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Employment and Administrative Law

A Look at Issues Faced by Employers as a Result of the Covid-19 Pandemic and Ensuing Movement Control Order

In this article, Wong Kian Jun looks at the main issues faced by employers as a result of the Covid-19 pandemic.

Introduction

The Covid-19 global pandemic which has swept the globe and caused many countries to introduce various degrees of lock down measures has given rise to various issues and scenarios which an employer must deal with and manage. This is no different for employers in Malaysia where the Government has implemented the Movement Control Order ("MCO") since 18 March 2020 which saw the economic activity brought to a halt.

Working from home is the new normal

Since the imposition of the MCO, the term Work from Home ("WFH") has been mentioned countless times and some employers like Twitter have gone even further by saying employees can WFH forever. Previously, the concept of WFH was merely bandied around as a pet project by employers without any intention of their entire workforce having to WFH.

As many may have realised by now, WFH has its fair share of issues and it is not as simple as bringing the laptop home and not turning up at the workplace the next day. In ensuring there is minimal impact to the organisation and the business, some of the key areas the employer must take into consideration are:

- Have in place a clear and comprehensive policy to facilitate WFH for employees. In most organisations such policies are contained in the Business Continuity Plan ("BCP"). What may work when everyone is physically in the office may not necessarily work in a WFH scenario. This could also be an opportune time to simplify and remove cumbersome procedures. As with any form of policies, proper communication and explanation should be provided to all employees.
- Ensure employees have access to the right tools and facilities to WFH. An employer should provide its employees access to software and hardware which would facilitate WFH. In this respect, the employer should also take into consideration security and personal data protection issues in protecting confidential/proprietary information which is particularly vulnerable when all employees are working offsite.

Safe working environment

Section 15 of the **Occupational Safety and Health Act 1994** provides that it is the duty of every employer to ensure a safe working environment for its employees. With the gradual reopening of economic activities, the employer is now tasked to ensure and maintain a safe workplace when employees return.

Various measures that an employer may have to implement are:

- Proper documentation to ensure contact tracing is possible;
- Temperature screening;
- Provision of hand sanitisers and face masks;
- Regular cleaning/disinfection of the workplace;
- Social distancing measures such as rearranging the office layout, staff rotation and so on; and
- Testing for Covid-19.

Managing the impact to business

The impact of the MCO and the Covid-19 pandemic on most businesses have been severe and crippling in some cases. Businesses have been forced to revaluate their operations and implement various cost cutting measures. The Government has also stepped in and announced some measures to mitigate the impact on businesses in Malaysia such as the Employee Retention Scheme and the Wage Subsidy Programme.

Additionally, some of the measures that employers may seek to implement include limitation of recruitment, restriction of overtime work, reduction in number of shifts, hours or days of work, temporary laying off or retrenchment as a last resort.

Employers have also resorted to other measures such as:

- Salary reduction;
- No pay leave;
- No bonuses or increments;
- Withdrawal of benefits associated with attendance in the office such as transportation, parking and so on.

The general position is that while a reduction of the benefits conferred under the terms and conditions of employment may seem feasible, this cannot be done unilaterally. Given that these are contractual entitlements, employers are not permitted in law to unilaterally vary the terms of employment unless the consent of the employees have been obtained.

Moving forward — revising employment contracts

Experience and knowledge gained from the pandemic have made employers recognise certain areas which could be improved or made clearer moving forward.

To ensure such a situation could be better managed in the future, employers have been contemplating introducing, amongst others, the following.

Express provisions dealing with a forced shutdown

The employment contract or the collective agreement is to contain terms and conditions that would be applicable when there is a forced shutdown of operations such as during the MCO period. During any forced shut down, benefits and remuneration would be amended accordingly based on the express provisions in the employment contract or collective agreement.

The employer would be able to rely on this clause in the event a future event causes a forced shutdown.

Force majeure clause

A *force majeure* is an extraordinary event which had affected the ability of parties to perform the obligations as contained in the contract. For an employer to successfully rely on *force majeure* such a clause must be expressly provided for in the employment contract. In addition, amongst other factors that an employer must show are:

- The event was unforeseeable and out of the control of the employer; and
- The employer had undertaken mitigating steps to counter the effect of the event.

Depending on the situation faced by the employer and the way the *force majeure* clause is drafted, the unforeseeable event may result in a suspension or even the end of the employment contract between the employer and employee.

Conclusion

New announcements, introduction of requirements, guidelines and standard operating procedures are made by the authorities on a regular basis and it is advisable that employers keep abreast of these developments through official and validated channels.

As many of the issues above may be new to employers in Malaysia and may even amount to new concepts, employers should keep themselves updated and make informed decisions.

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Corporate/M&A

Relying on the doctrine of frustration during a pandemic

In this article, Aisyah Muhammad discusses whether a party to a contract can rely on the doctrine of frustration in the event of the non-performance of its contractual obligations during the Covid-19 pandemic.

Introduction

The emergence of the highly contagious Covid-19 virus has without a doubt caused major disruptions across various industries including transportation, retail, tourism and oil and gas. The unprecedented movement control order ("MCO") imposed in Malaysia has effectively caused the closure of all government and private premises except those involved in providing essential services. As a result, many business owners are struggling to keep their businesses afloat and are unable to perform their contractual obligations.

One of the common questions being asked during this pandemic is whether a party can be excused for the non-performance of its contractual obligations. To address this issue, we will have to look at the particular terms of the contract itself and the particular facts and circumstances surrounding the non-performance.

The parties to a contract may have specifically agreed on the appropriate measures to be taken when unexpected events like Covid-19 take place. Such provision is known as *force majeure*. *Force majeure* is not a statutory concept, it is generally negotiated and agreed by the parties prior to entering into a contract. As such, in the absence of a *force majeure* clause, the courts would not imply one into the contract.

The question then arises — how can a party be protected during a pandemic when no provision has been made in the contract to allocate the risk between the parties; or when a *force majeure* clause does not sufficiently provide for the same?

In the absence of any relief in the form of termination rights or *force majeure* provisions, a party to a contract may be able to rely on the doctrine of frustration. A contract becomes frustrated when an event occurs which has rendered it impossible or unlawful to perform the contractual obligations. The doctrine of frustration can be found in section 57(2) of the **Contracts Act 1950** ("CA 1950"):

> "*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*."

The Court of Appeal in **Guan Aik Moh (KL) Sdn Bhd v Selangor Properties Bhd**[1] laid down three essential elements to be satisfied to give rise to frustration:

- the event must be one for which no provision has been made in the contract;
- the event must be one for which the promisor is not responsible; and
- the event renders it radically different from that which was undertaken by the contract. The Court must find it practically unjust to enforce the original promise or contractual obligation.

