

COVID-19 Act: Impacts on Leases and Tenancy Agreements of Non-residential Immovable Property

The Temporary Measures for Reducing the Impact of Coronavirus Disease 2019 (COVID-19) Act 2020 (“**COVID-19 Act**”), which is divided into 19 Parts, includes measures to mitigate the socioeconomic impacts of COVID-19. Following the enforcement of the COVID-19 Act on 23rd October 2020, this is a sequel to our previous frequently asked questions (“FAQs”) titled “[Impact of the Movement Control Order on Tenants](#)” published on 30th March 2020.

These FAQs focus on the impacts of two Parts of the COVID-19 Act - the ‘Inability to Perform Contractual Obligation’ and the ‘Modification made to Distress Act 1951’ - concerning leases and tenancy agreements of non-residential immovable properties.

Inability to Perform Contractual Obligation

Question 1: What temporary relief does the COVID-19 Act provide for the lessees/tenants of non-residential immovable property?

Answer: Lessees/tenants of non-residential immovable properties are entitled to the relief provided under Section 7 of the COVID-19 Act, which protects a party (tenant/lessee)’s inability to perform any contractual obligations e.g. to pay rents pursuant to the lease or tenancy agreement due to the measures taken under the Prevention and Control of Infectious Diseases Act 1988 (“PCIDA 1988”) to curb the COVID-19 pandemic.

When such inability arises, Section 7 of the COVID-19 Act prevents another contracting party (landlord/lessor) from exercising its contractual rights under the lease or tenancy agreement against the party experiencing such inability to perform.

Subject to interpretation by courts, tenants/lessees are cautioned that such inability to perform must be related directly to the measures under the PCIDA 1988, such as, the closure of economic sectors (except for essential businesses) during the Movement Control Order (MCO) and certain period of the Conditional MCO (CMCO). The defaulting party (lessee/tenant) will not be able to rely on the relief under Section 7 of the COVID-19 Act, if the default occurred before the implementation of the measures under the PCIDA 1988.

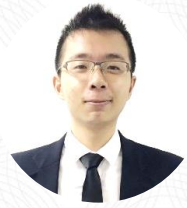
Authors



Tan Min Lee
Partner



Lee Hui Juan
Associate



Benjamin Kho Jia Yuan
Pupil-In-Chambers

Question 2: When does the relief for lessee/tenant of non-residential immovable property come into effect?

Answer: Upon the enforcement of the COVID-19 Act on 23rd October 2020, the relief provided to a lessee/tenant under Section 7 of the COVID-19 Act comes into operation retrospectively from 18th March 2020 and shall continue to remain in operation until 31st December 2020 (“Operative Period”). Subject to the provisions of the lease/tenancy agreement, this denotes that a lessor/landlord is restrained from exercising his contractual rights, which may include commencing an action against the defaulting lessee/tenant, if his inability to perform contractual obligations is proven to be caused by the measures under the PCIDA 1988.

Further, the Minister of Law may extend the Operative Period before the expiry of such, subject to the effective period of the COVID-19 Act. Tentatively, the COVID-19 Act will be enforced for 2 years from 23rd October 2020, unless a further extension is made by the Prime Minister.

Question 3: What recourse is available to the aggrieved lessors/landlords as a result of the lessees/tenants’ inability to perform the contract?

Answer: Section 9 of the COVID-19 Act provides that any dispute relating to any inability of any party to perform any contractual obligation may be settled by way of mediation.

Mediation is an alternative dispute resolution process whereby a mediator will be appointed to mediate the dispute between parties with the objective of reaching an amicable settlement on the dispute. Upon the conclusion of a mediation and the reaching of an agreement, the parties shall enter into a binding written settlement agreement.

While the COVID-19 Act is silent on other resolution methods, it is suggested that parties should utilise the mediation as a medium to negotiate for a favourable solution for both parties, in view of the landlord/lessor may not be able to commence an action in court, until after 31st December 2020.

