

I. INTRODUCTION

1. On 12 Oct 2020, it was announced by the Ministry of Law that the prescribed period of relief provided under Part 2 of the [COVID-19 \(Temporary Measures\) Act 2020](#) (the "Act") for construction and supply contracts, as well as any performance bonds granted thereto, would be extended to 31 March 2021, instead of the originally stipulated 19 Oct 2020.
2. Further, following the most recent [COVID-19 \(Temporary Measures\) \(Amendment No. 3\) Act](#), amongst the various reliefs introduced is a new Part 8A which provides for a universal Extension of Time ("EOT") for eligible construction and supply contracts has commenced under the Act on 30 Nov 2020.
3. These announcements certainly come as reassuring news to many suffering from considerable delays and disruptions in the Built Environment sector which has been battered by the pandemic. Looking beyond the Act, a question which bears some thought arises – what follows after a party in delay successfully enjoys relief under the Act?
4. With a focus on reliefs relating to liquidated damages ("LDs") and EOTs in the context of construction and supply contracts, this update seeks to provide some brief insight into the reliefs under the statutory regime, the effect of an assessor's determination on one's claim(s) as well as other points that contracting parties should look out for moving forward.

[\[Click here to access our various updates on the Act\]](#)

II. RELIEF FROM LDs AND GRANT OF EOT UNDER THE ACT

Part 2 of the Act: Liability for Liquidated Damages

5. Pursuant to section 6(5) of the Act, where a party is in delay due to failure to perform its contractual obligations, any period for which such inability to perform subsists and occurs on or after 1 Feb 2020 but before 31 March 2021 (the extended prescribed period of relief) is to be disregarded when determining the period of delay in performance, for purposes of calculating LDs payable under the contract or assessing other damages relating to the inability to perform.
6. Of course, such statutory relief from LDs is only applicable to eligible construction or supply contracts, which must satisfy the following requirements:
 - a. The party to the construction or supply contract is or will be unable to perform the obligation under the contract;
 - b. Such obligation must be due to be performed on or after 1 Feb 2020;
 - c. The inability to perform must be *materially* caused by a COVID-19 event; and
 - d. The defaulting party must have properly served a notification for relief on the requisite parties by 31 March 2021.

[\[Click here for our update on how to apply for relief under the Act\]](#)

7. Even after the requisite notification for relief is served, the other party to the construction or supply contract, may, by the deadline of 31 May 2021 (as extended) apply for an assessor's

determination as to whether the party in delay is eligible for such relief. Where no assessor's determination is submitted in response to the notification for relief, or where the assessor determines that the defaulting party is indeed entitled to such relief under the Act, the party serving the notification will be entitled to statutory relief from liquidated damages for the period during which the subject inability subsists.

Part 8A of the Act: Automatic grant of EOT

8. Applicable to both public and private sector construction projects, pursuant to the new Part 8A of the Act, a universal EOT of 122 days (around 4 months) will be granted for eligible *construction* contracts (as defined under s 2 of the Building and Construction Industry Security of Payment Act ("**SOPA**")).
9. Unlike the Part 2 relief from liability for liquidated damages, no notification for relief or any kind of application whatsoever has to be made in order to avail oneself of this relief. The grant of the EOT is *automatic*, and the completion date under the contract will simply be extended by 122 days accordingly, from and including the completion date.
10. The 122-days EOT takes into account the following:

- a. Most construction projects would have halted works for the period of 56 days from 7 April to 1 June 2020 (the "**Circuit Breaker**"; Only 5% of the construction workforce had been working during this period on a very small number of critical infrastructure projects and projects which had to continue for safety reasons.¹
- b. From 2 June 2020, the BCA had begun to approve the resumption of construction projects sequentially, requiring contractors to comply with various COVID-Safe Restart criteria such as the COVID-19 Safe Management Measures² as well as to clear dormitories (many of which had been seriously affected by COVID-19 outbreaks), a process which had taken place from 2 June 2020 to on or around 6 August 2020 (a period of 66 days).³

