



After 3 months of being placed under MCO, CMCO and now RMCO, a Covid-19 (Temporary Measures) Bill (“**the Bill**”) is impending. The government had called for a public consultation on matters. The Bill is expected to be tabled in the next Parliamentary sitting in July 2020.

Are the stimulus packages legitimate?

Although a full Parliamentary sitting has yet to be convened under the new government (save for the limited sitting on 18 May 2020), the Prime Minister had recently announced the Penjana stimulus package, the latest after a series of stimulus packages. All of these stimulus packages share one similarity, in which they were announced without first being tabled nor debated in the Parliament.

There have been questions about the legality of such measures without Parliamentary authorization. The legality of these measures, especially those involving direct fiscal injections will depend on where the money comes from in the first place. The opposition had multiple times called for the stimulus packages to be tabled in Parliament.

Government had recently stated that most of the direct injection would be raised through domestic borrowings. This will ultimately contribute to Malaysian public debt, which currently stands at 52% of GDP. The raising of the self-imposed public debt ceiling would first require approval from Parliament. Instead, if the source of the fiscal injections comes from the Consolidated Funds, any withdrawal must comply with the Federal Constitution (FC). Since no prior Parliamentary authorization had been obtained, any withdrawal would be a violation of the FC.

These measures ought to be included as part of the Bill and to be debated in Parliament. A number of jurisdictions across the world had enacted similar Covid-19 laws in order to address the significant economic impact brought by this pandemic. Several measures ought to be included in the Bill:

- **Temporary relief against non-performance of contractual obligations**

Businesses are inevitably exposed to legal repercussions for breach of contract due to non-performance arising from the restrictions during the MCO. Our neighbour Singapore, in its Covid-19 (Temporary Measures) Act 2020 had put in several measures in order to support businesses that are threatened by legal actions due to non-performance. Parties are not allowed to commence or continue any legal action against the defaulting party, enforce any security or make any application for winding up or bankruptcy. This temporary relief will apply for a period of six months from 23 April 2020 and may be extended further.

A similar measure, if included in the Bill, would be most welcomed by Malaysian businesses that are currently struggling to perform their contractual obligations. It is important for this provision to apply retrospectively from 18 March 2020 when the MCO first commenced.

- **Covid-19 as a *force majeure* event**

An alternative approach to the above would be for the Bill to declare the pandemic as a *force majeure* event. A similar approach had been adopted in France, Spain and China. A *force majeure* clause commonly covers various situations in which the performance of a contract is delayed, prevented or hindered. In the event of a *force majeure* event, parties will be excused from their contractual obligations. However under the existing laws, if a *force majeure* clause is not wide enough to cover the outbreak the Covid-19 as one of the triggering events, parties will not be able to rely on such a clause. If the government were to designate Covid-19 as a *force majeure* event, more parties may be able to excuse themselves from their contractual obligations, which would prevent impending litigations.

- **Relief of directors' personal liability for wrongful trading**

The threshold amount for indebtedness and the time period to respond to a statutory demand had recently been extended to provide more breathing space for companies. However, companies that are near insolvent may require more than just these measures. Australia had inserted a section 58GAAA into its Corporations Act 2001 to remove a director's personal liability for trading while insolvent. Similarly in Malaysia, section 539(3) of Companies Act 2016 provides for personal liability of directors if the company contracted a debt without any reasonable expectation of the company being able to pay the debt. If this liability were to be temporarily removed in the Bill, directors may be more prepared to lead companies out of financial difficulties. However, to prevent this relief from being abused for fraud, there must be clear statutory provisions as to the mechanism of this relief and in what circumstances it should apply.

- **Rental waiver for business tenants**

Under the recently passed amendments to its Covid-19 regulations, Singapore had extended rental waivers for business tenants for two more months. Qualifying commercial properties will now be entitled to a total of 4 months of rental waiver, while other industrial/office properties will be given a 3-month waiver. 2 months of this waiver will be funded by the government support, while the rest are required to be borne by landlords. It is advisable for the government to include a similar provision in the Bill in order to provide more support for companies in rebuilding their businesses.

Conclusion

Although we are in desperate times, it is essential that the executive continues to uphold the pillars of democracy by allowing the Parliament to perform its functions and properly scrutinize the measures against Covid-19. The government had not been exactly clear on the sources of funding for these stimulus packages. Therefore, it becomes especially important for the Bill to not only provide for measures to mitigate the impact of Covid-19, but to also legalise measures that have been announced but have yet to be debated and/or gazetted.

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