

FAQ:

COVID-19 (Temporary Measures) Act 2020

1. Objective of the Act

The COVID-19 (Temporary Measures) Act 2020 (the 'Act') is intended to provide temporary and targeted relief to businesses and individuals unable to perform their contractual obligations as a result of the unprecedented COVID-19 outbreak affecting Singapore. As stated by the Minister for Law (the 'Minister'), the Act is meant to give '*breathing space*' and to '*staunch the flow of blood*' for affected individuals and businesses.

In a nutshell, the Act puts in place a statutory moratorium (or as the Minister described it, a '*legal circuit-breaker*') on the enforcement of rights and obligations under specific types of contracts covered by the Act. However, it is important to note that the Act does not (unless parties agree otherwise) relieve parties of their obligations under the relevant contracts after the relevant period has passed.

Aside from temporary relief against contractual (non)performance, the Act also provides temporary relief for financially distressed individuals and businesses. In this regard, the bankruptcy and insolvency thresholds have been increased from S\$15,000 and S\$10,000 to S\$60,000 and S\$100,000 respectively. The time period before a statutory demand would take effect has also been increased from three weeks to six months. There are also safe harbour provisions for individuals, directors and other relevant officers of companies who would otherwise be committing the offence of trading while insolvent during this period.

As a whole, therefore, the Act seeks to protect individuals and businesses which have been hit by the COVID-19 pandemic by providing an initial six month-

long shield against legal action arising from a failure to perform certain contracts.

The Act also provides legal powers to the Minister for Health to impose a control order to prevent the spread of COVID-19 and enforcement powers under the same. However, this article will not be dealing with such issues relating to public health measures and movement restrictions.

2. When will it come into effect and when does it end?

The Act was introduced, read and passed in Parliament on 7 April 2020.

However, the Act has retrospective effect and covers contractual obligations to be performed on or after 1 February 2020. In other words, the Act will apply to and/or affect contracts which were made even before the Act came into force. However, the Act does **not** apply to covered contracts that are entered into or renewed on or after 25 March 2020.

These measures will initially apply for six months (the '**Prescribed Period**'). The Minister may, however, either shorten the Prescribed Period or extend it for up to 12 months. Regardless, the total duration of the temporary contractual relief provided for under the Act must not exceed one year.

3. What types of contracts does it cover?

The Act covers the following categories of contracts (the '**Scheduled Contracts**')

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The Act can be accessed at <https://sso.agc.gov.sg/Act/COVID19TMA2020>

- leases or licences for commercial and industrial property (aka non-residential immovable property), eg lease for factory premises;
- construction contracts or supply contracts, eg contract for supply of materials for construction works;
- performance bonds or equivalent granted pursuant to a construction contract or supply contract;
- event contracts: provision of goods and services for events, eg venue or catering for weddings, business meetings;
- tourism-related contracts: provision of goods and services relating to tourism, eg cruises, hotel accommodation bookings;
- secured loan facilities granted by a bank or finance company to Small & Medium Enterprises (ie businesses with turnover of not more than S\$100 million in the latest financial year);
- hire-purchase agreements, ie for commercial vehicles; or plant, machinery or fixed assets located in Singapore and which are used for manufacturing, production or other business purpose.

Further, so long as a Scheduled Contract is governed by Singapore law, it is covered by the Act. This could include contracts made with foreign companies or entities.

Notwithstanding the categories above, the Act confers on the Minister the power to amend, add to or vary the list of Scheduled Contracts. As such, the categories of contracts which are covered by the Act may be expanded should the need arise. The Minister has noted that the text of the Act was put together over the course of nine days. This power provides welcome flexibility to tailor the temporary measures under the Act to cater for a developing situation.

4. What industries will be impacted by the Act?

Based on the list of Scheduled Contracts above, the following industries will be directly impacted by the Act:

- construction, including the supply of goods for construction works;
- real estate, ie owners and tenants of commercial and industrial premises;

- tourism;
- events, ie companies involved in providing venues, accommodation, amenities, transport, entertainment, catering or other goods or services for events.

However, many other businesses which do not fall directly within the industries stated above may still find themselves or may find that their counterparties are availing themselves of the various relief measures in the Act. For example, the Act provides for the remission of property tax granted by the Government to property owners – those property tax rebates must be passed on by the property owner to tenants. Failure to do so, or to keep the necessary records evidencing that the owner has passed on the benefit, is an offence.

5. What does the Act mean to the affected industries?

5.1 Temporary relief for non-performing party

For the non-performing party in a Scheduled Contract, the Act will provide temporary cash-flow relief from legal action during the Prescribed Period, where the inability to perform a contractual obligation is materially caused by a COVID-19 event.

Crucially, to avail itself of the relief measures, the non-performing party must serve a notification for relief on the other contracting party(ies) and the non-performing party's guarantor or surety.

