The Covid-19 Bill: Key points to note in relation to performance of contractual obligations

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Malaysia's long awaited Covid-19 Bill was finally tabled for first reading in the Lower House of Parliament on 12 August 2020 – some six (6) months or so after the imposition of the Movement Control Order ("**MCO**"), i.e. on 18 March 2020. Malaysia is currently in a recovery phase, dubbed as the Recovery Movement Control Order ("**RMCO**"). The RMCO, declared on 10 June 2020, is expected to last at least until 31 August 2020.

The Bill, formally known as ***The Temporary Measures for Reducing the Impact of Coronavirus Disease 2019 (Covid-19) Bill 2020***, is subject to further rounds of reading, and need to be passed by both Houses of Parliament, receive a royal assent, and be gazetted before it becomes valid law. It is thought that the earliest that this Bill can be gazetted would be late September.

The general consensus is that the Bill's approach is a case of too little too late. Immediate legal reliefs were required at the time the MCO was first imposed. The late introduction of the Bill invites a comparison with the Singapore's approach as reflected in its Covid Act[1] which came into operation in early April 2020.

In this post, we set out 5 key points to note from our reading of the Bill relating to performance of contractual obligations.

Point 1:
Limited applicability of retrospective effect

Clause 5 (1) of the Bill provides that Part II of the Bill "*is deemed to have come into operation on 18 March 2020 and shall continue to remain in operation until 31 December 2020*". Clause 7 of the Bill subsequently provides that "*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 … shall not give rise to the other party or parties exercising his or their rights under the contract*".

The Schedule includes, amongst others, construction contracts, performance bond, and professional service contracts.

While this may, at first blush, convey the impression that the Bill will afford protection from MCO onwards and provide legal relief on all MCO-related legal issues, that is not to be the case.

Clause 10 of the Bill is framed as follows:

"*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 of this Act shall be deemed to have been validly terminated, forfeited, received, commenced, granted or carried out*."

Simply put, the Bill does not provide any relief whatsoever to acts in respect of Clause 7 of the Bill carried out prior to "*date of publication of this Act*". In reality, the approach is not surprising. As a matter of law, it is generally accepted that retrospective operation should not be given to a statute to impair an existing right.

The impact caused by the time gaps, first, between the start of the MCO and the introduction of this Bill, and second, between this Bill and the "*date of publication of this Act*" is significant.

As to the former, the right to legal relief and protection is lost altogether. As to the latter, there may be a rush to act on current contracts to avoid being caught by the protections afforded by this legislation.

An early introduction of the Bill may have avoided this contractual quandary altogether.

[1] Formally known as the COVID-19 (Temporary Measures) Act 2020

Point 2:
No certain end date to the reliefs provided under Part II of the Bill

The Bill is intended to take effect from the date of publication of the Act and to remain in operation for a period of two years, with the Prime Minister having the ability to extend the operation more than once.

Specific to Part II of the Bill – which deals with matters discussed above, the Minister may extend the period of operation, again more than once – provided the extension shall not exceed the operation period of the Act, as a whole, and is extended prior to the expiry period of the Part itself.

This suggests that the protections afforded under Clause 7 of the Bill may be in place for a far longer period than end of December 2020. This uncertainty certainly serves as an incentive for parties to act on the current contracts immediately, prior to this legislation coming into effect.

Point 3:
Limitations as regards to targeted industries

Schedule 7 in Part II lists seven (7) type of contracts that are subject to the reliefs afforded in Part II. However, as we are all well aware, the effect of the pandemic is all encompassing and are not limited to certain economic areas only. This, naturally, raises the question as to whether the legislation is sufficient to protect all Malaysians.

Further, even the categorisation of the listed contracts is bound to invite future litigation.

For example, first on the list is "*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*".

The terms e.g. "*construction work contract*", "*construction consultancy contract*" and "*construction contract*" are not defined in the Bill. On this basis, one may be inclined to argue that the definitions per the Construction Industry Payment & Adjudication Act 2012 ("**CIPAA 2012**") ought to apply. If that is the accepted position, then, those in the ship building business may not avail themselves to this relief. While that is not likely to be the intended effect of the Bill, clarity as to the position is certainly required.

Across the causeway, in addition to availability of definitions in the Act itself, the Singapore Ministry of Law has also developed a set of FAQs relating to the applicability of the Singapore Covid Act and from the explanation, it is plain that the Act covers constructions contracts which are excluded from the Singapore equivalent of CIPAA 2012 i.e. the Building and Construction Industry Security of Payment Act (Cap. 30B)[2].

Point 4:
"*Inability to perform contractual obligation*" – an undefined territory

The language adopted in Clause 7 of the Bill is ambiguous and almost certainly will, just as above, invite a floodgate of litigation in the future. "*Inability*" in itself is not a defined term.

Further, it is open to interpretation as to what circumstances would amount to inability to perform the contractual obligations "*due to measure prescribed under Prevention and Control of Infectious Diseases Act 1988 ("1988 Act") to control or prevent spread of COVID 19"*. Must the circumstances be a direct, or it is sufficient for it to be indirect?

The effect of this proposed provision is also very wide as it provides for the suspension of *all* rights. Performance of some part of the contractual arrangement may still be possible and one should not be allowed to seek refuge under this provision as means to avoid contractual obligations.

By way of comparison, the Singapore Covid Act specifically limits the "*inability*" to a "*material extent*" due to a "*COVID-19 event*", with the latter being a defined term. In addition, specific rights and obligations that are subject to suspension are identified (as opposed, to a general statement as in our Bill).

[2] https://www.mlaw.gov.sg/covid19-relief/faq/construction

Point 5:
Reference to mediation is voluntary, not mandatory. The procedure remains to be determined.

Clause 9 (1) of the Bill provides any dispute in respect of ones "*…inability ... 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*." (emphasis added).

Whilst it is commendable that an alternative dispute resolution method is prescribed as part of the Bill, it is certainly disappointing to note that reference to mediation in not mandatory. More so as Malaysia has a progressive track record in promoting and adopting alternative dispute resolution. Prime example is the position in s.8 of the Arbitration Act 2005, as amended, where it is expressly stated (and widely observed in practice) that "*No court shall intervene in matters governed by this Act, except where so provided in this Act*.".

A mandatory approach will not only advocate early settlement of disputes, but is also a cost-effective measure.

Equally disappointing is the failure to prescribe the procedures involved. All that Clause 9 (2) of the Bill provides is that "*(2) The Minister may determine the mediation process which includes the appointment of a mediator, role of a mediator, conduct of mediation and conclusion of mediation*."

The Asian International Arbitration Centre (AIAC) has in place a tried and tested set of Mediation Rules which could have been specifically identified and adopted in the Bill. AIAC is specifically named as the adjudication authority in CIPAA 2012. Based on its handling of CIPAA disputes, AIAC clearly has the capability, including in terms of resources, to carry out similar functions in respect of the mediation framework in this Bill. It would certainly bring about the much-needed certainty to the process if AIAC had been identified as the mediation authority in this Bill.

On the other hand, the Singapore Act provides specific assessment procedures – including prescribing a fine for failure to comply with a determination by an assessor without a reasonable excuse.

Conclusion

The Government's effort to introduce the legislation is certainly welcomed but it is plain that the Bill could have been better developed. It is hoped that the Bill will be debated thoroughly in the coming readings and the shortcomings addressed.

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