

NEXIA PULSE 2020

Quarter 2 Issue

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“ We **LISTEN** to our clients, **THINK** on their behalf and help guide them on difficult decisions. We help steer companies towards **GROWTH**. Our domain is **ASIA**. ”

Dear Valued Clients and Associates,

As I pen this message, businesses are busy gearing up the resumption of operations for the re-opening of a new ‘Covid-19-safe’ normal.

While most activities have sprung back into actions after months of isolation, the return of partial normalcy can also bring anxiety in some having to cope with day-to-day tasks like in pre-Covid times. We must, therefore, adopt an outward mindset to see beyond the next normal and emerge stronger. Like how businesses were made to jump on the digital springboard overnight however not knowing what can technology brings.

The increased efficiency and productivity that automation provides remain an integral part of our service promise to reduce your manual intervention in the mundane tasks so that you stay focus on reigniting your energy for your business.

The circuit breaker period has also see us being connected more with you through a series of webinars, and virtual meetings and networking events. Regardless of the limited space we have, our team continues to be serving your business needs via alternating work arrangements, remotely or directly from workplace, come 29 June.

We thank you for your support during difficult times as we continue to be your reliable business partner in the new normal.

Henry Tan

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Addressing Uncertainties In Goodwill Impairment Assessment

What are the cautionary measures to be exercised by management in their formulation of the goodwill impairment model? Should management regard this global pandemic as a one-off extraordinary event to be disregarded entirely in their financial projections?

As a function of the widespread disruption to countries and societies resulting from the onset of COVID-19, most businesses continue to struggle to settle into the reality of a new normal alongside the macroeconomic impacts that are now inevitably ingrained into its very corporate fabric. The compounding effects of the pandemic upon the global economy can cause ripples throughout an organisation from its finance and liquidity, workforce availability, demand and supply of its revenue drivers, down to its operations and supply chain, impacting its operating expenses and costs of functioning. These ripples are due to deliver long sustaining impacts beyond the initial occurrence of the pandemic for an extended time period unknown and undeterminable.

The million dollar question thus exists: What are the cautionary measures to be exercised by management in their formulation of the goodwill impairment model? Should management regard this global pandemic as a one-off extraordinary event to be disregarded entirely in their financial projections?

While companies are still struggling to recover from the financial impacts from lock-downs in countries/ states and economic closures, we believe that evidence remains for companies to exercise prudence in their approach towards preparing a well-rounded goodwill impairment assessment.

At each reporting date, a company is required to perform impairment assessment on goodwill, intangible assets with indefinite life as well as intangible assets not used as of reporting date in accordance with FRS 36 Impairment of Assets, irrespective of whether any impairment indicators exist.

The key requirement is the measurement of the recoverable amount of the asset or cash-generating unit (CGU) against the respective assets' carrying amount. The determination of the recoverable amount is achieved through the stringent documentation and measurement of, and relying on the

higher of, the a) fair value less costs of disposal (FVLCD); and b) value in use (VIU):

	FVLCD	VIU
Definition	The amount obtainable from the sale of asset in an arm's length transaction between knowledgeable and willing parties, less costs of disposal, other than those that have been recognised as liabilities.	The sum of the present value of future cash flows expected to be derived from an asset or cash-generating unit.
Perspective	Market participant's perspective	Company's perspective
Valuation approach	1. Market approach 2. Income approach	1. Income approach

	FVLCD	VIU
Cash flow projections	<ul style="list-style-type: none"> - Eliminate owner-specific synergies - Adjust assumptions to be consistent from a market participant's perspective - Include considerations for restructuring and/ or investment enhancement, if applicable 	<ul style="list-style-type: none"> - Recognise synergies - Disregard all effects from restructurings, if no provision in accordance with IAS 37 has been made - Eliminate all effects from enhancing investments; only maintenance investments should be incorporated
Cost of Capital	<ul style="list-style-type: none"> - Post-tax WACC from a market participant's perspective - Reliance on information data extracted from comparable companies 	<ul style="list-style-type: none"> - IAS 36 requires applying a pre-tax discount rate. However in practice, a post-tax discount rate is used to derive a pre-tax discount rate - Reliance on information data extracted from comparable companies
Rule of thumb: First estimate VIU; 1) where CA < VIU, no need to determine FVLCD, except where CA > VIU, estimate FVLCD (or vice versa).		

Our avid investigation into the impact of a post-Covid landscape has provided evidence of financial impact on value determination of many commercial assets, on both the FVLCD and VIU fronts.

A. FVLCD key considerations:

In the estimation of fair value of tangible and intangible assets as a measure of an orderly transaction between market participants, reference should be made to observable transactions performed at arm's length, where possible. Due in part to the economy having been cast into knee-deep uncertainty since the onset of the pandemic with stability of major financial markets yet to be achieved, big ticket transactions have mostly ground to a halt, with many observable transactions having been performed on a fire-sale basis, deviating from what would have been an orderly transaction.

When faced with the situation of unobservable inputs or limited data points, such reliance in itself will require greater investigation into the facts and circumstances of each transaction observed and available as at reporting date, before sound judgment can be applied to provide for adjustments, if required.

