

THE EFFECTS OF LAW IN MALAYSIA IN GUIDING BUSINESS CONTINUITY MANAGEMENT

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Abstract: The importance of Business Continuity Management either in private or government sector is the vital indicator of their successful business survivability and service operation continuity, so much so that a few industries and sectors in Malaysia had recognized the need of establishing the Business Continuity Management as compulsory requirement for the business to be considered sustainable and survivable. The aim of this paper is to review the effects of law in Malaysia in guiding the Business Continuity Management practice. The result should assist in the approach of Business Management practice that complies with the legal requirements, regulations and standards that exists in Malaysia.

Keywords: Business Continuity Management; Laws; Legal Provisions; Standards; Regulatory; Malaysia.

I. INTRODUCTION

The Business Continuity Management model is aimed to deliver a methodical approach to the management of any adverse occurrence that has the probability to damage an organization and to establish the basic principles as to ensure the recovery of timely dependent or critical business operations that have been interrupted. The Business Continuity Management model consists of policies, procedures and plans that provide the competency to continue the organization business operations with minimum impact in the event of an emergency, crisis or incident, to manage recovery, and identify opportunities for subsequent improvement. However, how legitimate is Business Continuity Management in Malaysia? Are there any laws, regulations and standards for BCM in Malaysia and to what extent do the laws, regulations, and standards guide in establishing Business Continuity Management in Malaysia?

II. LITERATURE REVIEW

Business Continuity Management is nothing new today. According to [1], Business Continuity Management starts as early as 1960 from Crisis Management and Disaster Recovery planning and continues to develop into Business Continuity Planning and Business Continuity Management. Figure 1 describes the development of Business Continuity Management from the era of development stage up until the standardization stage until today.

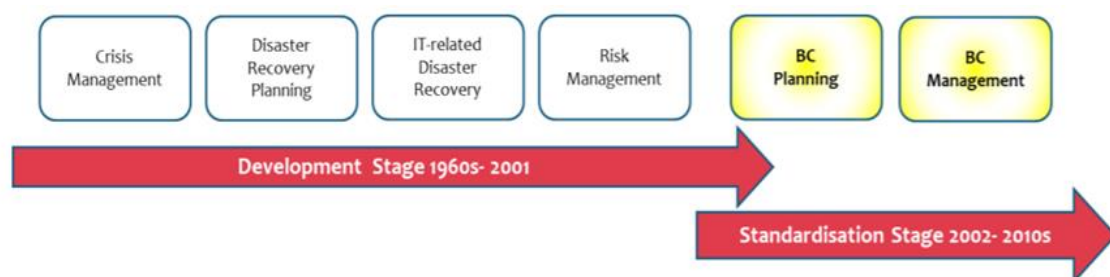


Figure 1: Business Continuity Management History and Development Stage

Business Continuity Management is a whole process that primarily contains the Business Continuity Planning which will then be divided into Emergency Response, Disaster Response and Business Response plan. As far as Business Continuity Management is concern, the initiatives in Public Sector in 2016 have seen the Malaysian Nuclear Agency (Nuklear Malaysia) was chosen to be the pioneer in adopting the Business Continuity Management (BCM) that refers to ISO 22301:2012 [1]. The project aims to focus organization strength in the capability of preparedness, anticipation, respond and adaptation to alterations and rapid disruptions in terms of survivability and sustainability of organization's services and operations.

According to [2] The ISO 22301: 2012 is the world's first international standard for Business Continuity Management, aiming to support organization in reducing the business disruptions risk. It is imperatively vital to have a world standard guide to Business Continuity Management as it will assist organizations to adopt and implement the best practice of approaching and executing it. ISO 22301: 2012 is all about an international network standard for Business Continuity Management that provides a framework to plan, establish, implement, operate, monitor, review, maintain and continually improve a Business Continuity Management System [3]. Nevertheless, without neglecting the importance of world's standard, our very own nation also has its own fair share of regulations and guidelines for creating Business Continuity Management.

