

Legal Analysis of COVID-19 Outbreak: What Businesses Should Be Aware Of

On 30 January 2020, the World Health Organisation (“WHO”) declared the coronavirus disease 2019 (“COVID-19”) a public health emergency of international concern. More than 90,000 people globally have been infected in a short span of two months, sending shockwaves through the global economy.

Every business has been affected in some way or the other by COVID-19 and the measures taken by governments and authorities to contain its outbreak. Some steps which companies can consider taking are:

1. should an employee contract COVID-19, consider the rights of the employee under the Personal Data Protection Act 2010, before deciding to inform other staff members, customers and/or authorities;
2. revisit social media policies and practices to ensure no dissemination of unauthorised, fake, or defamatory statements, as there may be consequences under the Penal Code and the Communications and Multimedia Act 1998;
3. update health and safety policies by implementing guidelines restricting travel to places with reported cases. Strengthen hygiene standards at the workplace by providing updated symptom alerts and mandating employees showing respiratory symptoms to seek immediate medical examination. Conduct hygiene awareness training for all employees;
4. in M&A transactions, check for material adverse change provisions in standard transaction agreements and review their intended effect. Consider price-adjustment mechanisms that take into account any reduction in earnings after an agreement is executed;
5. review terms of credit facility agreements to ascertain whether obligations could be impacted. Approach lenders to discuss the best way to address the issue, as certain local banks have offered moratoriums to customers who are affected by the outbreak; and
6. review and/or renegotiate contractual terms of performance with customers and suppliers, if the contract does not provide any reprieve from the COVID-19 outbreak. Only if attempts fail should parties resort to dispute resolution proceedings.

The first part of this guide provides a legal analysis on the potential impact of COVID-19 on seven crucial Malaysian economic sectors, namely, Building & Construction, Energy & Power, Events & Sports, Hospitality & Tourism, Oil & Gas, Real Estate & Retail, and Shipping & Trade. In the second part of this guide, we examine the general legal implications on contracts, employment, financing, mergers & acquisitions, personal data protection, and social media.

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Part I – Sectorial Impact

1. Building & Construction

by Nereen Kaur Veriah

The building and construction industry in Malaysia relies, to some extent, on the availability of material from China. As a result of COVID-19, the steady flow of materials from China for on-going construction projects could face disruption.

Not only will employers see an increase in applications seeking for extension of time as a result of delays faced, contractors may similarly face prolonged periods of delay which may impact the critical path of the scheduled progress of work.

Under the Malaysian Institute of Architects (PAM) 2006 Standard Form of Building Contract and the Public Works Department (PWD) 2007 Standard Form of Contract (Form 203A), the contractor has a right to apply for an extension of time if there is a force majeure event.

While the definition of a force majeure event under both standard form contracts vary, the underlying theme for both forms are that circumstances are beyond the control of the contractor, or such events which an experienced contractor could not reasonably have been expected to take precautions against.

Should the COVID-19 outbreak constitute a force majeure event, which it arguably could, the contractor may be able to seek an extension of time subject always to proof that the delay impacted the critical path of the scheduled progress of work. Any claims arising from such delay must be made promptly and supported with full particulars of the delay and its corresponding impact.

2. Energy & Power

by Eileen Yeoh

On 27 February 2020, the Government announced the 2020 Economic Stimulus Package (“**2020 ESP**”) in an effort to address the economic risks associated with the outbreak of COVID-19. Assuming the new Government implements this, Strategy III which relates to “Promoting Quality Investments” encourages agencies and Government-Linked Companies to accelerate planned investments projects for 2020, including for the Ministry of Energy, Science, Technology, Environment and Climate Change to open an additional 1,400 MW of solar power generation bids.

In any event, solar developers should be mindful of the committed timelines and, correspondingly, the force majeure clause specified in the bid documents which will excuse any failure to achieve the Scheduled Commercial Operation Date. Given the import dependency on China for sourcing of solar photovoltaic (“**PV**”) modules, solar developers may encounter challenges which could potentially play spoilsport to the execution timelines for their solar projects due to any delivery delays of the PV modules and uncertainty over when the manufacturing operations in China will regain its normalcy.

