

Dear valued clients and friends,

We are pleased to bring you this update from our China Desk.

China Desk Alert – Malaysia Covid-19 Legal Update M&A focus

You or your Chinese clients may have investment in Malaysia (for example, subsidiaries (“MY Sub”)) and this serves as a guide for your reference.

Pursuant to the Movement Control Order (“MCO”)¹, all business activities (save for essential services) in Malaysia must be suspended from 18 March 2020 until 31 March 2020. The duration of the MCO has since been extended until 14 April 2020². Essential services include amongst others, banking and finance, e-commerce, port and dock services³, and this list may be updated from time to time.

Subject to the approval of the Ministry of International Trade and Industry, manufacturers of certain critical/essential goods may continue their operations during the period of the MCO, subject to compliance with terms and conditions⁴.

The Government together with its agencies have issued various guidelines and FAQs to clarify the restrictions under the MCO.

For Chinese corporations with business operations in Malaysia, it may be worth highlighting the following key points:

- The MY Sub may conduct its Annual General Meeting (“AGM”) electronically⁵ or apply for more time to hold the AGM as a result of the outbreak⁶. The MY Sub must still ensure that the proceedings of the AGM comply with the requirements under its constitution (if any) and the **Companies Act 2016**.
- The MY Sub is allowed a moratorium of 2 weeks after the expiry of the MCO to lodge all statutory filings and notifications.⁷ Late submission fees will be exempted during the moratorium⁸.
- For listed companies, they are given flexibility by Securities Commission Malaysia and Bursa Malaysia Berhad on the timing to hold an AGM and issue their quarterly and annual reports⁹. Proceedings of the AGM must still comply with the requirements under the constitution and the **Companies Act 2016**.
- The MY Sub should check whether any of its licences/approvals are expiring in the near future. If this is the case, it is advisable that the application for renewal be made earlier as it may be prudent to anticipate longer processing time.
- The MY Sub must continue to pay its employees their salaries during the MCO closure period, unless the employment contract expressly provides otherwise.

IN ADDITION TO THE ABOVE, YOU OR YOUR CLIENTS OR THE RESPECTIVE MY SUB MAY HAVE ENTERED INTO VARIOUS AGREEMENTS (INCLUDING COMMERCIAL AGREEMENTS), IT MAY BE PERTINENT TO TAKE NOTE OF THE FOLLOWING:

During the MCO period, financial institutions including commercial banks are still open during the MCO closure period. Therefore, if pursuant to the agreement, parties have undertaken certain obligations which are pegged to “*business days*” and “*business days*” is defined as days when commercial banks are in operation, then the timing of the obligations will generally continue to run. Therefore, IT IS IMPORTANT to prepare a checklist / timeline of obligations to monitor that the agreed milestones is in keeping with the timeline.

On the other hand, there is no uniform *force majeure* provision under Malaysian law and before the same is finalized, it remains subject to parties’ negotiation akin to other terms of the agreement. Please check whether the *force majeure* provisions (if any) specifically refers to epidemics, pandemics and have a catchall provision (e.g. any other event beyond the reasonable control of the parties) to include the situation under the MCO, and whether the parties’ obligation under the agreement can be suspended / held in abeyance for the duration of the MCO. In this regard, industry specific clarifications issued from various Ministries may be of assistance, where relevant. IT IS IMPORTANT to draft a *force majeure* clause properly, or where such clause has been included, to construe the same in detail to protect MY Sub’s business because a declaration of *force majeure* must be done promptly and in accordance with the terms of the agreement. However, in the absence of applicable *force majeure*, parties will need to negotiate a compromise.

Moving to the context of a M&A agreement, a buyer may wish to consider incorporating the anticipated effects or consequences of a virus outbreak or an office shutdown for prolonged period under material adverse events (“MAE”) which may lead to, amongst others, adjustment of purchase price and termination of the agreement; whereas the seller should be mindful of the extent of such MAE clause (for example, territory specific and period specific). Parties should be mindful that any MAE and *force majeure* provisions do not conflict with each other.

Moving forward, considerations for the MY Sub may include the process for engagement with employees for their consent to implement amongst others, voluntary pay cut, utilise annual leave towards the shutdown, freeze on non-contractual increments, in the event of a similar shutdown. In the absence of consent, any unilateral action by the employer may be treated as grounds to treat oneself as constructive dismissal.