Regulatory bodies in Malaysia such as the Malaysian Central Bank or more commonly known as Bank Negara Malaysia (BNM) and Securities Commission Malaysia also enforced their own regulations related to Business Continuity Management. A report from [4] highlighted that The Securities Commission Malaysia (SC) has published a new document 'Guiding Principles on Business Continuity' for capital market entities, as part of its ongoing efforts to enhance the systemic resiliency of the capital market.

The principles, developed in consultation with the industry, cover six areas: Principle 1: Responsibility of the Board and senior management; Principle 2: Major operational disruptions; Principle 3: Recovery objectives and strategies; Principle 4: Communications; Principle 5: Testing and Training and Principle 6: Maintenance and Review. According to [5] the establishment of Guidelines on BCM by the BNM was due to the objective of the Ministry of Finance to guarantee a chain of secure financial systems in the country. The goal of the regulations is to provide guidance and impose minimum requirements of BCM on financial institutions to ensure that their services and business is not disrupted should anything happen. Banking services played a big role in our day-to-day business, hence the move from BNM is vital to all levels of customer either individual or company.

Conclusively, it can be said that the guiding principles from Bank Negara Malaysia and Securities Commission Malaysia are created due to the industry needs. The ISO 22301 is another reference or standards that can be referred when planning for Business Continuity Management. All of them are being implemented differently with regards to their industry requirements but with the same objective of BCM.

III. DISCUSSION AND ANALYSIS

Currently, there are no legal provisions precisely stating that all industry either government or private sector must have BCM as part of their business operation and practice. In spite the lack of legal provisions exclusively for BCM, there are regulatory requirements from BNM, The Malaysian Communications and Multimedia Commission (MCMC) and Securities Commissions Malaysia for related industries to comply and they are considered as by-laws. It is also noted that there are no legal provisions stating 'the capacity to sue or be sued', 'the non-existence of BCM in the government or private sector is considered as an offence' and 'the absence of BCM in a company can be charged'. Thus, it is fair to say that only the regulatory compliance from BNM, Securities Commission Malaysia and MCMC can be considered as legally binding in developing, maintaining and reviewing their BCM with respect to their industry.

In light of the foregoing, the question of BCM legitimacy in Malaysia will bring us straight to the question of availability of such laws, regulations and standards. Under the supreme law of Malaysia, there are a few provisions that somehow related to BCM. Article 150 (1) Federal Constitution of Malaysia stated that: *If the Yang di-Pertuan Agong is satisfied that a grave emergency exists whereby the security, or the economic life, or public order in the Federation or any part thereof is threatened, he may issue a Proclamation of Emergency making therein a declaration to that effect* [6].

Emergency is part of BCM, referring to the Article 150 (1), this basically means that the Yang di-Pertuan Agong (YDPA) can declare a state of emergency if he feels that the nation may experience some sort instability. It must be stressed out that the declaration of emergency does not solely depend on war time only. In 2013, Malaysia declared the state of

emergency in various districts in Johor due to air pollution [7]. However, a state of emergency cannot simply be declared, because according to Article 40 Federal Constitution of Malaysia: *In the exercise of his functions under this Constitution or federal law the Yang di-Pertuan Agong shall act in accordance with the advice of the Cabinet or of a Minister [9]*. This means the declaration of emergency by the YDPA is made, only after he has been advised to do so by the government.

It is also noted that under the Article 150 (2) Federal Constitution of Malaysia: *A Proclamation of Emergency under Clause (1) may be issued before the actual occurrence of the event which threatens the security, or the economic life, or public order in the Federation or any part thereof if the Yang di-Pertuan Agong is satisfied that there is imminent danger of the occurrence of such event [10]*. This means that the declaration of emergency may be declared even before the actual event triggers if the YDPA sees it fits. After a state of emergency has officially been declared, all laws can be passed instantly without the proper procedure as practiced during outside the state of emergency.

