

## CORPORATE AND DISPUTE RESOLUTION

**BEYOND COVID-19: THE NEW**

**NORMAL** The current outbreak of the coronavirus, officially named Covid-19 by the World Health Organization (WHO), has brought far-reaching chaos and dark uncertainties globally, not to mention grievance to victims of all walks of life.

Restrictions on cross border travels and lockdowns had to be declared by Heads of Governments. And collectively, they have, one way or another, affected people's daily routines and life. Streets that used to be congested with residents and tourists alike are empty and eerily quiet. Facial masks had to be worn whenever it is necessary to be outdoors. Activities and gatherings are prohibited, due to social distancing. Businesses are not spared. Malls, retail outlets, restaurants and bars had to be shut. Factories are operational with limited capacity. Goods and raw materials, which have arrived at ports, are slowly being delivered to their destinations. Airlines have grounded part, if not all, of their fleet. The world is practically at a standstill.

This article explores the possible new normal, from the legal perspective, that may be adopted beyond Covid-19. This article seeks to identify the possible areas of law where different ways and approach in the business and corporate sectors may be adopted by their players. Terms of contracts, for example, that were unimaginable previously may be relevant now. Interpretation and computation of time may not be as straight forward as it used to be before.

In order to wage its war against Covid-19, our Malaysian Government announced and implemented a movement restriction order (MCO) which generally restricted the movement of persons and ordered the closure or shut downs of establishments providing non-essential services. In addition to non-essential services, the MCO also ordered the closure of public service offices, including land registries, company registries and the offices for the Inland Revenue Board, with the exception of stamp offices. As the Honorable Prime Minister advised in one of this announcements, as Malaysia faced the unprecedented challenges emanating from the pandemic, Malaysians should embrace also a new normal. The working community will have to work

remotely, and from their home. Due to social distancing, gatherings will be restricted, if not banned totally, even after lifting of the MCO. Sadly, greetings by handshakes may become rare.

**FORCE MAJEURE CLAUSES IN**

**CONTRACTS** Following the outbreak of Covid-19 and the ensuing breakdown of transactions, the primary focus and discussion had been the contractual clause on force majeure. In the absence of clear statutory provisions applicable on business transactions during this crisis, reliance is placed on interpretation and application of the scope of force majeure. One must be mindful and appreciate that at the time contracts were prepared or signed, there was no history of a pandemic that resulted in the extensive and far-reaching global lockdowns, since the last pandemic announced by WHO, severe acute respiratory (SARS), did not produce consequences as presently experienced globally. By reason thereof, many contracts would have omitted the inclusion of a pandemic in defining force majeure. As a result, the floodgates on disputes on the application of force majeure to the current pandemic will open.

Notwithstanding that whether a clause on force majeure effectively applies would depend largely on a handful of factors, such as, whether the definition includes pandemic, the subject matter of the contract, the intention of the parties to the contract and the prevailing circumstances, the new normal would see contracting parties to intentionally ensure that the application of force majeure clause extends to pandemics. Contracting parties and lawyers alike will take steps to ensure that clauses on force majeure are interpreted to apply to pandemics. All-encompassing words such as "... or any circumstance or event that directly or indirectly cause or likely to cause a party thereto from observing and performing its obligations contained herein." will be a new normal.

**EMPLOYMENT CONTRACTS** Probably the second most affected area during Covid-19 and will witness a new normal beyond Covid-19, is employment. At present, employers and employees alike were caught off-guard by the MCO, which resulted in the closure of several non-essential businesses. Uncertainties surrounding the right to receive full salary and employment benefits, such as annual leave entitlement during the MCO arose. The

new normal in this area will see provisions by employers in their terms of employment or their employees' handbook that addresses the effect and implication of any lockdown similar to that of the MCO. It will be a new normal to find clear and specific provisions relating to payment of salary, whether in full or otherwise, and employee's entitlement to employment benefits during a pandemic or its resulting lockdown.

**TIME FRAME IN CONTRACTS** It is not uncommon for contracts to provide for the reference and application to a time frame. In doing so, it is common for parties to plainly rely on "days" which would be any day in a Gregorian calendar. It is similarly not uncommon for parties to prefer the usage of "business days", which is usually defined as "*a day (excluding gazetted public holidays, Saturdays and Sundays) on which banks are open for business in Kuala Lumpur*". As witnessed currently, whilst banks in Malaysia are open, the MCO has effectively closed, *inter alia*, public offices such as land registries, company and business registries and tax offices, excluding stamp offices. Typically, for documents relating to real estate property transactions and loan securitisation, it is normal to find definition of business days as paraphrased above to be adopted. This means computation of time continues although the public offices are ordered to be closed pursuant to any lockdown like the MCO. The new normal beyond Covid-19 would see other types of documents adopting definition of time which does not only relate to the banking industry, but also to public offices.