B. VIU key considerations:

The fundamental key inputs to developing financial models lay in carefully considered cash flow projections and appropriately-adjusted discount rates, supported by justifiable bases and assumptions provided for the explicit forecast period which accurately reflect the risks and uncertainty of the post-Covid economy as at the reporting date. Such discovery should be reflected in the cash flow projections with considerations made based on the industry, business and identifiable key operating drivers of the company or CGU.

A logical approach towards mitigating the risk of developing a cash flow projection model that does not reflect accurately the financial impact of the uncertain economic situation on the subject company, is to develop defined scenarios with alterations to critical variables affecting revenue and cost, based on defensible assumptions. Critical variables may include, but not limited to, market disruptive factors such as customers' willingness to pay for the same unit of good or service, efficiency of distribution systems and supply chains, workforce availability, and the level of adoption of digital technology. A modest take towards integrating any outward economic disruptions into financial projections would be an estimation of the extent of uncertainty across scenarios, coupled with the corresponding theoretical execution time required for stabilisation of identified critical variables, and the critical analysis of how changes in such variables interplay with assumptions implied towards all other operational considerations.

Such defined scenario analysis should then allow for the identification of factors directly undermining liquidity or optimal functioning of the company, allowing for management to build their risk framework within the cash flows projections itself, thereby achieving a level of robustness while ensuring that the prospective financial

information is defensible in itself. Probabilities applied to each defined scenario should provide perspective to the risks, concerns and circumstances if the company or CGU, casting visibility into key value drivers.

Where discount rates are concerned, arbitrary discount rate adjustments should be applied with caution, with additional consideration to be provided in arriving at adjusted inputs such as the capital structure of the company or CGU, which is known and expected as at the reporting date. A thorough review should be equally provided to other critical inputs including beta, cost of debt and cost of equity to reflect the increased risk for each defined scenario. A final analysis into the material differences between each of the defined scenarios based on the application of adjusted and non-adjusted discount rates should provide a supplementary review into the reasonableness of the various explicit cash flow projections prepared.

Defined scenarios		VIU	Probability
Scenario A	Best case	1,000,000	20%
Scenario B	New normal	900,000	50%
Scenario C	Worst case	800,000	30%
Probability-weighted VIU		890,000	100%

As a cautionary measure, a proactive dialogue should be formed with auditors early in order to obtain proper directives and the approach to be taken when dealing with the appropriate and substantiative assumptions used in the goodwill impairment evaluation process.

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CEOs Today - Top Of The Minds

Nexia TS has invited the Chief Executive Officers and Chief Finance Officers to share their thoughts on the current pandemic, how it has affected business and their insights on what might lie ahead.

The COVID-19 pandemic has redefined the way businesses are carried out across the world. Analysts predict that Singapore economy will shrink by 11.8 per cent in the second quarter, which could be Singapore's worst recession. In order to cope with this crisis, the Singapore government has dedicated close to \$100 billion or nearly 20 per cent of GDP to help businesses and individuals.

The impact of a bleak economic performance here in Singapore is indisputable but to what extent has COVID-19 affected businesses and which sectors are more severely hit than others? Hear from the C-suites in a networking forum hosted by Nexia TS as they share their thoughts on the challenges they have faced, how the crisis has impacted ways of doing business and their insights on what might lie ahead.

Challenges – Impacts on businesses face in a world of changed economy

“COVID-19 – The perfect storm”

Marcel Tjia, Executive Director & CEO, Interra Resources

Interra Resources is a Singapore listed company in the oil and gas industry. We have operations in Indonesia and Myanmar. This is the perfect storm of falling oil prices amidst current economic backdrop and COVID-19 -so this is a trying situation. What gives me a lot of hope is that the demand for oil can come back quite sharply. The demand for oil comes from transportation which we may see a V-shaped recovery. I'm mildly optimistic that for the rest of the year there will be a decent recovery if there is no large second wave of COVID-19 cases.

“Retail is almost a standstill”

Lucy Cher, CFO, Singapore Myanmar Investco Limited

The company is directly impacted by the COVID-19 situation because the airport is closed thus retail is almost a standstill. There are also no dine-in services for F&B in Yangon, Myanmar therefore, we are impacted. What we are doing now is looking at the government-backed financing schemes. It has been 2 months since we have started the application for this government-backed assistance, and we are still waiting for the local banks' approval.

“Focused on what we can control”

Carolyn Choo, CEO, Worldwide Hotels

The hotel industry is badly hit since there are no overseas guest and hotels are not allowed to check in any local guests for staycation during the circuit breaker period. We must create new demand and create new growth areas. We are working with government to generate a new use for the hotels and some of our hotels are housing foreign workers to keep our cashflow going. Even though the room rates are very low, we need to secure some form of cashflow to survive the COVID-19 crisis. We are also challenging new norms.

The new standard for a 5-star hotel is providing the highest standards of hygiene and cleanliness hence we are preparing all our hotels to be SG-Clean certified. With stricter protocols and standard operation procedures to increase hygiene and cleanliness, and minimising contact points with our guests, we hope to see a bigger market share when international travel resumes.

“Change the way we think about going digital”**Sharad Tibewara, CEO, Polymet SA**

Sales for restaurants and F&Bs are down during the COVID-19 period. As a result of this, the sales of alcoholic beverages to these F&B industries are also affected. When people don't travel, the sales of F&B also go down. For the polymer business, we used to run the entire business based on human-to-human relationship.

