Published on 29 July 2020

NAVIGATING COMMON THREADS UNDER THE DOCTRINE OF *FORCE MAJEURE* AND THE COVID-19 (TEMPORARY MEASURES) ACT 2020

Impact on the Construction Industry

[2020] SAL Prac 15

The outbreak of COVID-19 and its impact on Singapore's construction industry cannot be understated. Contractors facing difficulty in performing their contractual obligations during this difficult period will likely want to seek a way to escape the consequences of non-performance of their contractual obligations. In this article, the authors explore contractual relief in the form of *force majeure* clauses and statutory relief in the form of the new COVID-19 (Temporary Measures) Act 2020 (Act 14 of 2020) in Singapore. The authors also attempt to navigate the common threads between *force majeure* clauses and the new legislation: (a) the extent of the inability to perform; (b) causation and remoteness; and (c) consequences for the construction industry.

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1 The views and opinions expressed in this article are those of the author and are not to be taken as a reflection or representation of the official position of the author in her role as an assessor.

I. Introduction

1 The COVID-19 pandemic is a human tragedy that has had dramatically negative repercussions on the entire world. With seemingly never-ending waves of COVID-19 cases worldwide, the economic cost is mounting rapidly. There has been much talk about the COVID-19 "Great Lockdown" being the worst economic recession since the Great Depression.[2] This is no surprise given that COVID-19 has been a menace to nearly every sector due to disrupted supply chains, sharp hikes in demand for personal protective equipment, and suppressed demand for almost everything else as a result of fear and uncertainty.

2 Worldwide and in Singapore, the building and construction sector has been hammered by COVID-19 with innumerable projects facing serious labour crunch due to lockdowns of entire cities and travel restrictions, cash-flow problems, and disruptions of supply chains for materials.[3] In this article, the authors explore contractual relief in the form of *force majeure* clauses and statutory relief by way of the new COVID-19 (Temporary Measures) Act 2020[4] (the "Act") in Singapore. The authors also attempt to navigate the common threads between *force majeure* clauses and the Act.

II. *Force majeure*

3 A contracting party affected by the COVID-19 pandemic is required to perform its contractual obligations and will be potentially liable to its counterparty for a failure to do so. One key exception to this rule is the operation of a *force majeure* clause in a contract.

4 *Force majeure* clauses essentially allow a contracting party to excuse or suspend the performance of the relevant contractual obligations when an unforeseeable event beyond the control of any of the parties to the contract takes place. Examples of *force*

2 Graeme Wearden & Jasper Jolly, "IMF: Global Economy Faces Worst Recession since the Great Depression – as it Happened" *The Guardian* (14 April 2020).
3 Siow Li Sen, "Construction to Suffer Double-digit Knockdown from COVID-19 Pandemic" *The Business Times* (13 April 2020).
4 Act 14 of 2020.

majeure events include acts of God,[5] natural disasters, wars, action by government and the like.

5 Under English and Singapore law, *force majeure* is a creature of contract. Accordingly, the precise language of a *force majeure* clause is paramount, as it would define the ambit of events that are considered *force majeure*.[6] Whether a *force majeure* clause relieves a party of contractual liability will ultimately depend on the precise language of the clause, the allocation of risks between the parties by reading both the clause and the contract as a whole, the circumstances in which the parties entered into the contract, and the alleged unforeseeable event that has occurred. Depending on the contract, notice invoking *force majeure* may also have to be given. The defaulting party seeking to rely on the *force majeure* clause bears the burden of proving the scope of the clause, and that the facts in question fall within that scope.[7]

III. COVID-19 (Temporary Measures) Act 2020

6 The Act was passed by Parliament on 7 April 2020, with Pts 2 and 3 of the Act coming into force on 20 April 2020. The objectives of the Act are to offer "temporary and targeted protection" and "cash-flow relief" to businesses and individuals who are unable to fulfil their contractual obligations due to the COVID-19 pandemic, and to complement the financial measures announced in the Resilience Budget.[8] Before the authors turn to examine the temporary contractual relief afforded by the Act, a few preliminary points about the Act merit mention. They are as follows:

(a) The Act is a piece of retroactive legislation. It applies to contracts that were entered into or renewed before

5 *Transco plc v Stockport Metropolitan Borough Council* [2003] UKHL 61; [2004] 2 AC 1 at [59], *per* Lord Hobhouse of Woodborough.

6 *RDC Concrete Pte Ltd v Sato Kogyo (S) Pte Ltd* [2007] 4 SLR(R) 413.

7 *Great Elephant Corp v Trafigura Beheer BV* [2013] EWCA Civ 905 at [31], *per* Longmore LJ.

8 Ministry of Law, "Temporary Relief for Inability to Perform Contractual Obligations due to Coronavirus Disease 2019 (COVID-19) Situation" (1 April 2020).

25 March 2020 and covers relevant contractual obligations that are to be performed on or after 1 February 2020.[9]

(b) The measures under the Act are in place for a prescribed period of six months, and the prescribed period may be extended or shortened by the Minister.[10]

(c) The definition of a "COVID-19 event" is relatively broad and all-encompassing, and the authors say rightly so, to provide breathing space for businesses and individuals. A COVID-19 event under the Act means "(a) the COVID-19 ... pandemic; or (b) the operation of or compliance with any law of Singapore or another country ... or an order or direction of the government or any statutory body ... that is made by reason of or in connection with COVID-19".[11] Further, foreign government regulations or directions which relate to COVID-19 are included within the definition of a COVID-19 event.

