



Shearn Delamore & co.

**Covid-19: Further Relief for
Contractual Parties through an
Extension of Part II of the
Covid-19 Act**

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Background

On 23 October 2020, the Malaysian government gazetted the **Temporary Measures for Reducing the Impact of Coronavirus Disease 2019 (Covid-19) Act 2020** ("Covid-19 Act"). This Act, as evident from its name, is meant to provide temporary measures to ease the impact of Covid-19 on various sectors and industries in Malaysia. Areas addressed by the Covid-19 Act include inability to perform contracts, insolvency and limitation periods.

Section 1(2) of the Covid-19 Act provides that save where the relevant date of commencement and expiry period of the operation of each Part of the Act has been stipulated, the Covid-19 Act is to remain in force for two years from the date of it being gazetted.

What is Part II of the Act?

Part II of the Covid-19 Act came into operation on 18 March 2020 and was to remain in operation until 31 December 2020.

In view of the unceasing pandemic, the operation of Part II has been extended by an extension order issued by Malaysian government. This is the Temporary Measures for Reducing the Impact of Coronavirus Disease 2019 (Covid-19) (Extension of Operation) Order 2020 ("Extension Order").

Currently, Part II of the Covid-19 Act will be in operation until 31 March 2021.

How does the Extension Order affect contracting parties?

Section 7 of Part II of the Covid-19 Act provides where a party to specific contracts is unable to perform its contractual obligations due to measures prescribed made or taken under the

Prevention and Control of Infectious Diseases Act 1988 to control the spread of Covid-19, the inability to perform will not permit the counter parties to the contract to exercise their contractual rights under the contract to seek redress by reason of such inability to perform.

In brief, Section 7 of the Covid-19 Act is meant to ensure that parties are not penalized for an inability to perform insofar as that inability is caused by Covid-19 measures.

The Extension Order ensures that this protection continues until 31 March 2021.

What contracts fall under Part II of the Covid-19 Act?

The Schedule to the Covid-19 Act provides the list of categories of contracts that are caught by the Covid-19 Act.

They are:

1. Construction contracts related to, among others, construction work, construction consultancy, supply of construction materials, equipment or workers.
2. Performance bonds granted pursuant to a construction contract or supply contract.
3. Professional services contracts.
4. Leases or tenancies of a commercial property.
5. Event contracts for, among others, provision of venues, accommodations, amenities, transport, entertainment and so on.
6. Contracts by a tourism enterprise as defined under the **Tourism Industry Act 1992** and contracts for the promotion of tourism.
7. Contracts related to religious pilgrimage.

By a recent order gazetted by the Malaysian government (see the Temporary Measures for Reducing the Impact of Coronavirus Disease 2019 (Covid-19) (Amendment of Schedule) Order 2020 (“Amendment Order”)), two new categories of contracts have been included. These are:

1. Hire-purchase agreements defined under the **Hire-Purchase Act 1967** or leasing contracts entered into by micro-enterprises, B40 or M40 class of persons for vehicles such as motor vehicles or goods or public service vehicles or tourism vehicles.
2. Credit sales contracts under the **Consumer Protection Act 1999**.

Part II of the Covid-19 Act now covers nine categories of contract.

The government’s passing of the Amendment Order is a targeted measure that assists micro-enterprises and those falling in the B40 and M40 categories. It comes as no surprise that the government has seen fit to introduce these two new categories of contracts as the majority of bankruptcy cases in Malaysia are contributed to by hire purchase loans. It has also recently been reported that [approximately 84,805 Malaysians have been declared bankrupt between 2015 to 2019, with 47% percent of Malaysian youths having high credit card debts.](#)

What “inability to perform” is caught by Part II of the Covid-19 Act?

Thus far, no local cases have defined this. The party that fails to perform bears the burden of proving it has protection accorded by Section 7 of the Covid-19 Act.

It is clear that not every inability to perform will fall under Section 7. For example, the inability to pay contractual dues as a result of reduced

earnings over the period of the pandemic is not likely to be caught under the Act. The converse may hold true for the failure to perform services, for example, providing cleaning services. Such a provider may not have been able to perform cleaning services during the Movement Control period by reason of movement control to its place of business.

Whilst the precise definition of “*inability to perform*” has not been spelt out, it is wide enough to provide a reprieve to those who have been unable to perform their contractual obligations by reason of measures introduced to deal with Covid-19.

What can be done in the event of a dispute then?

Section 9 of the Covid-19 Act provides that any dispute regarding the inability to perform may be settled by way of mediation. The mediation process, including the appointment of the mediators, will be determined by the Minister.

Upon conclusion of the mediation, the parties to the dispute will enter into a settlement agreement. Section 9(5) of the Covid-19 Act provides that such a settlement agreement is binding upon parties.

Section 10 of the Covid-19 Act provides that, inter alia, the termination of a contract, receipt of damages, commencement of legal proceedings and/or grant of a judgment carried out between 18 March 2020 until the date of publication of the Covid-19 Act (gazetted on 23 October 2020) are not affected by the Act.

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