Unfortunately, during an emergency, timing is very vital whereby the government may not have the luxury of time and laws must be passed quickly. This set of laws which are passed by the government during an emergency are called ordinances. This is inline with the Article 150 (2B) Federal Constitution of Malaysia whereby: *If at any time while a Proclamation of Emergency is in operation, except when both Houses of Parliament are sitting concurrently, the Yang di-Pertuan Agong is satisfied that certain circumstances exist which render it necessary for him to take immediate action, he may promulgate such ordinances as circumstances appear to him to require [11]*. An example of such an ordinance was enacted when a state of emergency was declared during the May 13th, 1969 Riots. However, whether ordinances will interfere with constitutional rights depends on the situation. Ordinance for detaining people is deemed unnecessary if the emergency is declared due to bad weather. Usually for weather emergencies, ordinances will be enacted to ensure the federal government can cure the situation swiftly. In addition to that, since the purpose of a state of emergency is to restore order from chaos, it does not last forever. Once order has been restored to the nation, the government can advise the YDPA to revoke his declaration of a state of emergency. Additionally, if Parliament decides that a state of emergency is no longer needed, they can vote to remove the state of emergency returning the country's governing system to normal operation.

When talking about the availability of a statutory binding law, it was discussed earlier that the BNM, Securities Commissions Malaysia and MCMC had already enforced their regulatory requirements for BCM. The BNM, Securities Commissions Malaysia and MCMC are empowered through enactment of legislation by the Parliament of Malaysia which is the Central Bank of Malaysia Act 2009 (replacing the Central Bank of Malaysia Act 1958), Securities Commission Act 1993 and Malaysian Communications and Multimedia Act 1998. Statutory binding means all circulars or guidelines created by BNM, MCMC and Securities Commission Malaysia are legal orders. This is true whereby according to Section 95 Central Bank of Malaysia Act 2009, Power to issue guidelines, etc.: *The Bank may, for— (a) giving effect to its objects and carrying out its functions or conducting its business or affairs;(b) giving full effect to any provision of this Act; or (c) the further, better or more convenient implementation of the provisions of this Act, generally in respect of this Act, or in respect of any particular provision of this Act, or generally in respect of the conduct of the Bank, issue such guidelines, by-laws, circulars, standards or notices as the Bank may consider necessary or expedient [12]*. This explains that the BCM guidelines from BNM are statutory and legally binding. All banking industries under the supervision of BNM must adhere to the requirement of setting up a sound BCM.

The power of Securities Commissions Malaysia in regulating the BCM for market entities can also be found under the Section 158 (1) Securities Commission Act 1993, Written notices circulars, conditions or guidelines: *The Commission may, generally in respect of any securities law or in respect of any particular provision of any securities law, issue such written notices, circulars or guidelines as the Commission considers desirable [13]*.

The Malaysian Communications & Multimedia Commission under the Malaysian Technical Standards Forum Berhad (MTSFB) also formulates the technical code for BCM Requirements. Technical code is generally a BCM guideline. This is pursuant to Section 185 (1) (b) Malaysian Communications and Multimedia Act 1998 whereby: *A technical code prepared by the technical standards forum or the Commission under this section shall include, but is not limited to, the following: (b) the promotion of safety of network facilities [14]*. With the power conferred from the Malaysian Communications and Multimedia Act 1998, the BCM in communications and multimedia industry is considered as statutory and legally binding.

Apart from the Statutory Binding discussed earlier, the Malaysian National Security Council also issued their Directive 20 or more commonly known as MKN 20 Directive whereby the objective is to draw a Land Disaster Management and Relief Policy based on level of disaster and to establish a Management Mechanism which decides the role and responsibility of agencies involved in actions against a disaster [15]. However, from legal point of view this is not statutory binding and considered as soft law. Every government body mentioned under the directive is already operating under their own statutory law (Armed Forces Act 1972, Police Act 1967 and other government agencies act). However, the existence of MKN 20 Directive does help in pointing out the roles and responsibilities of agencies involved when exercising any disaster management and recovery.