11. For those construction projects which had resumed immediately after the Circuit Breaker on 2 June 2020, the automatic universal EOT would not apply and the party should request for an extension of the completion date based on the actual number of days under any applicable contract provisions.
12. To summarise, to be eligible for an EOT under Part 8A of the Act, the following conditions must

¹ <https://www1.bca.gov.sg/about-us/news-and-publications/media-releases/2020/05/15/gradual-resumption-of-construction-work-from-2-june-2020>

² See 2 June 2020 BCA Media Release at: <https://www1.bca.gov.sg/about-us/news-and-publications/media-releases/2020/05/15/gradual-resumption-of-construction-work-from-2-june-2020>

³ For the month of June 2020, BCA had projected that another 5% of the construction workforce would gradually resume work in the month of June (a total of 10% of the construction work force).(see 2 June 2020 BCA Media

Release at footnote 2 above). 300 construction projects were approved to resume work by 13 June 2020 (see <https://www1.bca.gov.sg/about-us/news-and-publications/media-releases/2020/06/13/resumption-of-all-renovation-projects-subject-to-availability-of-workers>) and almost all dormitories had been cleared by 12 August 2020 (<https://www1.bca.gov.sg/about-us/news-and-publications/media-releases/2020/05/15/gradual-resumption-of-construction-work-from-2-june-2020>).

be satisfied:

- a. The construction contract in question (the "**Contract**") must have been entered into before 25 March 2020, but must not have been renewed (excluding automatic renewal) on or after that date;
- b. The Contract must still be in force on 2 Nov 2020;
- c. As at 7 Apr 2020, the construction works to be performed under the Contract must not have been certified as completed;
- d. **No** construction works must have been performed in the period between 20 Apr – 30 June 2020 (both dates inclusive);
- e. **No** court proceedings, arbitral proceedings under the Arbitration Act, or such other prescribed proceedings relating to the failure to comply with the completion date (excluding any automatic extension of 122 days) must have commenced before 2 Nov 2020, including any enforcement proceedings relating to the same;
- f. **No** judgment, arbitral award, or compromise or settlement entered into in the course of or resulting from any proceeding in (e) above has been made before 2 Nov 2020.

13. Contractors who do not qualify for the automatic 122-days EOT but satisfy the criteria for relief from liquidated damages should file a notification of relief for the relevant period of non-performance arising from a COVID-19 event, in order to ensure that no liquidated damages are imposed for such delay.

[What if the completion date has already been extended under my contract?](#)

14. Where EOT has already been granted pursuant to the contract or by agreement of parties, and any part of the delay warranting such EOT occurs during the period between 7 Apr – 6 Aug 2020 (both dates inclusive), the statutorily-granted EOT would have to be reduced by the number of days of contractually-granted EOT for delays falling within such period.

[Can I still rely on the EOT clause in my contract to ask for a further EOT?](#)

15. Yes, it is still possible to apply for a further extension of the completion date that has already been extended pursuant to Part 8A of the Act, so long as it is in accordance with and in compliance with any procedures or conditions in the relevant EOT clause (if any) in parties' contract.

[III. SUCCESSFUL NOTIFICATION FOR RELIEF / ASSESSOR'S DETERMINATION IN FAVOUR OF PARTY IN DELAY – MOVING FORWARD](#)

[Effect of an assessor's determination on one's claim](#)

16. After a determination is made by an assessor, the parties may rely on the assessor's determination in subsequent legal or other dispute resolution proceedings, such as adjudication, arbitration or litigation.

17. However, the assessor's determination is not *res judicata* as the Building and Construction Authority (BCA) has in its [Joint MinLaw-BCA Info Note on Commencement of the Covid-19 \(Temporary Measures\) Act 2020](#) clarified that the

substantial merits and defences will be decided separately in the adjudication, arbitration or litigation proceedings, separate from the regime under the Covid-19 Act.