Now we see that the business can go digital via WhatsApp and Zoom, there will be significant cost savings for the distribution business if we can implement this transformation at the operational level.

“Cash is king”**Chin Chee Choon, Advisory Leader, Nexia TS**

In time of crisis, it is important to think outside the box and look for other business opportunities. A good case to look at is this precision engineering company that produces scanners that I have come across. Now that demand has dropped, they had to look at new business opportunities.

One of it is to produce scanners that use facial recognition technology. These facial recognition scanners allow temperatures to be taken automatically as people walk pass them. Based on the forum discussion, the consensus across the board is that recovery will take place somewhere mid of next year, so businesses need to preserve their cash to ride through this storm – cash is king now.

Embracing Post-COVID – From disruption to opportunity**“Look at new growth areas for recurring business”****Loh Ji Kin, Assurance Leader, Nexia TS**

It is a unanimous consensus that COVID-19 will take a long while before we are back to normalcy. Opportunities are amid the challenges we face. We must continuously be looking out for new areas of growth where there are recurring business opportunities. Regardless of the type business we are in, we must readapt and make necessary changes.

“Consider M&A deals”**Ong Hwee Li, CEO, SAC Capital**

Companies looking for funding through IPO during this period may face difficulties in raising a meaningful sum because valuation and pricing are on the downside. Instead, companies with tight cashflow can consider M&A or sell-out as an alternative if the business is in the wrong industry. There has been an increase in enquiries for M&A, trade sales or partial sell-out services.

We are also seeing a demand for some opportunities to invest in some listed companies in Singapore where the share price has come down but the question is whether the owners of these listed companies are willing to give up their equities at the current share prices which are lower than the pre-COVID prices.

“Rethink your business model”**Bill Foo, Chairman, Tung Lok Group**

Pre-COVID, we were looking at ways to expand our business offices. Post-COVID, there are some questions regarding whether we need that much office space? Do we need everyone to be working at the same place? For our business models if we can't go out and meet customers to sell like in the real estate agency, then what can we do? We need to rethink about our business models and make necessary adjustments to adapt to the new business environment and different price points.

“This pandemic is not end of the world”**Chia Ming Ting, CEO, The Global Serve**

Going forward there should be more optimism in the economy as I see some progress in the current situation. Countries are reopening; factories are gradually resuming its operations and vessels are starting to move. We also see more activities in Europe even though the environment there is generally quite pessimistic. People's mindset changes after this COVID-19 pandemic because we realise whether there is business or not, it is not the end of the world.

“Tech future remains bright”**Daphne Ng, Co-Founder of Dedoco and Executive Director of RootAnt Global.**

The tech future remains bright. Digital banking space will be very vibrant as banks realise that they are meeting customers (physically) lesser and with COVID-19, it forces the banks to look at other mobile (digital) banking services. We are going into that space quite quickly.

“Be productive and cost conscious”**Jazz Chong, Founder, Ode to Art Singapore**

Art galleries are not being spared in this crisis that rest of the world is going through. We are mainly feeling the financial squeeze from slower volume of sales. One way or other it is to be more productive and be cost conscious regarding the way we are operating now.

“We are all in the same boat”**Henry Tan, Group CEO & Chief Innovation Officer, Nexia TS**

Don't just do nothing. Do something. Transformation is the key as we continue to operate on what we have and what we can. COVID-19 changes the way how businesses are done as it changes a lot of mindset. People are willing to collaborate more as compared to pre-COVID times.

The pandemic has taught us to come together as one, to collaborate, and make businesses work. Given that we are all in the same boat (in this current situation) – think positively and don't stop looking out for any opportunities ahead.

Respond. Recover. Reimage.

Businesses regardless of size will need to be proactive in managing the risks and challenges presented by the COVID-19 crisis. Based on key highlights from the COVID-19 KEY IMPLICATIONS FOR BOARDS by CPA Australia ESG Centre of Excellence, it suggests that for organisations to survive they should respond to the changing demands; recover to emerge stronger; and reimagine the next normal.

Respond

Strong leadership is required to undertake the critical role of monitoring the performance of the organisation, carefully reviewing management's scenario analysis, identifying and accessing funding and reviewing updated cashflow forecasts.

Recover

When businesses are faced with uncertainties, it is vital to continuously monitor the financial performance of the organisation, including updated cash flow models and focus on cost management and expenditure. Other important strategies to consider is exploring options for the business to pivot and create alternative revenue streams.

Reimagine

Reinventing is a leap into the future. One thing is certain, many organisations will look to build resilience into all aspects of their business. Digital transformation projects will continue with robotic process automation and artificial intelligence will be used to streamline operations, empower employees, engage customers and transform products.

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China Transfer Pricing Regulation Review

China's State Administration of Taxation (SAT) released Announcement [2016] #42, Improved Administration of Related Party Declarations and Contemporaneous Documentation, and Announcement [2017] #6, Administrative Measures on Special Tax Investigation, Adjustment and Mutual Agreement Procedures.