On 30 January 2020, the China Council for the Promotion of International Trade (“**CCPIT**”) announced that it would offer force majeure certificates (“**FM Certs**”) to help affected enterprises minimise losses arising from COVID-19. To date, China has issued more than 1,600 FM Certs to shield companies from legal suits if their businesses with overseas partners have been affected by COVID-19.

The FM Cert serves to excuse affected companies from any failure to perform its contractual duties, by proving that such affected companies are suffering from circumstances beyond its control. CCPIT claims that its FM Cert is recognised by Governments, customs, trade associations and enterprises of more than 200 countries and regions.

The contractual provision that usually appears in power purchase agreements for large scale solar projects in Malaysia defines a “Force Majeure Event” as, *“an event, condition, or circumstance or its effect which is beyond the reasonable control of and occurs without fault or negligence on the part of the party claiming it as a Force Majeure Event, and causes a delay or disruption in the performance of any obligation under the power purchase agreement despite all reasonable efforts of the party claiming such disruption as a Force Majeure Event to prevent or mitigate the effects of the Force Majeure Event”*.

It is interesting to note that, subject to satisfying the foregoing criteria, these power purchase agreements provide a non-exhaustive list of force majeure events, which includes *“any force majeure event affecting the performance of any person that is a party to the EPCC Contract or other contract between the solar developer and such person relating to the construction, operation or maintenance of the solar facility”*.

If a China-based solar PV modules supplier contracting with a Malaysian solar developer produces a CCPIT FM Cert, the question remains whether a CCPIT FM Cert *per se*, is sufficient for the China-based solar PV supplier to prove that a force majeure event occurred and, thereby, that it may be excused from the performance of its obligations under the contract with the solar developer.

Notwithstanding that the CCPIT FM Cert provides support of an affected party’s claim that it is unable to perform its contractual duties due to circumstances beyond its control, that affected party should still be required to provide factual proof of the causal link between the force majeure event relied upon (due to COVID-19 and the preventive measures implemented), which consequently affected that party’s ability to perform its obligations under the contract.

3. Events & Sports

by Sri Sarguna Raj

Many events around the world have been cancelled or postponed as a result of the COVID-19 outbreak. Governments and businesses alike have advised against events that gather large crowds to prevent the spread of the disease.

The Tier One international friendly between Bahrain and Malaysia, which was scheduled to take place at the Khalifa Sports City Stadium in Isa Town on 21 March 2020, has been cancelled by the Bahrain Football Association. Similarly, the FIBA Asia Cup 2021 qualifying match between China and Malaysia, to be held in Foshan on 24 February 2020, has also been rescheduled. Japan has also indicated that it may postpone the Olympic Games to the end of 2020. Numerous regional and global conventions and events have similarly been cancelled or postponed. Many countries have also issued travel advisories and health and safety warnings in relation to large scale events.

These actions would definitely give rise to the question of breach of contract and whether force majeure or frustration can be raised as a defence. This would especially be relevant in respect of cancellation or deferment of sponsorships, advertising, hosting and rental of sporting venues. Alternatively, on a goodwill basis, parties can agree to defer their obligations under the agreement to a later date, which appears to be what has happened in many instances given that businesses across the board have been impacted.

4. Hospitality & Tourism

by Ooi Ju Lien

Based on statistics from Tourism Malaysia, there were approximately 2.1 million tourists from China in 2019, representing 11% of the total number of inbound travellers, making China the country with the second highest number of travellers to Malaysia.

The health advisory issued by WHO has also advised countries to be prepared for the necessary precautionary measures such as repatriation and quarantine of travellers for the prevention of onward spread of COVID-19.

Many industry participants such as hotel operators, airlines, tour agencies and event management companies have been overwhelmed by cancellations and customers seeking compensation due to the travel restrictions. Are service providers obliged to provide compensation or entertain such change requests?

Whether service providers must accede to the requests of their customers would depend on the terms of their contracts. If the contracts contain clear force majeure provisions which envisage a global phenomenon of this scale and nature, then the answer would be yes.

In any case, given the severe consequences of COVID-19 on the industry, the Government announced the 2020 ESP, which has several incentives targeted at the tourism and hospitality industry. These include:

- (i) deferment of monthly income tax instalment payments for businesses in the tourism sector from April until September 2020;
- (ii) 15% discount in monthly electricity bills to hotels, travel agencies, airlines, shopping malls and exhibition centres;
- (iii) exemption from Human Resource Development Fund levies for hotels and travel related companies; and
- (iv) exemption of 6% service tax for hotels.

