



MASTER BUILDERS
A U S T R A L I A

1 May 2020

The Hon. Scott Morrison MP
Prime Minister
Parliament House
CANBERRA 2600

Dear Prime Minister

COVID-19 DELAYS TO BUILDING WORKS AND CONSTRUCTION CONTRACTS

Master Builders Australia ('Master Builders') writes to express our significant concern about the contractual ramifications of delays and other disruptions to building works caused by COVID-19 and the resulting adverse impacts on the Australian economy, jobs and industry participants likely to arise if not appropriately addressed.

We outline below examples how these adverse impacts could manifest and note that while the nature, timing and manner by which they occur may vary, the potential they hold to cause significant and long-lasting adverse damage to the industry and economy as a whole is clear.

Master Builders is concerned that situations outlined in the examples will soon become more apparent and, unless addressed promptly, it will be increasingly difficult to address the adverse impacts on the economy, jobs and industry participants that we predict will result.

Addressing this issue will be challenging, particularly when regard is had the complexity of existing industry contractual arrangements and a relevant legislative regime shared between both State/Territory and Commonwealth jurisdictions.

Notwithstanding this, Master Builders is of the view that an effective and practical solution is necessary and we outline below options for consideration.

BACKGROUND

Most building works, whether it be for a new home or new hospital, is done under a written contract which sets the rules not only about the work required and the cost, but also what happens if problems arise during the works, such as a delay to the build or similar.

Delays during building and construction work are not unusual. Neither are the common reasons for those delays, which is why conventional contract arrangements used in the industry usually make it clear who is responsible, when, for what cost, for what share, in the event there is a delay.

But these are unconventional times and COVID-19 is different. It means delays to building works are for reasons that no-one could have ever predicted; causing situations that are hereto unprecedented; and presenting challenges that no-one ever expected.

Master Builders is concerned that if building industry participants take a conventional approach to what is an unconventional set of circumstances, there is a very real chance this will cause a raft of problems and damaging outcomes that will make challenging times, even worse.

Everyone accepts that COVID-19 has created challenges and problems for which they are not responsible but, regardless, still must be addressed. And like the rest of the community and economy, the building and construction industry has been doing its bit to share the costs and responsibility of addressing COVID-19 challenges.

However, because of the way contracts for building work are conventionally written, sharing the responsibility and costs of delay might not always be possible, often because participants remain bound to arrangements that were not written expecting something like COVID-19.

Master Builders is concerned that this may open the door for outcomes that are dis-proportionate and conduct which is unfair, unreasonable or most importantly – unnecessary and avoidable.

It means jobs might go when they don't have to; small businesses and sub-contractors might face an insolvency event when it could be avoided; contracts might be cancelled when they needn't be; or construction works might go unfinished when they could be completed.

Outcomes such as these are exactly what all Governments have been working tirelessly to avoid and this is why we believe it is in the interests of all Governments to work with industry to find a solution that is both practical and effective, while ensuring the building and construction industry can continue its significant contribution to the economy, community and jobs.

It is our view that problems arising from COVID-19 are best resolved by taking a sensible, open and fair approach where all parties to a contractual arrangement, and those with capacity to influence the conduct of the direct parties, look at all the options to see how a problem can first be avoided, consequences minimised, all possible solutions explored and if necessary, agree on a way to share responsibility in a way that is fair and not disproportionate in the circumstances.

However as earlier noted, the conventional contractual processes used throughout industry may limit the above approach, discourage parties from implementing an otherwise available solution, or restrict parties from exploring options in circumstances when reasonable and appropriate to do so.

It would be an unfortunate outcome to see small problems become far bigger, or possible solutions go begging, simply because a conventional contractual arrangement does not adequately deal with these unconventional circumstances. If this occurs, it will make challenging circumstances even worse, and a difficult recovery even harder, particularly if early and simple solutions were possible yet not explored.

