



## **ENACTING A LAW PROVIDING TEMPORARY RELIEF FOR INABILITY TO PERFORM CONTRACTUAL OBLIGATIONS DURING THE RESTRICTION MOVEMENT ORDER**

1. The Novel Coronavirus (“**COVID-19**”) pandemic has led the world economy to almost a standstill due to disruptions in business operations, supply chain and travel restrictions. On 6 April 2020, the RM10 billion worth PRIHATIN PLUS was announced by the Prime Minister, Tan Sri Muhyiddin Yasin with the hope to ease the financial burden of SMEs and subsequently, preserve the jobs and livelihoods of workers.

2. We believe that more can be done towards this purpose such as by addressing the issue in relation to the performance of contractual obligations by businesses and individuals in Malaysia that have been significantly affected by COVID-19 event, in particular, the Restriction Movement Order (“**RMO**”) (“**Affected Parties**”). One way of doing this is by enacting a temporary law that would intervene into private contracts to address this issue, as has been done by the Singaporean government.

3. On 7 April 2020, the Singapore Parliament has passed the **COVID-19 (Temporary Measures) Act** (“**the Act**”) which commenced on the same day, to address the impact of COVID-19 on businesses and individuals by providing temporary relief to those who are unable to fulfil their contractual obligations due to COVID-19 event. The Act is given a retrospective effect and is applicable to certain scheduled contracts that are to be performed on or after 1 February 2020 (the date when the country’s economy has started to be significantly affected by COVID-19), and on the contracts entered into or renewed before 25 March 2020.

4. The measures will be in place for a prescribed period i.e. six (6) months or possibly up to twelve (12) months from the commencement of the Act. Within this period, **the liabilities of the non-performing parties will be suspended and non-enforceable** so as to shield them against any legal action initiated by the other contracting party(ies). The Act covers **contracts as set out in the Schedule** which are as follows:-

### **(a) Leases or licenses of non-residential immovable property**

(i) Where the commercial tenants or licensees are unable to pay the rent, the rental payment will be suspended for up to six (6) months. In other words, rent would still accrue and the Affected Parties will eventually have to pay for the accrued rent after the temporary relief period is over; and

(ii) Property owners are also required to unconditionally pass on their property tax rebate in full to their tenants, by reducing rentals. This follows that commercial properties that qualified for Budget 2020's rebates of 15 per cent to 30 per cent will, with enhancements introduced in the Resilience Budget, pay zero property tax for this year.

### **(b) Construction or supply contracts**

Contractual obligations will be deferred so as to temporarily relieve the contracting parties from their liability to pay liquidated damages in the event of a delay or failure in performance that was caused to a material extent by COVID-19.

**(c) Contracts for the provision of goods and services for events** (e.g. cancellations of business meetings, conference, weddings etc.) **and tourism-related contracts** (e.g. the cancellation of cruises, hotel accommodation bookings);

(i) Deposits for such events cannot be automatically forfeited; and

(ii) There shall be no forfeiture of booking fees and deposits unless if it has been determined by an assessor that it is just and equitable to forfeit the whole or part of such deposit, taking into account any expenses that have been incurred by the service provider.

### **(d) Certain loan facilities granted by a bank or a finance company to SMEs**

(i) Limited to companies with turnover of not more than SGD100 million in the latest financial year where the grant of loan facilities are secured against any commercial/industrial immovable property, plant, machinery or fixed assets used for business purposes all located in Singapore;

(ii) Contractual rights of banks or finance companies are not affected other than the right to commence legal action for a default on the said loan (e.g. enforcing mortgages and seizing equipment), which is put on hold during the prescribed period. A bank's contractual right to charge fees and interest for non-payment of loan obligations due remains unaffected;

(iii) Company directors will be temporarily relieved from the prohibition of trading while the company is insolvent, if the debts are incurred in the ordinary course of business and not incurred fraudulently.

(iv) facilities / loan granted under hire-purchase arrangement or conditional sales to purchase any plant, machinery or fixed asset located in Singapore used for manufacturing, production or other business purpose including a commercial vehicle.

5. Apart from the above, it is observed that a contracting party served with a notice for relief from the counterparty is prohibited from:-

**(a) commencing or continuing any court or arbitral proceedings as well as bankruptcy and insolvency proceedings;**

(i) the monetary threshold for insolvency proceedings against companies/partnerships will be increased ten-fold from SGD10,000 to SGD100,000.

(ii) the monetary threshold for bankruptcy proceedings against individuals will be increased from SGD 15,000 to SGD60,000.

(iii) the period in which debtors are required to satisfy a creditor's statutory demand will be lengthened.

**(b) enforcing the security over properties used for purpose of business or trade;**

It covers private-hire drivers who are unable to afford monthly instalments on their hire-purchase loans.