Question 4: Would the relief provided under Section 7 affect the ongoing or completed legal actions by lessors/landlords against the defaulting lessees/tenants?

Answer: The relief provided under Section 7 of the COVID-19 Act will not affect the legitimacy of ongoing or completed legal actions initiated by lessors/landlords against the defaulting lessees/tenants between 18th March 2020 and 23rd October 2020.

Section 10 of the COVID-19 Act provides a ‘saving’ provision whereby the section states that any contract terminated, any deposit or performance bond forfeited, any damages received, any legal proceedings commenced, any judgment or award granted and any execution carried out from 18th March 2020 until 23rd October 2020, shall be deemed to have been valid.

Section 10 of the COVID-19 Act negates the protections provided under Section 7 of the COVID-19 Act for some lessees/tenants affected by the MCO, CMCO or other measures to curb COVID-19 under the PCIDA 1988.

Modification made to Distress Act 1951

Question 1: What is a distress action?

Answer: Apart from rent due to the federal and state governments, a distress action is a remedy for a lessor/landlord to recover outstanding rent from a lessee/tenant, where the lessor/landlord may apply to the court for a warrant of distress. However, Section 5 of the Distress Act 1951 prescribes that the amount of outstanding rent which a lessor/landlord can claim is limited to twelve (12) completed months of the tenancy immediately preceding the date of application for a warrant of distress.

Also, a distress action is applicable to lessors/landlords of all types of premises which is the subject of a lease or a tenancy agreement, including both residential and non-residential immovable property.

Question 2 : What is the modification of the COVID-19 Act towards distress actions?

Answer: Essentially, the COVID-19 Act modifies the Distress Act 1951 to suspend the rights of lessors/landlords to distrain for the arrears of rent for the period from 18th March 2020 to 31st August 2020 ("Moratorium Period"). Having said that, any warrant of distress issued before 23rd October 2020 will proceed accordingly, as the modification made by the COVID-19 Act does not affect such warrant of distress. In short, a warrant issued by the court before 23rd October 2020 could still include the outstanding rent during the Moratorium Period.

Question 3: How long will the modification operate?

Answer: Upon the enforcement of the COVID-19 Act, the modification made to the Distress Act 1951 is deemed to operate retrospectively from 18th March 2020 until 31st December 2020 ("Operating Period"). This would mean that the modification made to the Distress Act 1951 will cease to have effects from 1st January 2021 onwards. The lessors/landlords are entitled to commence distress actions against the defaulting lessees/tenants to recover the outstanding rent during the Moratorium Period. Unlike some modification to other statutes, the modification made to the Distress Act 1951 does not provide for extension of the Operating Period.

Question 4: What does the modification made to the Distress Act 1951 mean to lessors/landlords and lessees/tenants?

Answer: Although the modification offers a temporary relief to the lessees/tenants amidst the COVID-19 pandemic, both lessors/landlords and lessees/tenants should take note of these few points:

Timeline		Lessors/Landlords	Lessees/Tenants
<p>pre-Operating Period / pre-Moratorium Period (Before 18th March 2020)</p>		<p>a. Lessors/Landlords are entitled to claim for outstanding rent pre-Moratorium Period</p> <p>During the pre-Operating Period, lessors/landlords may commence distress actions against the defaulting lessees/tenants by applying to the court for warrant of distress for the outstanding rent due for the pre-Moratorium Period.</p>	<p>During the pre-Operating Period, lessors/landlords may commence distress actions and the court can issue warrant of distress for outstanding rent accrued during the pre-Moratorium Period. Lessees/tenants should ensure that they pay all outstanding rent accrued until the day preceding the Moratorium Period i.e. 17th March 2020, so as to avoid any possible distress actions.</p>
<p>Operating Period (18th March 2020 - 31st December 2020)</p>	<p>Moratorium Period (18th March 2020 - 31st August 2020)</p>	<p>b. Prior to the enforcement of the COVID-19 Act on 23rd October 2020</p> <p>The court can still issue warrant of distress to include the outstanding rent during the Moratorium Period. If the lessors/landlords intend to recover the outstanding rent from their lessees/tenants for the Moratorium Period, they may consider commencing distress actions by 22nd October 2020.</p> <p>Any execution of the warrant of distress before 23rd October 2020 is not affected by the modification made to the Distress Act 1951 by the COVID-19 Act.</p>	<p>Before 23rd October 2020, the warrant of distress issued by the courts may to include the outstanding rent during the Moratorium Period. As a result, the defaulting lessees/tenants are not completely free from any risks of possible distress actions.</p> <p>Any execution of the warrant of distress before 23rd October 2020 is not affected by the modification made to the Distress Act 1951 by the COVID-19 Act.</p>