HOW CONCERNS MAY MANIFEST AND ARISING EXAMPLES

The impacts caused by delays and other contractually significant events due to COVID-19 will flow through to building participants both up and down the supply chain, as well as Principals and Owners. In conventional circumstances, all will be subject to significant contractual and financial consequences caused by events beyond their reasonable control.

These consequences could be in the form of liquidated damages for delays; or for other substantial losses arising, for example, as a consequence of contracts being suspended or terminated when Principals/Owners experience changes in their financial circumstances and banks or financial institutions rescind loan approvals.

In the absence of swift government intervention, these adverse impacts would likely give rise to circumstances such as:

- Head Contractors being exposed to crippling liquidated damages claims that they could not have ever planned or budgeted for prior to entering into the contract with the Principal/Owner;
- Sub-Contractors being exposed to crippling consequential liquidated damages claims that they could not have ever planned or budgeted for prior to entering into the contract with the Head Contractor;
- Principals/Owners being exposed to crippling damages claims by the Head Contractor to recover genuine losses following suspension or termination of construction contracts when loan approval from the bank/financial institution is frozen or withdrawn.

Parties unable to fulfil their obligations under a contract as a direct result of COVID-19 will inevitably be subject to circumstances such as those above, giving rise to outcomes that would:

- Put in serious jeopardy the viability of a significant number of head and sub-contracting companies, partnerships, sole trading and supply businesses throughout the entire construction supply chain;
- Significantly reduce business confidence and limit employers' capacity in the sector to retain or engage new employees and apprentices;
- Place a further strain on already troubling levels of industry skills shortages and significantly reduce competition in the market; and
- Place increased pressure on the affordable/community housing market where Owners/Principals are forced out of contracts due to the oppressive conduct of banks or other lending institutions.

Master Builders is aware that our concerns have begun to manifest within the sector with early indications evidencing our concern that parties faced with COVID-19 challenges may be restricted, in the absence of any alternatives, in pursuing conventional avenues and/or be subject to outcomes which may be disproportionate.

- One residential builder in Victoria with 12 projects has incurred costs nearing almost \$400,000 per week for reasons attributable to COVID-19. Facing potential delays as a result, the builder has engaged in discussions with all clients with a view to reaching agreement for an extension of time and related costs for the duration. At time of writing, no agreement has been reached and early indications suggest the prospects of doing so are unlikely.
- A commercial builder in Queensland has been engaged as head contractor for construction work valued at over \$170 million that is highly likely to be impacted or delayed by COVID-19. Should this transpire, a 3 month delay will add almost \$3 million dollars to the costs incurred by both the head contractor and sub-contractors, in addition to liquidated damages costs of \$125,000 per day which may reach over \$11 million in total, resulting in unforeseen costs of almost \$15 million.
- Residential home builders across Australia are starting to report that clients are wanting to end or terminate contracts for works commenced prior to 15 March 2020, on the grounds of financial instability or loss of institutional finance. Reports to this effect are increasingly common and likely to result in significant loss for both builder and client.

OPTIONS

The legislative considerations involved in considering options to address delays caused by COVID-19 are broad and complex. The below section outlines several approaches that may assist Government in its considerations.

INDUSTRY CODE OR SIMILAR INSTRUMENT

A temporary Code or similar instrument given force by Government may avoid some of the legislative complexities that would arise in conventional circumstances and enables a wide range of different options to be considered. Two versions of such an arrangement, by way of examples, are set out below. **Attachment 1** sets out how these examples might operate in practice.

Option A

Government consider mandating a temporary industry Code or similar instrument that would operate in such a way as to require parties to a building contract for construction or building works, when faced with a COVID-19 delay, to explore all possible solutions thoroughly and in good faith - before taking conventional legal steps seeking enforcement of a particular contractual legal right in court.

To be clear, a Code such as this would not remove or alter the legal or contractual rights of parties to a building contract but would mandate a requirement for the parties to exhaust all alternative resolution options before they are pursued in court.

