

Construction & Projects

Relief for Construction Firms Facing Higher Foreign Manpower Costs Due to COVID-19

Introduction

The COVID-19 pandemic has brought about a whole host of challenges for construction firms. Among them, the cost of foreign manpower necessary for the construction works has increased due to travel restrictions and limited supply. To provide relief for affected firms, the COVID-19 (Temporary Measures) (Amendment No. 3) Bill ("**Bill**") was introduced in Parliament on 10 May 2021.

The Bill introduces a new Part 10A to the COVID-19 (Temporary Measures) Act ("**Act**"), which provides a framework for parties to construction contracts to apply for relief from their contractual counterparties if they are affected by an increase in remuneration for work permit holders as a result of a COVID-19 event. Such increase may be caused by border control quotas set by the Government limiting the inflow of workers from particular countries facing a spike in COVID-19 cases, or by travel restrictions imposed by other countries on their citizens.

The Bill was tabled on a Certificate of Urgency and has since been passed on 11 May 2021.

In this Update, we highlight the key provisions of the Bill and the framework for relief applications set out therein.

Does the Bill apply to you?

A party to a construction contract (referred to here as "**Party A**") who undertakes to carry out any construction works under that contract may apply to the Part 10A Registrar to appoint a Part 10A Assessor to adjust the contract sum. This is provided that Party A has made a reasonable attempt to negotiate with the other party to the contract ("**Party B**") for such adjustment.

The timeline requirements for the applicability of the new Part 10A are as follows:

- (a) Part 10A applies to construction contracts entered into before 1 October 2020.
- (b) The contract must not have been terminated before 10 May 2021. Similarly, notice for the termination of the contract must not have been given before 10 May 2021.
- (c) The construction works under the contract must not have been certified as completed as at 10 May 2021.
- (d) The purpose of the adjustment is to take into account an increase in the amount of foreign

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manpower salary costs incurred by Party A between 1 October 2020 and 30 September 2021 (or such later date as may be prescribed) because of a COVID-19 event ("**eligible foreign manpower salary costs**").

Part 10A does not apply to construction contracts for the carrying out of construction works at any residential property that do not require the approval of the Commissioner of Building Control under the Building Control Act.

How do you make an application?

To apply for the appointment of a Part 10A Assessor to adjust the contract sum, Party A must do so in the prescribed form and manner, as well as within the prescribed time. Crucially, the application must be accompanied by evidence that Party A had made a reasonable attempt to negotiate with Party B for such adjustment, together with the prescribed fee.

The application must be served by Party A within the specified period on:

- (a) Party B and any other party to the contract, and any assignee thereof; and
- (b) Any person who is Party A's guarantor or surety, or who has issued any performance bond or equivalent.

The Part 10A Registrar may request for further information, or reject an application on specified grounds, including where (i) the application fails to comply with statutory requirements; (ii) the Registrar reasonably suspects that information provided is false or misleading in a material particular; or (iii) the application is frivolous or an abuse of process.

Regulations for Part 10A have yet to be made under the new section 79K, but are expected to set out the prescribed form, manner, and timeframes.

How does the Assessor make his determination?

The Assessor must determine whether:

- (a) Part 10A is applicable to the case;
- (b) Party A had made a reasonable attempt to negotiate with Party B;
- (c) There has been an increase in the amount of eligible foreign manpower salary costs;
- (d) It is just and equitable in the circumstances to adjust the contract sum; and
- (e) The quantum of the adjusted amount.

A determination may be enforced in the same manner as a court judgment or order, with the leave of the court. It will be binding on all parties to the contract, as well as all parties claiming under or through them, and is not subject to an appeal.

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Under what circumstances can the initial determination be varied or replaced?

Notwithstanding that there is no appeal from a determination, the Assessor may, on his or her own motion or upon either or both parties' application:

- (a) vary or replace the initial determination if there has been a material change in circumstances such that it is just and equitable for the variation or replacement to be made; or
- (b) require the parties to attend before the Assessor for a further review, and to make any additional determination as appropriate.

In assessing whether it is just and equitable, the Assessor is required to take into account whether:

- (a) there has been undue delay by the applicant seeking the subsequent determination;
- (b) any party to the contract has acted in reliance on the initial determination;
- (c) court, arbitral, or adjudication proceedings have been commenced in relation to the adjusted contract sum, and if so what stage such proceedings are at. The making of a subsequent determination is not permitted if a judgment, arbitral award, or determination has already been made.

Concluding Words

In the wake of the latest border control measures, the construction industry is facing yet another manpower crunch. The Bill aims to provide relief for parties to a construction contract by allowing for a Part 10A Assessor to make a binding determination on any adjustments to the contract sum. However, parties must note that they are required to make a reasonable effort at negotiations before this mechanism can be activated. They should also ensure that their case falls within the relevant parameters, especially in relation to the specified timeframes – for instance, the increase in foreign manpower salary costs must have been incurred between 1 October 2020 and 30 September 2021.

Should there be any material change in circumstances, parties should be prompt in applying for a subsequent determination, particularly if legal proceedings in relation to the adjusted contract sum are already ongoing.

Visit our [COVID-19 Resource Centre](#) for views from our lawyers across the region on common issues and legal implications brought about by COVID-19. For specific inquiries, please reach out to your relationship partner or send an email to our [COVID-19 Legal Team](#).