(d) The contracts that are covered under the Act are set out in the Schedule to the Act, and as of the date of this article, it is an exhaustive list which includes various tourism- and event-related contracts as well as construction[12] or supply contracts.[13]

7 The gateway to obtaining temporary relief from legal action is set out in s 5(1) of the Act, which is arguably one of the most important provisions in the Act. For ease of reference, s 5(1) of the Act is reproduced below:

9 COVID-19 (Temporary Measures) Act 2020 (Act 14 of 2020) ss 4(1) and 5(1).
10 COVID-19 (Temporary Measures) Act 2020 (Act 14 of 2020) s 3.
11 COVID-19 (Temporary Measures) Act 2020 (Act 14 of 2020) s 2.
12 The terms "construction contract" or "supply contract" are stated in the COVID-19 (Temporary Measures) Act 2020 (Act 14 of 2020) as having meanings attributed to it by s 2 of the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed).
13 See the Schedule to the COVID-19 (Temporary Measures) Act 2020 (Act 14 of 2020).

> **Temporary relief from actions for inability to perform scheduled contract**
>
> **5.**—(1) This section applies to a case where —
>
> (a) a party to a *scheduled contract* (called in this Division *A*) is or will be unable to perform an obligation in the contract (called in this Division the subject inability), being an *obligation that is to be performed on or after 1 February 2020*;
>
> (b) the *inability is to a material extent caused by a COVID-19 event*; and
>
> (c) *A has served a notification for relief* in accordance with section 9(1) on —
>
> (i) the other party or parties to the contract;
>
> (ii) any guarantor or surety for *A*'s obligation in the contract; and
>
> (iii) such other person as may be prescribed.
>
> [emphasis added]

8 In summary, the framework of questions that a defaulting contracting party should consider in determining whether it enjoys the benefits of the temporary relief from legal action is as follows:

(a) Is the contract a scheduled contract?

(b) Was the scheduled contract executed before 25 March 2020 with obligations to be performed on or after 1 February 2020?

(c) Is the inability to perform such contractual obligations materially caused by a COVID-19 event?

If all of the above are true, a relief notification[14] may be served on the counterparty to that contract.

9 If a defaulting party has served the contract counterparty with the relief notification, there is a moratorium on taking legal action arising from the failure to perform the relevant contractual obligation, which include the commencement or continuation of

14 COVID-19 (Temporary Measures) (Temporary Relief for Inability to Perform Contracts) Regulations 2020 (S 303/2020) reg 9.

Singapore court proceedings, execution proceedings (except with the leave of the Singapore court and subject to such terms as the Singapore court may impose), arbitral proceedings under the Arbitration Act,[15] call on a performance bond unless it expires within seven days, and enforcement of an adjudication determination under the Building and Construction Industry Security of Payment Act.[16] Interestingly, there is no moratorium on adjudication applications; the intention is probably to protect the claimant's entitlement to the sum of money due, but to defer the payment of that sum until this challenging period is over. Parties are also free to pursue legal action through foreign court proceedings or international arbitrations, as there is no moratorium on those legal options.

10 At the Second Reading speech on the COVID-19 (Temporary Measures) Bill, Minister for Law K Shanmugam recognised that while the Act is a form of intervention "after the contracts have been entered into, to alter performance obligations", this does not undermine the "unyielding principle" of the "sanctity of contracts".[17]

11 The Act also expressly provides that the temporary relief it offers to contracting parties does not affect the taking of any other action in relation to the subject inability, including action based on a *force majeure* clause or an action pursuant to the common law doctrine of frustration.[18] It is with this that the authors turn to explore and compare two possible avenues of relief open to employers, contractors, sub-contractors, and suppliers: the Act and *force majeure*.

15 Cap 10, 2002 Rev Ed.
16 COVID-19 (Temporary Measures) Act 2020 (No 14 of 2020) ss 5(2), 5(3) and 6(2).
17 *Parliamentary Debates, Official Report* (7 April 2020), vol 94 (K Shanmugam, Minister for Home Affairs and Law).
18 COVID-19 (Temporary Measures) Act 2020 (Act 14 of 2020) s 5(13).

IV. Navigating common threads

A. To what extent must the inability to perform be?

12 One of the common threads between bringing a claim under the Act and bringing a *force majeure* claim is that the performance of the relevant contractual obligation must have been affected by the supervening event, which, in the context of this article, are the COVID-19 pandemic and/or the ensuing laws or governmental directions. The common underlying question is: to what extent must the obligation to perform have been affected, or in other words, to what extent must the inability to perform be affected?