Can a contract be frustrated because of Covid-19 or the MCO?

Following the test laid in **Guan Aik Moh**, the first limb to satisfy is that there are no termination rights or *force majeure* clauses for a "*pandemic*", "*epidemic*", "*government order*" or any other similar events in the contract. The second limb is easily met as no party is responsible for the Covid-19 pandemic and/or the MCO. Lastly, the party seeking relief would have to prove that the Covid-19 pandemic and/or the MCO is radically different from what was undertaken by the contract and that it would be unjust to enforce the original promise or contractual obligation. This third limb is the hardest limb to satisfy and it generally depends on the circumstances of each case as described below.

1. A contract is not deemed frustrated merely because it is inconvenient or difficult to perform.

   The Federal Court in **Pacific Forests Industries Sdn Bhd v Lin Wen Chih**[2] held that:

   > *"[22] A contract does not become frustrated merely because it becomes difficult to perform. If a party has no money to pay his debt, it cannot be considered impossible to perform as it is not frustration. Neither can he plead frustration because the terms of the contract make it difficult to interpret. If it cannot be performed or becomes unlawful to perform, then the party who is to perform his part of the bargain can plead frustration. The doctrine of frustration is only a special case to discharge a contract by an impossibility of performance after the contract was entered into. A contract is frustrated when subsequent to its formation, a change of circumstances renders the contract legally or physically impossible to be performed."*

   This illustrates that a party cannot suspend its contractual obligations just because the party's obligation has become more onerous due to a change of circumstances.

2. A contract may become frustrated due to a government order or sanction.

   In **Yew Siew Hoo v Nikmat Naju Development Sdn Bhd**[3], the parties entered into an agreement for the construction of a central waste treatment plant to treat the waste water from a pig farm. Unfortunately, there was an outbreak of the Japanese Encephalitis disease subsequent to the execution of the agreement. This led to the State Government of Negeri Sembilan banning the rearing and sale of pigs in the affected area. It was held that this constitutes a frustrating event to discharge both parties from the agreement.

3. A contract is not frustrated if the frustrating event was only for a short duration.

   In the Hong Kong case of **Li Ching Wing v Xuan Yi Xiong**[4], a tenant claimed that his tenancy agreement was frustrated due to the isolation order imposed by the Government following the outbreak of the Severe Acute Respiratory Syndrome ("SARS"). On the facts, the 10-day isolation order, of which the defendant was not allowed to stay in the premises, was quite an insignificant period in terms of the overall use of the premises for a term of two years. The Hong Kong Court concluded that whilst the outbreak of SARS was an unforeseeable and supervening event, it did not significantly change the nature of the outstanding contractual rights or the obligations from what the parties could reasonably have contemplated at the time of the execution of the tenancy agreement.

Further, in a contract of sale and delivery of goods or services whereby the parties have agreed that time is of the essence, the imposition of the MCO would render it impossible to deliver goods or services within the stipulated period in the contract. In this situation, it is possible to argue that the MCO constitutes a frustrating event. As a result, both parties may be discharged from the performance of the contract.

It should be noted that the frustrating event cannot be an event that was within the contemplation of the parties or an event which is reasonably foreseeable at the time the contract was entered into. Therefore, if parties were to enter into a contract now and the pandemic is within the contemplation of the parties, such an event cannot be considered as a frustrating event.

As illustrated by the cases above, whether the Court considers a contract frustrated depends on how the terms of the contract are interpreted and the circumstances of each case. The party seeking relief must prove that it is not able to perform its contractual obligations due to the Covid-19 pandemic and/or the MCO and that such event renders the contract legally or physically impossible to be performed.

What happens when a contract is frustrated?

By virtue of section 57(2) of CA 1950, if frustration is proved, the contract becomes void. Consequently, both parties would be discharged from further performance of the contract. When the contract is deemed frustrated, section 15(2) of the **Civil Law Act 1956** ("CLA 1956") provides the following remedies:

- all sums paid before the parties were discharged of its contractual obligations shall be returned whereas any sums payable will cease to be payable.
- If the party to whom the sums were paid or payable has incurred expenses before the parties were discharged of its contractual obligations, the Court may, if it considers just, allow that party to retain or recover the whole or any of the sums so paid or payable, provided that the sum does not exceed the expenses incurred.

Nonetheless, section 15(2) of CLA 1956 is not applicable to contracts for the carriage of goods by sea, insurance contracts and contracts for the sale of perishable goods.

Conclusion

Given that the outbreak is unprecedented and that there is no reported case law, it is recommended that parties commence negotiations to seek mutually and commercially viable solutions prior to seeking legal recourse. Failing which, we can expect that there will be more commercial disputes arising from the non-performance of contractual obligations in the near future. Ultimately, the question of whether Covid-19 and the MCO can be considered as grounds for frustration of contract depend on the facts and circumstances of each case, the terms of the contract and the determination by the Court.

[1] [2007] 3 CLJ 695.

[2] [2009] 6 MLJ 293.
[3] [2014] 1 LNS 2.
[4] [2004] 1 HKC 353.

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Dispute Resolution

Likas Bay Precinct Sdn Bhd v Bina Puri Sdn Bhd[1]

A case note by Roshan Sunther.

Background facts

The respondent, Bina Puri Sdn Bhd ("Bina Puri), obtained an adjudication award dated 31 December 2016 ("Adjudication Award") against the appellant, Likas Bay Precinct Sdn Bhd ("Likas"), pursuant to the **Construction Industry Payment and Adjudication Act 2012** ("CIPAA 2012") whereby Likas had to pay Bina Puri certified sums amounting to RM16,439,628.24 ("Adjudicated Sum").

Bina Puri served a statutory notice of demand pursuant to section 465 of the **Companies Act 2016** on Likas. Bina Puri stated that Likas had neglected and failed to pay or satisfy the Adjudicated Sum or any part thereof or to secure or compound for it to the reasonable satisfaction of Bina Puri.

Bina Puri presented the petition dated 17 March 2017 to wind up Likas pursuant to sections 465(1)(e) and (1)(h) of the **Companies Act 2016** on the ground that Likas was unable to pay its debt and that it was just and equitable that Likas be wound up.

Likas resisted the petition on the grounds that the statutory notice which was premised on an adjudication award was defective as under the award no payments were ordered to be paid to Bina Puri by the adjudicator but, instead, the payments were ordered to be made by Likas to the KLRCA; and it was not just and equitable for Likas to be wound up when it was expecting progress payment amounting to RM18,606,483.03 from Malaysia Building Society Bhd ("MBSB") which was the financier for Yayasan Universiti Malaysia Sabah. Furthermore, Likas had a gross development value amounting to RM237,817,686 in connection with the construction of a proposed 25-storey student hostel for Yayasan Universiti Malaysia Sabah.