However, like all incentives, these are transient in nature. While the 2020 ESP might mitigate the impact of COVID-19 on the economy during this critical period, it is neither a long term solution nor the only measure which companies can take.

Customers would likely be the party seeking to rely on force majeure provisions to recover any payments made for these services. From the perspective of service providers, given that COVID-19 is not the first epidemic which adversely impacted the industry, consideration should be given in drafting force majeure provisions to take into account the possibility of such epidemics in future. Similarly, terms governing termination, frustration and amendment of contracts should be revised to cater for situations such as cancellation of events or flights arising from the travel bans.

5. Oil & Gas

by Eileen Yeoh

COVID-19 has battered China's economy, shuttering businesses and prompting the quarantine of tens of millions of people in the world's biggest crude oil importer. Oil importers across China's state-owned and private refining entities are struggling to take delivery of committed quantities of purchased crude and gas cargoes.

Some buyers in China are declaring force majeure in light that the quarantines, lower production output, production shutdowns, operation curtailment and flight restrictions have eroded fuel demand and cut processing throughput. Most contracts in the oil and gas industry set out a non-exhaustive list of force

majeure events, which includes “*epidemic and quarantine restrictions*” and “*an action or directive issued by the specific Government of that contracting party*”. Notwithstanding that such events are specified as constituting force majeure, careful consideration should be given to the nature and effect of such events.

The effect of COVID-19 and the quarantine restrictions imposed by the Chinese Government on the supply and delivery of crude oil should only be deemed as a force majeure event if such quarantine restrictions affected or disrupted a party’s performance under its contract. Whether such buyers may succeed in claiming relief from their obligations due to the occurrence of a force majeure event will depend on whether:

- (i) the preventive measures implemented by the Chinese Government to curb the spread of COVID-19 constitute an event of force majeure within the definition provided in the contract;
- (ii) even if these preventive measures constitute an event of force majeure, such preventive measures have prevented, impeded or delayed and/or continues to prevent, impede or delay the affected buyer’s performance of its obligations under the contract; and
- (iii) the affected buyer complied with its obligations under the contract vis-à-vis the force majeure event including promptly notifying the seller of such force majeure event and taking reasonable actions to limit or mitigate the effect of the force majeure event on the performance of the buyer’s obligations under the contract.

Therefore, the precise wording of the contract should be carefully assessed as force majeure clauses often refer to a party’s performance being “*prevented*”, “*hindered*” or “*delayed*”. Each phrase may be construed differently in the context of the entire force majeure clause and against the contract as a whole. The more important point to note is that “force majeure” cannot be construed to extend to an event which makes it more difficult or costly for a party to perform its obligations under the contract.

6. Real Estate & Retail

by Lee Hock Chye and Eileen Yeoh

In the 2020 ESP, the Government has called for shopping malls to reduce rentals. This follows retailers having called upon shopping malls and landlords to provide tenants with a six month rental rebate in order to remediate or reduce the adverse commercial impact from the drop in consumer foot traffic, as well as additional cost incurred in socially responsible activities such as providing additional cleaners, hand sanitisers and other good hygiene practices. Reports in the media have proposed that shopping mall operators consider allowing their retail tenants to operate shorter business hours mall-wide on weekdays, or that the shortened business hours apply for certain types of business tenants, as part of the measures to reduce operating cost.

The joint statement by the Malaysia Retailers Association, Malaysia Retail Chain Association, Bumiputra Retailers Organisation, ASEAN Retail-Chains & Franchise Federation, and Branding Association of Malaysia, which called for rental rebates ranging from 30 to 50%, is consistent with the developments happening in Hong Kong and Singapore. However, the Malaysia Shopping Malls Association had expressed that it is too soon to assess the impact of COVID-19, as it will need time to analyse and monitor data to curate an appropriate and targeted action plan.

As in Hong Kong and Singapore, some tenants and landlords in Malaysia have increased their focus on force majeure clauses in their lease agreements in an effort to determine whether the current situation will affect their respective rights under these lease agreements. Ultimately, tenants will look to establish whether any business disruption caused by COVID-19 will entitle them to claim relief on their obligations arising under the lease agreements.