13 In respect of a *force majeure* claim, as discussed above, the precise construction of the clause is paramount and determines the requisite extent of the inability to perform. The Singapore Court of Appeal's observations in *Holcim (Singapore) Pte Ltd v Precise Development Pte Ltd*[19] ("*Holcim*") give clear insight in this regard. In *Holcim*, the *force majeure* clause provided that the supplier shall be "*under no obligation to supply the concrete if the said supply has been disrupted by virtue of inclement weather…*" [emphasis added]. The Court of Appeal was of the view that words such as "disrupt" and "hinder" suggest a "datum measure of difficulty that interferes with the successful completion of the transaction", but unlike "prevent", they do not render further performance impossible, as "disrupt" and "hinder" "connote a lower degree of negativity".[20] In a commercial transaction, the process of ascertaining if a particular supervening event constitutes a "disruption" or "hindrance" within the meaning of the *force majeure* clause ought to be informed by considerations of commercial practicability, bearing in mind the context in which the contract had been entered into, including any relevant commercial practice and/or resultant dislocation in the trade.[21] A mere increase in costs, in and of itself, was considered insufficient to result in a finding of "disruption" or "hindrance".[22] In *Holcim*, the supervening event was the Indonesian

19 [2011] 2 SLR 106.
20 *Holcim (Singapore) Pte Ltd v Precise Development Pte Ltd* [2011] 2 SLR 106 at [56].
21 *Holcim (Singapore) Pte Ltd v Precise Development Pte Ltd* [2011] 2 SLR 106 at [56].
22 *Holcim (Singapore) Pte Ltd v Precise Development Pte Ltd* [2011] 2 SLR 106 at [56].

sand ban in 2007 and the Court of Appeal held that the appellant could rely on the *force majeure* clause, given that the appellant was placed in a commercially impracticable situation where it had to choose between being in breach of contract and performing the contract while being vulnerable to potentially exorbitant demands by main contractors who were in a monopolistic position.[23]

14 In the context of standard form construction contracts, the Public Sector Standard Conditions of Contract for Construction Works[24] ("PSSCOC"), Singapore Institute of Architects' ("SIA") Building Contract[25] and Real Estate Developers' Association of Singapore[26] ("REDAS") standard forms use the word "delay" in the context of *force majeure* and extension of time clauses, which suggests that the legal test is that of the lower threshold of commercial impracticability, *ie*, whether the alleged *force majeure* event hinders or delays performance of the particular contractual obligation.

15 In the Act, the term "subject inability" is defined as "is or will be unable to perform an obligation in the contract".[27] Reading ss 5(1)(*a*) and 5(1)(*b*) of the Act together, the provisions merely suggest the need to prove a causal connection between the subject inability and the COVID-19 event. As to what the requisite extent of inability is, this is unclear on the face of the Act. It is merely stated that this is a situation where a party "is or will be unable to perform an obligation in the contract".[28] Pending any published determination from the panel of assessors[29] or any decision of a court, the Act lends itself to some uncertainty. For example, in the case of a main contractor, the Act does not prescribe that a defaulting contractor is under any obligation to

23 *Holcim (Singapore) Pte Ltd v Precise Development Pte Ltd* [2011] 2 SLR 106 at [60]–[64].
24 7th Ed, 2014, at cl 14.2.
25 Singapore Institute of Architects Building Contract 2016 Without Quantities (International) (1st Ed, 2016) at cll 23(1) and 23(2).
26 Real Estate Developers' Association of Singapore Design and Build Conditions of Main Contract (3rd Ed, 2013) at cll 18.1 and 18.2.
27 COVID-19 (Temporary Measures) Act 2020 (Act 14 of 2020) s 5(1)(*a*).
28 COVID-19 (Temporary Measures) Act 2020 (Act 14 of 2020) s 5(1)(*a*).
29 COVID-19 (Temporary Measures) (Temporary Relief for Inability to Perform Contracts) Regulations 2020 (S 303/2020) reg 30.

mitigate the effects of a COVID-19 event or to source for materials from alternative suppliers. It is an open question whether this suggests that the extent of inability to perform under the Act is the lower threshold of commercial impracticability as opposed to an impossibility.

16 While the extent of inability to perform appears to be clearer under a well-drafted contractual clause as compared to the Act, a contractual clause could also suffer from one other defect that is absent from the Act. The Act prescribes clearly what a COVID-19 event constitutes.[30] However, some contractual clauses neither define nor set out any examples of *force majeure* events, as a result of which these *force majeure* clauses could be held void for uncertainty.[31] The COVID-19 pandemic has prompted a relook into existing contracts with *force majeure* clauses, revealing that a number of *force majeure* clauses do not seem to include pandemics, such as SARS,[32] Ebola,[33] MERS,[34] and the novel COVID-19, all of which could affect labour which is of critical importance in the construction industry.

17 Has the time come for a more liberal doctrine of *force majeure* to cater for novel supervening events not specifically set out in contractual clauses, or perhaps for a more limited judicial formulation of *force majeure*? The Singapore Court of Appeal has observed that the principal purpose of a *force majeure* clause is to "contractually allocate the risks between the contracting parties".[35] The Singapore High Court held in at least one case that there can be "no general rule as to what constitutes a situation of *force majeure*" as "whether such a (*force majeure*) situation arises, and, where it does arise, the rights and obligations that follow, would

30 COVID-19 (Temporary Measures) Act 2020 (Act 14 of 2020) s 2.
31 *British Electrical and Associated Industries (Cardiff) Ltd v Patley Pressings Ltd* [1953] 1 WLR 280.
32 World Health Organization, "Severe Acute Respiratory Syndrome (SARS)" <https://www.who.int/csr/sars/en/> (accessed 22 April 2020).
33 World Health Organization, "Ebola virus disease" (10 February 2020) <https://www.who.int/news-room/fact-sheets/detail/ebola-virus-disease> (accessed 22 April 2020)
34 World Health Organization, "Middle East respiratory syndrome coronavirus (MERS-CoV)" (11 March 2019) <https://www.who.int/mediacentre/factsheets/mers-cov/en/> (accessed 22 April 2020).
35 *RDC Concrete Pte Ltd v Sato Kogyo (S) Pte Ltd* [2007] 4 SLR(R) 413 at [53].

