

The Impact on Loan Facilities under the COVID-19 (Temporary Measures) Act (Singapore)

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A. Introduction

The new COVID-19 (Temporary Measures) Act 2020 (the “**Act**”) was passed by Parliament on 7 April 2020. It seeks to provide temporary relief to companies who are unable to fulfil their loan repayment obligations if their inability to do so was due to the COVID-19 pandemic. This article will look at the impact the Act could have on loan facility agreements and what institutional lenders should be aware of.

B. Scope of the Act

Before going into the temporary relief provisions, it is important to know which contracts the Act covers in the first place.

Section 4(1) of the Act provides:

4.—(1) This Part does not apply to a scheduled contract entered into or renewed (other than automatically) on or after 25 March 2020.

There are two things to be aware of:

1. The Act only applies to a “scheduled contract”;
2. The Act does not apply to contracts entered into on or after 25 March 2020.

Most loan facilities by institutional lenders are likely to be a scheduled contract. Paragraphs 1(a) and (b) of the Schedule to the Act provides:

1. The following are scheduled contracts:

a) a contract for the grant of a loan facility by a bank licensed under the Banking Act (Cap. 19) or a finance company licensed under the Finance Companies Act (Cap. 108) to an enterprise, where such facility is secured, wholly or partially, against any commercial or industrial immovable property located in Singapore;

b) a contract for the grant of a loan facility by a bank licensed under the Banking Act or a finance company licensed under the Finance Companies Act to an enterprise —

- (i) where such facility is secured, wholly or partially, against any plant, machinery or fixed asset located in Singapore and
- (ii) where such plant, machinery or fixed asset (as the case may be) is used for manufacturing, production or other business purposes;

As such, institutional lenders with loan facilities extended to an enterprise where such facilities are secured and where such agreements had been entered into prior to 25 March 2020, may potentially be affected by the Act. However, unsecured loan facilities to enterprises and loan facilities to individuals (whether secured or not) do not fall within the ambit of the Act. Loan facilities extended on or after 25 March 2020 also do not fall within the ambit of the Act.

C. Requirements for Temporary Relief

Even if the Act applies to a loan facility in question, the borrower still has to meet certain requirements before he can obtain temporary relief under Section 5 of the Act.

Section 5(1) sets out 3 requirements:

(i) the borrower is unable to perform an obligation in the contract, being an obligation that is to be performed on or after 1 February 2020 (the “**Obligation Requirement**”);

(ii) the borrower’s inability to do so is to a material extent caused by a COVID-19 event (the “**Materiality Requirement**”); and

(iii) the borrower has served a notification for relief in accordance with section 9(1) on —

- the other party or parties to the contract;
- any guarantor or surety for A’s obligation in the contract; and
- such other person as may be prescribed (the “**Notification Requirement**”).

(i) The Obligation Requirement

Only obligations that are to be performed on or after 1 February 2020 but cannot be performed by the borrower will entitle the borrower to temporary relief. This means that payment instalments that were due prior to 1 February 2020 may still be enforced in the usual manner. However, given that the COVID-19 pandemic started gaining commercial significance after that date in Singapore, it is likely that this requirement will be easily met.

(ii) The Materiality Requirement

The borrower’s inability to repay an instalment due on or after 1 February 2020 must be caused by COVID-19 to a “material extent”. The question of “material extent” is likely to be the subject of much controversy. However, some guidance may be obtained from the Explanatory Statement to the Act, before it was passed.

One example illustrated is where the borrower is unable to generate sufficient revenue to repay a loan instalment when his ability to manufacture goods was adversely affected due to the outbreak of COVID-19 globally.

If the borrower’s inability to repay is due to other reasons unconnected with COVID-19, then it may be possible to pursue legal proceedings against the borrower. Alternatively, the borrower may seek an assessor’s determination on whether section 5 applies under Division 4 of the Act.

(iii) The Notification Requirement

If the borrower intends to seek relief under section 5 of the Act, it must also serve a notification on the lender and any guarantor or surety for the borrower’s obligation. The borrower must do so within specified timelines and either party to the loan facility agreement may make an application for an assessor to determine whether section 5 applies.

At the time of writing, the timeline requirements have not yet been published as subsidiary legislation.

D. Scope of Temporary Relief

Assuming that the borrower has met the requirements as set out in section 5(1) of the Act for temporary relief, lenders are prohibited from taking certain actions against the borrower for a period of time.

(i) Duration of Temporary Relief

The lender is prohibited from taking certain actions the borrower until after the earliest of the following milestones:

1. The expiry of the prescribed period of 6 months from 7 April 2020 (section 5(2)(a) of the Act);
2. The withdrawal by the borrower of the borrower's notification for relief (section 5(2)(b) of the Act); or,
3. An assessor makes a determination that section 5 does not apply (section 5(2)(c) of the Act).

(ii) Prohibited Actions Against the Borrower

Section 5(3) of the Act sets out a full list of actions that a lender is prohibited from commencing against the borrower. These include, but are not limited, to:

1. Commencing an action in court against the borrower or the borrower's guarantor or surety;
2. Enforcing any security over any immovable property;
3. Enforcing any security over any movable property used for the purpose of trade, business or profession;
4. Filing an application for winding-up, judicial management, or for a scheme of arrangement; and,
5. Appointing a receiver or manager.

However, this does not mean that lenders are left without any recourse for enforcing their loan facilities. Section 5(6) of the Act makes it clear that these prohibited actions only apply in relation to a security mentioned or the part of the obligation that is secured by such security.

What this means is that lenders may still enforce the security over the borrower's stock-in-trade, commence an action in Court against the borrower in relation to any part of the loan facility that is unsecured, take any action against the borrower in relation to any part of the loan facility that is unsecured, commence an action against the guarantor in relation to any part of the loan facility that is unsecured.

If you wish to seek further clarification and advice on how the Act affects your agreements, please contact us.

Please see below for our other articles on the COVID-19 (Temporary Measures) Act:

- Rights and obligations of landlords in view of the COVID-19 pandemic and under the COVID-19 (Temporary Measures) Act
- Singapore plans to enact COVID-19 (Temporary Measures) Bill to mitigate risk of deposit forfeitures under events and tourism-related contracts due to pandemic
- Singapore plans to enact COVID-19 (Temporary Measures) Bill to mitigate economic pressures on tenants due to pandemic
- Singapore plans to enact COVID-19 (Temporary Measures) Bill to mitigate disruptions to construction industry due to pandemic
- Singapore plans to enact COVID-19 (Temporary Measures) Bill to mitigate economic pressures due to pandemic

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