Force majeure is generally defined as “unforeseeable circumstances that prevent someone from fulfilling a contract”. Whether or not the COVID-19 outbreak amounts to a force majeure event will be heavily dependent on the facts of each individual case and the terms of the force majeure clause within the lease agreement.

In order to make a successful claim on a force majeure clause, the affected party must prove that:

- (i) one of the events defined as “force majeure” in the lease agreement occurred;
- (ii) the affected party was prevented, hindered or delayed from performing its contractual obligations due to the force majeure event;
- (iii) the affected party could not perform its obligations due to circumstances beyond its control; and
- (iv) the affected party has taken reasonable measures to avoid or mitigate the force majeure event or its effects.

If an affected party is successful in establishing a claim based on force majeure, the affected party is excused or may claim relief from the performance of its obligations under the lease agreement. In the context of lease agreements, such recourse may include the right to terminate the lease (usually due to prolonged duration of the force majeure event) or in seeking an extended time for payment of rent.

7. Shipping & Trade

by Clive Navin Selvapandian

It is well documented that COVID-19 has had a particularly grave impact on the global supply chain and in particular the maritime industry. The fact that the virus originates from China, the leading trade partner of most countries and by most accounts the world's leading economy, simply compounds the situation. The outbreak disrupts the import and export of goods and commodities from China and softens demand from Chinese consumers.

Perhaps the best example of the maritime industry's attempt to deal with epidemics of this nature is in the wording of its standard form contracts. Clause 25 of the widely used Supplytime 2005 Charterparty, for instance, reads:

'25. Epidemic/Fever

The Vessel shall not be ordered to nor bound to enter without the Owners' written permission any place where fever or epidemics are prevalent or to which the Master, Officers and Crew by law are not bound to follow the Vessel.

Notwithstanding the terms of Clause 13 [the Off hire Clause], Hire shall be paid for all time lost including any lost owing to loss of sickness to the Master, Officers, Crew or passengers or to the action of the Crew in refusing to proceed to such place or to be exposed to such risks.'

The impact of a virus outbreak as such can be further underscored by adopting a force majeure provision such as Clause 32 of the Supplytime 2005 Charterparty, which similarly includes an "epidemic" as a force majeure event.

These clauses seek to provide ready-made solutions in the face of an outbreak, perhaps building on the industry's experience with the previous SARS and MERS outbreak. Such provisions, however, place the risk of an epidemic squarely on one party. It would therefore be prudent to bear in mind that a careful reading of the clauses is necessary as (under Malaysian law at least) the party relying on the clause to insist on or excuse performance has to prove that his case falls squarely within the ambit of the relevant clause. This is in keeping with the approach of the Malaysian Courts in holding parties to their bargain.

Part II – General Legal Implications

1. Contracts

by Han Li Meng

Assuming there are no termination rights for an epidemic or force majeure provisions in a contract, there is still a possibility that the contract could be deemed frustrated and, therefore, void as a result of the COVID-19 outbreak. In such instance, neither party would need to perform their obligations under the contract.

Section 57(2) of the Malaysian Contracts Act 1950 (“**Contracts Act**”) provides that, “*A contract to do an act which, after the contract is made, becomes impossible, or by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful*”.

The party who intends to rely on Section 57(2) of the Contracts Act must show that:

- (i) the event upon which the promisor relies as having frustrated the contract must have been one for which no provision has been made in the contract. If the provision has been made, then the parties must be taken to have allocated the risk between them;
- (ii) the event must be one which the promisor is not responsible for; and
- (iii) the event must be such that renders it radically different from that which was undertaken by the contract.

Not all contracts can therefore be said to be frustrated by the COVID-19 outbreak. A company would have to prove that the outbreak has made it impossible, as opposed to simply being more difficult, to discharge its contractual obligations, or that doing so has become unlawful. These would be questions of fact to be determined in each instance.

Once Section 57(2) frustration is proven, the contract will be declared void and Section 66 of the Contracts Act provides that any person who has received any advantage under the contract is bound to restore it, or make compensation for it, to the person from whom it was received.

Additionally, Section 15 of the Civil Law Act 1956 (“**Civil Law Act**”) also specifically provides for the following remedies where a contract¹ is frustrated:

- (a) any sum paid or payable to any party in pursuance of the contract before the parties were so discharged, shall be recoverable from him or cease to be payable;
- (b) if the party to whom the sums were so paid or payable has incurred expenses for the performance of the contract before the discharge, the Court may even, in its discretion, allow him to retain or recover the whole or any part of the sums so paid or payable; and
- (c) any party to the contract who has obtained a valuable benefit before the time of discharge, shall also be recoverable from him by the other party such sum, if any, as the Court may determine.

