NEWSLETTER

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Companies' Legal Obligations Under COVID-19

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Pursuant to Section 259 of the Companies Act 2016, companies are bound by the duty to lodge their financial statement within 30 days from the financial statement are circulated to its members for private companies or within 30 days from its annual general meeting for public companies.

In the announcement on 6 April 2020 by Prime Minister Tan Sri Muhyiddin Yassin, the Government recognizes the statutory duty of companies are affected due to the inconvenience caused by Covid-19. Hence, the lodgment period for financial statement has been extended by 3 months from the ending period of the Movement Control Order (MCO) for companies with financial year ending 30 September 2019 to 31 December 2019. To be able to enjoy such relaxation of the duty bound, the company would need to apply to the Companies Commission of Malaysia (SSM).

Further, the Government has agreed to provide an automatic moratorium for any statutory documents required to be lodged to SSM for a period of 30 days from the end date of the MCO.

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(A) WHETHER A PARTY IS EXEMPTED FROM PERFORMING ANY CONTRACTUAL OBLIGATION DUE TO THE HINDRANCE OF RMO?

It is important to note here that RMO does not have any direct impact on commercial contracts to allow party to contract to be exempted from performing any contractual obligations.

Essentially, parties to a contract would be bound by the contract terms to perform their respective obligations and thus incurring liability and/or committing an act of breach of contract should there be any failure in such performance.

It is important to note here that whilst Covid 19 may be seen as circumstance beyond the control of a party in the contract, liabilities may still be incurred for breach of contract if parties do not have a consensus to allow the suspension of the contract.

In the following, the effects of RMO on parties' legal obligation will be discussed in relation to the Contracts Act 1950 and the respective contracts and/or contractual terms.

1. TERMINATION OF CONTRACT

In relation to the above, reference could be made to section 57(2) of the Contracts Act 1950 which states that,

A contract to do an act which, after the contract is made, becomes impossible, or by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.

By virtue of section 57(2) of Contracts Act, a contract will become void if there is occurrence of event beyond the control of the contracting party which render the performance of the contract impossible or unlawful.

It is to be noted that the following three elements must be present before a contract can be rendered void under section 57(2) of the Contracts Act as stated in the case of BIG Industrial Gas Sdn Bhd v Pan Wijaya Property Sdn Bhd and another appeal [2018] 3 MLJ 326;

(a) the event upon which the promisor relies as having frustrated the contract must have been one for which no provision has been made in the contract. If provision has been made then the parties must be taken to have allocated the risk between them;

(b) the event relied upon by the promisor must be one for which he or she is not responsible. Put shortly, self-induced frustration is ineffective; and

(c) the event which is said to discharge the promise must be such that renders it radically different from that which was undertaken by the contract. The court must find it practically unjust to enforce the original promise. If any of these elements are not present on the facts of a given case, then s 57 does not bite.

Following from the above, it can be seen that section 57(2) of the Contracts Act can only be invoked if the party can show that the RMO render the promise and/or obligation radically different from what was undertaken originally.

It is to be noted further that such provision can only be invoked if the result of the such event is that the contractual obligation becomes impossible or unlawful. An example of a contract which can be rendered void due to the RMO could may be a scenario whereby an artist had been invited to perform at a concert. The implementation of the RMO which restrained any mass gathering had rendered the concert impossible and/or unlawful to be carried out. The contract for the artist to perform can be seen as void pursuant to Section 57(2) of the Contracts Act.

It is pertinent to note here that section 57(2) Contracts Act 1950 is intended for a significant impact to put a contract to end without imposing any fault on any party. Given the circumstances of the RMO, it may not be the intention of any party to invoke such provision (even if it fulfills the aforesaid elements) to put an end to all contracts but to suspend and/or to reduce the obligation undertaken pursuant to such contract.

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2. SUSPENSION OF CONTRACTUAL OBLIGATIONS

In a different scenario where a company seeks to know whether it is still bound to perform a contract in view of the RMO, one may have to refer to the terms in the contract to determine if there is a force majeure clause incorporated in the contract that enable the company to be excused from performance of the said obligation.

Force majeure (literally means superior forces) is a common clause in most commercial agreement which contains the parties' agreement to excuse themselves and/or to allow the other party to be excused from performing certain contractual obligations, due to certain event which are beyond the control of the parties.

In the event that there is a force majeure clause in a contract, it would be a question of interpretation whether such clause include RMO as a situation where a party can be excused from performing the contract.

In the event that such force majeure clause is not incorporated in the contract, the parties may have to re-negotiate the terms of the contract to accommodate to the performance of obligations under the contract in view of the circumstances which are beyond the control of the parties.

Should there be any dispute in relation to a claim of breach of contract and/or non-performance of contract which is brought before the court whereby there is no force majeure clause incorporated in the court, it may be possible for a party to argue that there is no breach of contract because such force majeure clause is an implied term of the contract. Such argument however must be able to fulfill the officer bystander test and business efficacy as stated in the case of See Leong Chye @ Sze Leong Chye & Anor v United Overseas Bank Bhd and another appeal [2019] 1 MLJ 25.

While the court in Malaysia had on several past occasions refused to imply such force majeure clause into a contract, it is noted that such cases may be able to be distinguished as it involved statutory contracts where no amendments can be allowed without fulfilling certain requisite requirements and thus which can be distinguished from the scenario herein.

