

COVID-19: SHOULD MALAYSIA ADOPT SPECIFIC LAW?

On 7 April 2020, the Singaporean Parliament passed the Covid-19 (Temporary Measures) Act 2020 to deal with various matters relating to COVID-19 pandemic and to provide temporary measures during the pandemic. Apart from stating expressly the orders to control the spread of COVID-19, this legislation effectively introduces temporary measures by prescribing temporary relief for inability to perform contracts specified and included thereby, temporary relief for financially distressed Singaporean individuals, firms and other businesses, temporary measures for the conduct of meetings and temporary measures for Court proceedings in Singapore. This legislation implements those measures by either prescribing the specific orders or by temporarily amending relevant statutes during the period expressly prescribed by the Covid-19 (Temporary Measures) Act 2020

Taking into account the current situation during the spread of COVID-19 on our shores, it may be worthwhile for our Government to consider adopting a similar legislative approach, albeit in a different context and effect. A similar statute may be considered, either in the form where the proposed legislation is tailor-made based on the national crisis or alternatively, one in the form that does not effectively amend the relevant statutes but declares relevant statutes to be legally interpreted or where applicable, to be overridden in accordance with the provisions contained in this proposed legislation. In the case of the latter, the proposed legislation will contain a general statutory provision that during the period or periods of time declared by the Prime Minister after consultations with the National Security Council as moratorium period, the contents of this proposed legislation shall apply so as to override or to be applicable to interpret any other relevant laws. The application of the proposed legislation can occur not only for COVID-19 but for other future pandemics, touch wood, if any. The effect and benefits of the proposed legislation is best illustrated on a general overview basis in the areas of law identified below.

Private Contractual Timeframe It is not uncommon for contracts to contain definition of a contractual timeframe. Usually, the definition of “day(s)” would generally mean a calendar day. In certain contracts, a timeframe based on business days may be adopted, where the definition of “business days” would typically be defined to mean “*a day (excluding gazetted public holidays, Saturdays and Sundays) on which banks are open for business in Kuala Lumpur*”. The proposed legislation may provide that all computation and calculation of time, whether expressly provided or otherwise in any contract, deed, letter or other documents, shall be interpreted to exclude the moratorium period announced by the Prime Minister or to be suspended for the duration of such moratorium period. By doing so, stakeholders of funds will be legally prohibited from releasing any stakeholders funds during any lockdown period of time. This would be most relevant for real estate property transactions where in a secondary market transaction, it is not uncommon for solicitors for sellers to hold part of the consideration for specified days or business days (where definition is often linked to the operation of banks as illustrated above as opposed to land registry), as the case may be.

By having the suspension of contractual timeframes, parties in a contract for sale and supply of goods may have the option of not terminating the contract on grounds of frustration of contract or on the grounds of force majeure. With the proposed legislation, parties to such contracts may instead opt to suspend the operation of the contract during the application of this proposed legislation. The time frame can then resume on the expiration of the moratorium period. The same effect may apply to tenancy or lease agreements for business or industrial premises, whereby the proposed legislation may be interpreted to allow tenants who are suffering from slowdown of business and cash flow problems, during the moratorium period to suspend the payment of full rental. By extension, the proposed legislation may prescribe a threshold of reduction of rental during the moratorium period.

The suspension and extension of contractual timeframe may also be statutorily extended to maturity dates or coupon payment dates for existing bonds issued with the approval from the relevant authorities, such as Securities Commission Malaysia. Prescribing such revision of timeframe to observe and

perform contractual obligations will prevent parties to such issuances of bonds from having to activate and renegotiate the revision of maturity dates or dates for payment obligations.

Statutory Timeframe The Companies Act 2016 prescribes for statutory timeframe within which shareholders' meetings must be held and convened by public companies and within which financial statements must be circulated to shareholders. The proposed legislation may contain a provision that construes the timeframe prescribed by the Companies Act 2016 to be extended by the duration of the moratorium period free from any charge under the Companies Act 2016. In doing so, directors and other officers of affected companies as well as shareholders will be made aware of the automatic suspension and extension of time once the proposed legislation is announced to apply. Having such automatic extensions will also allow external parties such as auditors and accountants, to be made aware of the extended deadlines to complete their audits and reports to their clients if and when the proposed legislation is declared to apply.

The relevant tax legislations, to wit, the Income Tax Act 1967, the Real Property Gains Tax Act 1976, the Service Tax Act 2018, the Sales Tax Act 2018 and the Stamp Act 1949, similarly contain timeframe within which taxes or stamp duty or instalments of taxes must be paid and settled. The proposed legislation may defer and delay the statutorily prescribed timeframe for the duration of the moratorium period or by such longer time as may be determined by the Minister of Finance after taking into account the economic and financial condition of the nation. Such clear provisions will allow taxpayers to obtain positive cash flows besides facilitating adjustments and restructures their debts.

Statutory timeframe prescribed by the National Land Code or any guidelines or directives issued by the relevant land registry pursuant to the National Land Code may similarly be extended and deferred without any penalty or fine during the moratorium period. Since land registries do not fall within the purview of essential services determined by the Prevention and Control of Infectious Diseases (Measures Within the Infected Local Areas) Regulations, presentation of instruments for registration will then be allowed to be carried out free from any penalty or fines.

