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Malaysia implemented a nationwide Movement Control Order (“MCO”) (as announce by the Prime Minister on 16 March 2020) from 18 March 2020 – 14 April 2020 (“Period”) under the Prevention and Control of Infectious Diseases Act 1988 and Police Act 1967.

On 18 March 2020, the Prevention and Control of Infectious Diseases (Measures within the Infected Local Areas) Regulations 2020 (“Regulations”) was issued to lay down the relevant regulations in relation to the movement restriction.

We have prepared the following FAQs, which we hope will assist you with some of the issues that you may be facing during the Period. Please note though that the FAQs do not constitute legal advice and as the situation remain fluid and further information is awaited from the relevant Ministries. Various Government ministries have also been issuing guidelines from time to time. You may refer to the relevant websites to view the FAQs issued by the various Government ministries and National Security Council.

1. To close or not to close businesses and/or places of employment?

Premises providing essential services may be opened with minimum personnel and to limit the minimum patrons at the premises.

Essential services have been described in the Schedule to the Regulations as follows:

- a. Banking and Finance
- b. Electricity and Energy
- c. Fire

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- d. Port, dock and airport services and undertakings, including stevedoring, lighterage, cargo handling, pilotage and storing or bulking of commodities
- e. Postal
- f. Prison
- g. Production, refining, storage, supply and distribution of fuel and lubricants
- h. Healthcare and medical
- i. Solid waste management and public cleansing
- j. Sewerage
- k. Radio communication including broadcasting and television
- l. Telecommunication
- m. Transport by land, water, or air
- n. Water
- o. E-commerce
- p. Defense and security
- q. Food supply
- r. Wildlife
- s. Immigration
- t. Customs
- u. Hotels and accommodations
- v. Any services or works determined by the Minister as essential or critical to public health and safety.

2. Employees' salary, perks, lay-off, pay cut during this Period?

They need to be paid as per their contract of employment unless otherwise provided in the contract. MOHR has issued FAQs stating that all salaries and allowances must continue to be paid in full during the period as it is not a case of frustration.

The law does not permit annual leave entitlement to be set off or to force employees to take unpaid leave during this Period.

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If business is in an essential service or permitted non-essential service, employer may revoke the approval of the annual leave given earlier to require employees to return to work.

For employers whose businesses are severely impacted by the MCO and are unable to pay employees their full salaries during the Period, employers may need to consider other cost cutting measures by amongst others undertaking retrenchments, lay-offs and/or pay-cuts.

Retrenchment is to be based on the general principles of industrial law and benefits may be payable. Temporary lay-offs and salary reduction may only be done after consultation and with the consent of the employees. Lay-off benefits may be payable under the Employment (Termination and Lay-Off Benefits) Regulations 1980.

Where cost cutting measures include a period of at least 1 month where employees will not be paid/ placed on unpaid leave, that employees may be able to claim RM600 per month for a maximum period of 6 months under a stimulus package provided by the Government (as announced by PM on 16 March 2020).

3. Accommodation for submission and payment of tax by the Lembaga Hasil Dalam Negeri/Inland Revenue Board ("LHDN")?

LHDN is providing a time extension of 2 months to all taxpayers who need to submit their tax declaration forms between March and June 2020. This extension would also apply employees who would otherwise be required to submit their BE Form by 30 April 2020.

The deadline for filing of returns under section 21B of the Real Property Gains Tax Act 1976 that fall due

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during the Relevant Period has been extended to 30 April 2020.5. The operating hours are Monday to Friday, 9.00am to 5.00pm.

4. **Withdrawing from EPF savings?**

Beginning 1 April 2020, employees below the age of 55 may withdraw up to RM 500 per month for 12 months from their respective EPF **Account 2** (Prime Minister's announcement on 23 March 2020).

5. **Performance of Contractual Obligations affected by Covid 19 – whether Covid 19 pandemic excuses parties from performing their obligations or from doing so on time?**

Force Majeure Clause

The answer depends on each circumstance and the drafting of the relevant contractual provisions, in particular, the force majeure clause.

Force majeure clauses are contractual clauses which alter parties' obligations and/or liabilities under a contract when an extraordinary event or circumstance beyond their control prevents one or all of them from fulfilling those obligations.

Based on existing case law, it set out below, how such clauses might be interpreted and applied in the current circumstances, along with practical guidance for businesses looking to rely on force majeure clauses.

Such clauses may have a variety of consequences, including: excuse from performing the contract in whole or in part; excusing that party from delay in performance,

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entitling them to suspend or claim an extension of time for performance; or giving that party a right to terminate.

Thus, whether a particular clause relieves a party of contractual liability will depend on the precise wording used in the clause. It is for the party seeking to rely on a force majeure clause to satisfy a court or other tribunal of its effect.

Is Covid 19 a force majeure event?

Where the term epidemic, or pandemic, has been used, that will clearly cover Covid-19. If not, phrases like "beyond the parties' reasonable control" or "or any other causes beyond our control" may be interpreted to cover the present unprecedented circumstances as the courts are likely to be generous in their interpretation of this sort of wording when faced with parties who have encountered genuine difficulties in performing.

The next question to consider is the impact of the pandemic on the affected party's ability to perform its contractual obligations.

What the affected Party needs to show?