IN RELATION TO PROCESSES WHICH MAY BE TIME SENSITIVE:

- Where applications have to be made to regulatory authorities, most regulatory authorities are either closed or have limited operation during the MCO, and it is likely that any such applications will only be processed after the MCO is lifted.
- Even when the MCO ends, applications submitted will likely take a longer processing time due to the backlog of applications submitted.
- Where share transfer is expected to be effected, while the share transfer form can be submitted for stamping via the e-stamping portal, the actual assessment is a manual process and this may have been impacted by the MCO and may take longer than usual. Assuming this is the case, the timing for transfer of legal ownership of shares will be impacted as it can only be completed after the stamping is done.

- Due to the delay in the performance of obligations, and processing time as a result of the outbreak and the shutdown, parties may not be in compliance with their contractual and/or licensing conditions. In view of this, parties should consult with the relevant counterparty or regulator to seek their written waiver, exemption and/or clarification on the same taking into account the outbreak and the shutdown.

Inevitably, companies are likely to face financial liquidity and cash flow issues due to amongst others, the restricted movement period under the MCO. Immediate actions must be taken, in addition to managing the aforementioned timelines, to also review its contractual obligations and liabilities, particularly those that have financial implications for non-compliance. It may be worth putting efforts to do a thorough review of all the material contracts bearing in mind the unprecedented global pandemic.

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中国服务组快讯 – 马来西亚新冠肺炎法律更新（收购兼并）

您或您的中国客户可能在马来西亚进行了投资(如子公司(“MY Sub”), 此快讯旨在为您提供一些指南作为参考。

根据行动管制令(“MCO”)¹⁰, 自 2020 年 3 月 18 日至 2020 年 3 月 31 日, 马来西亚境内的所有商业活动(除基本保障服务以外)必须暂停。目前, MCO 的期限被延长至 2020 年 4 月 14 日¹¹。基本保障服务包括银行及金融、电子商务、港口及码头服务等,¹² 此名单可能会随时更新。

在得到国际贸易和工业部批准的情况下, 部分重要/基本保障货物的制造商可在遵守条款和规定的情况下, 在 MCO 期间继续经营¹³。

政府以及有关部门已发布了各项指南和常见问题解答, 以说明 MCO 限制的内容。

对于在马来西亚开展业务的中国企业, 以下几点值得注意:

- MY Sub 可以通过电子方式召开其年度股东大会(“AGM”) ¹⁴,或者由于疫情爆发申请更多时间举行 AGM¹⁵。MY Sub 必须确保 AGM 的过程符合其章程(如有)和 2016 年公司法的规定。
- MY Sub 可以在 MCO 期满后的两周内提交所有法定文件和通知¹⁶。在这 2 周的暂缓期间,逾期呈交的费用将得到豁免¹⁷。
- 对于上市公司,马来西亚证券委员会和马来西亚证券交易所将给予其时间上的灵活度召开 AGM、以及发布季度和年度报告¹⁸。AGM 的程序仍须符合其章程和 2016 年公司法的规定。
- MY Sub 应该检查是否有任何许可证/批准在近期内到期。如属此类情况,建议尽早提出更新此证/批准的申请,谨慎看来,预计其需要更长的办理时间。
- MY Sub 必须在 MCO 的关闭期内继续支付员工工资,除非雇佣合同另有明确规定。

除了上述内容,您或您的客户或各自的 MY SUB 可能已经签订了各种协议(包括商业协议),可能需要注意以下事项:

在 MCO 期间,包括商业银行在内的金融机构在这 MCO 期间仍然营业。因此,如根据协议,各方已承担了与“营业日”挂钩的某些义务,而“营业日”被定义为商业银行营业的日子,那么义务的时间进度一般将继续运行。因此,准备一份责任清单/时间表来监测商定的里程碑进度是否符合时间表是很重要的。