A Code would be limited in application to only those delays which are attributable to COVID-19, the nature of which would be clear and defined. For example 'any delay with a material effect that is caused by unforeseen impacts and commercial disruption that results from, or is likely to result from, the economic, trade, and commercial disruption caused by COVID-19 and any government response thereto' or similar. A Code would only apply to such arrangements entered into prior to 15 March 2020.

Where relevant and practicable, a Code could encourage the involvement in discussions of not just the direct parties to a building contract, but *any* party who has capacity to influence or affect the conduct of the direct parties. These may include head contractors, banks, insurance companies, financiers, other parties involved in a project, etc. who are frequently a relevant source of, influence on, or driver behind, the commercial conduct of the direct parties.

Given this influence, a mechanism to encourage involvement of all parties with reasonable and relevant commercial influence over the direct parties experiencing a delay, is highly likely to assist in any process to find a solution. Further, it may afford an opportunity for solutions to be explored that may not otherwise be available to the parties, particularly if third party involvement removes or reduces a key factor influencing or affecting the commercial conduct of a direct party.

The majority of contracts already contain dispute resolution processes and Courts in all jurisdictions have processes to encourage that parties hold discussions before proceeding to formal hearing. A Code would not disturb those processes (and indeed, would work to reinforce the need for them to be explored in the first instance) but it would allow for the parties to explore all possible resolution options and involve all relevant parties, which are elements that may not otherwise be available through the conventionally applicable processes.

A Code would also encourage parties to engage in an appropriate mediation process conducted by an independent third party if they cannot reach agreement or if there is some other disagreement or basis for such assistance (for example, discussions are not taking place in good faith; whether basis for talks are in fact attributable to COVID-19; or if another relevant party has refused to engage). In the event mediation is utilised and fails to resolve matters, the direct parties would be free to seek court intervention.

Any procedural steps within a Code may not necessarily need to be strictly followed if the parties agree that there is no prospect of reaching an outcome, no alternative solutions exist or a likely to, or agree that court intervention is necessary. However, a Code would require that direct parties declare this when seeking court intervention thereby assisting the relevant jurisdiction to be satisfied that the parties have reasonably explored all ways to avoid formal determination.

The Code would set a series of principles underpinning outcomes to which parties would reference in guiding discussions and any agreement resulting. Such principles could include that any outcome:

- Be mutually, freely and genuinely agreed;
- Share responsibility and is not unfairly or unreasonably disproportionate to a particular party having regard to all the relevant circumstances;
- Minimise or avoids, wherever practicable, adverse and unnecessary outcomes or ramifications;

- Facilitate the ongoing viability of parties throughout COVID-19; and
- Enable the efficient, effective and ongoing performance of building works so far as is practicable.

If parties reach agreement, it could be binding upon them, enforceable and applied for a period necessary to ensure its effective operation. To ensure that parties engage in a good faith process and any agreements reached are met, the Code could oblige parties to ensure that its terms meet the above principles and that where relevant, they were applied equally, or 'flowed on', to others in a particular contractual agreement or relevant chain.

If parties remain in dispute, the Code would cease application and conventional court processes remain free to pursue.

In considering a Code or similar instrument, it would be important to ensure that its features operate to:

- Prevent abuse or exploitation by one or other party;
- Operate subject to reasonable but efficient timeframes;
- Ensure only matters attributable to COVID-19 are captured;
- Preserve the legal contractual rights of direct parties;
- Ensure any and all options have been thoroughly explored, including through the involvement of other parties with capacity to influence the conduct of the direct parties;
- Avoid the need for costly and protracted legal proceedings by helping find solutions that might not be conventionally considered or available;
- Ensure that agreements reached are genuinely made, fair and reasonable, and not disproportionate to the parties in particular circumstances;
- Allow parties to seek swift independent mediation or related assistance if required; and
- Preserves the right to pursue contractual legal rights in Court, but only if other alternatives have first been explored and were not pursued.

