

## CONSTRUCTION

## MALAYSIA'S COVID-19 ACT 2020 AND ITS IMPLICATIONS ON THE CONSTRUCTION INDUSTRY...

Having come into force on 23 October 2020 and extended to the 31 of March 2021<sup>1</sup>, the Temporary Measures for Reducing the Impact of Coronavirus Disease 2019 (COVID-19) Act 2020 (“COVID-19 Act”) seeks to reduce the impact of the COVID-19 disease and the health measures taken to contain the pandemic.

Governments around the world took legal and executive actions in an effort to stem the spread of the contagion. The Malaysian government similarly utilised the Prevention and Control of Infectious Diseases Act 1988 (“PCID Act”) to introduce measures to restrain movement, economic activity, and social interaction within its borders. It goes without saying that the Malaysian construction industry was adversely affected by these measures.

## CONTRACTUAL PROTECTION FOR INABILITY TO PERFORM CONTRACTUAL OBLIGATIONS

**(SECTION 7)** Items 1 and 2 of the Schedule to section 7 list out categories of contracts in the construction industry to which the protections apply, namely; contracts relating to construction work, consultancy, supply of material, equipment, or workers, as well as performance bonds or other equivalents (presumably such as advance payment guarantees, parent company guarantees and the likes) – in connection with a construction contract.

Section 7 acts as a statutory *force majeure* clause, albeit a temporary one as it protects a “defaulting” party’s inability to perform any contractual obligations due to any measures under the PCID Act from the exercise of any contractual rights by the “non-defaulting” party. This protection is for a period spanning from 18 March 2020 and extended until 31 March 2021, or

such further extension as may later be ordered by the Minister<sup>2</sup>.

Some contractual rights that cannot be exercised are for example termination of contracts and forfeiture of deposits or bonds. It may also include such further contractual rights as suspension of works, the making of deductions from certified payments, *etc.*

It must be noted that these protections are temporary in nature and do not extinguish the non-defaulting party’s rights. The non-defaulting party may opt to exercise those rights upon the expiry of the COVID-19 Act, currently fixed on 1 April 2021. Further, these protections are not available where the non-defaulting party had already exercised their contractual rights prior to the publication and coming into effect of the COVID-19 Act<sup>3</sup>.

In order for a defaulting party to avail itself to these protections, it is likely that said party need establish the chain of causation between the measures taken under the PCID Act and the resulting inability to perform its contractual obligations. There is yet no case law establishing to what degree or extent this causal link must be established, or whether these section 7 protections would be available where measures under the PCID Act need to be the whole cause, or whether it would be sufficient to be one of or a contributory cause for the defaulting party’s inability to perform its contractual obligations.

**MEDIATION OF DISPUTES** Section 9 of the COVID-19 Act provides a method for resolving disputes arising in respect of any party’s inability to perform its contractual obligations by way of mediation. The mediation process (appointment, role and procedure) may be determined by the Minister. Upon conclusion of the mediation, it is provided that parties would enter into and sign a written settlement agreement, to be authenticated by the mediator and which would be binding on the parties.

The Malaysian government established the COVID-19 Mediation Centre, a.k.a. Pusat Mediasi COVID-19 (“PMC-19”)<sup>4</sup> to facilitate the mediation of disputes relating to the inability to perform any contractual obligations arising from any of the categories of contracts specified in the Schedule to Part I of the

<sup>1</sup> Temporary Measures for Reducing the Impact of Coronavirus Disease 2019 (COVID-19) (Extension of Operation) Order 2020 [Order P.U.(A) 386]

<sup>2</sup> see above and sections 5(1) and 6 of the COVID-19 Act

<sup>3</sup> see section 10 of the COVID-19 Act

<sup>4</sup> see <http://www.pmc19.gov.my/index.html>

COVID-19 Act for dispute sums not exceeding MYR500,000.00. Depending on the sum in dispute, the mediation process is fully or partially subsidised at different rates to assist the less economically able to partake in the mediation process.