Since June 2016, China's State Administration of Taxation (SAT) has responded to the OECD BEPS transfer pricing recommendations through release of two primary regulatory documents, to include Announcement [2016] #42, Improved Administration of Related Party Declarations and Contemporaneous Documentation, and Announcement [2017] #6, Administrative Measures on Special Tax Investigation, Adjustment and Mutual Agreement Procedures. While in some cases Announcement 42 increases the complexity of related party transaction reporting by global companies operating in China, many of the provisions clarify points that were previously quite vague, and overall the regulations mostly bring China's transfer pricing documentation requirements into line with the BEPS recommendations. Meanwhile, Announcement 6 consolidates a number of previously released regulations related to outbound payments for royalties or service fees, and introduces many of the BEPS concepts into the regulations. The scope of the announcement includes transfer pricing, thin capitalization, controlled foreign companies (CFCs) and general anti-avoidance rules (GAAR), while also detailing the rationale and methods used in transfer pricing audits and tax investigations. A brief summary of key points in the regulations follows.

Related Party Transactions Clarified

Announcement 42 provisions mandate that all resident and non-resident companies subject to China corporate taxation annually file an updated version of a Report of Yearly Related Party Business Transactions. Correspondingly the definitions of related party relationships and transactions have been clarified and broadened, thereby making it simpler to determine whether or not a related party relationship exists. Related party transaction definitions include a new category covering financial assets transfers. The financial intermediation category has expanded to include long-term and short-term borrowing, surety bonds, accrued interest advances, deferred payables and receivables, and similar

transactions. The related party service transaction category has been expanded to include market survey, marketing planning, agency, design, consultancy, administration, technical services, contract R&D, repair and maintenance, legal services, financial management, audit, recruitment, training, centralized procurement and so on.

Contemporaneous Documentation and Country-by-Country Reporting

Announcement 42 also details new contemporaneous documentation requirements, to include how the documentation is structured, the contents of the documentation, the thresholds at which documentation is required, and the deadlines for document preparation. As per the BEPS Action 13 report, contemporaneous documentation shall now include a Master File and a Local File, as well as "special documentation" that may be required with respect to Cost Sharing Arrangements, or where thin capitalization thresholds are exceeded.

Additionally, there are now three general cases in which country-by-country (CBC) reporting is required. In the first case, a resident ultimate holding company of a multinational group that has consolidated financial statements exceeding RMB 5.5 billion for the previous year must file a CBC report. A CBC report will be required where a multinational group designates a China resident company such responsibility. Lastly, where any taxpaying entity in China is under special tax investigation, CBC reporting is required even if the entity does not fall into either of the two cases listed above.

Special Tax Investigations

Announcement 6 clearly specifies factors that may trigger special tax investigations, to include companies that: engage in a large number and/or varied types of related party transactions; incur long-term losses or low profits; have transactions with related parties in low tax jurisdictions; fail to prepare contemporaneous documentation as required; exceed standards for debt to equity ratio; have certain characteristics related to CFCs; or have tax planning arrangements that have no reasonable business purpose.

Transfer Pricing Methods

Announcement 6 allows that in any comparability analysis, any of the OECD acceptable transfer pricing methods may be used, as well as other arm's length methods which reflect the principle that "the place where profit and economic activities occur matches the place of value creation." Each of the methods is described in detail with respect to when a given method should be used, the factors that should be considered in choosing, and how prices shall be calculated.

Royalties and Service Fees between Related Parties

Announcement 6 mandates that any royalties or licensing fees paid to related parties must be commensurate with provable economic benefits to the party paying the fees. Likewise, service transactions between related parties must be beneficial, willingly received by the recipient, and priced at arm's length. A list of services considered non-beneficial to the recipient is included in the announcement. If determined to have no economic benefit to the recipient, deductibility of royalties and/or service fees is not allowed.

Conclusion

While remaining questions linger, the SAT announcements introduced above go a long way toward providing unambiguous regulatory guidance with respect to transfer pricing and related issues for both taxpayers and in-charge tax officials throughout China. As a result, it is predicted that tax investigation and adjustment practices in transfer pricing cases will be increasingly standardized from one tax bureau to the next. Likewise the reasonably close adherence to the related BEPS deliverables should help global businesses better understand how to plan and implement transfer pricing policies and practices, as well as what is required to avoid special tax adjustment investigations in most types of related party transactions.

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Looking For Recovery After The Coronavirus Sell-Off

This article was first published by Smith & Williamson in Investment Outlook May.

After falling 34% from their peak this year, global equities (as measured by the MSCI All Country World Index) bottomed-out on 23 March. At the time of writing, they had since rallied 25%[1]. Investors returned on signs that the coronavirus outbreak may be peaking after a slowing in daily new cases in epicentres like Italy and New York.

Equities were also lifted after the Fed (and other central banks) stepped-up their asset purchases (Quantitative Easing) and governments around the world unveiled record stimulus programs.

Crucially, governments and central banks are working together to ensure funding flows to the private sector during the lockdown. For example, the \$2.3trn US Coronavirus, Aid, Relief, and Economic Security Act (the 'CARES' Act) stimulus package includes unprecedented US Treasury-Federal Reserve co-operation. Essentially, the US Treasury will allocate \$454bn to the Fed who can multiply this capital by up to 10 times to provide credit worth around \$4.5trn for firms, municipalities and funding support for the corporate bond market[2].

