

## COVID-19 Act: The Impact on Construction Contracts and Construction Disputes

The Temporary Measures for Reducing the Impact of Coronavirus Disease (COVID-19) Act 2020 (“**COVID-19 Act**”) which seeks to reduce the impact caused by COVID-19 to businesses and individuals, has been gazetted and shall be in force for a period of 2 years from 23 October 2020 or until such other extension(s) which may be made by the order of the Prime Minister.

The construction sector at large would be affected by several sections of the COVID-19 Act. In this article, we examine the impact of the COVID-19 Act on construction contracts and construction disputes.

### Inability to Perform Contractual Obligation

Part II of the COVID-19 Act deals with the inability of contracting parties to perform contractual obligations. In particular, Section 7 of the COVID-19 Act which reads as follows:

*“The inability of any party or parties to perform any contractual obligation arising from any of the categories of contracts specified in the Schedule to this Part due to the measures prescribed, made or taken under the Prevention and Control of Infectious Diseases Act 1988 [Act 342] to control or prevent the spread of COVID-19 shall not give rise to the other party or parties exercising his or their rights under the contract.”*

[Emphasis is ours]

### The Relief under Section 7 of the COVID-19 Act

Upon enforcement of the COVID-19 Act, Section 7 of the COVID-19 Act relieves businesses and individuals from the performance of their contractual obligations retrospectively from 18 March 2020 to 31 December 2020, provided that the inability to perform such contractual obligations is due to the measures prescribed by the authorities to control or prevent the spread of the COVID-19 under the Prevention and Control of Infectious Diseases Act 1988 (“**PCID Act**”). The non-defaulting party to a contract is prevented from exercising its rights under the contract.

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As far as the construction industry is concerned, the following contracts fall within the “categories of contracts” under Section 7 of the COVID-19 Act:

- (i) Construction work contract;
- (ii) Construction consultancy contract;
- (iii) Supply contracts for construction material, equipment or workers in connection with a construction contract;
- (iv) Performance bond or other equivalent granted pursuant to a construction contract or supply contract;  
and
- (v) Professional services contract.

## **Enforcement Period**

The relief is available from 18 March 2020 to 31 December 2020 (“Relief Period”) upon the enforcement of the COVID-19 Act. The Minister of Law may extend the Relief Period by gazetting an order of such effect and tabling such order before the Parliament later. However, any extension order must be made during the continuance of the Relief Period and such extension may not be ordered beyond the two-year period after the enforcement of the COVID-19 Act or any such extended period.

## **Degree of ‘Inability’**

The coverage of Section 7 of the COVID-19 Act is streamlined to only provide protection to very specific action i.e. inability to perform. Section 7 of the COVID-19 Act does not cover instances where there is a non-performance or failure to perform the contractual obligation. For a situation of inability to perform, inference can be drawn to judicial interpretation<sup>1</sup> of the doctrine of frustration, where it requires the intending party to prove impossibility to perform – a radical change to what the parties bargained for in the contract. While impossibility to perform, from its plain wording, would amount to a higher threshold than inability to perform, the burden to prove such inability remains strenuous based on the circumstances of each case.

## **Extent of Causation**

Construction activities often include activities which are sequential, corresponding and/or interconnected, it may not always be practical to determine in a construction contract, which activity falls within or outside of the relief in Section 7 of the COVID-19 Act. The protection is further narrowed by the requirement that the inability to perform has to be due to the measures prescribed by the authority under the PCID Act to curb the spread of COVID-19. This would cover the series of regulations under the PCID Act that had been promulgated during the Movement Control Order (MCO), Conditional MCO (CMCO), and Recovery MCO (RMCO).

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<sup>1</sup> Guan Aik Moh (KL) Sdn Bhd & Anor v Selangor Properties Bhd [2007] 3 CLJ 695



Notably, this provision would also be likely to cover consequential events within the critical path of the event directly affected by the measures taken under PCID Act. A simple example to illustrate this is, if the construction of the basement level of a multi-levelled building is affected by the implementation of MCO and thus causing delay in the progress of work, the progress of the construction of the next level e.g. Level 1, which cannot be proceeded without the completion of the basement level, would fall within the definition of “inability to perform” under Section 7 of the COVID-19 Act. Extension of time ought to be granted to the contractor for such delay.

However, it is conceivable that Section 7 of the COVID-19 Act does not offer protection to an independent / standalone event in a work programme which is not affected by any sequential events and not within the critical path, notwithstanding MCO, CMCO and RMCO.

In comparison, under the Singapore’s COVID-19 (Temporary Measures) Act 2020 (“**Singapore COVID-19 Act**”), contracting parties can rely on the relief from actions for inability to perform contractual obligations, so long as the inability is materially caused by a “COVID-19 event<sup>2</sup>”.

## Section 7 of the COVID-19 Act and *Force Majeure* Clause

Section 7 of the COVID-19 Act, to a certain extent, is akin to a *force majeure* clause. Another pertinent question is whether Section 7 of the COVID-19 Act invalidates the *force majeure* clause provided in construction contracts and standard form of construction contracts. It is the authors’ view that Section 7 of the COVID-19 Act does not invalidate such clause which would normally include “pandemic”, “quarantine” or “by order of government” as part of the *force majeure* events. Rather, Section 7 of the COVID-19 Act supplements the contracts which do not contain such *force majeure* events. Thus, contracting parties are entitled to rely on the contractually agreed *force majeure* clause, and Section 7 of the COVID-19 Act will be applicable for events not covered under the *force majeure* clause.

