

Client Alert

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Potential disruptions to and impact on mergers & acquisitions, joint ventures and other corporate transactions arising from the Restriction of Movement Order by the Malaysian Government

With the global outbreak of the novel coronavirus (**COVID-19**) and the implementation of the Restriction of Movement Order ("**Order**") by the Malaysian Government effective from 18 March 2020 to 31 March 2020 ("**Control Period**"), parties involved in M&A transactions may encounter disruptions to the progress of their M&A, joint venture or other corporate deals involving Malaysian target companies or joint venture companies.

We have prepared the following guidance to assist parties involved in a Malaysian M&A transaction to navigate complexities arising from the Order. The guidance proposes suggestions to address specific challenges in a deal, and is not intended to be exhaustive. This note is intended to supplement [our earlier client alert relating to Private Equity transactional issues](#) in an environment of high volatility arising from the escalating COVID-19 pandemic.

1. Physical or face-to-face meetings (including negotiations and Completion/Closing meetings)

a. *Potential disruptions and impact:*

- Parties as well as their respective advisers will not be able to attend any physical or face-to-face meetings to discuss or negotiate the transaction.
- To the extent that any transaction documentation requires physical exchange of documents at Completion, this cannot take place simultaneously during the Control Period. Logistical arrangements must be made ahead of time to ensure the documents are signed, delivered and received by the relevant parties in a timely manner.
- Electronic/digital signatures, whilst legally recognised in Malaysia, may not be acceptable in practice for documents to be submitted to government agencies such as share transfer forms or land transfer documents.

b. *Proposed solution(s):*

- To have virtual meetings via teleconferencing.
- If physical Completion is required under the relevant transaction documentation, parties can consider agreeing to postpone physical Completion or do away with physical Completion for virtual



Completion (by exchanging scanned copies of documents). That said, virtual Completion may also have its challenges, e.g. if company secretary office is completely closed and the company secretary's services are unavailable during this period.

2. Availability of company secretarial services/support

a. Potential disruptions and impact:

- Parties to transactions, particularly in share acquisition transactions, often require extensive company secretarial support throughout the course of a transaction, e.g. to prepare directors' and members' resolutions. For instance, directors' resolutions approving the transfer of shares are commonly a Completion deliverable in share acquisition transactions.
- The premises of company secretaries must be closed during the Control Period and the availability of their support will be dependent on their remote working capabilities. We note that many company secretaries do not have such capabilities and therefore their services are unavailable during this period.

b. Proposed solution(s):

- To the extent that the services of the relevant company secretaries are unavailable during the Control Period and are required for purposes of Completion, parties can consider agreeing to postpone Completion altogether until the company secretarial support is available again.

3. Physical signing of legal documents

a. Potential disruptions and impact:

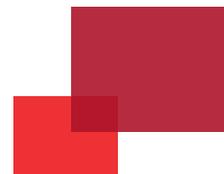
- All non-essential government and private premises (with limited exceptions) must be closed during the Control Period, and individuals are restricted from traveling except for specified purposes such as to purchase necessities or seek medical assistance.
- Where legal documents must be signed physically in the presence of all the parties, witnesses or specified persons such as a Commissioner for Oaths, this cannot take place during the Control Period.

b. Proposed solution(s):

- Parties can consider agreeing to sign certain documents by way of electronic/digital signature, or postpone signing until after the Control Period.

4. Stamping of legal documents (including share transfer forms)

a. Potential disruptions and impact:



- The Inland Revenue Board of Malaysia, including the Stamp Office, is closed during the Control Period. No submission for stamp duty adjudication or stamp duty payments can be made.
- Under the Malaysian Companies Act, the transfer of ownership/ title to shares can only be legally effected (and the new shareholder is entered into the Register of Members) after the relevant share transfer form is stamped.
- In light of the closure of the Stamp Office during the Control Period, no share transfers can take effect during this period.
- The instrument of transfer for the transfer of title to shares must be stamped within 30 days of completion or the document being brought into Malaysia. The inability to submit for stamp duty adjudication during the Control Period may result in a delay to stamping and a fine being imposed for late stamping.

b. Proposed solution(s):

- Where there is a delay to stamping due to the inability of parties to submit for stamp duty adjudication or pay the requisite stamp duty as a result of the Stamp Office being closed during the Control Period, an application for an appeal against the fine imposed can be submitted.

5. Company filings to the Companies Commission of Malaysia ("CCM")

a. Potential disruptions and impact:

- CCM is closed during the Control Period. This includes CCM's counter and online services, which means companies will not be able to make any filings to the CCM during this period.
- Where Completion requires certain company filings (e.g. for change of directors or company secretaries, change of company names), such filings cannot be carried out during the Control Period.
- Similarly, companies will not be able to undertake corporate exercises which require filings with the CCM (e.g. increase of share capital or change of directors).
- On a related note, in light of the closure of CCM, parties will not be able to conduct any corporate-related searches with the CCM, such as company profile searches.

