# The COVID-19 Act and Contracts

by Crystal Wong Wai Chin and Teh Wai Fung

At long last, Malaysia has enacted the COVID-19 legislation businesses and the legal profession called for as early as April 2020.[1] On 23 October 2020, the Temporary Measures for Reducing the Impact of Coronavirus Disease 2019 (COVID-19) Act 2020 (**COVID-19 Act**)[2] came into operation.[3]

Of the COVID-19 Act's 19 Parts, Part II (ss 5-10), titled "Inability to Perform Contractual Obligation", is sure to garner attention across the construction industry, where "contract is king".[4] This is especially because at least two of the scheduled[5] categories of contracts to which Part II applies strike at the heart of the industry concerned:

1. Construction work contract or construction consultancy contract and any other contract related to the supply of construction material, equipment or workers in connection with a construction contract

2. Performance bond or equivalent that is granted pursuant to a construction contract or supply contract

In this article, we explain the elements of s 7 of the COVID-19 Act (on relief from inability to perform contractual obligations) and the limited period of operation of Part II. We then summarise the likely interplay between s 7, *force majeure* and frustration, before turning lastly to the mediation envisaged under the COVID-19 Act.

## Section 7: Inability to Perform Contractual Obligations

Section 7 of the COVID-19 Act reads:

> 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.

Below, we explain the three criteria of s 7, before turning to its effect.

*A contractual obligation*

Firstly, there must be an "obligation". Unlike Singapore's Act,[6] Malaysia's COVID-19 Act omits to also address inability to exercise a contractual right or entitlement.

For instance, standard form construction contracts allow contractors to make claims for additional loss and expense. To claim, a contractor must give advance written notice of its intention to claim (typically within 28 days of the relevant event[7]) and submit substantiating particulars or documents within a stated subsequent timeframe.[8] While failure to adhere to these procedures may disentitle

1 "Malaysian Bar urges govt to enact 'Covid-19 law'" *The Star Online* (Kuala Lumpur, 29 April 2020) <https://www.thestar.com.my/news/nation/2020/04/29/malaysian-bar-urges-govt-to-enact-039covid-19-law039> (accessed 6 October 2020)
2 Not to be confused with the similarly named Temporary Measures for Government Financing (Coronavirus Disease 2019 (COVID-19)) Act 2020. That Act looks to establish a "COVID-19 Fund", that is, government aid.
3 COVID-19 Act, s 1(2)
4 Roberta Downey, "The contract is king ... and queen — the use of entire agreement clauses in construction contracts" (2003) Society of Construction Law
5 COVID-19 Act, Schedule
6 Singapore's COVID-19 (Temporary Measures) Act 2020, ss 5 and 5A
7 PAM Contract 2018 (Without Quantities), Conditions of Contract (**PAM 2018**), cl 24.1(a); FIDIC 2017 Red Book, General Conditions (**FIDIC 2017 Red Book**), cl 20.2.1
8 PAM 2018, cl 24.1(b); FIDIC 2017 Red Book, cl 20.2.4

the contractor from a claim to which it would otherwise be entitled, at no point is the contractor under any *obligation* to submit the claim. Section 7 thus offers no relief to a contractor prevented by a full-blown Movement Control Order (**MCO**) from accessing the records necessary to claim in time for submission.

*Inability*

Secondly, there must be an "inability". How the courts will define "inability"—total, substantial, or partial—remains to be seen. At one extreme, if total inability is required, a party whose inability is "90%" will not be entitled to relief under s 7. At the other extreme, if partial inability suffices, a party whose inability is a relatively insignificant "10%" will nevertheless be entitled to total relief. It remains to be seen whether the courts (if the opportunity arises) somehow manage to imply some fairer, intermediate position into the otherwise clear language of s 7.[9]

*Prevention and Control of Infectious Diseases Act 1988* (*PCIDA 1988*)

Thirdly, the inability must be "due to the measures prescribed, made or taken under the [PCIDA 1988] to control or prevent the spread of COVID-19". This is far narrower than the corresponding provision in Singapore's Act, which defines a "COVID-19 event" to include not only specific governmental measures, but "the COVID-19 epidemic or pandemic" more generally.[10] A contracting party may be hamstrung by lockdowns in other countries, or even prudent internal COVID-19 policies not mandated by the PCIDA 1988. That party would be unable to avail itself of relief (if any) under s 7.