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Contacts



Soh Lip San
Head, Construction & Projects
Senior Accredited Specialist,
Building & Construction

T +65 6232 0228

lip.san.soh@rajahtann.com



Sim Chee Siong
Partner, Construction &
Projects
Senior Accredited Specialist,
Building & Construction

T +65 6232 0227

chee.siong.sim@rajahtann.com

Please feel free to also contact Knowledge and Risk Management at eOASIS@rajahtann.com

Our Regional Contacts

RAJAH & TANN | *Singapore*

Rajah & Tann Singapore LLP

T +65 6535 3600
sg.rajahtannasia.com

CHRISTOPHER & LEE ONG | *Malaysia*

Christopher & Lee Ong

T +60 3 2273 1919
F +60 3 2273 8310
www.christopherleeong.com

R&T SOK & HENG | *Cambodia*

R&T Sok & Heng Law Office

T +855 23 963 112 / 113
F +855 23 963 116
kh.rajahtannasia.com

RAJAH & TANN | *Myanmar*

Rajah & Tann Myanmar Company Limited

T +95 1 9345 343 / +95 1 9345 346
F +95 1 9345 348
mm.rajahtannasia.com

RAJAH & TANN 立杰上海

SHANGHAI REPRESENTATIVE OFFICE | *China*

**Rajah & Tann Singapore LLP
Shanghai Representative Office**

T +86 21 6120 8818
F +86 21 6120 8820
cn.rajahtannasia.com

GATMAYTAN YAP PATACSIL

GUTIERREZ & PROTACIO (C&G LAW) | *Philippines*
Gatmaytan Yap Patacsil Gutierrez & Protacio (C&G Law)

T +632 8894 0377 to 79 / +632 8894 4931 to 32
F +632 8552 1977 to 78
www.cagatlaw.com

ASSEGAF HAMZAH & PARTNERS | *Indonesia*

Assegaf Hamzah & Partners

Jakarta Office

T +62 21 2555 7800
F +62 21 2555 7899

Surabaya Office

T +62 31 5116 4550
F +62 31 5116 4560
www.ahp.co.id

RAJAH & TANN | *Thailand*

R&T Asia (Thailand) Limited

T +66 2 656 1991
F +66 2 656 0833
th.rajahtannasia.com

RAJAH & TANN LCT LAWYERS | *Vietnam*

Rajah & Tann LCT Lawyers

Ho Chi Minh City Office

T +84 28 3821 2382 / +84 28 3821 2673
F +84 28 3520 8206

RAJAH & TANN | *Lao PDR*

Rajah & Tann (Laos) Co., Ltd.

T +856 21 454 239
F +856 21 285 261
la.rajahtannasia.com

Hanoi Office

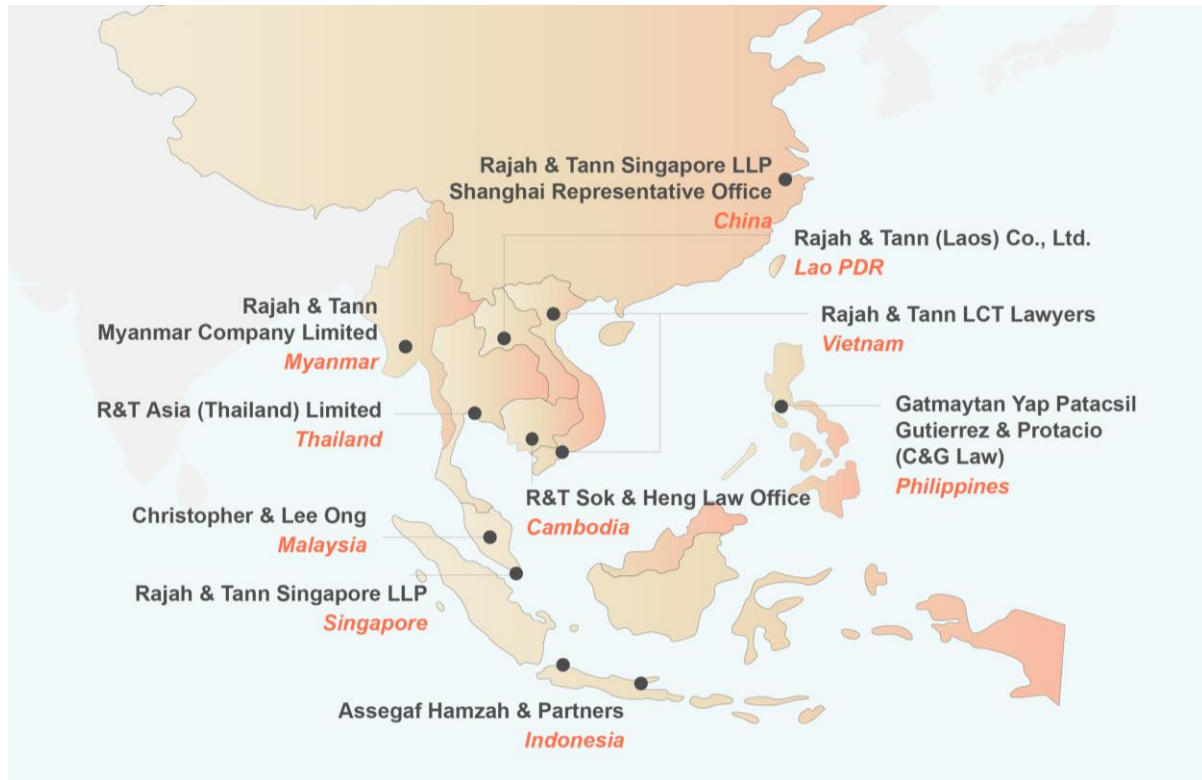
T +84 24 3267 6127
F +84 24 3267 6128
www.rajahtannlct.com

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