18. The assessor's determination is also limited to
 - a. Whether the party to the construction or supply contract is unable to perform an obligation; and
 - b. Whether the inability is to a material extent caused by COVID-19.
19. What lies outside the ambit of the assessor's determination would be the extent of delay attributable to COVID-19, the quantum of liquidated damages or damages payable, and whether the defaulting party can make out a defence against breach of contract where the subject inability is the inability to supply goods and services under the contract.
20. Further, the failure to apply for an assessor's determination does not preclude a party from later raising defences in subsequent legal proceedings. Therefore, a party's silence or inaction after receiving a Notification for Relief does not mean that that party has conceded any defences available to it.
21. Nonetheless, a subsequent tribunal, adjudicator or court having to decide on the issue of whether a particular inability to perform was caused by COVID-19 can consider a prior assessment made by the assessor on the very same issue to be persuasive.
22. In this regard, assuming that all relevant facts had been placed before the assessor, a determination by the assessor in one party's favour could very well mean that the successful

party will have a higher probability of prevailing on the same issue in subsequent legal proceedings.

23. Further, since parties can rely on the determination in subsequent proceedings, a subsequent tribunal, adjudicator or court, in coming to its own decisions on the same issue, can take into account positions previously taken by the parties when applying for or responding to the assessor's determination.
24. Accordingly, it would be a matter of prudence and good practice for the defaulting party to carefully consider its positions taken before any assessor as well as to preserve all relevant evidence, given that any assessor's determination could still be subject to challenge at a later stage.

[\[Click here for BCA's circular on FAQs for the Built Environment Sector dated 22 Jun 2020\]](#)

IV. CONTRACTUAL OBLIGATIONS STILL APPLY

25. Although there are various statutory reliefs for parties to construction and supply contracts as observed above, parties are still bound by their contractual obligations.
26. This means that parties must still comply with any contractual duties to proceed with due diligence and expedition or to follow the contract programme, subject to any defences or extensions of time allowed by statute or under the contract.
27. Any contractual mechanism for applying for a contractual extension of time will still continue to

apply, especially so where the non-performance of one's contractual obligations results in an extended period of delay that exceeds the statutorily granted 122-days of automatic EOT, or where such failure to perform is not shown to be materially caused by COVID-19.

28. In any event, even where the statutorily granted automatic 122- days extension is applicable, as a matter of good practice, any party in delay should also properly record and document the EOT in accordance with any relevant contractual provision(s).

V. FINAL WORDS

29. These are trying times for those in the Built Environment sector. With the toll that the COVID-19 pandemic has taken on global supply chains, availability of migrant workers and the countless other consequential roll-on effects, significant delays and disruptions to projects are surely inevitable and widespread.

30. The extension of the period of relief under the Act as well as the additional reliefs in the form of the universal entitlement to EOT (amongst various other new reliefs) are therefore most certainly much needed by those in the industry. At the same time, the reliefs may not cover all circumstances and parties will still have to be mindful to comply with their various obligations and procedures under their respective contracts.

31. If you have any questions on the above or if we can assist you on any particular matter concerning COVID-19, please feel free to reach out to us.

Authors: Ms Jennifer Fong (Partner); and Ms Tang Min Fay (Associate).

If you will like more information or wish to discuss any other area of law with us, please contact:



Ms Jennifer Fong, Partner
DID: +65 68378176
E: jenniferfong@eldanlaw.com



Mr Daniel Koh, Founding Partner
DID: +65 6837 8107
M: +65 9688 8320
E: danielkoh@eldanlaw.com



Mr Edwin Lee, Founding Partner
DID: +65 6837 8102
M: +65 9667 6924
E: edwinlee@eldanlaw.com



Mr Lawrence Tan, Founding Partner
DID: +65 6837 8108
M: +65 9749 2728
E: lawrencetan@eldanlaw.com

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