all depend on what the parties, in their contract, have provided for".[36] However, where a *force majeure* clause is "unintelligible, unambiguous and uncertain", it would be void because it is "too obscure to be capable of any definite or precise meaning".[37] Yet, if *force majeure* is traced back to its origins in Art 230 of the Code de Commerce of France, there was once a common understanding of what *force majeure* entailed.[38] A few English courts have held that holding a clause is too uncertain to be enforceable should be a last resort, and courts should generally strive to give meaning to contractual clauses.[39] The same should apply to *force majeure* clauses. In the construction of *force majeure* clauses, prior to the guidelines on interpretation of contractual clauses as laid out by the Singapore Court of Appeal in *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd*,[40] Singapore courts have, in some instances, referred to judicial dictionaries.[41] It may be argued that for the purpose of interpreting *force majeure* clauses, courts should be wary that the desire to save uncertain *force majeure* clauses could result in rewriting the parties' contractual bargain, thus undermining the fundamental sanctity of contracts. Nevertheless, in the light of the principle that holding a clause as too uncertain to be enforceable is a last resort, it is submitted that, apart from construing the *force majeure* clause based on its language and precise factual context,[42] Singapore courts should hold that *force majeure* events are events which have prevented the performance of the relevant obligation (and not merely made it more onerous), and which were circumstances beyond the parties' control.[43]

18 On the part of the contracting parties (and in particular, those in the construction sector), to avoid the uncertainties

36 *Magenta Resources (S) Pte Ltd v China Resources (S) Pte Ltd* [1996] 2 SLR(R) 316 at [60].
37 *British Electrical and Associated Industries (Cardiff) Ltd v Patley Pressings Ltd* [1953] 1 All ER 94 at 96A.
38 *Lebeaupin v Richard Crispin & Co* [1920] 2 KB 714.
39 *Astor Management AG v Atalaya Mining plc* [2017] EWHC 425; *Associated British Ports v Tata Steel UK Ltd* [2017] EWHC 694.
40 [2008] 3 SLR(R) 1029.
41 *Tesa Tape Asia Pacific Pte Ltd v Wing Seng Logistics Pte Ltd* [2006] 3 SLR(R) 116; *TCL Industries (Malaysia) Sdn Bhd v ICC Chemical Corp* [2006] SGHC 88 at [90].
42 *Holcim (Singapore) Pte Ltd v Precise Development Pte Ltd* [2011] 2 SLR 106.
43 *Chitty on Contracts* vol I (Sweet & Maxwell, 33rd Ed, 2019) at para 15-164.

highlighted above, perhaps parties should bear in mind when negotiating contracts to: (a) specifically include pandemics in their definition of *force majeure* events; and (b) expressly set out the extent of the inability to perform.

19 As for the Act, one could argue that the Act serves a different purpose from the contractual creature that is *force majeure*. After all, the Act is a means of temporary intervention, aimed to give companies "breathing space" until the COVID-19 pandemic dies out and contracts return to normalcy.[44] Given that the purpose of the Act is to do broad "justice" between the parties during these challenging times, it is certainly arguable that the "subject inability" ought to be based on the lower threshold of commercial impracticability, so that the pain of the pandemic is not left "to the smallest and weakest to bear it all".[45]

B. Causation and remoteness: To what extent must COVID-19 be a material cause of the inability to perform and what are the damages?

20 The next concern pertains to issues of causation and remoteness arising from the non-performance of parties' contractual obligations. A key issue is the extent to which COVID-19 had been the material cause of the parties' inability to perform their contractual obligations.

21 In addition to showing that the *force majeure* clause covers the COVID-19 pandemic, the requirements of causation must also be satisfied before a contracting party can rely on a *force majeure* clause. This appears to be accepted as a requirement under Singapore law although judicial pronouncement in this area appears to be limited in Singapore. In the High Court judgment of *Precise Development Pte Ltd v Holcim (Singapore) Pte Ltd*,[46] Lai Siu Chiu J had found that although the Indonesia sand ban had caused a general shortage of sand in Singapore, it did not cause

44 *Parliamentary Debates, Official Report* (7 April 2020), vol 94 (K Shanmugam, Minister for Home Affairs and Law).
45 *Parliamentary Debates, Official Report* (7 April 2020), vol 94 (K Shanmugam, Minister for Home Affairs and Law).
46 [2010] 1 SLR 1083.

the defendant's inability to supply concrete to the plaintiff under the relevant contract. Therefore, the defendant could not rely on the *force majeure* provision. Lai J's findings were subsequently overturned on appeal[47] but the Court of Appeal did not elucidate a test for causation within *force majeure* apart from a brief mention of the word "proximate" at [39]. UK law may be of assistance in this regard.

22 In *Classic Maritime Inc v Limbungan Makmur Sdn Bhd*[48] ("*Classic Maritime*"), the parties had entered into a long-term contract of affreightment for the carriage of iron ore pellets from Brazil to Malaysia. The charterer relied on a dam burst as a *force majeure* event excusing it from liability for failing to provide the cargoes of iron ore pellets for shipment from Brazil to Malaysia. The English Court of Appeal, scrutinising the words of the *force majeure* clause, held that the charterer was required to prove that "but for" the dam burst, it would have been "ready and willing" to perform the shipments of iron ore pellets for shipment from Brazil to Malaysia. As the charterer would not have performed the contract even if the dam did not burst, the Court of Appeal held that it could not rely on the *force majeure* provision. The court also rejected the applicability of any general principle that there should be a "but for" test for causation when it comes to *force majeure* provisions. Instead, it all depends on what the clause says.

