



**COVID-19
ONE YEAR LATER...**

HOW DO YOU MANAGE, LEGALLY SPEAKING?



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The construction industry was badly hit by Covid-19 in 2020 and remains affected to date. According to YBhg. Datuk Ir. Ahmad 'Asri Abdul Hamid, the chief executive of CIDB, the construction industry experienced losses up to RM 11.6 billion during the implementation of the first Movement Control Order (MCO) from 18 March to 14 April 2020.¹ The losses was largely derived from the value of salaries, building materials, machinery rentals, project management and profit.

The Malaysian Government, particularly the Ministry of Health, has worked to provide guidelines and standard operating procedures to ensure the safety of industry workers. Nonetheless and despite adhering to governmental guidelines, the industry is marred by regular outbreaks at construction sites and fabrication centres causing disruption to the progress of work, supply chains, provision of materials and manpower, resulting in increased costs and expenses for all parties. As an example, back in September 2020, it was reported by New Straits Times and CIDB that 149 construction sites have not resumed operations, despite the lifting of the MCO and 45 construction sites were unable to do so because of financial issues.² Contractors continue to struggle to strike a balance between the need to progress and keep up with work and the necessary compliance with the MCO as non-compliance will inevitably lead to hefty fines and site closures.³

This article aims to apprise construction industry players of the

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developments so far and the legal measures that may be undertaken to protect themselves.

Three (3) key things you need to know

1. Know your contract

It is crucial for parties to understand and fully appreciate their obligations, rights and remedies under a contract given that "the primary duty of a court of law is to enforce a promise which the parties have made and to uphold the sanctity of contracts".⁴

Based on our experience, the outbreak of Covid-19 revealed gaps and loopholes in contracts entered into in dealing with Covid-19 outbreaks on-site or related governmental measures such as the MCO.

The most frequently discussed issues since the outbreak of Covid-19 which persist to date, revolve around time and costs. The relevant clauses for consideration would pertain to extension of time (EOT), loss and expense (L&E), force majeure, possible acceleration costs, price fluctuations and payment. As an example and in relation to EOT, our previous analysis shows that contractors may be entitled to rely on certain events such as force majeure and suspension of works by statutory authority under Clause 23.8 of PAM 2018 to claim for EOT.⁵

Parties who are currently negotiating their contracts should ensure that Covid-19 outbreaks, disruptions and related events have been built in and/or have been considered.

2. Know your case and the current developments in law

Many industry players were efficient and active during the downtime in 2020, using this period as a window to carry out the assessments of contracts, claims, losses and

importantly, pursue settlement discussions to resolve and mitigate losses and to avoid litigation. This is particularly important in view of the forthcoming expiry of the Temporary Measures for Reducing the Impact of Coronavirus Disease 2019 (Covid-19) Act 2020 (Covid Act) on 30 June 2021⁶ which may attract enforcement of suspended rights and claims for breaches/defaults of contract. It may be an opportune time to gear up one's claims and/or defence or to engage in settlement discussions to prepare for the worst.

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This will also include identifying how the Covid-Act and surrounding developing case laws on the Covid Act, EOT, force majeure, variations, etc., may assist you in your dispute.

The main purpose of the Covid Act is to provide temporary relief to parties who are unable to perform their contractual obligations and to prevent innocent parties from exercising their rights under the contract for Covid-19 related breaches under Section 7 of the Covid Act. However, parties relying on Section 7 must be able to show and prove that the defaults are caused by the measures prescribed, made or taken under the Prevention and Control of Infectious Diseases Act 1988 such as the MCO. In addition to the protection granted to defaulting parties, the Covid Act introduced certain modifications to the Malaysian legislation with regard to the extension of limitation periods, increase of insolvency threshold and protection to developers against claims for liquidated damages. The Covid Act also provides that any dispute on the inability of a party to perform any contractual obligations arising from Covid-19 may be settled by mediation, albeit being entirely voluntary in nature.

At the time of writing, there has been only one reported High Court case being *SN Akmida Holdings Sdn Bhd v MTD Construction Sdn Bhd* [2020] MLJU 2038 which addresses the application and/or reliance on Covid-19 related events in relation to an application to injunct a demand on a performance bond. The Plaintiff in this case argued that certain Covid-19 related governmental measures such as the MCO and mandatory suspension of construction works prevented it from performing its works and therefore the Defendant was not entitled to demand the performance bond. The High Court eventually rejected this argument as it found that there was no causation between the Plaintiff's non-performance and Covid, i.e., the Plaintiff's non-performance had occurred in January 2020, prior to the outbreak of Covid-19 in Malaysia and any relevant governmental measures to battle the Covid-19 pandemic.



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3. Know how, when and where to enforce your rights

Generally, there are three ways of enforcing rights, (1) court litigation; (2) arbitration and (3) statutory adjudication pursuant to the Construction Industry Payment and Adjudication Act 2012. Parties may also consider alternate dispute resolutions (ADR) such as mediation and dispute managers / dispute resolution boards (DAB). Each process has its own benefits and considerations, and the key features are summarised below.