Contracting parties are encouraged to first review and/or renegotiate their contractual terms of performance. Only if the attempt fails should parties resort to dispute resolution proceedings. Doing so allows contracting parties to foster a greater long-term commercial relationship, and to avoid spending unnecessary time, resources and cost on litigation or arbitration.

2. Employment

by Han Li Meng

On 5 February 2020, the Ministry of Human Resources issued the Guideline on Handling Issues Relating to Contagious Outbreaks Including COVID-19 at Workplace (“**Guideline**”). Even though the Guideline does not have any statutory effect, employers are encouraged to follow its recommendations to ensure that employees:

- (i) showing respiratory symptoms and employees returning from countries reported with COVID-19 cases to immediately undergo medical examination with the costs being borne by the employer;
- (ii) certified by registered medical practitioners as showing signs of infection are entitled to paid medical leave or hospitalisation leave;
- (iii) put under home surveillance or quarantine orders by certified medical practitioners are paid in full;
- (iv) who are not put under home surveillance or quarantine orders are not prevented from reporting to work; and
- (v) put under home surveillance or quarantine by certified medical practitioners are not compelled to offset this with annual leave or unpaid leave.

¹ Note, however, that if the parties’ contract falls within the category of contracts under Section 16(5) of the Civil Law Act, the remedies under Section 15 would not be available to the parties.

Additionally, employers should also be aware that under both the common law and the Occupational Safety and Health Act 1994, employers are obliged to provide a safe and healthy workplace. This includes a duty to formulate and implement a safety and health policy at the workplace. Failure to do so will expose employers to a fine of up to MYR50,000, or imprisonment of up to two years, or both.

Some of the measures employers could include in their health and safety policy are guidelines prohibiting travel to places with reported COVID-19 cases, adopting strengthened hygiene standards at the workplace, providing updated symptoms alerts, mandating that employees showing respiratory symptoms to seek immediate medical examination, and conducting hygiene awareness trainings.

3. Financing

by Chor Jack

As with general corporate facility agreements in most jurisdictions, Malaysian facility agreements would almost invariably **not** contain a clause on force majeure allowing the borrower to defer its obligations under the facility. This reflects the general position that economic hardship or financial inability are not good grounds to be considered as force majeure events.

However, a force majeure event impacting the borrower's business could affect its financial health, which may in turn lead to difficulties in the borrower's servicing of debt. Failure by the borrower to make payments under the facility when due could potentially result in an event of default which, if continuing, would allow the lender to accelerate the facility.

Where there are financial covenants under the facility agreement which relate to the borrower's business, e.g. the debt service coverage ratio, the borrower's poor financial condition may also see it breaching those covenants. An event of default could arise should the borrower fail to remedy such a breach (if capable of remedy) and, if such breach continues, may also allow the lender to accelerate the facility.

Borrowers who are/could be affected by a force majeure event should review the terms of their facility agreements to ascertain whether any of their obligations could be impacted by such an event. Those borrowers may then approach their lenders to discuss the best way to address the issue. Due to the widespread economic impact that COVID-19 has wrought, many lenders would also be prepared to consider requests from affected borrowers. For instance, certain local banks have recently offered moratoriums to customers who are affected by the outbreak and have indicated that they would be open to accommodating requests by affected customers to restructure or reschedule their facilities.

4. Mergers & Acquisitions

by Yau Yee Ming

With Governments restricting movement of people across borders and temporary halts or slow-down in manufacturing in China, a cloud hangs over the value, performance and at least short-term business prospects of M&A assets. Obviously, these circumstances can be a boon to potential purchasers looking for a bargain or pressure on an owner to sell.

In these circumstances, deal makers will be looking at their standard transaction agreements either to ensure that the transaction proceeds as agreed or that the transaction is aborted, depending on which side of the negotiation table they are sitting on.

Transaction documents often contain material adverse change ("**MAC**") provisions that allow the purchaser (and sometimes even the seller) to terminate a transaction in the event of occurrence of a MAC. The question of whether a MAC provision allows a party to walk or requires the parties to proceed with a transaction really depends on the MAC agreed between the parties.