Upon being served with a notification for relief, that party may then challenge the notification and the applicability of the Act to provide relief to the non-performing party. The challenging party is to apply to an Assessor for a determination as to whether the relief measures apply, and if so, to make a further determination to achieve a just and equitable outcome in the circumstances of the case.

There is a stipulated deadline for when a party must submit a notification for relief as well as when a party in receipt of such a notification must then apply to challenge such a notification. These will be set out in future regulations.

5.2 Moratorium against enforcement of contractual rights by innocent party

As mentioned above, the non-defaulting (innocent) party is prohibited from taking steps during the Prescribed Period to enforce

its rights against a non-performing party that has issued a notification for relief.

The following are actions which are precluded under the Act:

- commencement or continuation of court proceedings against the non-performing party or its guarantor or surety;
- commencement or continuation of arbitral proceedings under the Singapore Arbitration Act (aka Singapore *domestic* arbitrations) against the non-performing party or its guarantor or surety;
- enforcement of any security over any immovable property;
- enforcement of any security over any movable property used for the purpose of a trade, business or profession;
- application under section 210(1) of the Companies Act to summon a meeting of creditors for the purposes of approving a compromise or arrangement in relation to the non-performing party or its guarantor or surety;
- application for a judicial management; winding up; or bankruptcy order against the non-performing party or its guarantor or surety;
- commencement or levying of execution, distress or other legal process against any property of the non-performing party or its guarantor or surety except with leave of the Court;
- 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;
- termination of a lease or licence of immovable property where the inability is the non-payment of rent or other moneys;
- exercise of a right of re-entry; forfeiture; or other similar right under a lease or licence of immovable property;
- enforcement of a court judgment; domestic arbitral award; or determination by an adjudicator under the Building and Construction Industry Security of Payment Act against the non-performing party or its surety or guarantor.

If any court or domestic arbitration proceedings have already been started in respect of a Scheduled Contract and a notification for relief is issued, those proceedings will be stayed or suspended.

The Act does **not** appear to prevent commencing or continuing international arbitration proceedings, or to prevent the enforcement of such international arbitration awards, even if the international arbitration is seated in Singapore. The Act also does not appear to prohibit foreign court judgments from being enforced in Singapore even if it involves a Scheduled Contract. We highlight that the taking of these prohibited actions by the non-defaulting party during the Prescribed Period is an **offence** under the Act, which is punishable on conviction to a fine not exceeding S\$1,000.

5.3 Further relief for certain contracts

Events and tourism related contracts: there is no automatic forfeiture of deposits under such contracts. Instead, an Assessor will determine whether it is just and equitable in the circumstances of the case for the whole deposit or just any part to be forfeited. Where applicable, deposits that have been forfeited will be returned (in whole or in part) to the customer. However, the Act does not mean that deposits are automatically refunded to the customer.

Construction and supply contracts: notwithstanding a contractual provision to the contrary, a contractor will not be liable for breach of contract and/or liquidated damages during the Prescribed Period if non-performance was materially caused by a COVID-19 event. Further, calling on a performance bond will not be permitted.

6. What happens if there is a dispute?

It is important to note that the Act requires a party's non-performance to have been materially caused by a COVID-19 event. What this means is that not every case of non-performance will be protected by the Act. For instance, if there is evidence that even without the COVID-19 outbreak, one party would not have been able to perform its contractual obligations, it is unlikely that such a party may seek relief under the Act. Similarly, there could also be disputes as to whether the party is unable to perform (for example, if the tenant is really unable to pay its rent). Finally, there could be disputes as to what is a fair and equitable outcome in apportioning losses between the parties (for example, deposits for events contracts).

Since materiality is a question of fact, it is likely that disputes will arise between the contracting parties as to whether or not one party's non-performance was indeed a true inability that was materially caused by a COVID-19 event. In such an instance, the party which disagrees with the notification for relief may refer the matter for a final and binding determination by an Assessor.

The Assessor will determine whether a party's failure to perform is to a material extent caused by a COVID-19 event. In so doing, the Assessor will seek to achieve a just and equitable outcome.

If the Assessor determines that the case in question does not qualify for relief, then the non-defaulting party may take any of the steps to enforce its contractual right as stated above.

It is clear that the determination by the Assessor is intended to be a fast and cost-effective process. As such, parties are not allowed to be represented by lawyers and no right of appeal lies against the Assessor's decision. Each party will also have to bear its own costs for proceedings before an Assessor. These assessors are intended to be professionals from the legal, accountancy, financial and other industry sections. The Minister has stated that there will be 12 panels, each headed by a State Courts Judge. The Ministry of Law (the 'Ministry') also expects to appoint about 100 Assessors.

Details of the application process will be announced and made available on the Ministry's website (which can be accessed at www.mlaw.gov.sg/covid19-relief/application-for-assessment) in end-April 2020.

In light of the constantly changing circumstances, this is a general overview and should not be treated as legal advice.

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Outside of practice, she enjoys writing on the latest legal developments and has contributed to various articles published by LexisNexis, Global Arbitration Review and of course, the Bird & Bird legal updates.