*Extinguishment or suspension?*

Fourthly, and most crucially, the relief s 7 affords is to restrain the "innocent" party(ies) from "exercising his or their rights under the contract". The immediate question is whether this operates merely to suspend the accrual and/or enforcement of an innocent party's right[11] for the period of "operation" of Part II—18 March 2020 to 31 December 2020—or to extinguish it altogether forever.

For instance, a contractor may be contractually required to complete works by 30 June 2020. The restrictions of the MCO (hypothetically) meant that the contractor achieved completion only on 31 January 2021, a delay of seven months. Undoubtedly, s 7 would (subject to the saving provision in s 10) prevent the employer from *exercising its right* (that is, taking steps) to recover liquidated damages before 1 January 2021. However, on 31 January 2021, is the employer's *right* then to recover seven months of liquidated damages (1 July 2020 to 31 January 2021) or only one month of liquidated damages (1 to 31 January 2021)? Neither is it clear precisely which aspects of s 7 (the inability? the contract? the measure? the accrual of the right? the exercise of the right?) must fall within Part II's period of operation for s 7 to apply.

## Section 10: Saving

Once s 7 applies, s 10 must still be considered:

> Notwithstanding section 7, 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

9 *Jayakumar a/l Rajoo Mohamad v CIMB Aviva Takaful Bhd* [2015] 6 MLJ 437 (CA) [21]-[22]
10 Singapore's COVID-19 (Temporary Measures) Act 2020, s 2
11 Although note that the Malaysian courts seem to have eschewed any distinction of consequence between the existence of a right and the enforcement of it: *CIMB Bank Bhd v Anthony Lawrence Bourke* [2019] 2 MLJ 1 (FC) [51], referring to *New Zealand Insurance Co Ltd v Ong Choon Lin* [1992] 1 MLJ 185 (SC) at 195.

> of this Act **shall be deemed to have been validly terminated, forfeited, received, commenced, granted or carried out**.[12] [*Emphasis added*.]

The intention behind s 10 must have been that transactions and legal proceedings which took place in the seven-month period between the first MCO and the gazetting of the COVID-19 Act should not be unravelled. However, this also means that, barring an extension of Part II's operation,[13] the relief available under s 7 will only be in "operation" for just over two months.[14]

Curiously, s 10 seems to overreach its intended effect. This becomes clear when s 10 is compared to the corresponding saving provision in Part VIII for the Hire-Purchase Act 1967:

> Notwithstanding section 19, any owner who has exercised his power of taking possession of goods comprised in a hire-purchase agreement under section 16 of the Hire-Purchase Act 1967 before the date of publication of this Act, shall be deemed to have validly exercised such power of taking possession of such goods **as if the Hire-Purchase Act 1967 had not been modified by this Act**.[15] [*Emphasis added*.]

The effect of the emphasised words of s 24 is to preserve the legal position in respect of hire-purchase possessions carried out before the publication of the COVID-19 Act. In contrast, because similar words do not appear in s 10, a literal reading would lead to the unthinkable result that all *otherwise invalid* terminations, damages recovered, judgments, awards and so on would be *valid*, *simply because* they happened to occur in the seven months between 18 March 2020 and 23 October 2020. Given the absurdity this would cause, it will be interesting to see how the courts approach s 10.