Bina Puri also submitted that Likas's current bank balance was not enough to pay the debts owed to Bina Puri as at 5 April 2017, the amount available in Likas's bank accounts only totalled up to RM6,162.38.

Decision of the High Court[2]

The High Court granted the winding up order as applied by Bina Puri. Likas appealed the decision of the High Court to the Court of Appeal.

Decision of the Court of Appeal

Having considered the submissions of the parties, the Court of Appeal dismissed the appeal and affirmed the High Court's decision.

The Court of Appeal at paragraph [10] stated the three points that were raised before them by Likas were as follows:

- the winding up notice by Bina Puri had been premature in that the adjudication decision had not been registered with the High Court which would convert it to a High Court order pursuant to section 28 of the CIPAA;
- the adjudication order did not name Bina Puri as the recipient of the monies due from Likas, as such it was wrong for Bina Puri to pursue this petition in the circumstances, in the sense that there was nothing owing to it under the adjudicator's order; and
- it was also the complaint of Likas that it was not just and equitable for the High Court to have granted the petition.

The non-registration of the Adjudication Award

On the point of the non-registration of the Adjudication Award, Likas argued that there was no judgment that could be used by Bina Puri as a basis to file the winding up petition against Likas given that the Adjudication Award was not registered pursuant to section 28 of CIPAA 2012.

Likas further argued that the registration of the Adjudication Award was a prerequisite that must be complied with by Bina Puri prior to the undertaking of the winding up proceedings.

In support of this point, Likas relied on the case of **Mobikom Sdn Bhd v Inmiss Communications Sdn Bhd**[3] ("**Mobikom**") which was in relation to the **Arbitration Act 1952** as well as the case of **Hing Nyit Enterprise Sdn Bhd v Bina Puri Construction Sdn Bhd**[4].

The Court of Appeal distinguished the case of **Mobikom** and held that the language used under section 28 of CIPAA 2012 does not convey an interpretation which suggests that the decision of the adjudicator must be registered with the High Court before a statutory notice under section 465(1)(e) and (h) of the **Companies Act 2016** could be issued.

The Court of Appeal held that as there was no application to set aside the Adjudication Award, the Adjudication Award was good and proper as a basis upon which a winding up petition notice against Likas may be filed for a debt in the amount as stated in the Adjudication Award.

As such, the Court of Appeal found that for the purpose of filing a winding up notice under section 465 of the **Companies Act 2016**, a successful litigant in an adjudication proceeding need not register the adjudication decision under section 28 of CIPAA 2012.

Further, in relation to section 31 of CIPAA 2012 which deals with the concurrent exercise of remedies, the Court of Appeal observed that the successful party in adjudication can also rely on section 31 as there is nothing in the language used in both sections 28 and 31 of CIPAA 2012 which suggests that section 31 is subject to section 28. Therefore, the Court of Appeal was of the view that the winding up petition was not premature.

The Adjudication Award did not name Bina Puri as the recipient of the monies due from Likas

Likas submitted that the Adjudication Award did not direct that payments were to be made by Likas to Bina Puri. Likas contended that instead payments were to be made to the KLRCA.

The Court of Appeal agreed with the High Court and found that the payments due from Likas referred to in the order were for the benefit of Bina Puri. It was undisputed that the Adjudication Award was issued pursuant to an adjudication proceeding which had involved only Bina Puri and Likas as litigating parties. Bina Puri was the party that had claimed from Likas for work it had performed for Likas under an agreement between them that was not in dispute.

Considering Likas's clear passivity when the action was taken against it by Bina Puri, the Court of Appeal agreed with the submission of Bina Puri that the belated demur by Likas was but an afterthought devoid of any merit, aimed at staving off the winding up notice.

It was not just and equitable for the High Court to have granted the petition

Likas submitted that it was not just and equitable for the company to be wound up when it was expecting progress payment amounting to RM18,606,483.03 from MBSB which was the financier for Yayasan Universiti Malaysia Sabah and that the company had a gross development value amounting to RM237,817,686 in connection with the construction of a proposed 25-storey student hostel for Yayasan Universiti Malaysia Sabah. In response, Bina Puri took the position that Likas's bank balance was not enough to pay Bina Puri.

The Court of Appeal agreed with the High Court that Likas's current bank balance was not enough to pay the debts to Bina Puri. The Court of Appeal further stated that a company may be at the same time insolvent and wealthy. The company may have wealth locked up in investments not presently realisable, yet if it has no assets available to meet its current liabilities it is commercially insolvent and may be wound up. The Court of Appeal held that there was nothing objectionable regarding the statutory demand as well as the petition to wind up Likas by Bina Puri in the circumstances of this case.

Conclusion

The effect of this decision is that a successful claimant in adjudication proceedings need not register the adjudication decision pursuant to section 28 of CIPAA 2012 before issuing a statutory demand under section 465 of the **Companies Act 2016**. The application to wind up a company will be further bolstered by the fact that there was no application by the company to set aside the Adjudication Award (which means that the Adjudication Award is final and binding).

It would be just and equitable to wind up a company if the company did not have enough funds in its bank account to pay the sum stated in an adjudication decision.

[1] [2019] 3 MLJ 244.
[2] **Bina Puri Sdn Bhd v Likas Bay Precinct Sdn Bhd** [2018] MLJU 864.
[3] [2007] 3 MLJ 316.
[4] Case No. BKI-28NCC-6/2015.

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Financial Services

Banking on Green: A Push Towards Climate-Conscious Financial Activity

In this article, Jonathan David Ross Silva writes about Bank Negara Malaysia's guidance for financial institutions in identifying risks arising from climate change and classifying economic activities that contribute positively to climate change objectives.

Introduction

In December 2019, Bank Negara Malaysia ("BNM") issued a discussion paper on "Climate Change and Principle-based Taxonomy"[1]. The discussion paper highlights the risks arising from climate change and environmental degradation to the economy. It outlines guidance for financial institutions in identifying these risks and classifying economic activities that contribute positively to climate change objectives.

According to BNM, 10.3% of the total assets of banks and 24.4% of the total assets of insurance companies and *takaful* operators are potentially exposed to climate change effects. This amounts to 11.7% total exposure for financial institutions. In quantitative terms, RM8 billion in damages have been sustained as a result of over 50 natural disasters which have occurred with increased frequency and severity over the last 20 years[2]. The gravity of the risks that climate change poses to our economy is strikingly clear.

