

The COVID-19 Act – Helps or hurts?

The Temporary Measures for Reducing the Impact of Coronavirus Disease (COVID-19) Act 2020 (“**COVID-19 Act**”) came into force in Malaysia on 23 October 2020. Too little, too late? This has been said. In its long title, the COVID-19 Act says it intends to reduce the impact of COVID-19. The first COVID-19 measure was implemented on 18 March 2020, more than 7 months earlier. It was an unprecedented nationwide lockdown, crippling commerce and many a business. By 23 October 2020, much of its impact had been felt. In many instances, irreversibly.

This paper outlines 3 broad reasons why the COVID-19 Act falls short.

Potentially Re-writes the Contract

First, the COVID-19 Act tries to do too much. Take Section 7. Where a contracting party has been unable to perform any contractual obligation due to measures under the Prevention and Control of Infectious Diseases Act 1988 (“**PCID Act**”) to control or prevent the spread of COVID-19, the other contracting party shall not be entitled to exercise his rights under that contract.

Most modern-day commercial contracts anticipate and regulate non-compliances, taking cognisance of the implication of such non-compliance, and its impact on the continued conduct of the contract. Take, for example, a building contract. In most standard form building contracts, where the employer causes delay to the contractor’s progress, the contractor is entitled to seek an extension of the completion date. If the employer had caused delay because of his inabilities due to COVID-19 measures – for example, his inability to supply certain materials to the contractor because of a shutdown of its source – the contractor cannot exercise his contractual right to apply for an extension of time.

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The problem does not end there. According to Section 5 of the COVID-19 Act, the contractor cannot make the extension of time application until 31 December 2020. However, as we know, some standard form building contracts stipulate that the making of that application within a specified time frame is a condition precedent to the entitlement to more time. Failing to do so may also amount to a waiver of that contractual right to more time. If the window to make the application expires before 31 December 2020, where does that leave the contractor? Whilst the COVID-19 Act sees itself as being temporary, the effect in this situation may well be permanent.

Another example. What happens when a performance bond is due to expire whilst the COVID-19 Act is in force? Ordinarily, a refusal to extend a bond will be met with a demand on it. That would be a contractual right that cannot be exercised because of Section 7 of the COVID-19 Act if the contractor was “unable” to extend the performance bond.

These are but some examples of contractual mechanism being adversely affected by the COVID-19 Act.

Certainly, that was not its intention. To reduce the impact of COVID-19 measures on a contract, the purpose of the COVID-19 Act may have been better served by being specific with the remedies, for example, by temporarily:

- (a) preventing a default from being triggered;
- (b) preventing the exercise of a contractual right to terminate, or claim default payments/interest;
- (c) preventing enforcement or execution proceedings;
- (d) preventing the enforcement of securities, including the appointment of receivers;
- (e) commencing legal proceedings on guarantees or other securities;
- (f) preventing the repossession of chattels, *etc*; or
- (g) preventing the exercise of a right to re-enter or forfeit premises on leases or licences.

A reference may be had to the Singapore equivalent of the COVID-19 Act.

Who qualifies for protection?

The second difficulty with our COVID-19 Act is fundamental – the trigger point of Section 7 protection. Section 7 of the COVID-19 Act operates where the inability of a party to perform his contractual obligation is due to the measures under the PCID Act to control or prevent the spread of COVID-19.

Section 7 of the COVID-19 Act assumes COVID-19 to be a local phenomenon. If A's inability to perform is due to the Movement Control Order implemented on 18 March 2020, for example, he is entitled to invoke Section 7 protection. However, if A's inability was due to a lockdown of a factory in China, he does not get Section 7 protection. The Chinese factory lockdown could not be a measure under the PCID Act. The challenge may ultimately be to pin-point a local source of this inability.

Then, there is potentially difficulty with the words "due to" in Section 7 of the COVID-19 Act. Must the inability to perform a contractual obligation be solely "due to", or can it be partially "due to" the COVID measures? Or must the COVID measures be a material cause of that inability?

Moreover, who makes this determination on causation? It is impractical to leave it to the courts, as that would by then be a post-mortem. The corresponding party ought to have some certainty as to whether the inability of the other party triggers a Section 7 protection because he has to make a judgment call as to whether he may exercise a contractual right or remedy, or whether he is prevented under Section 7. Singapore's equivalent legislation, for example, introduces assessors to make an early evaluation of whether the protection under the legislation is triggered. That is helpful to provide parties with a measure of certainty.

Coming to that, what happens when one flouts the COVID-19 Act? By the time the other party gets around to seeking some form of remedy from the courts, it may be too late. There is no deterrence, unlike comparable legislation abroad which render certain breaches a statutory offence.

What next?

Third, what happens when the COVID-19 Act protection comes to an end on 31 December 2020? Call a default on 1 January 2021? One possible interpretation of Sections 5 and 7 of the COVID-19 Act, read together, is that contractual rights are only temporarily suspended. When the COVID-19 Act expires, so does its protection. That would, of course, mean that we are postponing the repercussions of a breach to 1 January 2021, assuming the COVID-19 Act is not extended. A contractor whose work is in significant delay cannot today be determined, but risks being determined on 1 January 2021. Is there an incentive to continue his work today, in the face of that uncertainty? Is it, therefore, a better interpretation, one more consonant with its purpose, that Section 7 permanently excuses the inability beyond 31 December 2020? Otherwise, the COVID-19 Act is really postponing today's problem until tomorrow.

The problems are not limited to Section 7 of the COVID-19 Act. Take for example the extension of a defect liability period under a Schedule G, H, I or J sale and purchase agreement under Section 36 of the COVID-19 Act. Well-intended of course; to protect the purchaser. Under Section 36 of the COVID-19 Act, a purchaser is effectively given an extension corresponding to the period between 18 March 2020 and 31 August 2020 (of 166 days). To illustrate, if the defects liability period expires on 30 September 2020, the purchaser will be accorded the additional defects liability period of 166 days from 30 September 2020 to early 2021. However, who will rectify those defects? The COVID-19 Act does not correspondingly extend the defects liability period of the main contractor; it would have expired under the main contract. A case of not thinking through its effects, perhaps.

Whilst the COVID-19 Act has its application nationwide; the Housing Development (Control and Licensing) Act 1966 does not extend to sale and purchase agreements for housing developments governed under separate state legislations of Sabah and Sarawak.

Mediation under Section 9 of the COVID-19 Act might well be the most sensible way forward then.

Conclusion

The vague language of the COVID-19 Act opens up avenues for arguments against contract compliance, but it is the same vague language that may ultimately fail those arguments. It now falls upon our courts to interpret the COVID-19 Act in a way that promotes its purpose, keeping one eye on its long title and another on the commercial realities in these unprecedented times

*For any enquires on the COVID-19 Act and construction contracts, please contact **Foo Joon Liang** (joonliang@ganlaw.my)*