ABDULLAH CHAN

A Guide for Companies amidst the COVID-19 Pandemic

– Malaysian Economic Stimulus Packages, Contractual Obligations and Liabilities and Legal Implications

1. The impact of COVID-19 on the corporate industry in Malaysia

Due to the recent outbreak of COVID-19, the Government of Malaysia has declared a Movement Control Order ("MCO") for the period from 18 March 2020 to 31 March 2020, which has since been extended twice to **12 May 2020**.

Pursuant to the MCO, save and except for "essential services", all business premises in Malaysia must be closed from 18 March 2020 until **12 May 2020** – for practical purposes, this does not necessarily entail a shutdown or cessation of operations, merely that the premises must be closed. Most companies and businesses have opted to have a "work from home" policy, where possible. Such an approach allows them to continue providing their services, and in some cases, products too. Essential services are defined to include, amongst others, banking services, transportation (air/land/sea), telecommunication services, electricity and water services, food supply and preparation services, and e-commerce.

Companies that wished to continue their operations needed MITI's approval to do so, and even then such approvals to operate were subject to additional conditions, such as reducing manpower to minimal levels, recording the results of daily temperature checks of each employee, ensuring the business premises are sanitised, and ensuring hand sanitiser and face masks are available for all workers – all of which are aimed at preventing a further spread of COVID-19.

2. Economic Stimulus Packages

On 27 February 2020, the Malaysian Government unveiled a RM20 billion economic stimulus package ("First Stimulus Package") to be implemented over a six-month period, in order to boost the already-depressed global economic outlook for Malaysia, which was worsened by the COVID-19 outbreak. Measures introduced in the First Stimulus Package aimed to ease cash flow for businesses, boost private consumption, promote investments, develop human capital and protect employees.

In addition, a second RM250 billion package ("Second Stimulus Package" or "PRIHATIN") and an additional RM10 billion package, focusing on the Small and Medium Enterprises ("SMEs") - ("Additional Stimulus Package" or "PRIHATIN PLUS") were announced by the Government on 27 March 2020 and 6 April 2020 respectively.

Key measures that may impact on companies and business owners, include the following:

(1) Wage Subsidy Programme - The Government is giving a wage subsidy (ranging from RM600 to RM1,200 per month per employee) for 3 months.

(2) Restructuring of Employees' Provident Fund ("EPF") contributions - Employers may negotiate with the EPF to defer, restructure and/or reschedule the employers' portion of EPF contributions.

(3) Human Resources Development Fund ("HRDF") - The payment of HRDF levy is waived for a period of 6 months from April 2020 to September 2020.

(4) Deferment of tax instalment payments for the tourism industry - Payments of monthly tax instalments from 1 April 2020 to 30 September 2020 may be deferred for 6 months.

(5) Revision of tax estimate in the third month - Companies may seek to revise their tax estimates in the third month of the applicable instalment payment schedule.

(6) Loan Restructuring and Rescheduling - A 6-month moratorium for individual and SMEs' loans.

(7) Accelerated capital allowances at an initial rate of 20% and increased annual allowance from between 10%-20% to 40% on qualifying capital expenditure.

(8) Double deduction for establishment of regional office by international shipping companies.

(9) Import duty and sales tax exemption on importation or local purchase of machinery and equipment used in port operations for 3 years commencing 1 April 2020.

(10) Deduction/allowance on personal protective equipment - Any expenditure incurred in providing disposable PPE is tax deductible; expenditure incurred in providing non-disposable PPE to employees is claimable as capital allowances.

(11) Credit/ Financing Facilities and Guarantees Facilities - Various facilities have been made available particularly to the SMEs and micro-entrepreneurs. In addition, via Danajamin the Government will provide guarantee facilities of up to RM50 billion for working capital loans to the companies.

(12) Discount on electricity bills - The Government together with Tenaga Nasional Berhad is giving a tiered-discount with rates ranging between 15% and 50%.