This 'state capitalism' of injecting money into the economy has ensured there is ample liquidity flowing through the financial system. Indeed, US broad M2 money supply (e.g. currency in circulation and bank deposits), a rough proxy of the stock of money in the financial system, is expanding by over 18% a year[1], the fastest pace since the Second World War. The hope is that this largesse also helps support other credit markets.

Despite the improving funding environment, the underlying picture for global growth looks gloomy. For instance, China, the first major economy to release output data, saw its real GDP contract 6.8% in the first quarter, the biggest decline seen in over 30 years of available data[1].

For the 2020 calendar year, the IMF's latest economic projections see a 3% decline in global GDP, its worst performance since the Great Depression[3] more than 90 years ago. GDP contractions have led analysts to revise down global Earnings Per Share to -12% for 2020 so far[1].

If equities are to sustain their recent rally over the longer term, there needs to be a fundamental improvement in growth. For that to happen governments need to ease back on lockdowns. This is starting to happen.

In Germany, small shops and car dealerships (an important industry for the country) resumed business from 20 April, while schools for older children are due to reopen on 3 May.

According to a Sunday Times report, the UK government may start a partial reopening of the economy from 11 May. And President Trump, with an eye to the upcoming election in November, is upping the pressure on state governors to loosen the lockdown.

A V-shaped economic recovery will only be possible if restrictions are lifted and soon. However, there is the ever-present risk that a second coronavirus wave stalls this re-opening.....

Read more here:

<https://smithandwilliamson.com/en/insights/investment-outlook-may-2020/>

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[1] Refinitiv Datastream, 30 April 2020

[2] JPMorgan, 3 April 2020

[3] IMF, 20 April 2020



The COVID-19 (Temporary Measures) Act 2020

- Providing Temporary Relief For Inability To Perform Contracts

Introduction

The COVID-19 pandemic has caused upheaval in the world in most areas of living. Businesses have been disrupted worldwide resulting in economic hardship and devastation. In the light of such dire consequences, the COVID-19 (Temporary Measures) Act 2020 (hereinafter referred to as the "Act") is timely and meant to provide relief for businesses. It acknowledges that resulting from the pandemic, there will be obligations that parties will not be able to fulfil.

The Act

The Act is divided into several parts:

- (a) Temporary Relief for Inability to Perform Contracts - Part 2 of the Act
- (b) Temporary Relief for Financially Distressed Individuals, Firms and Other Businesses - Part 3 of the Act
- (c) Temporary Measures for Conduct of Meetings - Part 4 of the Act
- (d) Temporary Measures for Court Proceedings and Syariah Court Proceedings - Part 5 of the Act
- (e) Temporary Measures Concerning Remission of Property Tax - Part 6 of the Act
- (f) COVID-19 - Control Orders - Part 7 of the Act.

Inability to perform contracts

It is inevitable that there will be parties unable to perform their obligations. The provisions in Part 2 are useful for parties to seek relief. It is important that we know the scope of the provisions - the contracts applicable or who can apply - and the process to obtain relief - what information should you provide and what to expect in a determination.

The Act recognises that certain business will be more adversely affected than others.

For these contracts, no action can be taken against the defaulting party. However, this does not apply to all contracts.

The operative provision is Section 5 of the Act.

Conditions for section 5 of the act to apply

There are 5 conditions to be met, namely:

1. It must be a scheduled contract as listed in the Act - Section 5(1)(a) of the Act.
2. A party is unable to perform its obligations on or after 1 February 2020 - Section 5(1)(a) of the Act.
3. It does not apply to contracts entered into or renewed on or after 25 March 2020 - Section 4(1) of the Act.
4. This inability to perform a contract is to a material extent caused by the COVID-19 event - Section 5(1)(b) of the Act.
5. Notification for Relief must be served on the other party - Section 5(1)(c) of the Act.

Relief is not automatic like the Job Support Scheme. All the conditions must be met.

Scheduled contracts

The contracts listed in the Schedule to the Act are:

- Loan facilities granted to Bank licensed under the Banking Act (Cap. 19) or a finance company licensed under the Finance Companies Act (Cap. 108) secured against commercial or industrial property or secured against any plant, machinery or fixed asset used for business purpose.
- Construction or supply contract.
- Performance bond or equivalent granted pursuant to a construction or supply contract.
- Hire-purchase agreement or conditional sales agreement as defined under the Hire Purchase Act (Cap.125) relating to plant, machinery or fixed asset used for business purposes or

a commercial vehicle.

- Event contract.
- Tourism-related contract.
- Lease or licence of non-residential immovable property.
- Sale and purchase of a unit of housing accommodation.

The contract in which relief is sought must fall within one of those listed in the Schedule. It is important to note that not all contracts fall within the Schedule.

This has been expanded to include the sale and purchase of residential properties from Housing Developers with effect from 13 May 2020 - either by an option given by the housing developer or an agreement between the housing developer and purchaser.

If your contract does not fall within the Schedule, there is no relief. You can see that the list covers contracts very much impacted by the pandemic.

Loan facility - commercial or industrial immovable property

Not all bank loans qualify for relief. The Schedule does not cover residential properties or properties outside Singapore. The property secured must be a commercial or industrial property. It would seem that properties with dual use - part commercial and part residential - would not be eligible.

If the loan is taken from a party that is not a licensed bank or finance company, then you are not able to seek relief under the Act. An example is a loan from a private individual or company.