In view of the above, it can be summarized that whether a party can be excused from performing certain contractual obligations would be subject to the contract executed by the parties if such contract encompasses a force majeure clause that allows the suspension and/or non-performance of the contractual obligation under the circumstances (outbreak of disease or similar terms). The following may be referred for general understanding purposes in relation to the contents discussed above whereby force majeure clause does not cover RMO and/or where such clause is absent. Notwithstanding the following, one is reminded that a party to contract may always appeal to another party to the contract to modify terms and to agree upon new terms to vary parties' obligation amidst the challenges posed by the Covid 19 pandemic in order to achieve a win-win outcome.

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2. SUSPENSION OF CONTRACTUAL OBLIGATIONS

Commercial Agreement	*REMARKS*
1. Tenancy	*A contract where allows the usage of premises at the consideration of payment of rental. On a general basis, it is noted that the landlord's obligation under a tenancy agreement to allow the tenant to use the premises remains unaffected (as the **tenant's access but not the Landlord's permission for the tenant to occupy the premises** may be temporarily prohibited by the RMO), the obligation of the tenant to pay rental is not one that is impossible nor unlawful. In any event the termination of tenancy is most probably not the intended outcome but the reduction and/or waiver of rental and which may be achieved by way of negotiation and/or agreement between the parties.*
2. Utilities	*It is noted that the supply of various utilities (such as electricity, telecommunication and water) remains unaffected by the RMO. It remains to be seen whether there will be any additional measures be taken to lessen the burden of various business operators in addition to the discounts of electricity bill.*
3. Banking	*Bank Negara Malaysia has recently issued a six month's automatic moratorium on individuals and/or SME loans to suspend payment obligations. Beyond the ambit of such moratorium which payments' obligation remains unaffected, various borrowers may apply and/or request for a moratorium from the respective banks to avoid defaulting under the relevant facility arrangement and/or agreement.*
4. Hire-purchase	*Similar to the concept as illustrated under items no. 1 and 3 above, parties' obligations are largely unaffected and measures may be taken to adjust and/or vary payment obligation.*

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(B) WHAT ARE THE EFFECTS OF THE RMO IN RELATION TO EMPLOYMENT OBLIGATIONS?

1. PAYMENT OBLIGATION

Due to the RMO, most business except for those operating essential services had came to a halt and thus rendering the question whether payment of salary to employees during such RMO period one of the key issue to be discussed. Generally, the obligation of an employer to pay salary is not affected by the RMO.

While it is clear that the RMO has a significant effect from an economic perspective on various business owners, it is pertinent to note here that the RMO only prohibits movement and opening of premises and it does not exclude the employers from complying with a contract of employment.

Generally, an employer's obligation to pay salary is subject to the contract with the employee. In the scenario where the employment contract has a force majeure clause or a clause which give rise to the employer's right to shut down the business temporarily, the payment of salary may be adjusted accordingly pursuant to such agreement.

In any event, precaution must be taken that any adjustment and/or measures made do not contravene the Employment Act 1955 and/or Guidelines By Ministry Of Human Resources which was issued in relevance to those governed by the Act. It is prudent for an employer to obtain the approval of its employees before resorting to pay cuts and/or unpaid leaves from its employees.

2. LAY-OFF/TERMINATION

Employment Act 1955 And Employment (Termination And Lay-Off Benefits) Regulates the benefits an employee is entitled to in the event of termination and/or lay-off and which includes-

Termination and/or lay-off benefits to be paid must not be less than—

- *ten days' wages for every year for continuous employment of less than two years; or*
- *fifteen days' wages for every year for continuous employment for two years or more but less than five years; or*
- *twenty days' wages for every year of employment under a continuous contract of service with the employer if he has been employed by that employer for five years or more, and pro-rata as respect an incomplete year, calculated to the nearest month.*

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3. RETRENCHMENT

It is well settled that the employer is entitled to organize his business in the manner he considers best. As such, any form of retrenchment must be made bona fide and it must be shown that there is redundancy and/or surplus in order to justify the dismissals of respective employees, albeit that other cost-cutting measures should be considered and/or implemented by the employers prior to retrenchment. It is noted that the last in first out principle is of significance in selection of employee for the purpose of retrenchment. Also, one may refer to the Code Of Conduct For Industrial Harmony for some guidance in relation to retrenchment as follows:-

(22) (a) If retrenchment becomes necessary, despite having taken appropriate measures, the employer should take the following measures:

i. *Giving as early a warning, as practicable, to the workers concerned;*
ii. *Introducing schemes for voluntary retrenchment and retirement and for payment of redundancy and retirement benefits;*
iii. *Retiring workers who are beyond their normal retiring age;*
iv. *Assisting, in co-operation with the Ministry of Human Resources, the workers to find work outside the undertaking;*
v. *Spreading termination of employment over a longer period;*
vi. *Ensuring that no such announcement is made before the workers and their representatives or trade union has been informed.*

(b) The employer should select employees to be retrenched in accordance with objective criteria as set out in the Code.

(B) WHAT ARE THE EFFECTS OF THE RMO IN RELATION TO EMPLOYMENT OBLIGATIONS?

4. CONCLUSION

It is noted that while the employers are required to comply with certain statutory obligations in respect of employment, the law still recognizes the employer's right in organizing its business, especially when there exist contractual provisions and/or obligations between the employer and/or employee in relation to matters concerning employment.

For purpose of references, in certain cases where the employment contract specifically spells out the employer's right to temporary closure and/or shutdown, it has been held by the court that payment of 50% of the remuneration is a reasonable measure to be taken by the employer as a remedial measure.

It is noted that a further extension of the RMO may be possible and it is advisable that parties continue to monitor the developments of the RMO.

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