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A Comparison of Malaysia's COVID-19 Act 2020 with the COVID-19 Laws of Other Countries

by Ko Chia Chea

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Any entrepreneur worth his salt will know to prepare for unforeseen events that affect the business and to have contingency plans for when things go wrong. However, many businesses, both small and large, were ill prepared for the impact of the unprecedented COVID-19 pandemic. As enterprises struggle, so do their employees, suppliers, business partners and, eventually, their financiers.

A COVID-19 law was critically needed in Malaysia to deal with the uncertainties and challenges that businesses have been facing and will continue to face at least for the near future if the pandemic subsists. Prior to the coming into force of the Temporary Measures for Reducing the Impact of Coronavirus Disease 2019 (COVID-19) Act 2020 (**COVID-19 Act**) 2020 in Malaysia, commercial parties were often limited by the pre-existing laws and contractual terms in seeking much-needed relief. They were left to rely on the concession of their counterparties or piecemeal reliefs from the government, if any.

Scope and focus

This article explores a comparison of certain parts of the COVID-19 Act 2020 of Malaysia and the equivalent which have been passed by the legislators in other countries.

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While we have focused on Singapore, New Zealand and Germany in this article, these are not the only countries which have laws specifically to combat commercial and economic issues arising from COVID-19. Other countries such as Australia and the UK have also passed similar laws.

The types of relief discussed in this article are also not exhaustive. This article will focus on one of the many proposed objectives of an economic policy during a major downturn, namely the prevention of excessive economic disruption.[1] It appears that the majority of the COVID-19 related laws which have been introduced to mitigate the impact on businesses principally provide for contractual moratorium, safe harbour and changes to the insolvency regime. So, this article will primarily focus on these areas.

Some other jurisdictions such as Italy and the UK also cater for changes to other matters, for example, changes to financial reporting duties, exemption from restrictions on anti-competition practices, changes to the capital reduction rules and changes to the rules on company financing.

Contractual moratorium

During the pandemic, one of the key burdens for businesses is fulfilling their contractual obligations, whether it is for monetary payment or for the supply of goods and services. So, it is important for COVID-19 laws to mitigate, suspend or relieve certain contractual parties from having to fulfil their contractual obligations if their ability to do so has been significantly affected by COVID-19.

This can help to level the financial burden among contracting parties while preventing fallout in their business relationship as well as minimising the time and resources which they would otherwise have to spend on the negotiations and legal actions arising from their disputes over the contract.

From the examples given below, we can see that Singapore and Germany have legislated such relief. In many civil law jurisdictions such as China, France and Thailand, the codified contract laws have been able to support commercial relationships amidst COVID-19 without much intervention by the legislators.

Singapore

In Singapore, the COVID-19 (Temporary Measures) Act 2020 (**Temporary Measures Act**) was passed on 7 April 2020 to create temporary relief measures for businesses which are struggling due to COVID-19.[2] Pursuant to the Temporary Measures Act, parties are prohibited from taking certain types of actions against their counterparties (or their guarantors) for their inability to perform their contractual obligations which are, to a material extent, caused by COVID-19.

This is limited only to the types of contracts specified in the Temporary Measures Act (**Scheduled Contracts**) and which have been executed before 25 March 2020 with contractual obligations to be performed on or after 1 February 2020.

The Scheduled Contracts include commercial property leases; construction or supply contracts; events or tourism related contracts; certain secured loan facilities provided by financial institutions to qualifying small and medium-sized enterprises (**SMEs**); and certain hire purchase agreements for plants, machineries or fixed assets.

1 https://blogs.imf.org/2020/04/01/economic-policies-for-the-covid-19-war/
2 https://www.mlaw.gov.sg/news/press-releases/2020-04-20-covid-19-temporary-measures-act-provisions-relating-to-temporary-reliefs-to-commence-on-20-april-2020

The types of actions against counterparties which are prohibited by the Temporary Measures Act include commencement or continuation of any court, arbitration and insolvency proceedings; appointment of a receiver or manager; enforcement of security over property used for trade, business or profession; and termination of leases of immovable property due to non-payment of rent.

Germany

The Act on Mitigation of the Consequences of the COVID-19 Pandemic in Civil, Insolvency and Criminal Proceedings (**Mitigation Act**) came into force on 27 March 2020. Pursuant to this Mitigation Act, micro enterprises had, until 30 June 2020, the right to suspend their performance of contracts with a continuing obligation which is material to the business if they are unable to perform without jeopardising the basis of their operations due to COVID-19. For example, contracts for compulsory insurance, supply of electricity, gas or telecommunication services. The moratorium applies to both monetary payment obligations and also obligations to supply a product or service.