(13) Statutory filings with Companies Commission of Malaysia - A 30-day extension to submit statutory documents and a 3-month extension to the companies to file its annual financial statement.

Also of note is the fact that most State Governments in Malaysia have announced their own packages of aid, to further supplement the measures introduced by the Federal Government.

3. Do existing contractual obligations and liabilities have to be fulfilled during the MCO?

(a) Suspension or release from contractual obligations due to COVID-19 - Force Majeure ("FM") or section 57(2) of Contracts Act 1950, Malaysia

With operations being suspended, business premises effectively closed, and supply chains being significantly disrupted, a question that frequently arises is whether, notwithstanding the MCO, Malaysians (companies, businesses and individuals) remain strictly bound by the terms of their respective contracts – and may therefore be in breach of their contracts if they are unable to perform their obligations on time or at all.

Under Malaysian law, the doctrine of "Force Majeure" is not an implied concept, and needs to have been specifically provided for in the contract. There must be specific provisions on FM, FM events and the rights and consequences thereto. As such, each FM clause (if any) in a contract has to be construed on its own individual wording and scope. Language such as epidemic, communicable diseases or the like; or even events which are caused by 'any act of the government', may serve helpful in the current circumstances.

In addition, the contracting party who failed to perform its contractual obligation due to the outbreak of COVID-19 may also, if the contract is governed by Malaysia laws, be able to rely on section 57(2) of the Contracts Act 1950 (the concept of frustration). In order to establish the principle of frustration of a contract, a party must establish the following: (i) The contract is impossible or unlawful to be carried out; and (ii) The impossibility or unlawfulness must be supervening i.e. it must occur subsequent to the entry of a valid contract. The performance must be "impossible" and not merely "difficult".

The contract will become void on the date of frustration and any performance prior to the date of frustration is valid but any future obligations will be released.

(b) Calculation of "Business Days"

Malaysian contracts usually define "Business Days" as days when commercial banks are open for business in Kuala Lumpur, Malaysia - as commercial banks are still operating during the MCO period, it is advisable for companies to monitor and fulfil their respective contractual obligations based on the agreed time frame, notwithstanding the MCO.

4. Can companies terminate the employment of any employees or contract staffs because of a downturn in business as a result of the MCO?

The introduction of a wage subsidy and deferments or exemptions on certain statutory payments are aimed at helping businesses conserve cash, so they can surmount the COVID-19 economic downturn, and hopefully retain their employees. Although welcome, the current measures may be insufficient for this purpose.

Employers in Malaysia may find themselves having to take more drastic steps – including salary adjustments, reducing working hours, and ultimately, downsizing their workforce.

Employers cannot force employees to take annual leave or unpaid leave, or to accept a salary adjustment during the period of the MCO; such matters may however be agreed between employer and employee and may be a more palatable alternative to losing employment altogether.

If an employer is left with no choice but to opt for retrenchment or a "reorganisation of the organisation" despite undertaking various mitigation steps, then the employer will need to carry out a retrenchment exercise. Ultimately, if all else fails and a company is forced to shut down completely, a cessation of business exercise will have to be undertaken. Employees engaged in manual labour or earning RM2,000 and below, will be subject to different regulatory requirements pertaining to compensation for loss of employment.

5. Legal Implication – Protection to the rights of data privacy

Various measures have been taken by different Governments the world over, to slow down the spread of the virus. Companies are being vigilant too - mandating that employees and visitors sign health declaration forms, checking body temperature upon entry into buildings / premises, and monitoring past travel patterns.

This gives rise to possible questions of whether individuals' personal data is properly protected. The Personal Data Protection Act 2010 ("PDPA") regulates the processing of personal data in commercial transactions. Nonetheless, we would recommend that companies should take a conservative approach to applicability, and ensure any personal data is safeguarded accordingly.
Sensitive personal data consists of information as to, inter alia, physical or mental health or conditions, and can only be processed when the Data Subject has given his explicit consent; or where such processing of sensitive personal data is necessary to, among others, protect the vital interests - matters relating to life, death, or security of the Data Subject or another person; or where the data collector/processor cannot reasonably be expected to obtain the consent of the Data Subject; or for medical purposes.