23 Interestingly, the English Court of Appeal also held that even if an event after the breach of contract may have excused performance, the damages payable for the breach should not take into account that subsequent event. In the lower courts, Teare J held that the innocent party was only entitled to nominal damages because the dam burst would have prevented performance in any event. However, this was overturned by the English Court of Appeal, who held that the innocent party would be entitled to his full measure of damages as if the charterer performed his end of the bargain.

47 *Holcim (Singapore) Pte Ltd v Precise Development Pte Ltd* [2011] 2 SLR 106.
48 [2019] EWCA Civ 1102.

24 What then of the standard forms in construction contracts[49] in Singapore? If the local courts follow in the footsteps of English law, contractors would do well to scrutinise their *force majeure* clauses to determine the applicable test of causation. To this end, the test for causation seems to be the widest in the PSSCOC[50] standard form, which states that extensions of time will be granted when delay "will or might be or has been caused by any of the following events …". In contrast, the SIA[51] and REDAS[52] standard forms merely state the word "cause". In other words, it may be easier to prove causation under the PSSCOC standard form as opposed to the other standard forms.

25 Be that as it may, it appears that contractors may also need to prove that they are ready and willing to perform the contract "but for" the *force majeure* event. Hence, this requirement suggests that *force majeure* relief would not be available in "true concurrent delay" situations where only one of the effective causes of delay was the *force majeure* event.

26 Contractors also need to be aware that even if a COVID-19 event would have excused the contractor from performing his contract, the courts may disregard the effect of such event when assessing the measure of damages payable as a result of a breach of contract.

49 Public Sector Standard Conditions of Contract for Construction Works (7th Ed, 2014) at cl 14.2; Singapore Institute of Architects Building Contract 2016 Without Quantities (International) (1st Ed, 2016) cll 23(1) and 23(2); Real Estate Developers' Association of Singapore Design and Build Conditions of Main Contract (3rd Ed, 2013) cll 18.1 and 18.2

50 Public Sector Standard Conditions of Contract for Construction Works (7th Ed, 2014) at cl 14.2.

51 Singapore Institute of Architects Building Contract 2016 Without Quantities (International) (1st Ed, 2016) at cll 23(1) and 23(2).

52 Real Estate Developers' Association of Singapore Design and Build Conditions of Main Contract (3rd Ed, 2013) at cll 18.1 and 18.2.

27 Finally, a contractor seeking to rely on the *force majeure* clauses under the PSSCOC[53] and SIA[54] standard forms must also demonstrate that they had taken all reasonable steps to avoid or mitigate the delay caused by the COVID-19 event and their consequences. This may include engaging alternative modes of performance to secure performance of the contracted work at increased costs and/or deploying more equipment and/or resources to the contracted work.

28 Turning next to the Act, the test of causation appears to be whether the inability to perform is to a material extent caused by a COVID-19 event.[55] This appears to be a different inquiry from the "but for" test of causation in *force majeure* clauses (assuming the English approach is adopted). Instead, the test for causation under the Act appears to be an inquiry singularly focused on COVID-19 and its consequences.

29 Such a distinction becomes more pronounced where there are multiple competing causes to a party's inability to perform the contract. Generally speaking, *force majeure* clauses would be able to cover multiple competing causes so long as all the events are

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53 Public Sector Standard Conditions of Contract for Construction Works (7th Ed, 2014) at cl 14.2, which reads as follows:

> The time within which the Works or any phase or part of the Works is to be completed may be extended by the Superintending Officer either prospectively or retrospectively and before or after the Time for Completion by such further period or periods of time as may reasonably reflect delay in completion of the Works which, *notwithstanding due diligence and the taking of all reasonable steps by the Contractor to avoid or reduce such delay*, will or might be or has been caused by any of the following events:
>
> (a) *Force majeure* ...
>
> [emphasis added]

54 Singapore Institute of Architects Building Contract 2016 Without Quantities (International) (1st Ed, 2016) at cll 23(1)(b) and 23(2)(a), which read as follows:

> 23(1)(b) Entitlement to an extension of time arises only when:
>
> (i) *the Contractor shall have acted with due diligence and shall have taken all reasonable steps to avoid or reduce any delay in completion;*
>
> (ii) the Contractor shall have complied with the requirements of clause 23(3); and
>
> (iii) the delay shall have been caused by one or more of the events set out in clauses 23(2)(a) to (q).
>
> 23(2) The events referred to in clause 23(1)(b)(iii) shall set forth below:
>
> (a) *Force Majeure* ...
>
> [emphasis added]

55 COVID-19 (Temporary Measures) Act 2020 (Act 14 of 2020) s 5(1)(*b*).

covered by the relevant *force majeure* provision. In so far as the Act is concerned, the requirement of "a material extent" suggests that it may be a stringent test. Further, it suggests that in "true concurrent delay" situations where only one of the effective causes of delay was due to COVID-19, the "material extent" test may mean that the contractor would not be able to rely on the Act. However, one could argue that there may not be a need to show that the COVID-19 event was the "dominant" cause for the inability to perform since the language of s 5(1)(*b*) of the Act does not import any such requirement. Furthermore, should there be an additional requirement for a party relying on the Act to prove that the party was ready and willing to perform the contract "but for" the COVID-19 pandemic? This will certainly be a fertile area of dispute.