The final point of reference for BCM in Malaysia is the ISO 22301. It is regarded as the international standard for BCM practice and serves as a good practice for BCM. ISO 22301 is an international network standard for Business Continuity Management that provides a framework to plan, establish, implement, operate, monitor, review, maintain and continually improve a Business Continuity Management System (BCMS) [16].

Listed below are the published standards related to Business continuity management [17]:

- ISO 22301:2019 Security and resilience - Business continuity management systems - Requirements.
- ISO 22313:2013 Societal security - Business continuity management systems - Guidance.
- ISO/TS 22317:2015 Societal security - Business continuity management systems - Guidelines for business impact analysis.
- ISO/TS 22318:2015 Societal security - Business continuity management systems -Guidelines for supply chain continuity.
- ISO/TS 22330:2018 Security and resilience - Business continuity management systems -Guidelines for people aspects on business continuity.
- ISO/TS 22331:2018 Security and resilience - Business continuity management systems -Guidelines for business continuity strategy.
- ISO/IEC/TS 17021-6:2015 Conformity assessment - Requirements for bodies providing audit and certification of management systems - Part 6: Competence requirements for auditing and certification of business continuity management systems.

Standards are not statutory binding; it only applies to applicant acquiring the ISO certification.

The existence of such legislations, regulations, directives and standards for BCM in Malaysia brings us to the question of to what extent do they guide. Our supreme law of the nation, Federal Constitution of Malaysia though delivers lengthy explanation of declaring the state of emergency does not mentioned or provide any references for BCM. Though emergency is regarded as part of BCM, specifically the Federal Constitution of Malaysia did not cite any relation into it. This is quite similar to the MKN 20 Directive whereby it only focuses a few portions of BCM such as Emergency and Disaster Procedure as well as pointing the roles and responsibilities of agencies involved. Regulations made by the BNM, Securities Commissions Malaysia and Malaysian Communications & Multimedia Commission are seen to be more comprehensive whereby they produced guidelines that suits their industry needs. Table 1 illustrates the BCM guideline differences between Bank Negara Malaysia, Malaysian Communications & Multimedia Commission and Securities Commission Malaysia.

Table 1: BCM Guidelines differences

Guidelines Provided	BCM Guidelines from BNM	BCM Guidelines from MCMC	BCM Guidelines from Securities Commissions
Roles and responsibilities	√	√	√
Maximum Tolerable Downtime (MTD)	√	√	
Recovery Point Objective (RPO)	√	√	
Recovery Time Objective (RTO)	√	√	
Risk management	√	√	√
Business Impact Analysis (BIA)	√	√	
Critical Business Function	√	√	
Recovery Strategy	√	√	√

Testing and Training	√	√	√
Maintenance and review	√	√	√
Communication	√	√	√
Audit	√	√	√

From the figure above, BNM and MCMC guidelines for BCM provide the most comprehensive reference. This is different as oppose to the guidelines from Securities Commission Malaysia whereby it does not reflect on the MTD, RPO, RTO, BIA, Critical Business Function and Auditing.

The ISO 22301 which is the international standard for BCM is also offering comprehensive approach and guidelines. By acquiring the ISO 22301 certification, it shows that the company is maintaining their standard for BCM and this will ultimately reflect that they can be relied for business. The latest ISO 22301: 2019 specifies requirements to implement maintain and improve a management system to protect against, reduce the likelihood of the occurrence of, prepare for, respond to and recover from disruptions when they arise. What does the ISO 22301:2019 compared to ISO 22301:2012 has to offer? Figure 2 describes the comparison [18].