As such, the collection, processing and disclosure of personal information for contact tracing and other response measures against COVID-19 are possible.

6. Legal Implication – Extension of statutory limitation periods

Limitation periods apply to various claims that may be pursued in Court, and a failure to bring a claim within the applicable time period would mean your claim is time-barred. An extension of statutory limitation periods has recently been declared in India, Canada and British Columbia, but there have not been any such extensions in Malaysia as yet.

One exception is in relation to the Industrial Relations Act - On 31 March 2020, the Ministry of Human Resources has advised that the MCO period will not be taken into account when calculating the 60-day limitation period for employees to file a complaint of unfair dismissal under section 20 of the IRA. Further, as mentioned in paragraph 2 above, certain time-limits for statutory filings have been deferred.

7. What other options are available to businesses?

Aside from the specific reliefs afforded by the Government, including deferments / waivers on statutory matters, there are various other options that remain available from a commercial perspective. Malaysia has faced economic downturns before – the most recent large downturns being in 1998 and 2008 respectively. The quicker a business is to react, and to take steps to deal with the economic issues it faces, the more likely it is that a business will survive and even thrive once the economy is back on track.

Today's scenario presents new opportunities for businesses to explore. The drop in the share market may give rise to M&A (Mergers & Acquisitions) possibilities - including debt to equity conversions, entry of new investors, and identification of synergies and commonalities across different entities. Companies should also review their corporate structures – solutions such as downsizing, disposal of non-core business or assets, disposal of non-profitable business or assets and sale and leaseback transactions - have the potential of improving a company's cash position and optimizes its focus on the parts of its business that may have the most potential moving forward.

Debt issuance and securitised financing should also be considered. Whether a company's current structure is debt-heavy or asset-rich, there is a potential commercial solution for practically every situation. Financial institutions, facing a reduced appetite and demand from the market, may similarly be more open to considering more creative structures, when it comes to obtaining facilities.

The key is to move quickly. Putting something in place early, and putting the house in order – whether by way of improved cashflow or a more focused, smaller business, is likely to put a company in good stead to enable it to run once the economy demands that it does so.

8. More breathing time and space for Malaysian companies in difficult times?

The Malaysian Government has, on the 22nd April 2020, gazetted the Companies (Exemption) Order 2020 ("the Order"). The Order, which came into effect on 23rd April 2020 and remains in effect until 31st December 2020, has the effect of extending the time period under s.466(a) of the Companies Act 2016 ("the Act"), from 21 days to 6 months.

This is an important development for Malaysian companies that may be facing issues due to the ongoing Covid19 pandemic and ensuing Movement Control Order restrictions in Malaysia. Essentially, Malaysian companies are now given 5 additional months to settle a notice of demand from creditors, before the deeming provision of s.466(a) of the Act (which deems that a company is unable to pay its debts) is triggered.

Companies should note however that the Order has no impact on other kinds of enforcement actions, and that the Order is very specific in its impact.

9. Contact Us

As the assessment of liability and risks, and the corresponding options moving forward may be different for every case, it is advisable for you to seek a tailored risk and contract management solution, and we stand ready to assist you. Our team has assisted various companies and businesses to navigate their way through previous downturns, and we remain available to assist you today. From employment law issues to banking and finance, real estate, mergers and acquisitions and debt and equity issues to company and debt restructurings, we are able to provide a full suite of solutions and advice to help you through these tumultuous times.

Should you have any queries on whether your business qualifies for any aspects of the various stimulus packages outlined above, or should you require any other advisory services in relation to your businesses – which may have been impacted by the MCO and/or the outbreak of COVID-19, please contact:

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