Option B

This option would largely mimic that outlined above, but with an expanded definition that includes both COVID-19 delays as well as 'any event with significant contractual ramification' or similar. This could capture a broader range of circumstances such as:

- A residential client seeking to terminate a building contract if COVID-19 jeopardised or affected the availability of finance;
- If parties were materially affected due to the alteration of key completion dates caused by COVID-19; or
- Other events with consequences of a magnitude akin to those arising due to a delay.

Other possible features

As earlier noted, there are a range of other features that are conventionally given consideration by a Code or similar instrument. In the current circumstances, these could include items such as:

- Mechanisms to incentivise its usage, such as a term representing a clear bar on commencement of proceedings until such time its terms have been discharged, or in circumstances where a COVID-19 delay has not only become apparent but is likely to;
- Remove any doubt as to its capacity to operate conjunctively with relevant existing legislation and related processes, and that any usage would not prejudice, limit or otherwise interfere with the rights of parties in the future; or
- Mandate involvement of particular parties if they haven't otherwise engaged in resolution discussions, where so relevant.

Master Builders has no settled view as to what features a Code might contain and note that the Options outlined above (and at Attachment 1) are done so by way of example only. However, we do maintain that it should at least operate to ensure that any unnecessary, unfair or disproportionate outcomes detailed earlier above are avoided as far as possible, and that affected parties are given the chance to explore every possible option to find a mutually agreed outcome that suits them and their circumstances. How this is achieved will be a matter for Government and Master Builders would be pleased to discuss this further.

LEGISLATED RELIEF AND FINANCIAL ASSISTANCE PROGRAMMES

Governments may also consider a range of options to address COVID-19 delays through a combination of initiatives involving legislative change, financial support and taxation relief for the commercial construction sector.

The overall intent of this approach is to again ensure that parties have clear parameters to ensure that the costs of COVID-19 delays are shared between the private sector stakeholders, the head contractor and the subcontractor, and that the drivers of conventional commercial conduct are relieved or their influence minimised to the maximum possible extent.

Government may move to introduce a temporary legislative or regulatory mechanism applicable to all construction contracts executed prior to 15 March 2020 that has the effect of achieving the following actions by default:

- Granting an 'extension of time' in circumstances involving a delay attributable to COVID-19 including but not limited to:
 - authority delays
 - labour / productivity delays
 - materials supply delays
- Deeming claims for any consequential loss attributable to COVID-19 delays to be invalid. Any consequential impacts of such deeming would flow through the entire contractual position relevant to the project and delay.
- Freezing the conventionally available rights to principals and head contractors to realise security in circumstances involving COVID-19 related delays or issues.

Any temporary mechanism giving effect to the above changes should include capacity for any party to challenge the default nature thereof in particular circumstances. This would ensure any temporary mechanism is not exploited or misused.

Further changes may also be considered for pre-15 March 2020 construction contracts where financial relief is available to a principal which has secured finance either through senior debt financiers, non-bank financiers, mezzanine debt providers or similar, via:

- Interest for main bank / government backed financiers to be 'waived' for COVID-19 related extensions of time. This would operate similar to a range of SME relief measures currently operative.
- Interest for non-bank and mezzanine finance packages to be 'waived' for COVID-19 related extensions of time.
- Government to underwrite any cover costs (for example, at cash rate) for finance providers for the period the interest is 'paused'.

Government may consider making available some taxation relief or concessions for financial providers, developers and investors for 'interest foregone' in the form of:

- Rebates – potentially over future years to spread the impact on government revenues
- Tax deductions to remain for 'unpaid interest'.

Preliminary costings for this option reveal that a modest investment by Government will generate a significant return insofar as allowing the avoidance of inevitably higher costs to the community in the future.

INTERNATIONAL EXAMPLES

The above options have been formulated with regard to the approaches adopted by overseas Governments when responding to the exact same circumstances faced by participants in the Australian building and construction industry.