6. Submission to regulators for approvals/Notification to regulators in respect of transaction

a. Potential disruptions and impact:



- Many regulators will be closed during the Control Period, and therefore may not accept and/or process submissions by applicants for approvals or notification by the parties in respect of the transaction.
- Scheduled consultations or meeting with regulators will likely be affected, particularly where the relevant regulator is completely closed during the Control Period (i.e. not working remotely and does not offer teleconferencing or virtual meeting services).
- There may be a delay to the processing of any regulatory applications submitted prior to the commencement of the Control Period as government officers or the relevant committees within the regulatory bodies are not able to meet to discuss the merits of the applications. This may result in conditions precedent not being met prior to the cut-off or long stop date prescribed in the transaction documents, and provide relevant parties the right to terminate the agreement.

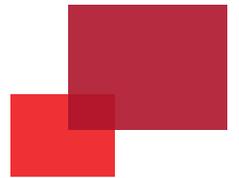
b. Proposed solution(s):

- While many regulators will be closed during the Control Period, we note that there are certain regulators (e.g. Bursa Malaysia, Securities Commission, Malaysian Digital Economy Corporation) which remains operational during this period.
- Therefore, to the extent that parties to a transaction require a regulator's approval or need to notify a regulator in respect of the transaction, it is imperative that the parties make inquiries to ascertain whether the relevant regulator is operating during the Control Period, and if so, to what extent the operation covers (e.g. does the regulator process submissions, etc.).
- Similarly, where parties have scheduled meetings with a regulator, they should ascertain whether the regulator continues to operate and whether virtual meetings are possible.
- Where the transaction documents do not have any force majeure provisions that could be effected, parties should negotiate an extension to the cut-off or long stop date currently prescribed in the agreement to cater to the potential delays in obtaining the relevant regulatory approvals.

7. Registration of land-related matters, including transfer of land or registration of land charge

a. Potential disruptions and impact:

- On 17 March 2020, the Kuala Lumpur Land Office announced that it will be closed during the Control Period. We also understand that a number of State and District Land Offices, including the Selangor,



Pulau Pinang, Johor, Kedah and Melaka State Land Offices will similarly be closed during the same period.

- To the extent that the Completion of a transaction depends on submission to the land office, this cannot be executed during this period if the relevant land office is closed.
- On a related note, parties will similarly not be able to conduct land searches (in respect of land for which the local land office is closed), hence will not be able to independently verify, among others, land title ownership during this period.

b. Proposed solution(s):

- To the extent that the Completion of a transaction depends on a submission to the land office, parties should make inquiries to ascertain whether the relevant land office will be closed during the Order period.

8. Existing material adverse change/effect ("MAC") clauses

a. Potential disruptions and impact:

- MAC clauses are common in share acquisition and business acquisition transactions to provide buyers with an exit in the event of a MAC.
- MAC clauses prior to the Movement Control Regulations or the COVID-19 outbreak may not have taken into account the impact of these events (including other related impacts, e.g. travel restrictions, quarantines, workforce disruptions, etc.), and could be triggered.

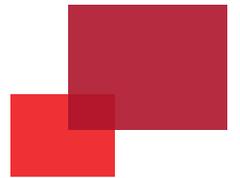
b. Proposed solution(s):

- To the extent that the recent events will result in the triggering of a MAC clause, the seller in a transaction may wish to consider initiating good faith discussions with the buyer such that the buyer does not trigger the MAC clause solely due to the effects arising from the recent events.

9. Existing pay-out clauses

a. Potential disruptions and impact:

- In share acquisition and business acquisition transactions, it is not uncommon for some key management personnel of the target to be retained following the acquisition. In such instance, there may be pay-out clauses pursuant to which financial incentives are paid to the personnel if a certain financial performance target is met within a specified period following the acquisition.
- Similar to the case for MAC clauses, such pay-out clauses may not have taken into account the impact of the recent events. As a result, these pay-out clauses may no longer realistically be met.



b. Proposed solution(s):

- To the extent that the recent events render the financial performance target of a pay-out clause unrealistic, the suggestion in paragraph 8(b) above will similarly apply.

10. Payment of purchase consideration

a. Potential disruptions and impact:

- While banks remain open during this period, there may be delays in payment settlements resulting from remote working arrangements or reduced physical workforce.

b. Proposed solution(s):

- Parties anticipating any payment of a large sum purchase consideration will need to plan well ahead to ensure that the payment can be executed by the contractual deadline.

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