The loan must be to an enterprise as defined - a body corporate or body un-incorporate that is incorporated or formed that carries on business in Singapore. Further, not less than 30% of its shares or ownership interest must be held by Singapore citizens or permanent residents. The turnover must not exceed S\$100 million in the latest financial year. Foreign owned companies or large corporations are excluded. Therefore, individuals who own and mortgaged their commercial or industrial property are not eligible.

Indirect mortgages involving commercial or industrial properties will not qualify. These refer to loans extended to individuals and secured against commercial or industrial property owned by the enterprise. This happens when a director or partner borrows monies against such security.

Loan facility - plant, machinery or fixed asset

The conditions are similar to loans for commercial or industrial property in that the loans are by a licensed bank or finance company to an enterprise.

The plant, machinery or fixed asset must be located in Singapore and used for manufacturing, production or other business purposes.

Construction or supply contract

Both contracts are specific contracts defined in the Act with reference to Section 2 of the Building and Construction Industry Security of Payment Act (Cap. 30B) which reads as follows:

“Contract” means a construction contract or a supply contract, and includes a construction contract or a supply contract that has been terminated;

“Construction Contract” means an agreement under which –
(a) one party undertakes to carry out construction work, whether including the supply of goods or services or otherwise, for one or more other parties; or

(b) one party undertakes to supply services to one or more other parties;

“Supply contract” means an agreement under which –
(a) one party undertakes to supply goods to any other party who is engaged in the business of carrying out construction work or who causes to be carried out construction work;

(b) the supply is for the purpose of construction work carried out or caused to be carried out by the second-mentioned party; and

(c) the first-mentioned party is not required to assemble, construct or install the goods at or on the construction site, but does not include such agreements as may be prescribed.

Performance bond or equivalent

This is related to the construction or supply contract referred to above.

Hire purchase agreement

The hire purchase or conditional sales agreement relates to any plant, machinery or fixed asset located in Singapore and used for manufacturing, production or other business purpose. Hire purchase for plant, machinery or fixed asset located in other countries will not be eligible.

Hire purchase of commercial vehicles would fall within the scheduled contracts and there is a comprehensive definition of commercial vehicle in Paragraph 2 of the Schedule.

Event contract

This is defined in Section 2 of the Act. It covers contracts for facilities or related goods or services for business meetings, incentive travel, conference, exhibition, sales event concert, show, wedding, party or other social gathering, or sporting event or participants thereof.

These are contracts affected by the social distancing measures and the circuit breaker measures.

Tourism-related contract

This is defined in Section 2 of the Act and covers travel by sea or land and tourism in Singapore, domestic tourist or outbound tourists.

These contracts are also affected by the circuit breaker measures examples cruises, hotel room bookings. Contracts related to air travel are excluded.

Lease or licence of non-residential immovable property

For Leases or Licences, it applies only to non-residential immovable property. In a technical sense, this could be wider as non-residential extends beyond commercial or industrial property - for example, property zoned for societies or a place of worship. A tenant of a mixed-use unit would not be able to apply for relief where there is an element of residential use.

Option/agreement - housing developer and purchaser for sale and purchase for a unit of housing accommodation

This applies to contracts between buyers and housing developers only for residential units.

The seller need not be a licensed developer - so long he is a person that engages in a business of housing development and includes the Housing Development Board.

Private sales and purchases between 2 parties do not qualify - sale of a completed unit or sub-sale of a unit in a housing development.

It would seem also that a contract for a mixed-use unit - residential and commercial - in a development will not qualify example a shop unit with living quarters in a development.

Material extent caused by COVID-19 event

The inability to perform a contract is to a material extent caused by COVID-19 event is the acid test.

COVID-19 event is defined as the epidemic or pandemic itself or by operation with any law of Singapore or other countries or order or direction of Government worldwide made as a result of or in connection with COVID-19, examples are the social distancing measures or a lockdown.

There must be a connection in the causation and the causation is material. The key operative requirement here is "material extent".

The potential issue for contention is what do you mean by "material extent"? How material is material? What is the extent of materiality? Is it an objective or subjective test? Do we look at current or future?

By the way Section 5 is drafted, "a party is unable to perform", suggests that the inability must exist and cannot be anticipated. But could that be too late?

What are the factors we look at? This could be a drop in earnings, absence of customers, cash flow stagnation etc. Some will be obvious - for instance, employees not being able to go to work or premises cannot be open for business.

However, there will be situations which are not so clear.

Before the COVID-19 event, a business is not doing well and the obligations cannot be met comfortably - delayed or reduced payments to suppliers etc. The business owner is thinking of closing the business as he feels it is a hopeless case. COVID-19 event worsens the business. Would the COVID-19 event be to a material extent the cause of the inability to perform its obligations if it merely accelerates the process?

If a business has some cash reserves, must the business owner utilise the cash reserves before applying for relief especially if the cash burn rate is high?

It is a case to case basis.

Notification for relief

Having met the conditions in Sections 4 and 5(1)(a)(b) of the Act, the affected party may seek relief. To obtain the relief, the affected party needs to take steps as prescribed by the Act.

A Notification for Relief (hereinafter referred to as the "Notification") has to be served on the various relevant recipients as provided in Section 9 of the Act. This has to be done within the prescribed period which is 6 months commencing 20 April 2020.