C. Consequences for the construction industry

30 Contractors, sub-contractors and suppliers in the construction industry who have had their obligations affected by the COVID-19 pandemic and/or ensuing laws or government directions now have two different avenues to seek relief. They can do so under the Act or pursuant to *force majeure* clauses under their own construction and/or supply contracts. As between *force majeure clauses and the Act*, which option should one pursue? Depending on the option taken, the effect on the contractor's performance of its contractual obligations and consequences may differ.

31 As mentioned earlier, the first aspect to a *force majeure* clause usually relates to the definition of the relevant *force majeure* event and the extent of the inability to perform the relevant contractual obligation. Any well-drafted *force majeure* provision will likely also deal with the rights and obligations of the parties and the consequences flowing from the *force majeure* event. Depending on the precise wording of the *force majeure* provision, contractual rights usually include the granting of an extension of time to the party seeking to rely on *force majeure*, suspension of certain obligations to perform or even termination of the contract prospectively if the duration of the *force majeure* event goes beyond a certain (contractually stipulated) duration. This may provide

a more tailored response to fit the subjective circumstances of the contracting parties.

32 In the context of the local standard form construction contracts referenced above,[56] it bears emphasis that their definitions of *force majeure* (as they presently stand) do not seem to include pandemics. Assuming that the COVID-19 outbreak would constitute a *force majeure* event within the meaning of those clauses, the consequences flowing from the COVID-19 outbreak would likely only entitle contractors to extensions of time to perform the contracted work under the respective forms. Certainly, there is no provision for contractors to claim loss and expense for the delay to the contracted work caused by the COVID-19 outbreak.

33 Apart from granting contractors extensions of time, it appears that none of the standard forms[57] (as they stand) allow for suspension of works or termination of the contract prospectively arising out of *force majeure* events. In contrast, the JCT Standard Building Contract With Quantities allows either party to terminate the employment of the contractor where works have been suspended for a period beyond a certain (contractually stipulated) duration[58] due to *force majeure*.

34 The Act addresses the COVID-19 pandemic head-on by providing parties with a statutory remedy.

35 After serving a statutory relief notification under s 9 of the Act, a contractor would be entitled to the following types of relief during the prescribed period (*ie*, six (6) months):

56 Public Sector Standard Conditions of Contract for Construction Works (7th Ed, 2014) at cl 14.2; Singapore Institute of Architects Building Contract 2016 Without Quantities (International) (1st Ed, 2016) at cll 23(1) and 23(2); Real Estate Developers' Association of Singapore Design and Build Conditions of Main Contract (3rd Ed, 2013) at cll 18.1 and 18.2.

57 See cll 23(1) and 23(2) of the Singapore Institute of Architects Building Contract 2016 Without Quantities (International) (1st Ed, 2016), cll 18.1 and 18.2 of the Real Estate Developers' Association of Singapore Design and Build Conditions of Main Contract (3rd Ed, 2013) and cl 14.2 of the Public Sector Standard Conditions of Contract for Construction Works (7th Ed, 2014).

58 See the JCT Standard Building Contract With Quantities (2016 Ed) at s 8.11.1.

(a) a moratorium from and/or suspension of court and domestic arbitration proceedings (including winding up, enforcement and execution proceedings);[59]

(b) relief from the call of any performance bonds in relation to the relevant construction contract at any time up until seven (7) days before the expiry of the relevant performance bond;[60]

(c) relief from performance of contractual obligations;[61] and

(d) relief from liquidated damages for delay and/or damages for delay.[62]

36 From the way s 5 of the Act is framed, adjudication proceedings were clearly intended to be carved out from the moratorium and/or suspension of proceedings arising from COVID-19. As explained by the Ministry of Law,[63] this carve-out was meant to preserve and facilitate cash-flow relief in the construction industry. However, the usefulness or effectiveness of the carve-out still remains to be seen.

37 Indeed, the inability to enforce adjudication determinations rendered under the Building and Construction Industry Security of Payment Act[64] ("SOP Act") limits the effectiveness of the carve-out. Furthermore, as most of the seasoned contractors in the industry would understand, timelines in adjudication proceedings are extremely tight. Allowing claimants to proceed with adjudication proceedings during the period of country-wide lockdown would likely have affected the ability of any respondent to gather evidence and respond effectively to adjudication proceedings. This

59 COVID-19 (Temporary Measures) Act 2020 (Act 14 of 2020) s 5(3).
60 COVID-19 (Temporary Measures) Act 2020 (Act 14 of 2020) s 6(2).
61 COVID-19 (Temporary Measures) Act 2020 (Act 14 of 2020) s 6(6).
62 COVID-19 (Temporary Measures) Act 2020 (Act 14 of 2020) s 6(5).
63 See Answer No 6 to the questionnaire "Provisions in the COVID-19 (Temporary Measures) Act (COVID-19 Act) Relating to Temporary Reliefs – Frequently Asked Questions (FAQs) for the Built Environment Sector" *Ministry of Law* (22 April 2020) <https://www.mlaw.gov.sg/files/news/announcements/2020/01/MinLaw-BCA_InfoNote_FAQs.pdf> (accessed 12 May 2020).
64 Cap 30B, 2006 Rev Ed.

