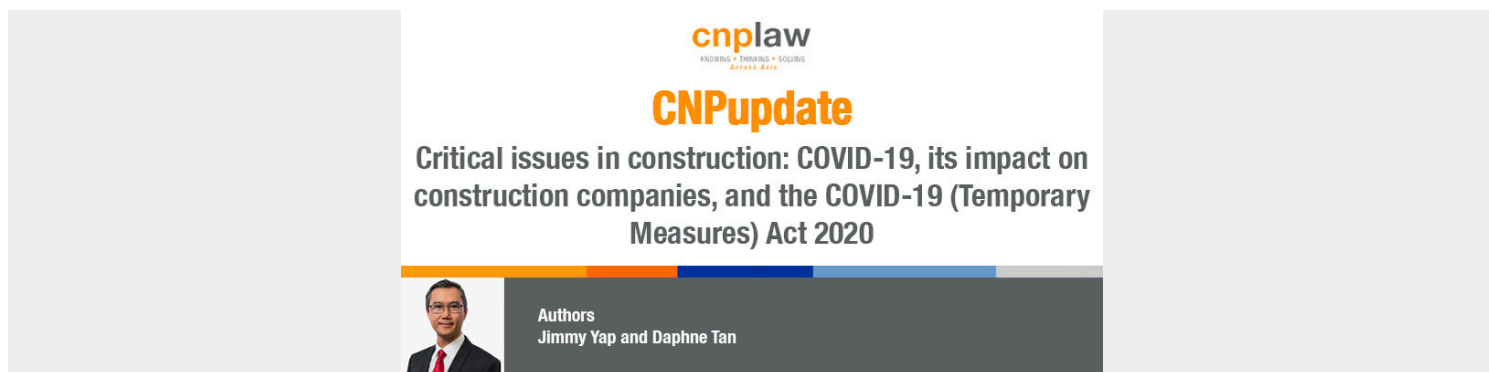


# CRITICAL ISSUES IN CONSTRUCTION: COVID-19, ITS IMPACT ON CONSTRUCTION COMPANIES, AND THE COVID-19 (TEMPORARY MEASURES) ACT 2020


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Critical issues in construction: COVID-19, its impact on construction companies, and the COVID-19 (Temporary Measures) Act 2020

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## Summary

The COVID-19 pandemic has had an enormous impact on various industries worldwide. Whilst generally well-managed, the tightened safe distancing measures in Singapore has obviously affected the work flow and cash flow of construction companies here, regardless of size. Passed by Parliament swiftly, the COVID-19 (Temporary Measures) Act 2020 (“**Act**”) aims to provide temporary relief to companies and business-owners who now find themselves suffering cash flow issues where those issues have been caused in a material part by the pandemic. We outline here the various reliefs available to those in the construction industry for general information and briefly explore the other likely legal issues that construction companies will face in the coming months.

## The statutory moratorium

Part 2 of the Act avails contractors of a **statutory moratorium** once the contractor has served a notification for relief. A moratorium is a restriction against a party commencing or continuing legal action against you – meaning, suing or continuing to sue you in court or through arbitration. The moratorium is statutory because it is prescribed by the law and cannot be “contracted” out of.

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You will be able to serve a notification for relief if the matter for which you are being sued or threatened to be sued relates to your **inability to perform a contractual obligation**. The contractual obligation must relate to a contract entered into before 25 March 2020, and your inability must to a material extent have been caused by a COVID-19 event. A COVID-19 event includes the passing of any law which would operate to prevent you from carrying out your obligations or which prohibit or prevents your company from continuing work on the construction project.

A **notification for relief** can be challenged by the party being served with the notification (*meaning, the party suing or threatening to sue*) by a quick process known as an “assessment”. The Minister for Law has appointed a panel of assessors, and once an application for an assessor’s determination has been filed an assessor will be appointed to determine whether the notification for relief is valid. If the assessor determines that the notification for relief is not valid (*for example, because the notifier’s inability to perform their contractual obligation was not due in material part to a COVID-19 event*), the statutory moratorium will not apply and will not prevent the applicant from suing or continuing to sue the notifier.