The procedures and prescribed information can be found in the regulations and Ministry of Law website.

It is noted that the procedures for service prescribed is primarily electronic by emails and internet messaging system. The use of postal services is last resort.

The Notification is a prescribed Form with 2 versions - electronic or manual version.

These are important information the affected party has to provide:

1. State the obligation that the affected party is unable to perform.
2. Explain how the inability to perform the obligation was

materially caused by COVID-19 event - with supporting documents if you can.

3. Proposals for the other party's consideration.

The Notification sets the basis for your application. Treat the explanation as a court pleading. You state your case. If you do it well, it will show your situation is genuine and you gain credibility.

Then, come up with sensible and reasonable proposals. Do not make ridiculous offers that would cast doubt on your sincerity. If you are a tenant, you should not be asking for waiver of rental completely. You need to consider the landlord's situation as well. Look into a reduction or perhaps a profit-sharing arrangement.

You want to move the other party to negotiate with you positively and come to a sensible settlement. Making a proposal that is not workable would be a bad start for negotiations.

Parties are encouraged to reach a compromise.

Prohibited actions

Once the Notification has been served, the other party is prohibited from taking any action under Section 5(3) of the Act which are:

1. Commence or continue with an action in court - stay of legal proceedings – 5(3)(a)
2. Commence or continue with arbitral proceedings - stay of arbitral proceedings – 5(3)(b)
3. Enforce any security over immovable and movable property – 5(3)(c) & (d)
4. Application for scheme of arrangement or judicial management or winding up or bankruptcy - enforcement actions or appointment of receiver or manager - 5(3)(e)- (i)
5. Commencement of execution, distress or other legal process against any property except with leave of court – 5(3)(j)
6. Repossession of any goods used for trade, business or profession under leasing agreement, hire-purchase agreement or retention of title agreement – 5(3)(k)
7. Termination of contract because rent or money not paid – 5(3)(l)
8. Right of re-entry or similar right – 5(3)(m)
9. Enforcement of judgement or arbitral award or determination as specified – 5(3)(n)
10. Such other actions as prescribed – 5(3)(o)

If there are pending court or arbitral proceedings against the party seeking relief, this affected party may wish to refer to the procedures and information on filing a Memorandum of Notification for Relief or other prescribed forms under the COVID-19 (Temporary Measures) (Temporary Relief for Inability to Perform Contracts) Regulations 2020 on the Ministry of Law website to obtain a stay or dismissal of those proceedings in the State Courts and Supreme Court

respectively. This is applicable where –

- (a) there are any pending court or arbitral proceedings in relation to the subject inability at the time where the Notification was served; or
- (b) such proceedings are commenced after the Notification is served.

Rule 3A of the COVID-19 (Temporary Measures) (Temporary Relief for Inability to Perform Contracts) Regulations 2020 expands on such other actions in Section 5(3)(o) and covers:

1. Unilateral increase in charges or interest - non-contractual
2. New charges
3. New security
4. Withholding of booking fee for housing development purchase
5. Termination of the agreement with developer

These prohibited actions apply only if a Notification is submitted.

If the affected party does not serve the Notification, the party is not protected from the actions that can be taken against it for default.

Additional relief

For construction or supply contract, event contract and tourism-related contract, Sections 6 and 7 of the Act provide additional relief.

Construction and Supply Contracts - a breach of terms of the contract or a delay in the supply of goods or services if materially caused by COVID-19, will be a defence to a claim for a breach of contract. Additionally, calling on a performance bond or equivalent as regards such inability is a prohibited action under the Act.

Event and Tourism-related Contracts - once the Notification is served, the service provider may not forfeit a deposit it has taken. Parties can make an application for an assessor's determination if they are unable to reach a compromise. The inability to perform an obligation in the contract if materially caused by COVID-19, will be a defence to a claim for the payment of a cancellation fee under the contract.

There have been further proposed amendments to the Act to provide more rental relief to small-and-medium sized enterprise (hereinafter referred to as "SME") tenants. Among the proposed amendments, Landlords will have to step up to provide SME tenants with more rental relief. SME tenants will be allowed to repay rental arrears by way of instalments with a cap on late payment interest or charges for specific contracts. The proposed amendments to the COVID-19 regulations are set to be introduced in Parliament on 5 June 2020 and if passed, will commence sometime at the end of July 2020.

Reference to assessors

Either party can make an application to the Registrar (Section 9(2) of the Act) to appoint an assessor who will make a determination as regards any dispute on whether the “conditions” are met.

The assessors must be a lawyer, public or chartered accountant, with at least 3 years of working experience in or relating to law, accountancy, finance, business management, building and construction or architecture. From the qualifications, we can see that these people are relevant insofar as they concern the scheduled contracts.

The considerations by the assessor are:

1. Whether the conditions in Section 5 of the Act are met.
2. The ability and financial capacity of the party to perform the obligation.
3. Achieving a just and equitable outcome.
4. In a case relating to event contract or tourism-related contract, whether it is just and equitable in the circumstances of the case for the deposit or any part of the deposit to be forfeited.