The occurrence of an epidemic, with a resulting loss in productive activity, by itself does not necessarily constitute a MAC if the MAC provision is drafted generally, without specific reference to the occurrence of an epidemic and how to determine whether an epidemic has occurred. The drop in production by an M&A target, and dip in revenue too, may not constitute a MAC if the agreement contains mechanisms to adjust the value/price of the M&A target.

In order to be certain that a MAC provision will have its intended effect (whether that effect is to force termination of the transaction, or to require that the transaction proceed notwithstanding unusual circumstances) the provision should ideally refer specifically to an event or circumstance in sufficient detail to enable any reasonable person to determine when the event or circumstance is triggered. A example of such a provision would describe an event as "the occurrence of a natural disaster, civil conflict, industrial action or disease that causes or is related to a drop in revenue of more than 5%".

Alternatively, a MAC provision in an agreement that already contains a price-adjustment mechanism that takes into account any reduction in earnings after the agreement is executed, can specifically clarify that no deterioration in the financial performance of the company will, by itself, constitute a MAC.

5. Personal Data Protection

by Deepak Pillai

With the unabated spread of COVID-19 across countries, there is an increasing likelihood that organisations will need to consider the possibility of their employees contracting COVID-19 and potentially exposing their work colleagues and/or clients or customers to infection.

Employers may face immediate and very real questions such as:

- (i) Is the employee required to inform the employer that he has contracted COVID-19?
- (ii) Where the employer has been informed by the employee that she/he may have contracted COVID-19, does the employer have a duty of care to forewarn the employee's colleagues and customers that they may have been exposed to COVID-19?
- (iii) Does the employer also have a duty to inform the authorities of the fact that the employee has contracted COVID-19?

Prior to determining the action to be taken, employers would be well advised to consider the rights of the employee under the Personal Data Protection Act 2010 ("**PDPA**").

Information relating to the medical condition of the employee belongs to a class of personal data (i.e. "sensitive personal data"), which requires a higher degree of care than normal personal data. The disclosure of sensitive personal data (such as the exposure of an employee to COVID-19) to third parties is provided for in the PDPA, but only where the employee consents or in certain other limited circumstances as detailed in the PDPA (e.g. where the employer cannot reasonably be expected to obtain the consent of the employee).

While it may be clear to an employer that it is required to protect the interests of its customers and the colleagues of an employee infected with COVID-19, the employer is also under a statutory duty to protect/not disclose the identity of the said employee, in order to avoid him/her being discriminated against at the work place.

Failure to adhere to these specific requirements of the PDPA would expose the employer to potential complaints being lodged with the PDPA Commissioner by the employee. Should the employer be found to be in breach of the PDPA, fines of up to MYR200,000 and/or imprisonment for a term of up to two years may be imposed on the employer.

The above exposure may be mitigated by crafting suitable provisions within the organisation's terms of employment, human resource policies and/or safety and health guidelines of the organisation.

6. Social Media – Fake News

by Anissa Maria Anis

On 19 December 2019, the bill to repeal the Anti-Fake News Act 2018 (“**AFNA**”) was passed and with that, the very short life-span of the legislation that was initially put in place to safeguard the public against the dissemination of fake news, will end once the bill comes into effect. The repeal of the AFNA reflected the Government’s change in policy that fake news may be dealt with under existing laws such as the Penal Code and the Communications and Multimedia Act 1998 (“**CMA**”).

With the present COVID-19 outbreak, news, data, information and speculations about COVID-19, fake or otherwise, are going viral at an alarming rate – raising the issue of how this invariable proliferation of fake news on COVID-19, especially in today’s social media driven world, can be curtailed and managed by affected countries. Uncontrolled and irresponsible spread of information can lead to fear and panic, and increase the risk of citizens taking measures that could cause more harm than care. Examples of this include making defamatory or false claims, panic-buying of medical supplies and daily necessities, and prejudicial conduct against those who are or are suspected of having the disease.

Social media and online messaging platforms, including news apps belonging to traditional media, have been forced to ramp up their efforts to curb the spread of fake news, to ensure their platforms do not incite panic or cause harm, as authorities try to address the outbreak. For example, Facebook has announced that it would use its existing fact-checkers to review and expose misinformation in order to limit the spread of false information about COVID-19. It also indicated that it would notify individuals who had shared or were trying to share information that has been flagged as fake or false.