One particularly commendable approach is the *COVID-19 (Temporary Measures) Act 2020* adopted by Singapore as detailed at **Attachment 2**. The key features of that system have considerable merit and would otherwise represent a regime capable of adoption domestically, but for some fundamental differences between applicable models of Government.

Nonetheless, there may be options for Government to implement aspects of the Singapore model domestically and we note that the two options outlined above incorporate, to the extent it is possible, its key features.

NEXT STEPS

Master Builders appreciates the difficulties addressing problems caused by COVID-19 in context of the complex contractual arrangements that underpin the Building and Construction industry, particularly when the jurisdictional responsibilities are shared between different levels of Government. We also recognise there are likely other alternatives to those outlined above and we would be pleased to explore these with Government.

Regardless of what option Government considers appropriate, we re-state our concern that conventional contractual arrangements may not adequately work in the unconventional circumstances caused by COVID-19. We stand ready to work with Government to help industry realise a solution that avoids any significant and adverse consequences that may likely flow for the entire economy and community that, in the view of Master Builders, are entirely unnecessary and avoidable.

Master Builders would welcome the opportunity to discuss this correspondence in greater detail.

Yours sincerely



Denita Wawn
Chief Executive Officer

ATTACHMENT 1

HOW COVID-19 DELAYS AND DISRUPTIONS AFFECT BUILDING AND CONSTRUCTION

The following hypotheticals are used to illustrate how COVID-19 causes adverse impacts to building and construction, the related consequences, and why the involvement of parties with capacity to affect conduct of direct contractual parties is usually relevant. Each example shows how problems are dealt with currently, and how they might be dealt with were a Code to apply.

Example 1 – Liquidated damages impact in commercial construction project

RS Building Company is a head contractor working to build a high-rise office block with construction work to the value of \$100 million dollars. RS Building has a contract with the developer that required the project to be finished within 2 years, otherwise liquidated damages of \$100k per day will apply for every day late.

RS Building has engaged three sub-contractors pursuant to subcontract arrangements that also contain liquidated damages provisions reflective of the contract terms made with the developer. One of these three subcontractors (subcontractor A) engage two other specialist subcontractors to perform specialist parts of the job, pursuant to arrangements that also have similarly structured liquidated damages provisions.

Because products needed by one of the specialist subcontractors (subcontractor specialist B) are not available, they speak to the subcontractor A with whom they are contracted, to notify of a likely delay. Subcontractor A states that because the contract is silent on COVID-19 delays, an extension of time will not be granted. Subcontractor A states that if any delays arise a claim for LD's will be made, because RS Building (the head contractor) has advised they will claim LD's on Subcontractor A. This is because RS Building has been advised by the principal that LD's will be claimed if the entire project isn't finished on schedule.

In conventional circumstances:

- Because of the prospect of LDs, subcontractor A will claim LD's against specialist subcontractor B for any delay;
- Regardless of whether or not they had any control of the cause or the delay, specialist subcontractor B will have to pay LDs or challenge this by way of defence in any arising court action;
- Any court proceedings will likely only involve subcontractor A and specialist subcontractor B, even though it is the conduct of RS Builders and the principal which cause subcontractor A to claim for LD's.

Under a Code or similar:

- While parties remain able to make claims for LDs, everyone knows that they can't be enforced by a court unless discussions have taken place first and options for alternative resolutions are first thoroughly explored;
- Subcontractor A and specialist subcontractor B have discussions and realise that RS Builders (and above them, the principals) insistence on LDs is forcing them down a particular path;

- Discussions occur with RS Builders who invites the principal to attend, during which it is revealed that the principal was mistakenly advised that LDs must be claimed and there were no other alternative options;
- The principal, upon realising the entirety of the circumstances behind the COVID-19 delay, agrees to not claim LDs against RS and this is recorded in writing;
- Because RS wants to rely on this written record and be able to enforce it in the future should the need arises, they adopt the same arrangement with subcontractor A on the condition that this flows through to any arrangement with specialist subcontractor B.
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Example 2 – Liquidated damages impact on subcontract

Sammy Mac Builders is a builder engaged to construct a shopping centre with construction work to the value of \$5 million dollars. Sammy Mac Builders has a contract with the shopping centre owner that requires the project to be finished within 10 months, otherwise liquidated damages of \$10k per day will apply for every day late under the head contract. The carpentry subcontract has liquidated damages of \$2k per day for late completion.

