory and contractual limitation periods for a time ending at the earliest of: (a) the expiry of the prescribed relief period, (b) withdrawal of the notification for relief by the non-performing party; or (c) upon application, the determination of a dispute by an Assessor (discussed further below). Additionally, section 6(5) and 6(6) of the Bill provide that construction companies will not be liable for liquidated damages or delays arising from the Coronavirus. We expect the burden of proof will nonetheless remain on the party in delay, in this case to prove that its delay is due to the Coronavirus.

For construction and supply contracts, the relevant threshold for relief is that non-performance is caused, to a material extent, by the Coronavirus (section 5(1)(b) of the Bill). Should any dispute arise from the application of the Act, parties may lodge such dispute on a website to be set up and Assessors will be appointed by the Ministry of Law to resolve these. Parties can expect verdicts within five days. However, parties may not be represented by lawyers, nor will they be able to appeal the decision taken. There will also be no costs orders. That said, given the novelty of the Act and depending on the significance of the sums involved, parties may nonetheless choose to seek legal advice on the issues at stake.

With leave of court, the Assessor's determination can be enforced in the same manner as a court judgment or order, and judgment can be entered in terms of a determination. Determinations are binding on all parties to the application and all parties claiming under or through them. It is thus clear that the Assessor's determinations will carry significant weight, even beyond the contracting parties.

4. PROTECTION AGAINST INSOLVENCY

Companies (including construction companies) are also protected from insolvency under the Bill. The monetary threshold for insolvency for businesses will be increased from S\$10,000 to S\$100,000 and the statutory period to respond to demands from creditors will also be lengthened to 6 months (section 22(1) of the Bill). Directors are temporarily relieved from their obligations to prevent their companies trading while insolvent if the debts are incurred in the company's ordinary course of business. Directors should note however, that they remain criminally liable for debts incurred fraudulently.

5. IMPLICATIONS FOR CROSS-BORDER CONTRACTS

Companies protected under the Act may seek to avoid contractual payments to protect cashflow in the coming months, notwithstanding the presence of a force majeure clause (which we have commented on in our separate briefing, [Coronavirus and force majeure](#)). This will inevitably have a knock-on impact on contracts even where counterparties are not protected under the Act. Given this, the Coronavirus may cause parties to reconsider how risks are allocated between them.

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