Part 2 also prohibits the making of immediate calls on a **performance bond**, and prevents liquidated damages from being imposed from 1 February 2020 to the expiry of the prescribed period. The Minister for Law has ordered that the prescribed period be a period of 6 months commencing on 20 April 2020. This period may be shortened or extended more than once by the Minister by notification in the Government Gazette.

## Adjudication Applications under the SOP Act

It is important to note that the Act does not prohibit the filing of adjudication applications under the Building and Construction Industry Security of Payment Act (“**SOP Act**”). Parties can continue to file adjudication applications under the SOP Act as such applications do not fall within the matters prohibited by the statutory moratorium. However, it should be noted that whilst you may indeed be able to obtain a favourable adjudication determination which entitles you to payment from the respondent, you will not be able to proceed to enforce that determination as of right if the respondent is unable to pay you. In other words, you may not be entitled to obtain the court’s leave to enforce the determination as a judgment debt. This is because whilst the filing and hearing of an adjudication application does not fall within the actions prohibited by the moratorium, the enforcement of an adjudication determination does. Hence, the respondent may be able to avail itself of the statutory moratorium discussed above should you attempt to enforce the determination. Therefore, if as a claimant you are aware that the respondent is suffering cash flow issues due to a COVID-19 event, you may wish to reconsider filing an adjudication application; as although you may be able to obtain a favourable determination you may not be able to compel the respondent to pay you timeously.

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# Salaries due to employees and cost-cutting measures

An important exception to the Act is that it does not relieve any company or any business-owner from the obligation to pay their employees. The COVID-19 (Temporary Measures) (Temporary Relief for Inability to Perform Contracts) Regulations 2020 contains an express carve-out for employees. As such, whilst as a company or business-owner you may be experiencing cash-flow issues due to your inability to progress works on a construction project and/or the statutory moratorium preventing you from enforcing favourable determinations against your employer or main contractor, you must still ensure that you pay the salaries due to your employees. You may have to consider external financing to tide you over this period, or alternatively, cost-cutting measures. Our colleagues have also previously commented on the [Unity](#), [Resilience](#), and [Solidarity](#) budgets and the government support that may be available to you.

If you are considering cost-cutting measures, you must ensure that you treat your employees fairly. You cannot unfairly discriminate against local employees, and you must serve the Ministry of Manpower with the relevant mandatory notifications within 1 week after you have implemented these measures. If you have foreign employees or if you are a foreign director of a company and you wish to voluntarily take no-pay leave to support your company during this time, you must also notify the Ministry.

## Force majeure and frustration

Apart from the moratorium, you may also wish to consider whether the impact of COVID-19 on your inability to perform a contract constitutes a *force majeure* event or has frustrated your performance of the contract. Whether or not you can rely on the force majeure clause to suspend your performance depends on the precise wordings of the clause, which generally will have to be strictly interpreted. Whether it can be said that COVID-19 has frustrated your performance of your obligations under your contract is also fact-sensitive and you will have to consider these carefully. These considerations also apply to cross-border contracts or those governed by foreign law and if relevant may absolve you of liability for your inability to perform your obligations timeously and/or for any liquidated or other damages that you may otherwise be liable for.

## The heightened criteria for bankruptcy and winding-up applications

Part 3 of the Act temporarily modifies the provisions of the Bankruptcy Act and Companies Act which relate to bankruptcy and corporate insolvency. It should also be noted in passing that the Act goes further so as to provide for a presumption that any debt incurred by a person or a company that is in the ordinary course of their business during the prescribed period was not incurred fraudulently.

The general position under the law prior to the Act is that a bankruptcy application can be filed by or against an individual and a company if the individual owes an undisputed debt of not less than S\$15,000 and in the case of a company, an undisputed debt of more than S\$10,000 and if the individual or company

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have failed to satisfy a statutory demand for that debt before the expiry of the statutory demand (*i.e. three weeks*).

However, with the Act now in force, for the duration of the prescribed period, the threshold debt for individuals is now not less than S\$60,000 and for companies, and more than S\$100,000, with the statutory demand only expiring and forming a basis of a creditor's bankruptcy or winding-up application after 6 months have passed from effective service. As noted above, the prescribed period is a period of 6 months commencing on 20 April 2020, and may be shortened or extended by the Minister for Law.

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