Effect of Force Majeure It is not uncommon for contracts to generally provide for force majeure, where by application, parties to a contract will be discharged from performing their respective contractual obligations or otherwise, At the time the contract is made, unprecedented events, such as the Covid-19 pandemic, may not have been envisaged and thus included as events of force majeure. As a result, it will be disputed whether a pandemic is intended to be included or a pandemic, if interpreted to be included, will adversely prevent one contractual party from observing and performing its contractual obligations. The proposed legislation will be instrumental in addressing this situation. The proposed legislation may contain statutory provisions that effectively and legally extend the interpretation of existing force majeure clauses to include pandemics on the condition that such interpretation is necessary due to the inability of one party to observe and perform its contractual obligations due to no fault of that party. Suffice to add, the proposed statutory provisions may contain conditions and qualifications before they are permitted to be applied.

Limitation Period At present, Section 29 of the Limitation Act 1953 prescribes for postponement of limitation period in cases of fraud or mistake only. Apart from this postponement, there is no statutory provision that provides for suspension or deferment of any limitation period provided by the 1953 Act. In addition to the suspension of contractual or statutory timeframe proposed in the preceding paragraphs, the proposed legislation may also contain a statutory provision to suspend the computation of all timeframe prescribed by the Limitation Act 1953 and that the computation will only resume on expiration or lifting of the moratorium period.

Employment Matters One of the most affected areas during any pandemic or lockdown period is the area of employment. Often, employers will be left wondering the status of employment of their employees and the application of the terms of employment during the pandemic. The proposed legislation should therefore include statutory terms that will be applicable to specified employment contracts or arrangements during the moratorium period. It would clearly state that notwithstanding the agreed terms in any employment contract or arrangement, employees will be, for example, granted paid leave for the moratorium period on either full or

prescribed portion of their monthly salary or remuneration with the option of reinstatement or repayment of such portion after the expiration of the moratorium period. It may also prescribe that during the moratorium period or any such period as may be announced by the relevant Minister, no termination of employment or retrenchment, with or without compensation, shall take place without the written permission from the Labour Department.

Court Proceedings Whilst Courts may still be operational during any lockdown period, this proposed legislation may address the challenges in obtaining postponement of hearings and trials, and in the service of cause papers. In the case of the former, the proposed legislation may provide ways in which parties to Court proceedings may seek and obtain deferment or postponement of hearing and trial dates already fixed during the moratorium period. The statutory prescribed methods of obtaining deferment or postponement will automatically apply during the moratorium period, unless otherwise declared by the Chief Justice of the Federal Court. Meanwhile, the challenges facing the service of cause papers may be similarly addressed, whereby, the proposed legislation may allow writs or originating summons to be served by way of substituted service without an order from the Court provided that the deadline for such service expires during the moratorium period.

Thresholds of Solvency The Insolvency Act 1967 and the Companies Act 2016 prescribe for the respective quantum of debt within which an individual and a company is deemed unable to pay his or its debt, which will trigger all insolvency proceedings against such individual or company. In the case of the Companies Act 2016, the Minister responsible is empowered to determine the quantum or threshold of debt applicable to companies. The proposed legislation can contain an increase limit for individuals and companies alike to be applicable during the moratorium period. Doing so will allow financially distressed individuals and companies comfort that a slew of insolvency actions will not be taken against them during the moratorium period. It will also allow any of them to, upon any announcement of moratorium period, activate consultation and discussions with their creditors for restructuring of their debts.

Finance and Credit Facilities During the moratorium period, income from individuals and companies will most likely be adversely affected. Besides the increase of limit of solvency proposed in the preceding paragraph, the proposed legislation may empower all relevant Ministers to issue an order or directive to all lenders to compulsorily suspend the repayment of all loans or credit facilities, including credit card facilities, and the suspension of interest payable thereon during the moratorium period. For borrowings under Syariah principles, all percentages of profits applicable for all facilities as well as repayment obligations may be similarly revised by the proposed legislation or by the Minister of Finance.

Conclusion In conclusion, it is admitted that the proposed legislation may not be a “one size fits all” legislation. There are intricacies of certain areas and laws that will necessitate further study, review and consideration before any statutory provision affecting those areas and laws are included in the proposed supplemental legislation. It is also admitted that ever since the existing Movement Control Order was announced by the Government on 16 March 2020, various Ministries and pertinent governmental departments and agencies have been announcing relevant measures applicable during the MCO. Bank Negara Malaysia announced the 6 months moratorium of repayment of loans from banks whilst the Minister of Housing and Local Government announced repayment moratorium of 3 months applicable to all moneylenders. The Domestic Trade and Consumer Affairs meanwhile announced the increase of the limit of solvency of companies to RM50,000 until 31 December 2020. These announced measures may render the proposed legislation discussed in this article to be unnecessary. Be that as it may, the proposed legislation may still be worth considering as it can be seen to confer all affected with certainty on their respective rights and obligations before any crisis arises. Having the proposed legislation will also, more importantly, allow the Malaysian Government to direct their focus and attention in protecting and safeguarding its people against the pandemic now and any in the future.

Author

David Lee



David Lee
david.lee@zulrafique.com.my

Co-Author

Khairuzzaman Muhammad



Khairuzzaman Muhammad
zaman@zulrafique.com.my

The contents do not constitute legal advice, are not intended to be a substitute for legal advice and should not be relied upon as such.

Zul Rafique & Partners
15 April 2020