is especially the case where the dispute concerns large commercial developments or complex final account disputes. Such situations are not entirely hypothetical – the High Court in England recently dismissed a contractor's attempt to injunct an adjudication due to difficulties arising from the coronavirus lockdown.[65] It remains to be seen whether a similar application may be taken by a contractor-respondent in Singapore, although it should not be in serious dispute that the Singapore courts would have jurisdiction to grant an injunction preventing the continuation of adjudication proceedings under the SOP Act in Singapore.[66]

38 In addition to the moratorium and/or suspension of legal proceedings, the Act also provides substantive contractual defences to the non-performance of contractual obligations in respect of construction and/or supply contracts if the said non-performance was to a material extent caused by the COVID-19 pandemic:

(a) Section 6(5) of the Act states that "for the purposes of calculating the liquidated damages payable under the contract or assessing other damages in respect of the subject inability, where the subject inability occurs on or after 1 February 2020 but before the expiry of the prescribed period, any period for which the subject inability subsists and falling within that period is to be disregarded in determining the period of delay in performance" by the contractor.

(b) Section 6(6) of the Act goes further to state that the inability to supply goods or services in accordance with the terms of a contract where it was, to a material extent caused by a COVID-19 event, is a defence to a claim for a breach of contract.

39 These additional provisions provide a contractor with a statutory contractual defence to the imposition of delay-related liquidated damages or general damages and non-performance of contractual obligations.

65 *MillChris Developments Ltd v Waters* [2020] 4 WLUK 45.
66 *Bresco Electrical Services Ltd v Michael J Lonsdale (Electrical)* [2019] EWCA Civ 27.

40 In respect of s 6(5) of the Act, any period for which the contractor is prevented from completing the works as a result of "subject inability" (as defined under the Act) is "disregarded" in determining the period of delay in performance. Therefore, the contractor's obligation to pay damages (whether liquidated or not) for delay is effectively suspended during the period where the contractor can show that he was prevented from completing the works as a result of COVID-19 related events.

41 Further, s 6(6) of the Act provides the contractor with a statutory defence to a claim for breach of contract as long as the contractor can demonstrate that the inability to perform the aforesaid obligation was to a material extent caused by a COVID-19 event. Section 6(6) appears to be a rather broad clause with wide ramifications. For instance, if there has been a delay materially caused by a COVID-19 event (which would, under usual circumstances, have amounted to a breach under the terms of a contract) and a separate concurrent breach of a contractual clause, is the counterparty left with no remedy against the defaulting party because of s 6(6) of the Act? Some clarity on the exact impact of s 6(6) in this regard would be welcome.

42 The statutory defences under ss 6(5) and 6(6) of the Act complement the rights which are available to the contractor under the relevant construction contract, which may include *force majeure* provisions and provisions for the extension of time and/or frustration (if applicable). Given the availability of these substantive contractual defences, there may be potential for the reliefs under ss 6(5) and 6(6) of the Act to extend to overseas construction contracts governed by Singapore law.

43 An issue that may arise is whether contractors need to serve a relief notification under s 9 of the Act in order to rely on the statutory defences provided under ss 6(5) and 6(6) of the Act. Section 9(1) of the Act states that a party that intends to seek relief under s 5 or s 7 must serve a relief notification under s 9 of the Act. Section 6 appears to be deliberately omitted. Furthermore, the reliefs provided in ss 6(2) and 6(3) in relation to performance bonds are also broadly linked to a relief notification by virtue of

s 6(4) of the Act[67]. However, ss 6(5) and 6(6) of the Act make no express references to relief notifications under s 9 of the Act.

44 On the other hand, s 6(1) of the Act expressly states that s 6 applies to a case mentioned in s 5 of the Act. One of the pre-conditions for the applicability of s 5 is the service of a relief notification under the Act.[68] This suggests that any reliefs under s 6 of the Act can only be triggered by the service of a relief notification.

45 Be that as it may, contractors should serve a relief notification under s 9 of the Act if they intend to seek specific relief under ss 6(5) and 6(6) of the Act. This is to put employers, main contractors and/or contract administrators on notice that the contractor intends to seek relief under ss 6(5) and 6(6) of the Act for the prescribed period and avoid any pitfalls arising out of a failure to give notice.

46 Given the availability of various statutory reliefs and remedies that contractors have under the Act, there seems to be a sort of "Year of the Jubilee" (*ie*, forgiveness of all debts) to contractors under construction and supply contracts. While the Act appears to undermine the sanctity of contracts by providing contractors with extra-contractual rights, the old adage that "extraordinary times call for extraordinary measures" rings true during this period of time. The COVID-19 pandemic has clear and real effects on the building and construction industry in Singapore.[69] Travel restrictions, closure of manufacturing plants and the lockdown imposed by governments around the world have caused construction projects to grind to a halt, various supply chains to be disrupted and labour to be frozen. Furthermore, the high numbers of infections and quarantines in the foreign worker dormitories will likely cause a significant impact on the availability of labour in the construction industry in Singapore. While Pts 2 and 3 of the Act have come into force, the interim reliefs provided by

67 Section 6(4) of the COVID-19 (Temporary Measures) Act 2020 (Act 14 of 2020) states that the reliefs provided in ss 6(2) and 6(3) shall not be applicable where a relief notification under s 9 has been withdrawn.