It is not surprising therefore that BNM has accorded this area attention given that one of its main objectives is to "*maintain monetary and financial stability as it contributes to a healthy economy and sustainable growth*"[3]. The discussion paper follows a trend of climate change and environment-focused initiatives issued by regulators:

- In September 2019 the Joint Committee on Climate Change was established by BNM and the Securities Commission Malaysia ("SC") to drive and coordinate the financial industry's collective response to climate risks[4].
- The SC has issued bond and *sukuk* frameworks for sustainable and environmentally conscious financing[5].

Risk

In the discussion paper, BNM identifies three dimensions of risk arising from climate change and its impacts:

- Physical risks;
- Transition risks; and
- Liability risks.

Physical risks

Physical risks are caused by events related to climate change which damage property, reduce productivity and disrupt trade. Downside risks to capital goods and production capacity will negatively impact businesses, causing balance-sheet erosion in a chain reaction which has repercussions for the institutions who finance them. Financial institutions also need to be conscious of the effect physical risks may have on collateral value, which will inform recovery value.

Examples include:

- Damage devaluation of assets/investments;
- Early retirement or abandonment of assets;
- Reconstruction/replacement of damaged infrastructure;
- Wider economic deterioration (lower demand, productivity and output);
- Disruption to business operations, trade and supply chain;
- Lower household and business income;
- Displacement or forced migration; and
- Increase in insurance premiums and *takaful* contribution as well as higher than expected insurance/*takaful* claims.

BNM warns that these physical risks are often not well-accounted for by financial institutions, resulting in the risks of climate-related events being under-priced.

Transition risks

Transitions risks arise from the economy and broader society shifting towards lower-carbon activities, which require extensive policy, legal, technology and market changes. These changes may include:

- Legal/regulatory framework

  - Disclosure requirements, implementation of carbon pricing;
- Technological advancements
  - Reducing cost of renewable energy;
- Consumer sentiments
  - Certification schemes, fossil fuel divestment campaigns.

Examples of transition risks include:

- Stranded, obsolescence, or unanticipated devaluation of assets;
- Asset replacement costs;
- Revaluation of financial assets;
- Threat to viability of business;
- Higher business operation cost;
- Impact on pricing and demand; and
- Increase in default risk.

Liability risks

These are legal risks such as claims for loss and damage which result from the negative consequences of physical and transitions risks materialising. The insurance and *takaful* sectors are particularly exposed to liability risks arising from climate-related events.

BNM warns that physical risks, transitional risks and liability risks caused by climate-related events transmit increased risk to other types of conventional risks, such as credit risks, market risks, liquidity risks, insurance risks, operational risks and strategic risks.

Economic activity

BNM also expects financial institutions to factor climate change risks into their business models and implement measures to protect against these risks, and further cautions that failure to do so could lead to significantly depressed investment values going forward. In order to facilitate this, BNM has outlined a framework for assessing economic activities according to five Guiding Principles ("GPs"):

- GP1: Climate change mitigation:
  - These are economic activities with the objective to avoid, reduce or enable others to avoid or reduce greenhouse gas emissions in the atmosphere. Examples of economic activities include:
    - Increase contribution of renewable energy in power generation;
    - Optimise energy consumption;
    - Encourage low carbon transport and mobility;
    - Promote green buildings.
- GP2: Climate change adaption:
  - Economic activities with the objective of increasing resilience against the negative physical effects of climate change. Examples include
    - Implement measures to increase own resilience, such as early warning systems for flooding;
    - The adaptation of other economic activities to mitigate physical effects of climate change, such as the development of technology.
- GP3: No significant harm to the environment:

  - Economic activities should not cause unintended harm to the environment, such as pollution, deforestation, or large amounts of waste.
- GP4: Remedial efforts to promote transition:
  - Financial institutions are expected to consider the remedial efforts and initiatives by business to transition to a more climate-change conscious business model and strategy.
- GP5: Prohibited activities:
  - Financial institutions must ensure that economic activities do not contravene environmental laws and policy. This includes, but is not limited to, the National Policy on the Environment, **National Forestry Act 1984**, **Fisheries Act 1985**, **National Parks Act 1980**, **Environmental Quality Act 1974** and its regulations and orders. Examples of prohibited activities include:
    - Illegal waste management including release of untreated toxic and hazardous industrial waste;
    - Operations which use fire for land clearance;
    - Illegal deforestation;
    - Activities within, adjacent to, or upstream of designated protected areas and habitats of rare/endangered species; and
    - Drift net fishing or fishing with the use of explosives.

To ensure economic activities are environmentally sustainable, BNM encourages financial institutions to leverage on third party verification and certification. The discussion paper includes a table with examples of different certification and verifications for respective industries.

In order to quantify the assessment of economic activities, BNM introduced a category framework based on the guiding principles above. There are five categories which scale from positive to negative, with Category 1 applicable to economic activity which:

- supports substantial reduction or avoidance of greenhouse emissions or enables others to do the same, or increases resilience to mitigate the physical effects of climate change, and
- does not cause harm to the environment.

Category 6 involves prohibited economic activity.

In assessing, classifying and subsequently participating in these economic activities, financial institutions are expected to conduct holistic due diligence assessments, consider the potential impacts to the wider eco-system and ensure that they do not acquire a track record of environmentally damaging practices.

Application

The discussion paper underwent a period of public consultation, with BNM hoping to collect feedback from financial institutions before finalising a policy document on Climate Change and Principle-Based Taxonomy. No date for the issuance of a final policy document has been indicated for now. However, financial institutions both in Malaysia and in markets across the world not have waited in applying a similar approach to the one set out by BNM.

- In his 2020 Letter to Shareholders, the CEO of BlackRock, Larry Fink, outlined a similar position. He announced that the world's largest asset manager will adopt sustainability as its "*standard for investing*", making sustainability "*integral to the way BlackRock manages risk, constructs portfolios, designs products, and engages with companies*"[6].
  - The letter specifically identifies the risk to financial markets arising from transition risk — how "*the global transition to a low-carbon economy could affect a company's long-term profitability*".
- In Malaysia, 28 financial institutions participated in the "*Green Technology Financing Scheme*", a financing scheme now in its second extension which focuses on providing soft loans to support the development of green technology in Malaysia[7].
- A wave of sustainability and environment-focused projects in Malaysia have been financed, including:
  - Merdeka 118, a skyscraper project by PNB[8] in central KL which is targeting a triple platinum rating with the Leadership in Energy and Environmental Design, GreenRE and Green Building Index certification, making it the first project in Malaysia to earn such a rating[9].
  - A five megawatt-peak solar farm in Padang Besar, Perlis, by Cenergi Sunseap Energy Solutions Sdn Bhd, a joint venture between Cenergi EE Holdings Sdn Bhd and Singapore-based Sunseap International Pte Ltd[10].