The carpenter is delayed in completing the construction of the timber framing for the shopping centre due to social distancing restrictions and delays to the delivery of feature cladding. As a result, Sammy Mac Builders advises the carpenter that it intends to impose LDs for every day that the carpentry trade package is late because Sammy Mac Builders will need to accelerate other trade packages that follow on from the carpenter in order to ensure that the overall program is not delayed. Additional costs will be incurred by Sammy Mac Builders to accelerate the follow on work packages as those subcontractors will be entitled to additional costs for accelerating their trade packages.

In conventional circumstances:

- Because of the additional costs that will be incurred by the Sammy Mac Builders to accelerate subcontractors that follow on from the carpenter, the builder will claim LDs against the carpenter to cover those additional costs;
- Regardless of whether or not they had any control of the cause or the delay, the carpenter subcontractor will have to pay LDs or challenge this by way of defence in any arising court action.

Under a Code or similar:

- While parties remain able to make claims for LDs, everyone knows that they can't be enforced by a court unless discussions have taken place first and options for alternative resolutions are first thoroughly explored;
- The carpenter subcontractor and Sammy Mac Builders have discussions and realise that Sammy Mac Builders is concerned about the late commencement of follow on trade contractors and the impact that that may have on the overall construction program;

- Discussions occur between the carpenter, Sammy Mac Builders and the principal, during which it is revealed that the principal does not have any additional time available between the Date for Practical Completion under the head contract and the commencement of leases for tenants for the shopping centre. If completion is not reached on time, the tenants have an option to withdraw from the leases;
- The principal, upon realising the entirety of the circumstances behind the COVID-19 delay, agrees to invite the prospective tenants to a meeting with Sammy Mac Builders, the carpenter, and the critical subcontractors that follow on from the carpenter, to discuss which areas of the shopping centre need to be completed first so that those tenants can open on time and which areas can be delayed because no tenants are currently committed for those areas and the incomplete section of the shopping centre can be closed off from the public;
- As a result:
 - the tenants agree to accept partial completion of the shopping centre as satisfaction of the lease agreement and the leases become unconditional;
 - the principal agrees to the creation of a separable portion in the head contract and to adjust the Date for Practical Completion and LDs applicable to the separable portion and the balance of the head contract;
 - the carpenter subcontractor agrees to accelerate (at its own cost) the completion of the areas that form part of the separable portion to meet the revised date for practical completion of the head contract separable portion; and
 - Sammy Mac Builders agrees to amend the overall construction program and the impacted subcontract agreements accordingly and not to claim LDs from the carpenter subcontractor provided it achieves the revised program and sequencing of the carpentry works.

Example 3 – New Home under Construction

Barry has obtained a \$500k loan from a bank and financed construction of a new home. He engaged Schmitters Builders to build the home, underpinned by a building contract. Schmitters Builders has almost completed the construction, been paid for \$300k of work already done, and is due to collect the remaining \$200k when the project is soon finished.

Barry has lost his job and the next day the bank advised that his loan was revoked. Barry now needs to find \$200k to pay the builder that he previously thought was available but cannot obtain alternative finance.