## Limitation of Section 7 of the COVID-19 Act

The saving provision in Section 10<sup>3</sup> of the COVID-19 Act protects any termination of contract, forfeiture of the performance bond or damages received prior from 18 March 2020 until the enforcement of the COVID-19 Act on 23 October 2020. This has been criticised as it compromises the contracting parties’ interests which are genuinely affected by the measures under the PCID Act before the COVID-19 Act come into force.

Section 10 of the COVID-19 Act would have acted as a catalyst for the non-defaulting parties to commence legal actions before the coming into force of the COVID-19 Act. Besides, it also incentivises parties to enforce their contractual rights before the enforcement date as those actions will be deemed as valid.

<sup>2</sup> A “COVID-19 event” is defined in Section 2 to mean – (a)The COVID-19 epidemic or pandemic; or (b)The operation of or compliance with any law of Singapore or another country or territory, or an order or direction of the Government or any statutory body, or of the government or other public authority of another country or territory, being any law, order or direction that is made by reason of or in connection with COVID-19.

<sup>3</sup> Section 10 of the COVID-19 Act reads: “Notwithstanding Section 7, Section 10 provides that any contract terminated, any deposit or performance bond forfeited, any damages received, any legal proceedings, arbitration or mediation commenced, any judgment or award granted and any execution carried out for the period from 18 March 2020 until the date of publication of this Act shall be deemed to have been validly terminated, forfeited, received, commenced, granted or carried out.”



It is also the authors' observation that the provisions under the COVID-19 Act do not significantly assist the contractor / subcontractors. For example:

- (a) The contractor is unable to exercise its rights to suspend or terminate the contract due to non-payment of the employer and may be "forced" to carry out its works without receiving payment, thereby increases the contractor's financial burden; and
- (b) There is no provision in the COVID-19 Act which protects the contractors from imposition of liquidated damages by the employer in view of the delay caused by the measures taken under the PCID Act.

## Disputes relating to Inability to Perform Contractual Obligation

Section 9 of the COVID-19 Act reads:

### *Mediation*

- (1) Any dispute in respect of any inability of any party or parties to perform any contractual obligation arising from any of the categories of contracts specified in the Schedule to this Part due to the measures prescribed, made or taken under the Prevention and Control of Infectious Diseases Act 1988 to control or prevent the spread of COVID-19 may be settled by way of mediation.

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[Emphasis is ours]

Section 9 of the COVID-19 introduces mediation for contracting parties to resolve any disputes relating to the inability to perform contractual obligations due to the measures prescribed, made or taken under the PCID Act to curb the spread of COVID-19. A practical question then arises as to whether parties, especially defaulting parties, are willing to go for mediation with the knowledge that the non-defaulting parties will be prevented from exercising his or their rights under the contract as stipulated in Section 7 of the COVID-19 Act. This concern is further substantiated by the word "*may*" in Section 9 of the COVID-19 Act, as it is unlikely that the draftsman intended mediation as a mandatory channel for the parties to resolve their disputes, notwithstanding that the agreement reached is binding on the parties.

Section 9 of the COVID-19 Act empowers the Minister of Law to determine the mediation process, including the appointment of a mediator, role of a mediator, conduct of mediation and conclusion of mediation. Upon the conclusion of a mediation and the reaching of an agreement by the parties regarding a dispute, the parties shall enter into a settlement agreement which shall be in writing and signed by the parties. The settlement agreement will have to be authenticated by the mediator and shall bind the parties. The COVID-19 Act is silent as to the possible, and sometimes inevitable disagreements between contracting parties that may be left unresolved even after lengthy and robust mediation processes. What would then be the recourse for the party unsatisfied with the outcome of mediation?



However, the ongoing legal proceedings, arbitration or mediation of dispute relating to parties' inability to perform contractual obligation remain valid and unaffected by Sections 7 and 9 of the COVID-19 Act. Similarly, any judgment or award granted, and the execution carried out for the period from 18 March 2020 until 23 October 2020 remains valid in view of Section 10 of the COVID-19 Act.

## Other Disputes arising from Construction Contracts

Contracting parties may proceed to resolve disputes, apart from those arising from an inability to perform contractual obligation under Section 7, through their preferred mode of dispute resolution. On this point, the modification made by the COVID-19 Act to the limitation period stated in the Limitation Act 1953 and Public Authorities Protection Act 1948 is relevant. In essence, if the limitation periods stated in both legislations expire during the period from 18 March 2020 to 31 August 2020, such limitation periods shall be extended to 31 December 2020 upon the enforcement of the COVID-19 Act on 23 October 2020.

Similar modifications are also inserted into the Sabah Limitation Ordinance and Sarawak Limitation Ordinance. The extended limitation period which expires on 31 December 2020 cannot be ordered for a further extension by the Minister of Law, in the absence of a provision such as Section 5 of the COVID-19 Act. Nevertheless, it is observed that there is no saving provision that allows actions that have been struck out during the period concerned to be resuscitated if it falls within the now extended period. Judicial guidance on this issue is necessary given the void in the COVID-19 Act.

In view of the wording in the COVID-19 Act, it appears that only construction contracts with cause of action expired / expiring between 18 March 2020 and 31 December 2020 are affected by the modification of limitation period. Any actions contemplated to be commenced against the defaulting party must be measured against the effect of Section 7 and not to be taken lightly to avoid the possible wastage of time, effort and costs.

It is crucial for contracting parties to assess the options and resolutions available before deciding on the next course of action, considering the far-reaching effects of Sections 7 and 10 of the COVID-19 Act.

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