There are clearly signs that financial institutions are already factoring climate-change risks into their business model, assessing economic activities through the lens of sustainability, and adjusting their strategies accordingly. As the trend continues and policies such as the discussion paper on Climate Change and Principle-Based Taxonomy come into force, the shift towards sustainable and environment focused financing will only intensify.

[1] "**Climate Change and Principle-based Taxonomy**" https://www.bnm.gov.my/index.php?ch=57&pg=137&ac=892&bb=file.

[2] "**Climate Change Risks and Opportunities: Respond, Not React**", Annual Report 2019 of Bank Negara Malaysia https://www.bnm.gov.my/ar2019/files/ar2019_en_box1.pdf.

[3] "**The importance of Financial Stability**" https://www.bnm.gov.my/index.php?ch=fs&pg=fs_ovr_imp&ac=114.

[4] "**Climate Change Risks and Opportunities: Respond, Not React**".

[5] Shearn Delamore & Co's financial services team has covered these in previous articles — "Issuance of Green Sukuk in Malaysia"[1] and "Sustainable Financing in the ASEAN Region".

[6] "**Sustainability as BlackRock's New Standard for Investing**" https://www.blackrock.com/corporate/investor-relations/blackrock-client-letter.

[7] "**Green Technology Financing Scheme**" https://www.gtfs.my/Financial_Institution.

[8] "**Merdeka 118**", http://www.merdeka118.com/.

[9] "**Merdeka 118 Tower to be completed by mid-2020**", EdgeProp, https://www.edgeprop.my/content/1590560/merdeka-118-tower-be-completed-mid-2020.

[10] "**Khazanah-linked Cenergi JV secures RM24m credit facility for solar project**", *The Edge Markets*, https://www.theedgemarkets.com/article/khazanahlinked-cenergi-jv-secures-rm24m-credit-facility-solar-project.

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Intellectual Property

Changes under the Franchise (Amendment) Act 2020

In this article, Yap Khai Jian analyses the changes introduced under the Franchise (Amendment) Act 2020.

Introduction

The **Franchise Act 1998** ("FA") has been the main source of legislation which governs franchise businesses and the relationship between a franchisor and franchisee in Malaysia for more than 20 years.

On 3 December 2019, the Franchise (Amendment) Bill 2019 was passed by the Lower House of the Parliament and received Royal Assent on 20 February 2020. Subsequently, the **Franchise (Amendment) Act 2020** ("the Amendment Act") was gazetted on 6 March 2020. Some of the changes under the Amendment Act are as follows.

The concepts of subfranchise and subfranchisee

The Amendment Act expressly recognises the concepts of "*subfranchise*" and "*subfranchisee*" by conferring on these terms their corresponding definitions. These definitions can be found in section 3(d) of the Amendment Act, which are reproduced as follows:

> "*'Subfranchise' means 'a franchise granted by a master franchisee to a subfranchisee for business purposes under the Act'; and*
>
> *'Subfranchisee' means 'a subfranchise holder'*."

Registration of a foreign franchisor

Under the existing section 54(1) of the FA[1], a foreign franchisor who intends to offer its franchise to a local entity in Malaysia must obtain an approval from the Franchise Registry. In practice and, according to MyFex online registration, section 6(1) of the FA was thought to apply only to local franchisors.

That position, however, was rejected by the High Court in the case of **Dr HK Fong BrainBuilder Pte Ltd v SG-Maths Sdn Bhd**[2] where the High Court held that section 6(1) should apply equally to foreign franchisors; otherwise, it would leave the franchisees of the foreign franchisors in a position worse off than the franchisees of the local franchisors[3].

The amendment that is sought to be made by section 4 of the Amendment Act to section 6(1), and which in essence sought to include "*foreign person who has obtained an approval to sell a franchise in Malaysia or to any Malaysian citizen under section 54*", appears to firm up the High Court's view.

With this amendment, it would appear that a foreign franchisor, having obtained the necessary approval from the Franchise Registry to offer its franchise in Malaysia under section 54 of the FA, would now be required under the Amendment Act to file an application to register its foreign franchise pursuant to the newly revised section 6 of the FA, resulting in potentially double registrations.

Be that as it may, this purported "*double registrations*" does not affect a foreign franchisor which had obtained approval under section 54(1) of the FA before the coming into force of the Amendment Act. It remains to be seen how this would work in practice.

Registration of a franchisee

Section 6B(1) of the FA[4] imposes an obligation on franchisees of local franchisors to register the franchise with the Franchise Registry. Such obligation is couched in mandatory terms owing to the use of the word "*shall*". Notwithstanding this, section 6 of the Amendment Act[5] further introduces a new subsection to section 6B of the FA which seeks to impose penalties against franchisees who fail to comply with section 6B(1).

It is thus important for a franchisee (who has been granted a franchise from a local franchisor or local master franchisee) to register the franchise to avoid being penalised by the Franchise Registry[6].

Requirements of a franchise agreement

For a franchise agreement to be valid, certain information are to be included in a franchise agreement as provided under section 18(2) of the FA. This would include, but are not limited to, the following:

- the name and description of the product and business under the franchise;
- the territorial rights granted to the franchisee;
- the franchise fee, promotion fee, royalty or any related type of payment which may be imposed on the franchisee, if any;
- the obligations of the franchisor;
- the obligations of the franchisee;
- the franchisee's rights to use the mark or any other intellectual property, pending the registration or after the registration of the franchise;
- the conditions under which the franchisee may assign the rights under the franchise;
- a statement on the cooling-off period as provided in section 18(4) of the FA;

- a description pertaining to the mark or any other intellectual property owned or related to the franchisor which is used in the franchise;
- if the agreement is related to a master franchisee, the franchisor's identity and the rights obtained by the master franchisee from the franchisor;
- the type and particulars of assistance provided by the franchisor;
- the duration of the franchise and the terms of renewal; and
- the effect of termination or expiration of the franchise agreement.

Section 18(3) of the FA further provides that failure to include the abovementioned information in a franchise agreement shall render the franchise agreement null and void. This drastic effect was removed by section 14 of the Amendment Act.

Implicit in this removal is the suggestion that a franchise agreement need not necessarily be null and void if it omits any of the information outlined under section 18(2). Needless to say, it is still prudent for a franchise agreement to contain the abovementioned information not only because they comprise information which are practical for the operation of a franchise business but also owing to the usage of the word "*shall*" in section 18(1) of the FA which indicates the mandatory nature of the provision.

Renewal of franchise

Pursuant to section 10 of the FA, "*the registration of franchise shall continue to be effective unless the Registrar issues a written order to the franchisor, to suspend, terminate or cancel the registration of the franchise*". In other words, there is no requirement to renew a registered franchise under the current FA unless the Registrar of Franchise ("Registrar") issues a written order in this regard.