A party seeking to rely on a force majeure clause must also show that:

- (a) the force majeure event was the cause of the inability to perform or delayed performance;
- (b) their non-performance was due to circumstances beyond their control; and

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(c) there were no reasonable steps that they could have taken to avoid or mitigate the event or its consequences.

Performance has been made more difficult or costly is not enough

Keep a documentary record, particularly of, why performance was impossible, hindered or delayed as the case may be; the steps taken to find alternatives and mitigate loss; and the service of any notices.

Procedural Compliance

Affected party is require to comply with the procedure requirement and give the necessary notices as may be required.

What if no Force Majeure Clause?

Malaysian Courts have refused to imply force majeure clauses into a contract where the contract is silent on the same. In the case of Muhammad Radhieddeen bin Abdul Khalid v Saujana Triangle Sdn Bhd, the High Court cited with approval the Singapore case of Magenta Resources (S) Pte. Ltd. v. China Resources (S) Pte. Ltd. which held that there can be no general rule as to what constitutes a situation of force majeure. Whether such force majeure situation arises, and where it does arise, the rights and obligations that follow, would all depend on what the parties have provided for in their contract.

The affected party will have to look to other provisions of the contract to get out of its difficulties. If there is none, it may be possible to rely on the doctrine of frustration of contract.

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However, it is very difficult to show that a contract has been frustrated. It requires that the unforeseen subsequent event (which is not within the control of the parties) has made the contract impossible to perform, or has transformed performance of the obligations under the contract into something so radically different from that which the parties intended and it would be unfair to hold the parties to their obligations. For example, where war broke out and works were banned and necessary equipment seized and sold by the government.

However, it might be possible to argue that the extent of the global government enforced lockdowns was unforeseeable and has made the contract impossible to perform.

Frustration may not be commercially desirable in some circumstances as it brings all parties' obligations under the contract to an end immediately.

Deferment and Restructuring of Loans/Financing Facilities

Loans/financing to individuals and SMEs

To the individuals and SMEs, banking institutions will offer a deferment of all loan/financing repayments for a period of 6 months, with effect from 1 April 2020. This offer is applicable to performing loans, denominated in Malaysian Ringgit, that have not been in arrears for more than 90 days as at 1 April 2020.

For credit card facilities, banking institutions will offer to convert the outstanding balances into a 3-year term loan with reduced interest rates to help borrowers better manage their debt.

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It is important to note that the interest/profit will continue to accrue on loan/financing repayments that are deferred and borrowers will need to honour the deferred repayments in the future.

Individuals and SMEs that do not wish or need to avail of these flexibilities can continue with their current repayment structures.

Loans/financing to corporations

Banking institutions will also facilitate requests by corporations to defer or restructure their loans/financing repayments in a way that will enable viable corporations to preserve jobs and swiftly resume economic activities when conditions improve.

The Bank has provided appropriate time-bound flexibilities for banking institutions to report deferred/restructured facilities in the Central Credit Reference Information System (CCRIS), taking into account the temporary nature of disruptions faced by borrowers/customers.

You may visit the website at www.bnm.gov.my for more information.

We are of the view that under present circumstances, open communication with business partners, associates and stakeholders are utmost important. Understand their needs and difficulties for you to take the proper actions. The objective is to keep all stakeholders afloat so you stay afloat. A time of sharing, caring and be compassionate.

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You may wish to consider the following action:

1. Conduct reviews

Form an Action Management Group comprises of key management team including finance and legal. Determine your important stakeholders' immediate needs and requirements and set all your contractual obligations that need to be delivered and performed. If you are unable to perform, inform your counterpart immediately and take appropriate mitigation action.

2. Assess Capacity, and Capability

Assess financial cash flow and liquidity and draft a business plan to keep the business afloat.
Review creditors and debtors list.

Check on the resources (possible grant or assistance from relevant Government Ministries), payroll and contractual obligations.

3. Effective and Strategic Communication

Strategise and Plan effective communication and public relation with stakeholders e.g. working partners, suppliers, contractors, creditors, debtors and employees. List down their immediate needs and requirement to keep them afloat. The idea is they are afloat you will stay afloat too.

Communicate with competitors to share and/or pool resources to keep cost down and sharing works to keep afloat.

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4. Action Plan

Mitigation plan

After assessing the situation and communicating with stakeholders. Set out a mitigation plan with objective to reduce liabilities and obligations. Start negotiating for extension of time for delivery or performance or in certain cases seek for a discharge to deliver or perform. Negotiating for rental reduction or deferment, debt payment. Looking at reduction on pay, wages, perks, claims and commission payable. The objective is to reduce liability and over stretching resource. Where possible keep as much cash as possible by looking at barter trade.

"Immediate to do" Plan

After assessing the situation and communicating with the stakeholders, list down the important task to be taken and set aside or source for the appropriate resources for such task. Take prompt action on important but not urgent matters. What is urgent may not be important. Stay very focus and be mindful. Avoid confrontation or dispute as they are not progressive but energy sapping.

5. Stay focus, mindful and be alert

Monitor the updates and announcement by government on regulation, notices and policies. Assess the surrounding situation local, regional and global.

6. Keep proper records

Keep proper record of all negotiations, correspondences, agreements, new reports affecting your industries. You may need it later in the event of dispute.

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Where Law Matters

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The information provided on this FAQ does not, and is not intended to, constitute legal advice.

Our firm Messrs Gan & Zul is monitoring the relevant developments and will from time to time issue updated FAQs.

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29 March 2020