**LIMITATION** Part III of the COVID-19 Act modified the Limitation Act 1953 on the expiry of any limitation period between 18 March 2020 and 31 August 2020 to 31 December 2020. This provision in Part III has not been extended in the Temporary Measures for Reducing the Impact of Coronavirus Disease 2019 (COVID-19) (Extension of Operation) Order 2020<sup>5</sup>.

## LIQUIDATED ASCERTAINED

### DAMAGES (“LAD”) Developer–Purchaser

LAD: Section 35(1) of the COVID-19 Act excludes the period between 18 March 2020 and 31 August 2020 from the calculation of liquidated damages for a developer’s failure to deliver vacant possession of housing accommodation to purchasers.

Developer/Employer–Contractor LAD: Unlike its Singaporean equivalent, the Malaysian COVID-19 Act limits the exclusion from the calculation of LAD purely to contracts between purchasers and developers under the Housing Development (Control and Licensing) Act 1966. There is no corresponding protection afforded to contractors for the purpose of calculating their LAD liability to their employers under the construction contracts.

**DEFECT LIABILITY PERIOD** Section 36 of the COVID-19 Act provides that for the purpose of calculating the defect liability period after vacant possession of housing accommodation or the time for the developer to repair or make good defects, shrinkages and other faults, the period between 18 March 2020 and 31 August 2020 shall be excluded. This exclusion period may be extended up to 31 December 2020 by the Minister upon application by purchasers<sup>6</sup>. In other words, this tantamounts to an extension of the period during which purchasers of housing accommodation may require the developer to rectify any defects in their property.

## POTENTIAL SHORTCOMINGS OF THE COVID-19 ACT

There are some shortcomings in the COVID-19 Act, namely:-

- (a) Delay: The implementation of measures to contain the COVID-19 pandemic began with the Movement Control Order (“MCO”) on 18 March 2020, yet the COVID-19 Act was only gazetted and came into operation on 23 October 2020 – a delay of over seven months. Furthermore, the savings provision under section 10 validates any exercise of contractual rights prior to the publication of the COVID-19 Act. This inordinate delay has no doubt already resulted in substantial harm to numerous participants in the construction industry who were not afforded these protections in a timely manner.
- (b) Limited scope of application: The protections under section 7 only apply where the inability to carry out contractual obligations arise due to measures specifically taken under the PCID Act. The Act fails to consider the global nature of the construction industry with international manufacturing, supply chains and foreign talent and services required for certain projects. It may well be the case that regulatory/executive actions are taken in foreign jurisdictions that result in the inability to carry out certain works. In this case, the protections under section 7 would not be available to a defaulting party incapable of carrying out construction activity due to foreign governmental action.
- (c) Mediation a toothless tiger: Whilst section 9 of the Act avails disputing parties to mediation, there is no final adjudicator or umpire to make any determinations. Mediation may be impotent where a defaulting party has no incentive to settle since they may kick the can down the road in light of the protections afforded, especially since the mediation process is entirely voluntary.
- (d) Extension of the Defect Liability Period: The COVID-19 Act extends the defect liability period for housing accommodation covered under the Housing Development (Control and Licensing) Act 1966. However, there is no

<sup>5</sup> [Order P.U.(A) 386]

<sup>6</sup> see sections 36(2) and (3) of the COVID-19 Act

corresponding protection for purchasers of commercial non-residential properties. Further, the extension is limited purely to sale and purchase agreements between developers and purchasers, yet has not been extended to construction contracts between developers/employers and their contractors. This potentially exposes developers to liability in respect of rectification costs without the ability to require contractors to rectify the defects at their own cost where the defect liability period or other warranties under the construction contracts may have already lapsed or expired.

**CONCLUSION** However late the COVID-19 Act may be, it nevertheless provides some comfort to those affected by measures taken under the PCID Act to contain the COVID-19 pandemic. The Government should continually evaluate and consider whether to provide further reliefs to those who may need them.

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