While the Facebook-owned messaging app, WhatsApp, is a closed platform thus making it harder for fact-checkers to track fake news, it has already taken measures to combat the spread of fake news, including introducing limits on the number of messages that can be forwarded in a chat and automatic detection of bulk or automated messaging. On the other hand, authorities have also used social media to inform the public about the correct news and information about COVID-19 in the country.

In the absence of the AFNA, authorities have sought to rely on the CMA and Penal Code to penalise offenders who are caught spreading fake news, where offenders can be liable to a fine, imprisonment or both. To date, at least 12 individuals suspected of spreading fake news about or related to COVID-19 on social media platforms have been hauled up for investigation by the Malaysian Communications and Multimedia Commission and the Royal Malaysian Police under the powers granted by the CMA. In any event, individuals and companies with social media pages and sites should be aware of the laws that remain in place to curb the spread of fake news and defamatory statements, as well as laws on personal data protection. Companies should therefore revisit their social media policies and practices not just to ensure that these are managed responsibly but also to ensure that they do not infringe the law.

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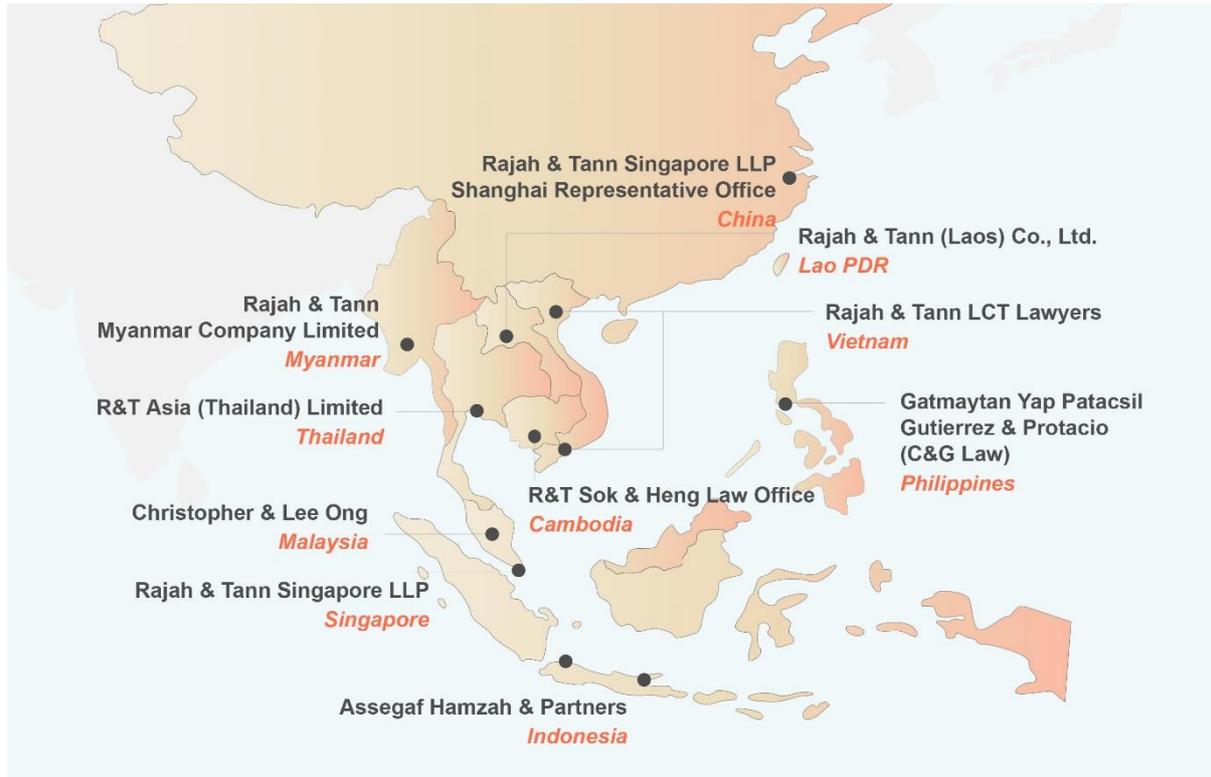
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