Sections 8 and 9 of the Amendment Act revamp the period of effectiveness of a registered franchise by amending section 10(1) of the FA[7] and introducing a new provision, that is, section 10A regarding the renewal of a franchise[8]. With these amendments:

- The registration of a franchise will be effective for a prescribed period as determined by the Registrar;
- Within 30 days from the expiration date of such registration, the franchisor may apply to the Registrar for the renewal of the registration of franchise; and
- The approval for such renewal would be subject to the conditions that may be imposed by the Registrar.

Display of registration of franchise

Section 9 of the Amendment Act[9] further introduces a new obligation on the franchisor and franchisee to display the registration of a franchise in a conspicuous position at the place where the franchisor or franchisee carries on his business. The non-compliance of such requirement by the franchisor or franchisee would constitute an offence.

Conclusion

It is without doubt that the introduction of the Amendment Act attempts to reinforce the reach of the FA. As certain amendments impose penalties in the event of non-compliance, it is prudent for franchisors (local or foreign) and franchisees to observe these requirements before operating their franchise businesses in Malaysia.

[1] Section 54(1) of the FA provides that: -

"*A foreign person who intends to sell a franchise in Malaysia or to any Malaysian citizen shall submit an application to the Registrar.*"

[2] [2018] 11 MLJ 701.

[3] Justice Wong Kian Kheong at **page 726** of the case of **Dr HK Fong BrainBuilder Pte Ltd v SG-Maths Sdn Bhd** [2018] 11 MLJ 701 held as follows:

"*Accordingly, I cannot accept the submission by the plaintiff's learned counsel that s 6(1) of the FA applies only to local franchisors. Such a submission is contrary to the purposive construction. Furthermore, if I have acceded to such a submission:*

(i) this will create an absurdity wherein local franchisors have to register their franchises with the Registrar under s 6(1) of the FA but foreign franchisors are exempted from such a requirement. Under s 58 of the FA, only the 'Minister' (defined in s 4 of the FA as the Minister for the time being charged with the responsibility for matters relating to franchises) may exempt a franchisor, local and foreign, from the requirement of registration under s 6(1) of the FA; and

(ii) *this will cause an injustice to franchisees of foreign franchises (as compared to franchisees of local franchises who are required to be registered under s 6(1) of the FA). This is because if a foreign franchisor is not required to register the foreign franchise with the Registrar under s 6(1) of the FA, the foreign franchisor may wriggle out from compliance with mandatory provisions legislated by Parliament in FA for the protection of franchisees of foreign franchises;…*"

[4] Section 6B(1) of the FA states that: -

"A franchisee who has been granted a franchise from a local franchisor or local master franchisee shall register the franchise with the Registrar by using the prescribed registration form within fourteen days from the date of signing of the agreement between the franchisor and franchisee."

[5] Section 6 of the Amendment Act provides that:

"*The principal Act is amended by substituting for section 6B the following section: -*

6B(2) Any franchisee who fails to comply with subsection (1) commits an offence."

[6] Section 39(1) of the FA provides that:

"*A person who commits an offence under this Act for which no penalty is expressly provided shall, on conviction, be liable –*

(a) if such person is a body corporate, to a fine of not less than ten thousand ringgit and not more than fifty thousand ringgit, and for a second or subsequent offence, to a fine of not less than twenty thousand ringgit and not more than one hundred thousand ringgit; or

(b) if such person is not a body corporate, to a fine of not less than five thousand ringgit and not more than twenty-five thousand ringgit or to imprisonment for a term not exceeding six months, and for a second or subsequent offence, to a fine of not less than ten thousand ringgit and not more than fifty thousand ringgit or to imprisonment for a term not exceeding one year."

[7] Section 8 of the Amendment Act provides that: -

"*The principal Act is amended by substituting for section 10 the following section:*

Period of effectiveness

10. (1) The registration of a franchise ***shall continue to be effective for a period as may be prescribed. (emphasis added)***

(2)Notwithstanding subsection (1), the Registrar may at any time issue a written order to the franchisor to suspend, terminate or cancel the registration of the franchise under this Act."

[8] Section 9 of the Amendment Act provides that: -

"*The principal Act is amended by inserting after section 10 the following sections:*

Renewal of registration of franchise

10A. (1) A franchisor may apply to the Registrar for renewal of the registration of franchise by submitting an application in such form as may be determined by the Registrar together with the prescribed fee ***within thirty days from the expiration date of such registration.***

(2) An approval for the application made under subsection (1) may be subject to such conditions as the Registrar may impose.

(3) Upon approving the application under subsection (1), the Registrar may require the applicant to pay such amount of fee as may be prescribed.

(4) Section 10 shall apply to the period of effectiveness of the registration of franchise which is renewed under this section."

[9] Section 9 of the Amendment Act provides that: -

"The principal Act is amended by inserting after section 10 the following sections:

"Display of registration of franchise

10B (1) A franchisor or franchisee shall at all times display the registration of franchise in a conspicuous position at the place where the franchisor or franchisee carries on his business.

(2) Any franchisor or franchisee who fails to comply with subsection (1) commits an offence."

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Tax and Revenue

Deductibility of Expenses Incurred by a Business in its Restructuring or Retrenchment Exercise

In this article, Sharon Lau Foong Yee considers the deductibility of certain expenses incurred by a company during a restructuring exercise.

Faced with the current Covid-19 pandemic and the consequential economic ramifications, it is inevitable that affected businesses are put under increasing financial strain. Affected businesses would at some point consider a restructuring of the business to manage the tide and stay afloat, with the last resort being liquidation for businesses operating in industries that are the most impacted by this pandemic.

As business operations slow down or come to a halt, a business restructuring could take place by reducing headcount, for example. In such cases, subject to applicable employment laws, contractual terms and company policy, certain sums of money would generally be disbursed to affected staff and employees as a form of monetary compensation or benefit for sudden or early termination.

Under section 33(1) of the **Income Tax Act 1967** ("ITA"), all outgoings and expenses wholly and exclusively incurred during a specified period by the business in the production of gross income from a source is deductible. From a plain reading of section 33(1) of the ITA, the requirements to be satisfied are twofold:

i. expense/(s) wholly and exclusively incurred; and
ii. production of gross income.

The applicability of this statutory principle of deductibility had been the subject of many disputes and would essentially depend on the facts of the case.

The tax treatment regarding retrenchment benefits was considered in the case of **Ampat Tin Dredging Ltd v Director General of Inland Revenue**[1] ("**Ampat Tin**").

Mohamed Azmi J held that retrenchment benefits paid to the company's employees before a winding up of its business could not be said to have been "*wholly and exclusively incurred in the production of gross income*" within the ambit of section 33(1) of the ITA on the reasoning that the retrenchment benefits were not exclusively incurred in the production of income.