Micro enterprises are defined as companies with fewer than 10 employees and an annual turnover or balance sheet below €2 million. The moratorium does not apply to employment contracts, rentals and loan agreements which are governed by other special provisions.

Malaysia

Similar to the Temporary Measures Act of Singapore, the COVID-19 Act 2020 of Malaysia also specifies the types of contracts which would be subject to a moratorium.[3] This is in contrast with the contractual moratorium under the Mitigation Act in Germany which has a relatively general scope.

The list of contracts subject to the moratorium against enforcement actions pursuant to the COVID-19 Act 2020 of Malaysia, which is similar to the Scheduled Contracts in Singapore, are as follows:

1. Construction related contract
2. Performance bond granted pursuant to a construction contract or supply contract
3. Professional services contract
4. Lease or tenancy of non-residential immovable property
5. Event related goods and services contract
6. Contract by a tourism enterprise and for the promotion of tourism in Malaysia
7. Religious pilgrimage-related contract

Furthermore, in contrast with Malaysia, the contractual moratorium in Germany is very much focused on micro enterprises. To a certain extent, Singapore also prioritised small and medium-sized enterprises (**SMEs**). The provision for secured loan facilities under the Scheduled Contracts list in Singapore is only applicable to qualifying small and medium-sized enterprises (**SMEs**).

This idea may be supported by the fact that the micro, small and medium-sized enterprises (**MSMEs**) are likely the ones suffering the most from the pandemic and ensuing economic downturn. In Malaysia, it has been reported that SMEs make up 98.5% of the business establishments.[4] The severity of the impact on SMEs from the pandemic was also highlighted by the government of Malaysia during the additional PRIHATIN SME Economic Stimulus Package announced on 6 April 2020.[5]

3 Temporary Measures for Reducing the Impact of Coronavirus Disease 2019 (COVID-19) Act 2020, s 7
4 https://www.smeinfo.com.my/
5 https://www.pmo.gov.my/2020/04/langkah-tambahan-bagi-pakej-rangsangan-ekonomi-prihatin-rakyat-prihatin/

Safe Harbour – Insolvent trading

As a result of COVID-19, many companies are facing solvency issues and directors may end up prematurely winding up the company due to fears of being held liable for insolvent trading. Therefore, it is important to have a temporary suspension of the insolvent trading regime so that directors can continue the company's trading despite the company being technically insolvent. This gives the directors time to recover the company's business which has been badly hit by the COVID-19 pandemic.

As can be seen below, both New Zealand and Germany have taken this approach via the temporary safe harbour and the suspension of management's obligation to promptly file insolvency petitions, respectively. Other countries such as Australia and the UK have also taken a similar approach.

Germany

Under German laws, the management of companies are under an obligation to promptly file insolvency petitions in the case of: (i) over indebtedness of the company; or (ii) illiquidity.

Pursuant to the Mitigation Act, this obligation was suspended until 30 September 2020 if: (i) the insolvency is based on the COVID-19 pandemic; and (ii) there are prospects that the existing illiquidity will be overcome. This gives the management some time and flexibility to manage the business and keep the company afloat. However, the management continues to have a responsibility to carefully monitor and manage the company's financial position.

On 17 September 2020, Germany granted an extension of the suspension but with modifications. From 1 October 2020 until 31 December 2020, the suspension of the obligation to file for insolvency only applies to companies which, may have had to file for insolvency due to over-indebtedness but (i) were still liquid as of 31 December 2019 and (ii) will be liquid after 30 September 2020.

New Zealand

The COVID-19 Response (Further Management Measures) Legislation Act (**COVID-19 Response Act**) came into effect on 16 May 2020.[6] It has safe harbour provisions which aim to relieve the pressure which directors may feel in fulfilling their obligations and duties under the Companies Act 1993 as a result of trading amidst the COVID-19 pandemic. The relief aims to prevent directors from prematurely winding up their business.

Pursuant to the safe harbour provisions, directors' decisions to continue trading over the six-month period will not result in a breach of duties if:

(a) in the good faith opinion of the directors, the company is facing or is likely to face significant liquidity problems in the next six months as a result of the impact of the COVID-19 pandemic on them or their creditors;

(b) as at 31 December 2019, the company was able to pay its debts due; and

(c) the directors consider in good faith that it is more likely than not that the company will be able to pay its debts as they fall due on or after 30 September 2021 (for example, because trading conditions are likely to improve or they are likely to able to reach an accommodation with their creditors).