In conventional circumstances:

- On hearing this, Schmitters Builders stops working on the project as they are worried they won't get the final \$200k payment. They speak with Barry but it is clear Barry doesn't have the money and the builder will need to find almost \$200k to cover the costs of the work done and products used.
- Schmitters Builders doesn't have this money so they commence court action to recover the money, knowing this is unlikely to recoup any loss. Schmitters is also forced to lay off three workers.
- Because of the extra debt they now carry, Schmitters Builders business finance interest rate is increased to reflect increase lending risk and a stop is put to accessing any future finance.

- This renders Schmitters Builders unable to purchase products for three other projects that they have been awarded, creating a need to withdraw from those contracts. Two of the other contracts are cancelled agreement, but the third refuses and court action ensues.
- The cost of the court action is such that it places Schmitters Builders into financial jeopardy and they enter insolvency.

Under a Code or similar:

- Before Schmitters Builders and Barry go to court, they have discussions to explore all relevant solutions. Barry says that he intended to pay Schmitters but can't because he lost his job and the bank pulled finance, so he hasn't a choice;
- It's clear that the bank has played a major role by pulling finance for Barry and it's discovered that Schmitters Builders and Barry both use the same bank, so they use the Code to involve the bank in discussions;
- The bank realises the full consequences of their decision to pull Barry's finance and agree to restore the finance if Barry can find another job within three months;
- The bank also agrees to not raise any finance or loan costs to Schmitters and agrees to make good on the business loan facility for the same period, meaning Schmitters has the capacity to continue working on other jobs or do so without any unforeseen delays;
- The agreement is recorded and a range of significant adverse consequences are avoided.

ATTACHMENT 2

COVID-19 (Temporary Measures) Act 2020

Introduction and Ambit of the Act

The Act covers a multitude of temporary measures dealing with COVID-19. This note will focus on Part 2 of the Act (which relates to temporary relief for a party's inability to perform contracts), and in particular, on how Part 2 impacts construction and supply contracts.

Contracts Covered

The Act adopts Section 2 of the Building and Construction Industry Security of Payment Act (Cap 30B) ("SOPA") for its definition of "construction contract" and "supply contract". Broadly:

- Construction contracts are agreements under which one undertakes to perform construction work for and/or supply services to others
- Supply contracts are agreements under which one undertakes to supply goods for the purposes of construction work carried out by another, with no requirement to assemble, construct or install the goods on site.

Notably, the Act does not adopt Section 4 of the SOPA, which excludes from the application of the SOPA certain categories of contracts (e.g. where the contract deals with construction work carried outside Singapore). At the time of this note, therefore, the categories of contracts covered under the Act appear to be wider than that covered under the SOPA.

Summary of Part 2

Pre-requisites for Relief

In order for relief to be granted under the Act:

- the relevant contract must have been entered into before 25 March 2020;
- the relevant contractual obligation must have been due to be performed on or after 1 February 2020;
- the inability to perform must have been to a material extent caused by a "COVID-19 event" (this includes not just the epidemic, but the operation of any laws, in or outside Singapore, made in connection with COVID-19); and the party seeking relief must have served a notice on:
 - the other party; and
 - any guarantor or surety for his obligation under the contract.

"To a material extent" means that the impact of the COVID-19 event needs to be meaningful (i.e. it must not be insignificant), although it need not be the sole cause. The notice requirements (e.g. timing and form) will be specified in regulations, which are not yet in place.

Temporary Relief Measures

A wide range of reliefs is available under Section 5 to a party who qualifies for relief ("Notifier"), of which the following are particularly notable:

- Court action. No action in court may be commenced or continued against the Notifier or his surety / guarantor (collectively, the "Protected Parties");
- Domestic arbitration proceedings. No arbitral proceedings under the Arbitration Act ("AA") may be commenced or continued against the Protected Parties;
- Security enforcement. There can be no enforcement of any security over any immovable property, or any movable property used for the purpose of trade, business or profession;
- Insolvency proceedings: No insolvency related proceedings (e.g. scheme of arrangements, judicial management, winding up orders etc.) may be commenced against the Protected Parties; and
- Enforcement of judgments / arbitral awards / adjudication determinations. There may be no enforcement of court judgments, arbitration awards under the AA, or adjudication determinations under the SOPA against the Protected Parties.