On the facts, there were two agreements with trade unions which expressly stated that the benefits were to be given if the employees were retrenched due to closure of the tin mine. Therefore, the retrenchment benefits were not made exclusively to produce income but pursuant to the closure of business.

Mohamed Azmi J in **Ampat Tin** made a distinction between employee wages and retrenchment benefits, the former being deductible:

> "*In the present case, for work done, all the company's employees were paid salaries or wages for which deduction had been allowed. At the most, the retrenchment benefits expended can only be said to be related to the production of income but not exclusively in the production of income*."

The deductibility of expenses incurred with a view to liquidate the company and retrenchment benefits was considered by the High Court in **Ketua Pengarah Hasil Dalam Negeri v International Foods Sdn Bhd**[2] ("**International Foods**"). A feasibility study was conducted by the respondent's (International Foods Sdn Bhd) parent company which led to International Foods Sdn Bhd's retrenchment exercise 16 days before the voluntary liquidation of the respondent.

Azmel J held that the efficiency study was not wholly and exclusively for the purpose of enhancing the efficiency of International Foods Sdn Bhd and thereby increasing its income generating capacity as there was another purpose of the efficiency study undertaken, which is to liquidate International Foods Sdn Bhd.

Azmel J held that as International Foods Sdn Bhd was placed in voluntary liquidation 16 days after the feasibility study, the irresistible conclusion to be derived is that the retrenchment exercise was done for the benefit of International Foods Sdn Bhd's successor ("acquirer") which is a completely different legal entity who took over the business of International Foods Sdn Bhd. On the facts, Azmel J concluded that the intention of carrying out the efficiency study was to facilitate the takeover of International Foods Sdn Bhd by its acquirer.

On the deductibility of retrenchment benefits, Azmel J in **International Foods** applied the principle established in **Ampat Tin** and held that the retrenchment benefits are not deductible.

The factors considered by Azmel J in concluding that the retrenchment exercise was done for the benefit of International Foods Sdn Bhd's acquirer (instead of production of International Foods Sdn Bhd's gross income) include:

i. the timing of the retrenchment exercise that was very close to the date of the takeover exercise of International Foods Sdn Bhd by the acquirer;
ii. the liquidation of International Foods Sdn Bhd was voluntary;
iii. the intention for which the retrenchment expenses were incurred was not for the production of gross income of International Foods Sdn Bhd;
iv. the intention of incurring the efficiency study leading to the retrenchment expense was to liquidate International Foods Sdn Bhd and for International Foods Sdn Bhd's business be taken over by the acquirer; and
v. the intention to liquidate International Foods Sdn Bhd existed well before the efficiency study was conducted.

The two cases above show that the facts of each case played pertinent roles in the final decision reached by the courts.

In deciding whether an expense is incurred wholly and exclusively in the production of income, the purpose or intention for which an expense is incurred would be taken in account and is an indicator of whether an expense satisfies the requirements of section 33(1) of the ITA.

[1] [1982] 2 MLJ 46.
[2] [2000] 7 MLJ 102.

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TMT And Data Compliance & Cybersecurity

Personal Data Protection in the Age of Covid-19

In this article, Timothy Siaw and Elyse Diong analyse the importance of complying with the Personal Data Protection Act 2010 in the age of Covid-19.

Introduction

With the implementation of the Movement Control Order ("MCO") since 18 March 2020, the Conditional Movement Control Order ("CMCO") as well as the Recovery Movement

Control Order, the Government has issued a number of Standard Operating Procedures ("SOPs") to control the spread of the Covid-19 pandemic.

These SOPs[1] include measures to facilitate contact tracing and monitoring of potentially infected persons which pose additional complexity to data protection compliance and increased privacy risks. The digital footprint generated from the implementation of these SOPs include the attendance and details of employees such as name, identification number, temperature, health condition, time of entry and exit and the personal details of customers such as their names, temperatures and contact numbers.

In the implementation of these SOPs, compliance with the **Personal Data Protection Act 2010** and data security measures must not be overlooked.

Consent and purpose

Companies are required to obtain the consent or explicit consent of the data subject for the processing of any personal data or sensitive personal data[2]. Collection of data in relation to health information concerning the physical or mental health or condition of a data subject can be considered as sensitive personal data[3]. Collection of such information may be allowed without the consent or explicit consent of the data subject if the companies are required to comply with legal obligations imposed on them[4] or in order to protect the vital interests of the data subject[5].

An interesting point to note is that the PDPA[6] does not apply to the Federal Government and State Governments. This is to say that notice and consent are not required for the Ministry of Health of Malaysia to collect or disclose personal data.

Further, it is important to note that the personal data should not be used or disclosed for any other purposes other than for purposes necessary in line with the Government SOPs[7]. The Department of Personal Data Protection ("JPDP") has prepared an advisory on the collection, processing and possession of personal data by businesses during the CMCO[8].

According to the advisory, businesses are only allowed to record minimal information, which are name, contact number, dates and time of visit. Businesses are also required to display a notice citing that it is compulsory for visitors to present the requested information and its purpose.

Nevertheless, companies should conduct due diligence on their privacy notices to ensure that existing notices to their customers are sufficiently wide to cover the type of sensitive personal data collected under the SOPs, the purpose for the processing[9], and the third parties to which the companies may disclose this information[10]. A supplementary privacy notice may be required to ensure that proper notice has been given.

Security of data and devices

Companies are required to ensure that practical steps are taken to protect the collected personal data from any loss, misuse, modification, unauthorised or accidental access or disclosure, alteration or destruction[11]. Various options for contact tracing have been introduced by the Malaysian Government including three tracking apps, namely, MySejahtera, MyTrace and GerakMalaysia[12].

Regardless of whether the companies choose to collect the personal data of its employees or customers manually or through tracking apps, measures must be taken to ensure that these forms or apps are proper and secure. For manual data collection, a specific document must be prepared and used throughout the CMCO[13]. Physical forms should not be exposed or disposed of in a manner where there may be disclosure of the personal data to the public or third parties.

In particular, companies may refer to the recommended practices[14] set out for personal data security such as to set up 24-hour security monitoring to safeguard computer systems from malware threats. Setting up of proper recommended practices to ensure data security may be a financial strain on many companies. Proper financial management is required to ensure that companies can bear the financial requirements to comply with PDPA and the Government SOPs.

Furthermore, any personal data collected during the CMCO should not be retained perpetually and should be permanently destroyed within six months after the end of the CMCO[15].

Collection of personal data by employers

The Ministry of Health of Malaysia issued a management guideline[16] to ensure that proper record keeping and practical steps are taken to reduce the risks of transmission between individuals. Employers are allowed to collect personal data relating to the health, travel history and location information to protect the safety and health of their individual employees or other persons not being their employees at the workplace as required under the **Occupational Safety and Health Act 1994** (“OSHA”)[17].