The New Zealand Companies Office has indicated that it was unlikely that the effective period for the safe harbour provisions would be extended after the expiry on 30 September 2020, but also stated that the government can re-instate the provision quickly should there be a need to do so.[7]

6 https://www.companiesoffice.govt.nz/covid-19/relief-measures/
7 https://companies-register.companiesoffice.govt.nz/news-and-notices/safe-harbour-for-company-directors-to-expire/

Malaysia

Pursuant to s 539(3) of the Malaysian Companies Act 2016, a director can be held personally liable if he allows the company to trade despite being insolvent (also known as “wrongful trading” or “insolvent trading”). In contrast with New Zealand and Germany, the COVID-19 Act 2020 of Malaysia only has provisions regarding the change in monetary threshold for insolvency proceedings (see below), but not on the matter of insolvent trading itself.

Therefore, the issue of insolvent trading is, at most, indirectly addressed via the changes to the insolvency threshold under the COVID-19 Act 2020 as explained below. It will be better if the issue of insolvency can be dealt more holistically by also making changes to the regime of insolvent trading, as how it has been done in New Zealand.

Insolvency

On 23 April 2020, the Minister of Domestic Trade and Consumer Affairs of Malaysia (KPDNHEP) issued:

(i) the Companies (Exemption) (No 2) Order 2020 to increase the time frame for responding to statutory demands for payments from 21 days to six months; and

(ii) a direction under s 466(1)(a) of the Companies Act 2016 to increase the statutory threshold amount of indebtedness from RM10,000 to RM50,000.

Although the six-month period gives the companies more time to respond to statutory demands, it is not enough to ease the other concerns as the distressed companies could still face other legal actions for failing to fulfil their payment obligations, such as court orders for seizure of assets or garnishee orders. It is also questionable whether the insignificant increase in the monetary threshold made much difference.

Instead, it may be better to provide a temporary moratorium on any type of legal action for non-payment of debts (including winding up petitions, seizure of assets or garnishee proceedings) against companies which are struggling due to COVID-19, such as the Business Debt Hibernation (**BDH**) in New Zealand as explained below.

New Zealand

A business may enter into BDH if: (i) as at 31 December 2019, it was able to pay its debts; (ii) at least 80% of the directors agree that it may do so; (iii) it has significant liquidity problems due to COVID-19; and (iv) it is more likely than not that it will be able to pay its due debts on and after 30 September 2021.[8]

The BDH regime allows businesses impacted by COVID-19 to continue trading by placing their existing debts into hibernation until they are able to resume trading at normal levels so that creditors cannot place the business into liquidation during the BDH period.

Upon submitting the BDH entry notice to the Registrar, the business enters into BDH for a period of one month. The BDH will cease after the one-month period unless it obtains a majority vote (in number and value) from its creditors in favour of its proposed arrangement for the debt repayments. If the arrangement is approved, the BDH is extended for a six-month period.

Malaysia

The COVID-19 Act 2020 amends the insolvency regime by increasing the minimum debt threshold for insolvency proceedings from RM50,000 to RM100,000.[9] This is a further increase following the direction under s 466(1)(a) of the Companies Act 2016 which was mentioned above. However, the new threshold is still considerably low, even for most SMEs.

8 https://www.companiesoffice.govt.nz/assets/covid-19-bdh/brief-to-professionals.pdf
9 Temporary Measures for Reducing the Impact of Coronavirus Disease 2019 (COVID-19) Act 2020, s 20

In addition, in contrast with the COVID-19 Response Act of New Zealand, the COVID-19 Act 2020 in Malaysia does not provide any temporary blanket suspension or moratorium on insolvency proceedings. Therefore, the protection afforded by the amendment under the COVID-19 Act 2020 is very much limited in effect.

Furthermore, the increase in the minimum debt threshold does not have retrospective effect on insolvency proceedings which have commenced prior to the coming into effect of the COVID-19 Act 2020. In light of the COVID-19 Act 2020 coming into force at such a late stage in the pandemic, which is in contrast with the COVID-19 Response Act of New Zealand that came into force much earlier in May of this year, it is likely that many companies will not be able to benefit from the increase in the minimum debt threshold under the COVID-19 Act 2020.

Conclusion

Whilst the key components of the COVID-19 Act 2020 of Malaysia are similar to the equivalent in other jurisdictions, it is not quite as far-reaching and detailed in certain aspects as explained above. It may be due to the fact that the COVID-19 Act 2020 is coming into force at a much later stage in the pandemic when most businesses have already either adjusted to the situation or closed down and moved on.

However, this would not be the best approach because it seems that the pandemic is here to stay in the foreseeable future, as we are seeing second and even third waves in Malaysia and in other countries. Even if the pandemic ends, businesses will take some time to recover. Therefore, the implications of the pandemic on businesses will last for a significant period of time. For this reason, the scope of the COVID-19 Act 2020 should also be extended to cover other key areas, including those discussed above. **LH-AG**

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