

CORONAVIRUS: THE "LEGAL CIRCUIT BREAKER" – LEGISLATION IN SINGAPORE

The COVID-19 (Temporary Measures) Act 2020 (the Act), passed on 7 April 2020, provides temporary and targeted measures which are designed to mitigate the economic shock which COVID-19 has caused to firms and businesses in Singapore. Characterised as a "legal circuit breaker", the Act is a novel and bold piece of legislation which provides a wide-ranging array of measures to address the needs of businesses suffering economic hardship caused by COVID-19.

In this briefing, we examine and consider the implications of some of the key measures implemented by the Act.

TEMPORARY RELIEF FOR INABILITY TO PERFORM CONTRACTS

QUALIFYING CRITERIA

The Act provides temporary relief for parties which are unable to perform obligations arising from the following five broad categories of contracts:

- certain types of loan facilities
- construction-related contracts (including performance bonds)
- leases and licences of non-residential property
- event and tourism-related contracts
- certain types of hire-purchase or conditional sales agreements,

(Scheduled Contracts).

Only parties to Scheduled Contracts entered into before 25 March 2020 which are unable to perform contractual obligations due to be performed on or after 1 February 2020 qualify for the relief.

Furthermore, the reason for non-performance must, to a material extent, be caused by the COVID-19 pandemic; or the operation of, or compliance with any law or direction which is made by reason of, or in connection with, COVID-19. This may include laws, orders and directions of other countries and their governments and public authorities – not just Singapore.

Key measures discussed in this briefing

- Temporary relief for parties unable to perform obligations arising from certain categories of contracts (including certain qualifying loan agreements and construction related contracts) as a result of COVID-19.
- These temporary measures prohibit certain legal actions being taken against counterparties for the next six, possibly 12 months.
- Specially appointed assessors will determine disputes on whether the Act applies by seeking to achieve a "*just and equitable outcome*".
- Relief to assist financially distressed firms and individuals by temporality
 - increasing insolvency and bankruptcy monetary thresholds
 - extending the period to respond to statutory demands to six months.
- Introduction of a framework for firms and businesses to conduct certain meetings, such as AGMs, by electronic means.
- Expansion of the ability for witnesses in court proceedings to give evidence using remote communication technology, thereby seeking to ensure the continuation of court proceedings during the COVID-19 pandemic.

For a party to qualify for relief, a notification for relief must be served on (i) the other parties to the contract, (ii) any guarantors or sureties of the principal debtor's obligations and (iii) such other persons as may be prescribed.

We examine below, the qualification criteria for loan facilities and construction-related contracts in further detail.

Loan facilities

Only certain borrowers qualify for relief from contractual obligations. A borrower can only apply for the relief if:

- it is incorporated, formed or established, and carries on business, in Singapore;
- not less than 30% of its shares (or other ownership interest) is held by citizens of Singapore and/or permanent residents of Singapore; and
- the turnover of the group to which it belongs does not exceed S\$100 million in the latest financial year.

Individuals are not covered by these relief provisions.

Only certain loan agreements qualify for relief. The Act only applies to loan agreements with Singapore licensed banks or finance companies, and the loans must be:

- secured, wholly or partially, against any commercial or industrial immovable property located in Singapore; or
- secured, wholly or partially, against any plant, machinery or fixed asset located in Singapore and such plant, machinery or fixed asset is used for manufacturing, production or other business purposes.

Unsecured loan agreements do not qualify for contractual relief. Furthermore, loan agreements where the only security is shares, contractual rights, other choses in action, or tangible property which does not fall within the categories referred to above, will not qualify for contractual relief.

Construction-related contracts

We analysed the qualification criteria for construction-related contracts in our [previous briefing](#) which examined the key features of the COVID-19 (Temporary Measures) Bill (now the Act) and its anticipated legal effect on the construction industry.

A key question which has arisen is how the Act can be expected to apply to cross-border construction contracts to be performed overseas. This is likely to depend on the governing law of the contract and/or the place of performance of the contract.

In summary, where the governing law of the contract is Singapore, the Act would be expected to apply even where the contract is to be performed outside Singapore, on the basis that the Act forms part of the body of Singapore law, which the parties have expressly chosen to govern their contract. This could include contracts with foreign companies or entities. However, as highlighted in our [previous briefing](#), because the Act defines a "*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) there may also be room to argue that the Act

would only apply to projects located in Singapore, relying on Section 4 of the SOP Act which excludes construction work carried out outside Singapore.

RELIEF PROVIDED BY THE ACT

Assuming the necessary qualifying criteria are met, the Act provides for a moratorium on taking certain actions relating to a Scheduled Contract until the earliest of (i) the expiry of the "*prescribed period*" (a period of six months from the commencement of the Act which may be extended by the Minister of Law for up to a further six months); (ii) the withdrawal by the debtor of its notification for relief; and (iii) an assessor appointed under the Act determines that the relief provisions of the Act do not apply.

The relief granted under the Act during the prescribed period will prevent the following actions (amongst others) being taken against the debtor:

- (a) the commencement or continuation of an action in a court against the debtor or the debtor's guarantor or surety;
- (b) the commencement or continuation of arbitral proceedings under the Arbitration Act against the debtor or the debtor's guarantor or surety;
- (c) the enforcement of any security over any immovable property;
- (d) the enforcement of any security over any movable property used for the purpose of a trade, business or profession;
- (e) the making of an application under section 210(1) of the Companies Act for a meeting of creditors to be summoned to approve a compromise or an arrangement in relation to the debtor or the debtor's guarantor or surety;
- (f) the making of an application for a judicial management order in relation to the debtor or the debtor's guarantor or surety;
- (g) the making of an application for the winding up of the debtor or the debtor's guarantor or surety;
- (h) the making of a bankruptcy application against the debtor's guarantor or surety;
- (i) the appointment of a receiver or manager over any property or undertaking of the debtor or the debtor's guarantor or surety;
- (j) the commencement or levying of execution, distress or other legal process against any property of the debtor or the debtor's guarantor or surety, except with the leave of the court and subject to such terms as the court imposes; and
- (k) the repossession of any goods under any chattels leasing agreement, hire-purchase agreement or retention of title agreement, being goods used for the purpose of a trade, business or profession.