It is a requirement by the Government for the employers to keep the contact details of all participants and organisers for at least one month from the date of completion of the event. Employees are also under an obligation to cooperate with employers to comply with the measures taken to discharge the employer’s duties[18].

Employers are also considering the implementation of work from home arrangements with their employees as a way to reduce the exposure to the risks of the Covid-19 pandemic. If devices are deployed to employees for work from home arrangements, steps should be taken to ensure that the risks of data security breach are minimised. These steps include:

- Only dedicated devices are used to collect or store personal data;
- Managing access and usage of devices (including no personal use of the devices or unnecessary installation or deletion of apps);
- Ensure proper and updated security/virus systems or measures have been installed in the devices;

- Avoid connecting the devices to public or unsecured Wi-Fi connections;
- Avoid sharing of emails or passwords between employees or non-employees;
- Regular checks to ensure the devices are secure and not exposed to any viruses; and
- Awareness of phishing or scam emails or software.

Nevertheless, companies should conduct due diligence on their privacy notices to ensure that existing notices to their employees are sufficiently wide. Otherwise, a supplementary privacy notice may be required.

Consequences of non-compliance

Non-compliance of the PDPA is an offence punishable by either fines or imprisonment against the data user. JPDP is monitoring compliance of the level of businesses and failure to comply may result in a fine of no more than RM300,000 or a prison term of no more than two years or both, if convicted[19].

Proposed enhancements to the PDPA

In early 2020, the PDP Commissioner issued a Consultation Paper to review the PDPA. Under the Consultation Paper the PDP Commissioner had proposed 22 amendments to the PDPA. The proposed amendments will impose additional obligations on companies and we would like to highlight some of these below:

i. **Appointment of a data protection officer**
The PDPA as it stands does not require data users to appoint a data protection officer unlike in other jurisdictions. This amendment is much welcomed as lack of essential knowledge on data protection matters is one of the main challenges faced in compliance, particularly in the current situation where various Government SOPs have been issued.

ii. **Report of data breach**
Unlike the General Data Protection Regulation ("GDPR")[20], the PDPA has no express provision that requires any data breach to be reported to the PDP Commissioner. Lack of an express requirement in the law to report this breach can lead to organisations covering up any data breach at the expense of the customer's personal data. Any amendment that includes such reporting obligation should include a clear guideline encompassing the procedure to be adhered to such as the type of breach that needs to be reported, and the time frame for the report to be made.

iii. **Privacy by design**
The concept of privacy by design can be explained easily as putting privacy as priority when creating new technologies or systems. This concept requires organisations to set up privacy measures in the whole process of developing a system, such as taking proactive measures to anticipate probable breach before it actually happens. Its importance is especially apparent to organisations who run their businesses online. Examples of measures that can be taken by data users are name pseudonymisation, end-to-end encryption and strict use authentication.

iv. **Application to non-commercial activity**
The application of the PDPA is currently limited to personal data processed in commercial transactions only. A blanket application to all entities who processes data is a good initiative to further protect personal data.

v. **Extra-territorial application**
It is proposed in the Consultation Paper for the PDPA's application to be extended to include personal data processed outside Malaysia. This proposal is in line with some other jurisdictions who are starting to impose extra-territorial obligations on organisations who process data of their citizens. However, the Consultation Paper proposes to restrict the application to data users outside Malaysia who monitor and do profiling of Malaysian data subject only.

Conclusion

While data collection and contact tracing are of vital importance during the Covid-19 pandemic, companies should ensure that their obligations under the PDPA are complied with when processing these personal data. Issuance of the advisory from the JPDP is much welcomed to standardise the approach for the collection of data for contact tracing and the protection thereof from unauthorised use and disclosure.

[1]https://www.pmo.gov.my/2020/05/sop-pembukaan-semula-sektor-ekonomi/; Annex 25 of the Guidelines COVID-19 Management No. 5/2020.
[2] Sections 6(1)(a), 6(1)(b) and 40(1) of the PDPA.
[3] Section 4 of the PDPA.
[4] Sections 6(2)(c) 40(1)(b)(i) of the PDPA.
[5] Sections 6(2)(d), 40(1)(b)(ii), 40(1)(b)(iii) of the PDPA.
[6] Section 3(1) of the PDPA.
[7] Section 6(3) of the PDPA.
[8] Advisory titled "Tatacara Pengendalian Bagi Aktiviti Pengumpulan, Pemprosesan Dan Penyimpanan Data Peribadi Oleh Premis Perniagaan Semasa Perintah Kawalan Pergerakan Bersyarat (PKPB)" dated May 2020; https://www.pdp.gov.my/jpdpv2/pengumuman/tatacara-pengendalian-bagi-aktiviti-pengumpulan-pemprosesan-dan-penyimpanan-data-peribadi-oleh-premis-perniagaan-semasa-perintah-kawalan-pergerakan-bersyarat-pkpb/?lang=en.
[9] Section 7(1)(b) of the PDPA.
[10] Section 7(1)(e) of the PDPA.
[11] Section 9 of the PDPA.
[12] https://www.thestar.com.my/tech/tech-news/2020/05/04/covid-19-mysejahtera-and-mytrace-apps-now-linked; https://www.thestar.com.my/tech/tech-news/2020/04/17/mcmc-launches-contact-tracing-app-gerak-malaysia.
[13] Para 2.3 (a) of the Advisory titled "Tatacara Pengendalian Bagi Aktiviti Pengumpulan, Pemprosesan Dan Penyimpanan Data Peribadi Oleh Premis Perniagaan Semasa Perintah Kawalan Pergerakan Bersyarat (PKPB)" dated May 2020.
[14] The Personal Data Protection Standard 2015.
[15] Para 2.4 of the Advisory titled "Tatacara Pengendalian Bagi Aktiviti Pengumpulan, Pemprosesan Dan Penyimpanan Data Peribadi Oleh Premis Perniagaan Semasa Perintah Kawalan Pergerakan Bersyarat (PKPB)" dated May 2020.
[16]https://www.moh.gov.my/moh/resources/Penerbitan/Garis%20Panduan/COVID19/Annex_25_COVID_guide_for_workplaces_22032020.pdf.
[17] Sections 15 and 17 of the OSHA.
[18] Section 24 of the OSHA.
[19] Para 3.0 of the Advisory titled "Tatacara Pengendalian Bagi Aktiviti Pengumpulan, Pemprosesan Dan Penyimpanan Data Peribadi Oleh Premis Perniagaan Semasa Perintah Kawalan Pergerakan Bersyarat (PKPB)" dated May 2020.
[20] Article 33 of GDPR.

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