Shortly after the Covid-19 pandemic hit Malaysian shores, the industry observed a stagnation in arbitration and adjudication. This was partly due to governmental measures such as the MCO which resulted in the closure of courts and suspension of works at construction site, and partly, the passing of the then-AIAC's director which effectively meant that there was no appointing authority for arbitrations and adjudications. This has led to many cases being filed in the courts. In December 2020, a new Director of AIAC was appointed. Following this appointment, AIAC has been working tirelessly to clear the 9 months' worth of backlog of new arbitrations and adjudications registrations. To this end, there has been a significant uptake in

adjudication as a means to expeditiously recover unpaid monies for work done. Mediation has also been lauded by the industry players in attempts to settle disputes that have arisen.

Table 1 sets out the nature and key features for the various dispute resolution processes.

¹<https://archidex.com.my/archive/2020/11/26/archidex-conversation-with-datuk-ir-ahmad-asri-abdul-hamid-cidb/>

²<https://www.nst.com.my/news/nation/2020/09/626530/malaysias-construction-industry-suffers-record-decline>

³<https://www.theedgemarkets.com/article/cidb-orders-15-construction-sites-close-noncompliance-sop-%E2%80%94-fadillah>

⁴*New Zealand Insurance Co Ltd v Ong Choon Lin (T/A Syarikat Federal Motor Trading)* [1992] 1 MLJ 185

⁵<https://www.wongpartners.com/-/media/minisites/wongpartners/files/publications/2020/03/lockdown-on-construction-projects-where-is-my-time-and-money.pdf>

⁶http://www.pmc19.gov.my/pua_20210319_PUA121.pdf

⁷The introduction of the Covid Act also introduced mediation as an avenue for parties to resolve dispute on parties' inability to perform contractual obligation due to Covid-19 related governmental measures. This mediation will be administered under a special Covid-19 Mediation Centre set up by the Prime Minister's Office however is only available for a fixed category of parties such as individuals from the B40 and M40 categories, and micro and small scale enterprises. <https://insightplus.bakermckenzie.com/bm/resilience-recovery-renewal/malaysia-covid-19-bill-passed-and-mediation-for-covid-19-related-contractual-disputes>

	Adjudication	Court	Arbitration	Mediation	Dispute managers / dispute resolution boards (DAB)
Claimant	Can be initiated by the "Unpaid party" only.	Any party with a claim.	Any party with a claim.	Any party with a claim.	Any party with a claim.
Timing	Estimated 3 to 4 months	Estimated 1 to 2 years, nb* appeals	Estimated 1 to 2 years, nb* challenges	Estimated 1 to 2 months	Estimated 3 to 4 months
Costs	Limited to scale fees or a higher fee scale depending on parties' written agreement	Higher compared to the other dispute resolution forums.		Subject to agreement, nb* low cost mediation ⁷	Dependent on parties' agreement and the individual in question
Process	Fixed timeline under CIPAA unless otherwise agreed. Generally documents only, parties may request for hearing.	Includes the filing of evidence and witness examination. More flexibility accorded in arbitration without strict evidentiary rules.		Flexible timeline. Generally limited documents only and discussions between parties facilitated by mediator	Fixed timeline under contract unless otherwise agreed. Generally documents only, parties may request for hearing.
Decision Maker	Adjudicator chosen by parties or appointed by AIAC. May be of a different background.	Judge (legal background)	Arbitrator chosen by parties or appointed by institution. May be of a different background.	Mediator chosen by parties or appointed by the relevant institution.	Follow contract or chosen by parties.
Decision / award	Fixed timeline under CIPAA for Adjudicator to deliver decision.	No fixed timeline. Arbitration rules may specify when an arbitrator is to issue an award.		Settlement will be reached during the mediation session.	Fixed timeline under the contract or to be agreed between parties.
Appeal	No rights to appeal. May only challenge the decision on limited grounds such as (i) breach of natural justice or (ii) fraud.	Able to appeal (depending on subject matter)	May only challenge the award on limited grounds such as (i) fraud by the arbitrator or (ii) arbitrator was unfair to losing party in the proceedings.	-	Usually no right to appeal. Parties may resort to court litigation / arbitration to resolve the dispute.

Table 1

*nb. : nota bene (Latin) / note well (English)

Conclusion

In summary, there is no better timing than the present for industry players to review and revisit their contract terms, understand the different dispute resolution forums and the suitability to the dispute at hand, and comprehensively prepare its evidence.

All parties affected are encouraged to seek advice (be it legal or otherwise) on the remedies available and to carry out an assessment of their entitlement/rights in light of Covid-19 and the eventual expiry of the Covid Act.

About Wong & Partners

Wong & Partners, a member firm of Baker McKenzie International, is a Malaysian law firm that uniquely combines its rich local knowledge with broad global capabilities. Since its establishment in 1998, Wong & Partners has grown steadily and now consists of 22 partners and more than 50 associates. The Firm's lawyers are able to deliver comprehensive and integrated advice to clients and are trusted by respected domestic and multinational corporations for their needs in Malaysia and throughout Asia.