Most contracts, if not all, will not provide for suspension of computation of time upon occurrence of a pandemic, unless reliance is placed on the clause on force majeure, which, if drafted wide enough, will include pandemics. More often than not, time is defined to be the essence of a contract. As such, time will continue to be computed and run during pandemic, much to the disadvantage and chagrin of one party to a contract. Beyond Covid-19, it may be a new normal to find contractually agreed suspension of computation of time notwithstanding that time declared to be of the essence of the contract.

**CONDUCT OF MEETINGS** With the requirement to adopt social distancing, convening and holding face-to-face meetings would provide a daunting challenge. Constitutions (or Articles of Association as it was previously called) of companies incorporated after the advance of technology would normally allow Directors' meeting by way of video or audio conferences to be held. Meetings held with such permissible provisions and decisions made therein will not be open to be challenged legally by aggrieved parties. On the contrary, there are still companies which were incorporated in yesteryears that either adopted Table A of the Companies Act 1965 or adopted Articles of Association which does not prescribe alternative modes of conducting Directors' meeting. In the absence of such provision in their constituent documents, conducting meetings via video or audio conference and decisions arriving thereat would be subject to legality and validity challenges. Beyond Covid-19, it would be a new normal for companies to include in their constituent documents options to allow for Directors' meetings to be held via video or audio facilities.

The same can be said about shareholders' meetings. Whilst constituent documents may allow Directors' meetings to be held and conducted electronically, it is not normal for such constituent documents to provide for conduct of shareholders' meeting electronically. With the advance of technology, where web conferencing platforms or applications can accommodate up to 10,000 participants at any time, and can contain a feature, such as "chatbox", to facilitate voting process, it would be a new normal beyond Covid-19 for public companies to alter their constituent documents so that they will be allowed to hold and conduct shareholders' meetings electronically. For public companies listed on the stock exchange, the Securities Commission Malaysia paved way for virtual general meetings by announcing a Guidance Note on conduct of virtual general meetings during the MCO. In announcing the Guidance Note, the Chairman of Securities Commission Malaysia encouraged public listed companies "to continue leveraging technology, even beyond the MCO period, to conduct meetings in a manner that will encourage and enable full shareholders participation, even from remote locations".

## COURT AND ARBITRATION

**PROCEEDINGS** It should be noted that well before the MCO or Covid-19 pandemic, as far as civil cases are concerned, the Malaysian Judiciary had already introduced electronic filing of documents *i.e.* e-filing as well as on-line conduct of case management or better known as the e-review process. There have also been instances of hearings being conducted on-line or *vide* video conferencing under special circumstances and with consent of all parties involved. In criminal cases, the use of video conferencing is also not completely foreign with *inter alia*, the introduction of Section 272B of the Criminal Procedure Code [Act 593] which essentially allows any person other than the accused to give evidence through video conferencing or live TV link with leave from the Court.

Moving forward and in line with the new normal, we may see more widespread use of technology and for more or all hearings to be conducted electronically or on-line. In order to turn this into reality however, several amendments would have to be made to existing laws so as to allow and give effect to the conduct of online hearings. In this regard, it is indeed reassuring that the Honorable Chief Justice had in her recent press statement, amongst others, assured all parties that the Malaysian Judiciary is already equipped with the necessary ICT infrastructure to provide secure online hearings.

**TENANCY AGREEMENTS** Tenancy and leases over business and industrial premises is another sector that suffered from the impact of the pandemic and MCO. With business revenue adversely affected and diminishing caused by disruption or suspension of operations during the MCO, many entrepreneurs and business owners faced the challenge of meeting to meet obligations to pay and settle fixed expenses and liabilities, which apart from salaries, includes overheads such as rent. At present, tenancy or lease agreements may contain either a force majeure clause or a suspension of obligation to pay rent due to damage to the demised premises. In cases where the tenancy or lease agreements do not contain force majeure clause, it will be a new normal for tenancy or lease agreements to include such clauses. Alternatively, it will be a new normal beyond Covid-19 to find terms and conditions in tenancy or lease agreements that allow suspension of payment of rent or payment of part of

the agreed rent during any pandemic or the resulting lockdown in addition to any damage to the demised premises during the term of the tenancy or the lease created.

At the time this article is prepared, Covid-19 has infected more than 2 million patients worldwide, of whom, more than 5% have perished. Unless a vaccine is discovered soon, the potency of the coronavirus may spread further and wider, which will invariably demand additional preventive measures to be ordered by WHO or Head of Government of a country. In declaring these new preventive measures, more new normal practices may be introduced and deemed necessary until the war against Covid-19 is won. Accordingly, more new normal from the legal perspective may have to be considered and if deemed suitable, adopted and practiced by all of us.

***NB:** The contents of this article do not constitute legal advice and are not intended to be construed as a substitute for legal advice. By reason thereof, no reliance shall be placed on all or any part of the contents of this article.*



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