Timeline	Lessors/Landlords	Lessees/Tenants
<p style="text-align: center;">post-Moratorium Period (1st September 2020 – 31st December 2020)</p>	<p>c. Upon the enforcement of the COVID-19 Act on 23rd October 2020</p> <p>(i) Outstanding rent during the Moratorium Period Any distress action commenced by lessors/landlords from 23rd October 2020 onwards shall not distrain the outstanding rent for the Moratorium Period.</p> <p>(ii) Outstanding rent post-Moratorium Period Lessors/landlords may commence distress actions during the Operating Period to claim for the outstanding rent for the period between 1st September 2020 and 31st December 2020.</p> <p>For instance, if a lessee/tenant fails to pay for the rent due from July until October 2020, a lessor/landlord, who commenced a distress action on 24th October 2020, can only recover the outstanding rent for September and October 2020.</p> <p>Be that as it may, it may not be practical for lessors/landlords to bring a distress action in court only for the outstanding rent for September and October 2020 during the Operating Period, as it would mean that the lessors/landlords will need to commence a separate action against the lessees/tenants for sums owed during the Moratorium Period.</p>	<p>(i) Outstanding rent during the Moratorium Period Any outstanding rent owed by the a lessee/tenant for the Moratorium Period cannot be distrained by his lessor/landlord <i>via</i> distress actions.</p> <p>(ii) Outstanding rent post-Moratorium Period Lessors/landlords may commence distress actions during the Operating Period, to recover the outstanding rent for the period between 1st September 2020 and 31st December 2020.</p> <p>For instance, if a lessee/tenant fails to pay the rent due from July until October 2020, his lessor/landlord, who commenced a distress action on 24th October 2020, can only recover for the outstanding rent for September and October 2020.</p> <p>Thus, a tenant should ensure that they pay the rent due timely from 1st September 2020 onwards in view of the Moratorium Period.</p>

Timeline	Lessors/Landlords	Lessees/Tenants
<p>post-Operating Period (1st January 2021 onwards)</p>	<p>d. Commencement of distress action as usual post-Operating Period</p> <p>Lessors/landlords are entitled to commence distress actions from 1st January 2021 onwards to recover the outstanding rent for the Moratorium Period.</p> <p>Another option is for the lessors/landlords to negotiate with their tenants to arrange for payment of outstanding rent by instalments, rather than waiting until 1st January 2021 to commence distress actions for the outstanding rent due for the Moratorium Period.</p>	<p>Lessors/landlords are entitled to commence distress actions from 1st January 2021 onwards to recover the outstanding rent for the Moratorium Period.</p> <p>Hence, the lessees/tenants should ensure that they pay all outstanding rent for the Moratorium Period by the end of the Operating Period, that is, 31st December 2020, to avoid any possible distress actions. In the event that such payment is not possible, subject to the provisions of the tenancy agreement in question, a better option is for the lessee/tenant concerned to negotiate with his lessor/landlord to reduce/suspend rental or defer payment of rental.</p>

For any enquires on the COVID-19 Act, please contact **Tan Min Lee** (minlee@ganlaw.my).

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The position stated herein is as at the date of publication on 4th November 2020.