The moratorium provisions relating to enforcement of security in paragraphs (c) and (d) above specifically relate to immovable property and movable property used for the purpose of a trade business or profession. Other types of security are not specifically referred to, although enforcement against other assets could fall within paragraph (j) above which refers to "any property".

The Act does not bar the commencement or continuation of security of payment adjudications, or mediations. The Act also does not bar the commencement or continuation of international arbitrations.

Non-compliance with the moratorium is an offence which is punishable with a fine not exceeding S\$1,000.

CONSEQUENCE OF THE RELIEF PROVISIONS

As indicated in the name of the Act, the relief provisions are intended to provide temporary relief, and only prevent certain actions from being taken against a debtor/guarantor/surety for a defined period of time. They do not excuse a debtor from performing its obligations under the contract, but merely restrict the creditor's ability to take certain types of actions for the prescribed period.

This means that contractual obligations will continue to accrue during the prescribed period and that, following the earliest to occur of (i) the expiry of the prescribed period; (ii) the withdrawal by the debtor of its notification for relief; and (iii) an assessor appointed under the Act determines that the relief provisions of the Act do not apply, the accrued obligations will kick in again.

This may also mean that default provisions may already have kicked in during the moratorium period, and default interest would have started to accrue during that period – and would be payable upon the expiration of such period (or otherwise, the creditor would be entitled to take all legal and contractual remedies available to it).

The relief provisions only extend to a guarantor or a surety if the primary debtor qualifies for relief under the qualifying criteria set out above. If the primary debtor does not qualify, then notwithstanding that the guarantor/surety may itself have qualified, the relief provisions will not apply.

DETERMINATION OF DISPUTES

The Act establishes a panel of assessors, appointed by the Ministry of Law, who will assess applications for the determination of disputes under various provisions of the Act, guided by principles of justice and equity. Parties may not be represented by lawyers, nor will they be able to appeal the decision taken. There will also be no costs orders.

Issues which we would expect to come before the assessors might include, for instance, whether a party's inability to perform an obligation was materially caused by COVID-19. Further, while on a strict reading of the Act a party must be *unable* to perform a contractual obligation in order to qualify for temporary relief (i.e. performance is impossible), one can foresee an argument that *material difficulty* in performance should also be sufficient.

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 clear that the assessor's determinations will carry significant weight, even beyond the contracting parties.

TEMPORARY RELIEF FOR FINANCIALLY DISTRESSED FIRMS AND OTHER BUSINESSES

In addition to the temporary relief from the commencement of insolvency proceedings for Scheduled Contracts, the Act also establishes increased insolvency thresholds during the prescribed period.

For businesses, the monetary threshold for insolvency is increased from S\$10,000 to S\$100,000 and the statutory period to respond to demands from creditors is lengthened to six months from 21 days.

For individuals, the monetary threshold for bankruptcy is increased from S\$15,000 to S\$60,000 and the statutory period to respond to demands from creditors is similarly lengthened to six months from 21 days.

Further, a company or an individual shall not be treated as having no reasonable ground of expectation of being able to pay a debt if the debt is incurred:

- in the ordinary course of trade or business;
- during the prescribed period; and
- before the making of an application for the appointment of a judicial manager or liquidator or a voluntary arrangement or bankruptcy (as the case may be).

Thus, the Act effectively disallows the commencement of new insolvency proceedings for at least the next six months.

OTHER TEMPORARY MEASURES

The Act also deals with alternative arrangements for meetings which are usually required to be held in person – for example, the attendance of the shareholders at an AGM.

In exercise of the powers conferred under the Act, the Minister for Law has since published the COVID-19 (Alternative Arrangements for Meetings for Companies, Variable Capital Companies (VCCs), Business Trusts, Unit Trusts and Debentures Holders) Order 2020 (Order) on 13 April 2020. Amongst other things, the Order provides a framework for companies to conduct meetings by electronic means.

The Act also deals with alternative arrangements for court proceedings, including by significantly expanding the ability to conduct court proceedings and for witnesses to give evidence using remote communication technology (subject to certain conditions).

CONCLUSION

The Act is a novel and bold piece of legislation which provides a wide-ranging array of measures to address the needs of businesses suffering economic hardship caused by COVID-19. In particular, the legal framework for a deferment of contractual obligations is a radical intervention into the sanctity of contracts between parties, justified only by the unprecedented economic circumstances. Given that the assessors charged with making determinations under the Act are provided with broad latitude to "*achieve an outcome that is just and equitable in the circumstances of the case*", it remains to be seen how the Act will play out in practice.

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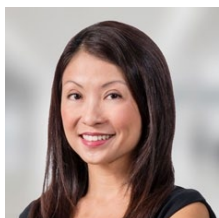
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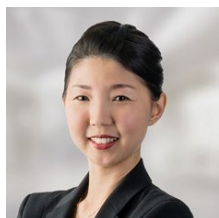
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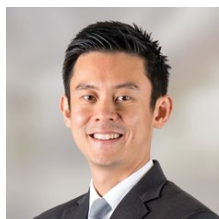
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