**(c) calling on performance bond given pursuant to a construction contract; and**

**(d) terminating leases / tenancies of non-residential premises due to non-payment of rental.**

6. To seek for the relief as provided under the Act, an Affected Party has to serve a notification of relief to the other contracting party, explaining that he is unable to perform his obligation due to lower footfall amid the virus outbreak. The notified party will then be barred from commencing (the prohibited) actions against the Affected Party, and any failure to comply, will constitute an offence punishable with a fine.

7. Additionally, any court or arbitral proceeding under the Arbitration Act must be dismissed by the court of tribunal which would cause the party commencing the said proceedings to lose substantive rights to enforce the contract, even after the prescribed period has ended.

8. Disputes arising from the application of the Act will be decided by a panel of independent assessors ("**Assessors**") appointed by the Ministry of Law who will decide on whether the inability to perform the contractual obligations was due to COVID-19 and the Assessors will have the powers to grant relief which is just and equitable in the circumstances.

9. Parties will not be allowed to be represented by lawyers and there will be no costs orders. The Assessors' determination will be final and not-appealable and failure to comply with the Assessors' determination is a criminal offence.

10. From the brief explanation of the Singaporean **COVID-19 (Temporary Measures) Act** above, there are mechanism that could be considered for inclusion into our own new law which would act as a temporary relief for the Affected Parties, pressured due to their inability to perform their contractual obligations from the 'date when Malaysia's economy has started to be significantly affected by the virus outbreak until a later date to be determined by the Minister' ("**Prescribed Period**"). We believe that this temporary relief would allow businesses and individuals to get back on their feet once the RMO is lifted.

11. The new law should expressly mention that the temporary relief will be afforded to the Affected Parties within the scheduled type of contracts "*despite any law or anything in the contract*" so as to supersede the legal rights a party may have under the said contract. This in effect would allow the Government to intervene into private contracts by inserting a statutory *force majeure* clause to excuse the inability of the Affected Parties to perform their contractual obligations within the Prescribed Period. In any event, it should be noted that the law merely suspends the Affected Parties' contractual obligations within the Prescribed Period and it does not release the Affected Parties from the performance of their contractual obligations upon the expiry of such Prescribed Period.

12. As for the application of the new law, we believe it should also be compulsory for Affected Parties to serve a notification of relief to notify the other party as to their inability to perform their contractual obligations due to COVID-19 event. Through this, the notified party will not be able to take prohibited actions as specified in the new law against the Affected Parties. Where there are disputes or where the parties are not agreeable to the application of the new law, the matter should be brought before a committee specifically set-up by the Minister (in charge of Laws); of which the members of such committee shall consist of persons having legal background and specific experience in any specific area of practice to preside over the claim(s) between the parties and whose decision should be final and non-appealable. The question as to whether or not businesses or individuals have been affected to a material extent by COVID-19 event should be a question of fact to be determined on a case-by-case basis through the perusing of evidences submitted by the parties.

13. Additionally, it would be a good idea to temporarily modify the monetary thresholds and time limits for bankruptcy and insolvency in Malaysia under the new law. There may not be a need to increase the minimum threshold for a bankruptcy proceeding as the Insolvency Act 1967 has already provided for a high minimum threshold of RM50,000.00 for individual debtors. However, the same cannot be said about the minimum threshold for a winding up proceeding. Section 466 of the Companies Act 2016 has set up quite a low minimum threshold for a creditor to issue a winding-up notice against companies, which is merely at RM10,000. As such, the government should consider increasing the minimum threshold for the winding-up of a company to up to RM100,000.00.

14. Furthermore, the 21 days deadline for both individuals and companies to comply with the statutory demand from creditors are too short for both bankruptcy and insolvency proceedings. The timeframe to comply with the statutory demand from a creditor should be given an automatic extension under the new law until the end of the Prescribed Period in order to allow sufficient time for companies in financial difficulties (not only SMEs) and individuals to increase their cash flow and satisfy the debts post COVID-19. After all, more work-force could be saved if more companies could survive from being wound up during this trying time.

15. In conclusion, the rapid escalation of COVID-19 into a global pandemic can be considered as an extraordinary event which calls for extraordinary measures. We need all resources, opinions and recommendations that could help water down the devastating impact brought by this calamity on the people not only as of now, but also for the many months and years to come, post COVID-19. We sincerely believe that the granting of temporary relief to SMEs and individuals in respect of the performance of their contractual obligations would help in reducing their financial burden and eventually help to sustain at least two-thirds of the workforce in our country.

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## **Important Information**

**Azmi & Associates has set up Azmilaw Task Force to look into all issues arising from COVID-19 and MCO. Clients are welcomed to contact their usual Partner who will bring their issues to Azmilaw Task Force for our further action.**

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We hope the above discussion is of assistance to you and your company. If your company's operations or contractual obligations are affected by the COVID-19 outbreak, we are ready to assist you on any queries you have.

**Corporate Communication**

**Azmi & Associates**

*16 April 2020*