另一方面,马来西亚法律没有统一的不可抗力条款(“force majeure”),在最终确定之前,仍然需要根据协议的其他条款,取决于双方协商结果。请检查不可抗力条款(如有)是否明确提及流行传染性疾病,大流行疾病,以及是否包括一项全面条款(例如超出双方合理控制的任何其他事件)涵盖 MCO 的情况,以及双方在本协议下的义务是否可以在 MCO 期间暂停/搁置。在这方面,政府各部委所发布的相关具体行业说明可能会有所帮助。正确起草不可抗力条款非常重要,或者在已包含不可抗力条款的情况下,对不可抗力条款进行详细解释以保护 MY Sub 的业务,因为不可抗力声明必须按照协议条款及时完成。然而,在没有适用的不可抗力的情况下,双方将需要通过谈判达成妥协。

就并购协议而言,买方可能考虑将疫情爆发或办公室长时间关闭的预期影响或后果纳入重大不利影响(“MAE”),这些不利影响可能导致购买价格的调整和协议的终止等;反之,卖方应注意此 MAE 条款的范围(例如具体区域和具体期限)。双方应确保任何 MAE 和不可抗力条款都不相互冲突。

另外,MY Sub 的考虑范围可包括与员工进行协商,在类似的关闭情况下,获得员工的同意以实施自愿减薪,在停工期间使用年假,冻结非合同加薪。未经员工的同意,雇主的任何单方面行为可能被解释为推定解雇。

对于可能具有时间敏感性的程序:

- 如果已经向监管部门提出申请,在 MCO 期间,大部分的监管部门已关闭或有限运作,并且很可能只有在 MCO 解除后才会处理任何此类申请。
- 即使 MCO 结束,由于提交的申请积压,提交的申请也可能需要更长的处理时间。
- 如果预计需要完成的股权转让预计会生效,可以通过电子印花门户网站提交盖章,但实际评估是通过人工操作,而且这些操作可能受到 MCO 的影响,所以可能会需要比往常更长

的时间。假设是此类情况，股份的法定所有权转让时间将会受到影响，因为它只能在股份转让表格加盖印花后才能完成。

- 因为疫情暴发和关闭情况导致履行义务及处理时间方面的延迟，各方可能无法遵守其合同和/或许可证的条件。有鉴于此，各方应与相关的合约方或监管机构协商，考虑到此疫情和关闭情况，寻求其书面免除、豁免和/或澄清。

不可避免的，公司很可能由于 MCO 的行动限制时期等原因面临金融流动性和现金流的问题。除了上述所提及的监测时间表，公司必须立即采取行动，审查其合同义务和责任，特别是那些因违约行为对有财务影响的合同义务。考虑到此前所未有的全球大流行疾病，对所有重要合同进行彻底审查可能是值得的。

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¹ Prevention and Control of Infectious Diseases (Measures within the Infected Local Areas) Regulations 2020.

² Special Declaration by the Prime Minister of Malaysia on 25 March 2020.

³ Schedule of the Prevention and Control of Infectious Diseases (Measures within the Infected Local Areas) Regulations 2020.

⁴ Press Statement issued by the National Security Council, Prime Minister's Department on 18 March 2020.

⁵ Media Statement issued by Companies Commission of Malaysia ("CCM") dated 16 March 2020.

⁶ Press Release by CCM dated 17 March 2020.

⁷ FAQ on AGMs and Filing of Documents during the Movement Control Order issued by CCM.

⁸ Press Release by CCM dated 17 March 2020.

⁹ Media Release by Securities Commission Malaysia and Bursa Malaysia Berhad on 17 March 2020.

¹⁰ 2020 年传染病预防及控制（疫区内措施）条例。

¹¹ 马来西亚首相在 2020 年 3 月 25 日的特别宣布。

¹² 2020 年传染病预防及控制（疫区内措施）条例列表。

¹³ 总理署国家安全理事于 2020 年 3 月 18 日发布的新闻声明。

¹⁴ 马来西亚公司委员会于 2020 年 3 月 16 日发布的媒体声明。

¹⁵ 马来西亚公司委员会于 2020 年 3 月 17 日发布的新闻稿。

¹⁶ 马来西亚公司委员会发布的行动限制指令中关于 AGMs 和文件归档的常见问题解答。

¹⁷ 马来西亚公司委员会于 2020 年 3 月 16 日发布的新闻稿。

¹⁸ 马来西亚证券委员会和马来西亚证券交易所于 2020 年 3 月 17 日发布的新闻稿。



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