To achieve an outcome that is just and equitable, the types of determination are stated in Section 13(3) of the Act which includes:

1. Requiring a party to the contract to do anything or pay any sum of money to discharge any obligation under the contract.
2. Where a right or repossession of goods under the contract or of re-entry or forfeiture under a lease or licence of immovable property had been exercised by a party in breach of Section 5(2) of the Act, requiring the party to return the goods or give possession of the immovable property to the other party.
3. In a case of event contract or tourism-related contract, to retain or restore the deposit forfeited.

The assessor would try to encourage parties to agree to a reasonable proposal fair to both parties and to a certain extent function as a mediator. The difference is that if there is no resolution, the assessor can make a determination whereas a mediator is not able to do so.

The hearing will generally be conducted by email exchanges. Therefore, what you write is crucial - clear, precise, logical and reasonable.

Determination - final and binding

Once a determination is made by the assessor, it is final and binding. Parties cannot bring an appeal.

However, if one party is absent from the hearing, and a dismissal or determination made, the absent party may make an application to set aside the dismissal or determination of the assessor if the assessor is satisfied that the absent party had a good reason for being absent from the hearing, and it is just in the circumstances to set aside the dismissal or determination (Rule 20 of the COVID-19 (Temporary

Measures) (Temporary Relief For Inability To Perform Contracts) Regulations 2020.

No advocate and solicitor can represent any party in the proceedings. However, by the definition in Section 14 of the Act, it would seem that a paralegal or a non-practising lawyer may represent parties.

This provision does not mean parties cannot engage the services of a lawyer. A lawyer can help parties draft the reasons for relief or to challenge the notification. Half your battle is won if parties are able to state clearly your case.

Engaging a lawyer trained and inclined towards mediation would be useful in helping parties work out practical and reasonable proposals.

Withdrawal of notification

The affected party may withdraw the notification at any time - before the determination by the assessor.

If the affected party realises that insufficient evidence was presented or that the application is weak, the application may be withdrawn. This is to avoid a determination against the affected party. The affected party can take steps to strengthen the case and proceed to serve another Notification. Of course, there can be abuse in this area. Multiple Notifications theoretically are allowed.

End of temporary relief

Section 5(2) of the Act provides that another party to the contract is prevented from taking the prescribed actions during the pandemic until the earliest of the following:

(a) the expiry of the prescribed period (described by Order 2 of the COVID-19 (Temporary Measures) (Prescribed Period) Order 2020 as 6 months commencing on 20 April 2020 i.e. 19 October 2020);

(b) the date the Notification is withdrawn;

(c) the date on which an assessor of the case makes a determination that the case in question is not entitled to relief under the Act, because any of the “conditions” have not been met.

Other actions for affected person - frustrated contracts act or force majeure

It is advisable to check your contract and see whether there are other avenues to seek relief. The Act preserves other actions that you may rely on for relief - in law or in contract.

The Act mentions 2 actions:

1. Whether the contract has a force majeure clause that allows a party to a contract to be excused from performance

caused by circumstances beyond its reasonable control. This depends on how the clause has been drafted to allow either party to terminate the contract or prolong performance - whether the clause refers to an epidemic or pandemic. Such clauses will have to be scrutinised on their wordings with consideration to the difficulties of the affected parties and in a commercial light.

2. Whether a party can rely on the doctrine of frustration if contract does not provide for force majeure. Here, the threshold is higher as it refers to a contract impossible of performance owing to an unforeseen event. There must not be any default by either party. The event significantly changes the nature of the contract. It is not only the expense or onerous consequence. It is something the parties had not contemplated and it would be unjust to hold them to the contractual terms in the new circumstances. In such an instance, both parties are to be discharged from further performance.

These actions have a higher threshold simply because the effect is to discharge parties substantially or fully from further obligations. This is different from the Act as the relief is only temporary.

Conclusion

The Act provides temporary relief. All rights are preserved and all obligations remain. For example, if interest is payable, you will still pay interest at the end of the day. It merely suspends your obligations.

The causation factor is important. The parties need to look at their contractual obligations, their financial position and the ultimate objective for your business.

As the relief is temporary, it is wise to take the temporary relief offered as an opportunity to reach a resolution palatable to both parties to a contract with a view to sustain the business and maintain the relationship between the parties.

In that way, the relief becomes permanent.

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About Nexia TS

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The business conditions are changing rapidly worldwide, with shrinking economic cycles and the emergence of a new economic world order. Whether one is doing business within the known boundaries or expanding globally, one cannot escape the challenges of this new state of affairs. Those who quickly adjust to and master these continually evolving conditions are also known to reap huge rewards from the abundant opportunities available today.

They say the world is getting smaller, and it really is. We help many talented entrepreneurs from across the globe with our sound strategic advice and highly-professional services. We go beyond the mandate typically enjoyed by accountants and become custodians of your business interests. In short, Team Nexia works with you to design game-changing business solutions.

Our Service Portfolio

We believe that we must continually evolve and augment our skills to protect your business interests. We are continually expanding our range of services in tune with your changing business needs. We serve you with:

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- Risk Advisory
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- M&A Advisory
- Financial Advisory, Insolvency & Restructuring
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Having worked with our clients through many different business conditions, the insights developed over these years have helped us quickly to find the solutions that serve your business interest in the best possible manner. Today we enjoy the implicit trust of our clients and often win business through referral.

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