



Impact of COVID-19 on Commercial Leases

The COVID-19 pandemic has been described as the “worst global crisis since World War II” and quite rightly so, as we have seen unprecedented measures being taken globally to contain the virus. Such measures have shut down the global economy and businesses in Singapore have not been spared. With the new Circuit Breaker measures kicking in from 7 April till 4 May 2020, and with containment being paramount, businesses have where possible responded and reacted by improvising and embracing the power of the Internet of Things. How the digital transformation would one day change the real estate industry and landscape shall be for future discussion. For now, the immediate concern is this – how does the closure and restriction of non-essential businesses affect parties to a commercial lease in Singapore?



I. COVID-19 (TEMPORARY MEASURES) ACT

In a bid to mitigate the effects of COVID-19, the Singapore Government passed a new COVID-19 (Temporary Measures) Act (the “**Act**”) on 7 April 2020. Amongst other things, the Act grants temporary relief to businesses and individuals such as Landlords and Tenants through the introduction of a prescribed relief period if they are unable to meet their contractual obligations. Among other reliefs, the Act covers relevant contractual obligations that are to be performed on or after 1 February 2020 for the lease of commercial premises that were entered into or renewed before 25 March 2020.

Key clauses in the Act which Landlords and Tenants should take note of:

a. Property Tax Remissions

It will be **mandatory** for Landlords to pass on the benefit of Property Tax Remissions to its Tenants. Failure to do so constitutes a criminal offence and attracts a fine not exceeding \$5,000.

The transfer of the Property Tax Remissions to Tenants must be unconditional and the Act prescribes **2 ways** the transfer may be effected:

- By way of a payment of money (as a lump sum or in instalments);
or
- By way of an offset against or a reduction of the whole or any part of any rent payable by the Tenant.

This rebate seeks to cushion the impact of the Circuit Breaker measures and help businesses survive the interim period of forced closures. IRAS estimates that a 100% rebate on property tax for most non-residential properties for the year 2020 is equivalent to slightly more than one month of rent remission (see IRAS Media Release dated 2 April 2020).¹

¹<https://www.iras.gov.sg/irashome/News-and-Events/Newsroom/Media-Releases-and-Speeches/Media-Releases/2020/COVID-19-Relief-Measures--Upcoming-Legislative-Provisions-To-Impose-Obligation-on-Property-Owners-To-Pass-On-The-Property-Tax-Rebate-In-Full-To-Tenants/>

The types of businesses most affected by the economic crisis have been identified and included in the following list of premises. These include **hotels, airports** and **premises** that are used or intended to be used for meetings, incentive travel, conventions and exhibitions. Other businesses affected include backpackers' hostels, boarding houses, guest houses or students' hostels that are not classified as hotels; **hotels** that are not registered hotels; **shops** or **warehouse retail buildings; restaurants; sports and recreation buildings; amusement centres; cinemas** or **theatres; nursing homes, hospices**, places of **rehabilitation** or **convalescent homes; childcare centres** or **kindergartens; schools; driving schools; purpose-built workers' dormitories**; and various **tourist attractions**.

Landlords should ensure that the remission is passed on in a timely manner and note that any disputes between the Landlord and the Tenant in relation to the property tax rebate shall be adjudicated by a Valuation Review Panel (comprising members from the Valuation Review Board constituted under the Property Tax Act). Thereafter, the Landlord is required to keep a record of the transfer for 3 years.





b. Moratorium

Where a party is unable to perform its legal obligations in the scheduled contract, it may, notwithstanding any law or any clause in its contract, be granted temporary relief from actions for a period of time where:

- Such inability is to a material extent caused by COVID-19; and
- The party has served a “Notification for Relief” to the counterparty and its guarantors.

After the contracting party wishing to claim relief provides notice to the other party, the other party is then prohibited from commencing an action in court, terminating the lease due to non-payment of rent or other moneys and exercising the right of re-entry or forfeiture. Any person who without reasonable excuse contravenes this moratorium shall be guilty of an offence and shall be liable on conviction to a fine not exceeding \$1,000.

It is important to note that this relief will only apply where COVID-19 has had a “material” impact. This is a question of fact, to be determined on a case by case basis. In the event of any dispute, the Ministry of Law can appoint assessors to determine whether the inability of a party to perform their contractual obligations was materially due to the COVID-19 outbreak and will have power to grant relief that is “just and equitable in the circumstances”.

However, where the inability to perform the said obligation cannot be attributed to COVID-19, the counterparty is still allowed to enforce their legal rights.

It should be noted that this temporary relief does not cancel parties’ obligations in the contract. For example, a Tenant’s obligation to pay rent continues to accrue and the Landlord is free to assert their respective full legal rights when the prescribed period (not exceeding 6 months) is over.

II. TERMINATION OF LEASE BY WAY OF FORCE MAJEURE OR FRUSTRATION

For parties who do not qualify for relief under the Act, the lease agreement may be reviewed to identify relevant provisions which would apply in such situations.



Grounds on which the lease agreement may be terminated include:

a. Force Majeure

Some lease agreements contain a force majeure clause which entitles a party to be excused or discharged from its contractual obligations as a result of an extraordinary event or circumstance beyond their control which prevents or delays performance.

The Singapore Courts tend to interpret such clauses narrowly – which means that Tenants must satisfy the courts that the wording of its force majeure clause is wide enough to cover the Tenant’s specific situation. It is usually not enough to show that it has merely become more difficult or more expensive for the party to discharge its obligations. The Tenant must also show that it has taken all possible steps to avoid the event.

b. Frustration

If parties do not have a force majeure clause in their contract, they may rely on the doctrine of Frustration and the Frustrated Contracts Act (Chapter 115) in Singapore. Frustration allows contracts to be terminated when an unforeseen event (through no fault of either party) renders contractual obligations impossible or radically changes the party’s principal purpose for entering into the contract. The effect of a contract being frustrated would be that it is essentially “cancelled” and that neither party is required to perform any further obligations under the contract.

While it is arguable that the COVID-19 outbreak and the subsequent measures imposed by the Government are events that were not anticipated and not due to the fault of any party, the high threshold for proving frustration means that the party relying on the doctrine would have to show that it is *impossible* to perform the contract and not just more costly or difficult to carry on with the contract.



III. MOVING FORWARD

Given that parties' obligations are not cancelled under the Act but have merely been postponed, the issue of whether parties can recover in time after the pandemic to meet their obligations is still unresolved. Both Landlords and Tenants alike will have to manage this carefully and remember that their interests are ultimately aligned.

As a matter of practicality, if the Tenants are in financial distress and Landlords proceed with enforcement actions, the Landlords may end up with a judgment that has little economic value. At the same time, it would also be challenging for Landlords to procure replacement Tenants in the current economic climate.

At this juncture, the most practical and best way forward would be for Landlords and Tenants to work together and negotiate on a mutually acceptable arrangement. This can be in the form of a rent adjustment or suspension etc. The goodwill shown by Landlords in this time of financial difficulty will hopefully lead to more business opportunities in the future and allow all parties to emerge stronger from this crisis.

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RHTLaw Asia COVID-19 Response Team will continue to bring you further updates following developments in Parliament.

Join us for an upcoming webinar on:

**“COVID-19 (Temporary Measures) Act
– Its Legal and Practical Implications”**

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