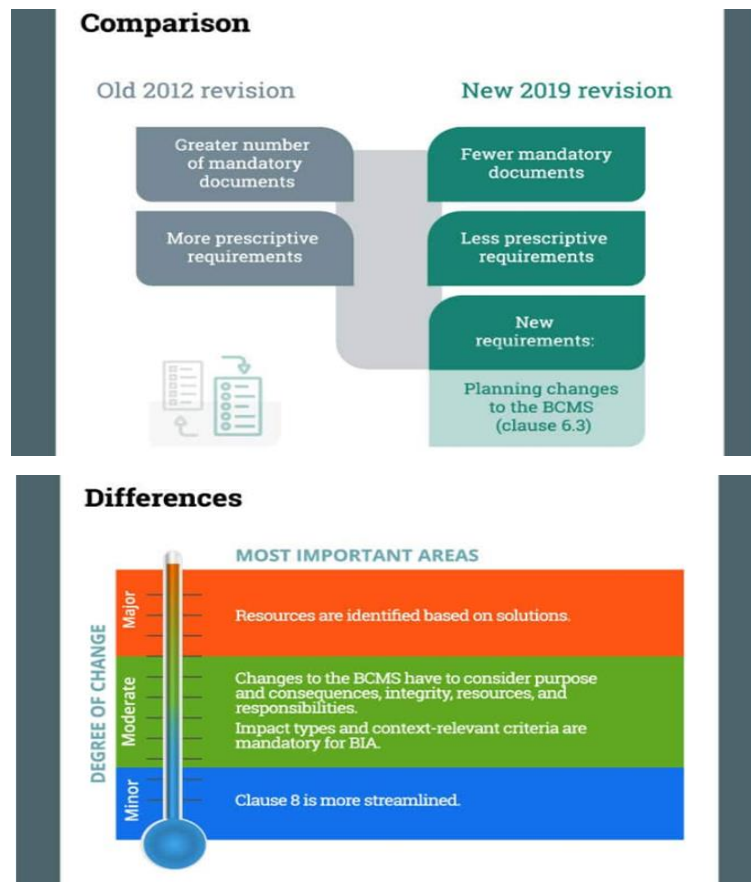


Figure 2: The difference and comparison between ISO 22301:2012 and ISO 22301:2019

IV. RECOMMENDATIONS

Although the current regulations and standards are in place, threats and disasters are changing with respect to industrial 4.0. To cater this, the implementation of BCM in Malaysia needs to be strengthened and continue to develop through the following recommended steps:

1. The introduction of Business Continuity Management Act as to make it statutory binding to all critical infrastructure agencies.
2. With the formation of BCM Act, Government Bodies that monitors and controls the industry should produce by-laws and comprehensive guidelines for BCM to related industries.
3. ISO standards are to be maintained as certification of good practice; however, the supreme rule is the by-laws for BCM and the BCM Act itself.

V. CONCLUSIONS

BCM in Malaysia is nothing new, though they were some industries practicing it; they are still rooms for improvement for BCM to flourish. In Malaysia as far as BCM is concern, regulations from BNM, MCMC and Securities Commission Malaysia are statutory and legally binding. Meanwhile, the Malaysian National Security Council (MKN 20 directive) is considered as soft law and legally binding to agencies involved but is not technically statutory binding. ISO standards are for good practice of BCM and functions towards company's credibility and capability of business.

In 2019, we have seen numerous accounts of BCM weaknesses that resulted in catastrophic damages especially in service deliveries. Without a doubt, the major incident had a direct relationship with BCM and it clearly shows how poor it was managed. Therefore, it is imperative that a proper BCM act needs to be passed to ensure enforcement, legality and its execution is made to be compulsory. The current laws in Malaysia do not instil the practice and culture except for a few industries such as banking, market share and telecommunication. The importance of BCM lies in the win-win situation whereby the community at large will benefit from uninterrupted service deliveries whilst companies will continue to survive and might even expand after learning from their BCM incidents and recoveries.

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