## *Force majeure* and frustration

Because of COVID-19, *force majeure* and frustration have been extensively discussed in recent months. In short, whether and how *force majeure* applies depends exclusively on the terms of a contract. Frustration, a creature of statute,[16] renders a contract void if an obligation in it becomes impossible. The question is whether s 7 will affect either of these.

Beginning with contractual *force majeure* provisions, s 7 seems likely to apply separately and in parallel, because the availability of contractual relief for *force majeure* should, in theory, mean that the contractual obligation is discharged, such that s 7 does not apply. Meanwhile, because parties' obligations upon frustration are statutory rather than contractual,[17] s 7 arguably becomes irrelevant where frustration exists.

## Section 9: Mediation

The COVID-19 Act, s 9 provides that:

> 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.

12 COVID-19 Act, s 10
13 COVID-19 Act, s 5(2)
14 COVID-19 Act, s 5(1), that is, between 23 October 2020 and 31 December 2020
15 COVID-19 Act, s 24
16 Contracts Act 1950, s 57(2)
17 Civil Law Act 1956, s 15

Consistent with the wider principle that mediation is consensual, mediation under s 9 is not mandatory. Likewise, unless contractually agreed beforehand, mediation is not a condition precedent to filing a lawsuit or a request for arbitration.

Nevertheless, many litigant parties have benefited from the court mediation service facilitated by the Malaysian judicial system.[18] The judiciary encourages mediation especially in the six areas of personal injury and road accidents claims, defamation, matrimonial disputes, commercial and contractual disputes, and intellectual property.[19] Of the 746 mediations conducted in the courts of Sabah and Sarawak between 2007 and 2009, 44% resulted in settlement.[20] In this way, mediation presents parties an opportunity to avoid lengthy court or arbitral proceedings. A skilled mediator can help bridge the gap between parties and assist them in formulating a settlement proposal.

Although not recorded in s 9, it was announced during the tabling of the COVID-19 Bill in both the Dewan Rakyat and Dewan Negara that the government will allocate approximately RM29 million to provide mediation services through a COVID-19 Mediation Centre (**PMC-19**) to be set up, to assist members of the public and companies affected by COVID-19 for disputes of up to RM300,000. PMC-19 is designed to complement the COVID-19 Act, in that parties who enjoy relief under the COVID-19 Act can then mediate with specialist mediators appointed by the Minister in the Prime Minister's Department.[21]

Naturally, the prevailing economic climate has engendered a surge in construction in recent months. Unlike litigation and arbitration which are invariably expensive, lengthy, and often acrimonious, mediation tends to cultivate long-term commercial relationships. In such challenging conditions, the value of mediation as a quick, cost-efficient method of resolving disputes should not be overlooked.

## Tying everything together

All in all, because of the relative delay in Malaysia's publication of the COVID-19 Act,[22] the limitation of s 7's application to only inability caused by measures under the PCIDA 1988, and the (potentially problematic) saving provision in s 10, the COVID-19 Act is unlikely to leave more than a transient two-month-long dent on existing contracts. Given also the inevitable uncertainties that come with any fresh piece of legislation, it can only help to adhere to the timeless best practices of studying one's contract, complying with all contractual procedures, and maintaining adequate contemporaneous records—in short, to tread with caution. Better still, cooperation rather than conflict, now more than ever, may well be the best way to navigate the storm clouds that lie ahead. **LH-AG**

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18 Practice Direction No 5 of 2010 on Mediation [Ref: JK/MA 38 Jld.5], 13 August 2010
19 Practice Direction No 4 of 2016 on Mediation [Ref: PKPMP.KP.100-1/8/1], 30 June 2016
20 Malaysian Judiciary, "Mediation" <https://judiciary.kehakiman.gov.my/portals/media/others/Mediation_220909.pdf> (accessed 8 October 2020)
21 Dewan Negara, 22 September 2020, 1710; Dewan Undang, 25 August 2020, 1220
22 In comparison, for example, to Singapore's COVID-19 (Temporary Measures) Act 2020, passed and assented to on 7 April 2020.