68 COVID-19 (Temporary Measures) Act 2020 (Act 14 of 2020) s 5(*c*).

69 Siow Li Sen, "Construction to Suffer Double-digit Knockdown from COVID-19 Pandemic" *The Business Times* (13 April 2020).

the Act are sure to be a welcome measure to assist the construction industry in emerging from this pandemic intact.

47 However, it is unlikely that all will feel the same way about the Act. There will also be opportunistic contractors who will use COVID-19 and the Act as an excuse to escape from their contractual obligations. In this regard, the Act provides a system to resolve disputes arising from whether one is entitled to temporary relief under the Act. Contractors and employers may (within the period beginning from 6 April 2020 and ending at the end of two (2) months after the end of the prescribed period[70]) apply to appoint an assessor to make a determination on whether the case is one to which a party is deserving of temporary relief under the Act.

48 At the Second Reading speech, Mr Shanmugam described this mechanism as being designed to "provide for a quick, inexpensive and effective practical solution". These assessors appear to have a broad mandate to make determinations in the cases before them "[taking] into account the ability and financial capacity of the [parties] concerned to perform the obligation … that is subject of the application"[71] and "must seek to achieve an outcome that is just and equitable in the circumstances".[72]

49 Although the Act gives assessors the mandate to further determinations including "requiring a party to the contract to do anything or pay any sum of money to discharge any obligation under the contract", these powers appear to be curtailed in the case of construction contracts and/or supply contracts and/or performance bonds related to such contracts.[73] The assessors cannot assess or determine the extent of delay attributable to COVID-19, the amount of liquidated damages payable nor whether the defence under s 6(6) of the Act has been made out. These issues

70 See s 9(2) of the COVID-19 (Temporary Measures) Act 2020 (Act 14 of 2020) read with r 14(2)(*a*) of the COVID-19 (Temporary Measures) (Temporary Relief for Inability to Perform Contracts) Regulations 2020 (S 303/2020).

71 COVID-19 (Temporary Measures) Act 2020 (Act 14 of 2020) s 13(2)(*a*).

72 COVID-19 (Temporary Measures) Act 2020 (Act 14 of 2020) s 13(2)(*b*).

73 COVID-19 (Temporary Measures) (Temporary Relief for Inability to Perform Contracts) Regulations 2020 (S 303/2020) reg 22.

would be determined separately in legal proceedings between the parties.

50 Some issues arise from the dispute resolution mechanism under the Act. Since the process is designed to be a binding[74] and summary process without intervention from lawyers[75] and without right to appeal,[76] parties may think twice before resorting to determination by an assessor under the Act and may seek to resolve their dispute by other means. To this end, what would be the interplay between the assessor mechanism under the Act and/or subsequent court or arbitral proceedings? This issue comes to the fore in the context of construction and supply contracts because of the nature of the reliefs provided under ss 6(5) and 6(6) of the Act excusing both delay and performance of contractual obligations during the prescribed period. Disputes arising out of construction projects may not be easy to resolve and may involve the review of voluminous documents and the determination of complex, inter-related issues. As such, it is possible that justice would not be served between the parties if disputes arising out of COVID-19 are resolved by a summary process. If one is of the view that the powers of an assessor should be circumscribed, one could argue that the determinations of assessors should only be of "temporary finality", until they are later scrutinised or overturned by a court or an arbitral tribunal.

51 Conversely, a case can be made that determinations by an assessor are intended under the Act to be final and binding. This is because the powers of an assessor are not unbridled in the context of construction or supply contracts; the Act only intends for an assessor to determine if there was a subject inability materially caused by a COVID-19 event under s 5 of the Act.[77] The Regulations prohibit an assessor from making any further

74 COVID-19 (Temporary Measures) Act 2020 (Act 14 of 2020) s 13(9).
75 COVID-19 (Temporary Measures) Act 2020 (Act 14 of 2020) s 14.
76 COVID-19 (Temporary Measures) Act 2020 (Act 14 of 2020) ss 13(9) and 13(10).
77 Section 13(1) of the COVID-19 (Temporary Measures) Act 2020 (Act 14 of 2020) read with r 22 of the COVID-19 (Temporary Measures) (Temporary Relief for Inability to Perform Contracts) Regulations 2020 (S 303/2020).

determinations in a construction or supply contract to ensure a fair and equitable outcome.[78]

52 Finally, if a party does not choose to appoint an assessor to make a determination under the Act, would he be subsequently precluded from arguing that the case is not one to which s 5 of the Act applies? In the absence of any mandatory language suggesting that the assessor mechanism has the exclusive right to determine the issues raised by the Act, this is unlikely to be so. Still, this would not deter lawyers from innovating arguments of waiver and estoppel on behalf of their clients.

V. Conclusion

53 As the COVID-19 pandemic situation continues to cause large-scale disruptions to the construction industry, all contracting parties should be informed of the various legal avenues at their disposal to protect themselves from liability caused by the COVID-19 outbreak. These include the Act and the commonly found *force majeure* provisions in the various standard forms. While *force majeure* is highly dependent on the exact wording of the *force majeure* clause in question, contractors will be relieved to know that they can still turn to the Act for more wide-ranging relief.

78 COVID-19 (Temporary Measures) (Temporary Relief for Inability to Perform Contracts) Regulations 2020 (S 303/2020) reg 22.