Additionally, under Section 6:

- Performance bonds. An employer cannot call on a performance bond (or equivalents) less than 7 days before its date of expiry (as may be extended under the Act (see below))
- Liquidated damages for delay. Delay liquidated damages cannot be imposed for a period of delay after 1 February 2020 resulting from a COVID-19 event.
- Defence against breach of contract. A party due to supply goods or services on or after 1 February 2020 may be excused for a breach of contract if his inability to perform was caused by a material extent by a COVID-19 event.

The relief above ceases to apply upon:

- the expiry of the prescribed period (which is not yet announced, but can be up to six months from when Part 2 comes into effect);
- the withdrawal of the notification for relief; or
- a determination by an assessor under Section 9 that the Act does not apply to the case in question (see below).

A number of other points should be noted:

- Severability of proceedings. Where court or arbitration proceedings relate to matters other than an inability to perform due to a COVID-19 event, the Act does not affect proceedings relating to those matters.
- Limitation period extended. The limitation period for the taking of an action affected by the Act is extended by the period of the relief (see above).

- Notice required for stay of proceedings. Ongoing court or arbitration proceedings are stayed only upon lodgement of a copy of a notification for relief with the court or the arbitral tribunal (as the case may be).
- Consequences for taking actions in contravention of Section 5 or Section 6

Any breach of Sections 5 or 6 will, in the absence of a reasonable excuse, constitute an offence punishable by a fine of up to f1,000. Acts in contraventions of Sections 5 or 6 are void, save for the enforcement of any security against a bona fide purchaser for value without notice of the notification for relief.

Assessor's determination (Division 4)

Application for assessor's determination.

To safeguard against unfair outcomes, contracting parties can apply to the Registrar (to be appointed by the Minister) for the appointment of an assessor to resolve disputes over the application of the Act.

Section 12 sets out the requirements for such applications, which must be in the form and manner specified by the regulations, and accompanied by a prescribed fee. Details of the regulations have yet to be announced.

An application for assessor's determination must be served on the Protected Parties and such other persons and within such times to be prescribed in the regulations. If satisfied that the application is compliant, the Registrar will proceed with the appointment and notify the parties.

Assessor's determination.

Assessors will decide if the inability to perform contractual obligations was due to COVID-19, and are empowered to grant just and equitable relief. The determination must:

- decide whether the relevant contract is covered by the Act;
- decide whether the party's inability to perform its contractual obligations was materially caused by a COVID-19 event; and
- seek to achieve an outcome that is just and equitable in the circumstances.

Assessors may consider the following factors:

- the ability and financial capacity of the relief-seeking- party seeking to perform the relevant obligation; and
- other factors to be prescribed by regulations.

Where an assessor has determined that the contract is covered by the Act and that the party's inability to perform its contractual obligation was caused by a COVID-19 event to a material extent, the assessor may make further determinations to achieve a just and equitable outcome in the circumstances.

Determinations or further determinations may, with leave of the court, be enforced like court judgements or orders. Further determinations that may be made by an assessor include:

- requiring a party to do anything or pay a sum of money to discharge a contractual obligation; or
- in cases where a contractual right of repossession of goods, re-entry or forfeiture has been exercised by a party, requiring such party to return goods or return possession of the immovable property to the relief- seeking-party.

Proceedings before Assessor.

Assessor proceedings are intended to be time and cost efficient. The Act expressly provides that:

- no party may be represented by a lawyer at proceedings before an assessor.
- each party shall bear its own costs for proceedings before an assessor.

Any determination made by an assessor:

- binds all parties to the application and all parties claiming under or through them; and
- cannot be appealed.

Failure to comply with an assessor's determination without reasonable excuse is an offence punishable by a fine not exceeding f1,000.