

# COVID-19 & Construction Sites: Effects of CMCO on Extension of Time and Loss & Expense Claims

The enforcement of the Movement Control Order (“**MCO**”) from 18<sup>th</sup> March 2020 brought most construction sites to a standstill. The movement control was later relaxed. As of May 2020, most construction sites could resume work but with heightened safety and health measures.

Earlier articles of Gan Partnership have explored the possible provisions under which the Agreement and Conditions of PAM Contract (**PAM Contract**), Fédération Internationale des Ingénieurs-Conseils Conditions of Contract for Plant and Design-Build (**FIDIC Form**) and the Asian International Arbitration Centre Standard Form Contract (**AIAC SFC**) may permit an extension of time (“**EOT**”) and possibly a loss and expense (“**L&E**”) claim by the contractor.

The focus of this article is on the relaxation of the MCO and how that affects the EOT and L&E claims. It was announced by the government on 1<sup>st</sup> May 2020 that most of the industries in Malaysia would be allowed to operate as of 4<sup>th</sup> May 2020 (“**CMCO**”) Certainly, with that relaxation, the contention that work on site has been prevented is no longer available.

## Introduction

With the CMCO, the government has stated that social distancing and such necessary regulations must be adhered to whilst contractors continue their operations. In this connection, the Construction Industry Development Board (“**CIDB**”) and Ministry of Public Works have circulated the Standard Operating Procedures (“**SOP**”) for those in the construction industry entitled “*Prosedur Operasi Standard (SOP) Dan Garis Panduan Kebenaran Beroperasi Serta Pergerakan Pekerja Bagi Projek Pembinaan Dalam Tempoh Perintah Kawalan Pergerakan (PKP) Fasa Ke-4*”, as well as the new SOP for the Construction Sector available on the Ministry of Public Works website.<sup>1</sup> Collectively, these measures include, amongst others:

- (i) daily temperature readings of each employee reporting to the site;
- (ii) employers are to ensure their employees observe social distancing on site; and,
- (iii) all vehicles transporting the contractor’s employees must be thoroughly disinfected every time before use.

The government has emphasised that all construction companies operating during the CMCO must strictly adhere to these SOPs.<sup>2</sup> Failure to do so may result in the forced shutdown of the site by the government. In such a case, the contractor would unlikely qualify for an EOT under most construction forms as the forced shutdown would likely be viewed as having been wrongfully caused by the contractor.

Notwithstanding that contractors are allowed to operate, there are concerns of costs of low productivity due to the disruption of the works carried out caused by implementation of the SOPs.

<sup>1</sup> National Security Council. (2020). *Garis Panduan Sektor Pembinaan*, [https://docs.ipa.gov.my/docs/pelbagai/2020/SOP/19\\_SOP\\_SEKTOR\\_PEMBINAAN\\_KKR.pdf](https://docs.ipa.gov.my/docs/pelbagai/2020/SOP/19_SOP_SEKTOR_PEMBINAAN_KKR.pdf)

<sup>2</sup> Chiam, Antonia (2020, May 4). *Fadillah: Contractors resuming operations during CMCO required to comply with MKN’s SOP*, Retrieved from <https://www.theborneopost.com/2020/05/04/fadillah-contractors-resuming-operations-during-cmco-required-to-comply-with-mkns-sop/>

There are also reports that the government will enforce a shutdown of the entire site if a positive COVID-19 case occurs on that site. There are also concerns that the costs of disinfecting a site will be charged to the contractor concerned. With these, notwithstanding the CMCO, does a contractor have the choice of remobilising to commence work on site?

## Opting to Operate

The relaxation of the MCO will not, in general, completely remove a contractor's entitlement to EOT and L&E, if such a right did exist with the MCO in place. Naturally, the ability to work albeit at a slower pace (because of the SOP) would likely reduce those entitlements. This should not be in controversy.

In reality, the flow of work on site may be significantly impacted as, for example, social distancing on site may be virtually impossible to be strictly observed since workers of almost all trades work in relatively proximity in order to carry out their work properly and, ironically, safely.

Also, work schedules may also require substantial improvisation. There may invariably be a knock-on impact even after the norm returns. Loss of momentum, for example. One may also need to take into consideration disruptions to the supply chain, which disruption may extend to beyond the MCO or CMCO. A delay analysis would have to be carried out to ascertain the effect of the reduced work rate as a result of the implementation of those SOPs as well as the extended effect of the global lockdown. This is fact based. Each project site will be affected in a different way.

## A Positive COVID-19 Case?

How would the contractor's entitlement be affected if, upon recommencing work, a worker on site tests positive for the COVID-19 virus? The site will be shut down, at least for the period of the disinfection. Is this a *force majeure* event? Is there a "lockout"? Is this due to an adherence of a directive or order of a statutory authority?

One view is that the relevant cause of the delay on site is either the pandemic or the MCO. This view, if accepted, would allow the contractor to rely on certain events under the standard form contracts for EOT, and possibly L&E. These events were discussed in the earlier articles.

Another view is that the relevant event is that of the worker contracting the virus. This was the intervening event post-pandemic, post-MCO, and post-CMCO. Works had already been permitted to proceed on site (albeit being regulated by the SOPs). It is the worker contracting the virus that had resulted in a subsequent shut down of the site. This latter view, may be the better view.

The latter view however does not mean, without more, that the subsequent shut down is attributable to the contractor, such as to deprive the contractor from EOT or L&E. Whilst from a regulatory standpoint the government may take the view that the contractor is responsible for the safety and health on site, when one is looking at EOT and L&E entitlements, these are contractual questions between the contractor and the employer. Most standard form contracts disentitle the contractor to EOT where the delay is attributable in some way or another to the contractor.

What if it can be shown that the contractor had complied with all SOPs, and had taken all reasonable steps to safeguard health and safety on site? Realistically, it may not be possible for the contractor to ensure that the workers are completely isolated from the virus. We know by now that some carriers of the virus are asymptomatic. They may not be detected by a simple temperature test.

Even if compulsory COVID-19 test is imposed on all foreign workers, what happens while results are pending? Bear in mind that the best of COVID-19 tests presently available is only accurate to about 60-70%. Bear in mind, too, that some personnel on site may be of artistes and tradesmen; they are not personnel of the contractor or his agents. The contractor has no control of the movement of these categories of personnel. Thus, placing complete responsibility on the contractor may be unjustifiably onerous. For example, in **Tenaga Nasional Bhd v Ahmad Zaki Resources Bhd**<sup>3</sup>, the court recognised that a contractor who is in possession of a site may not necessarily be responsible for all incidents on site (see also **Dow v AMEC Group Ltd**<sup>4</sup>, where the reasonable foreseeability of an incident was a relevant factor when deciding on the responsibility of the contractor for a workplace fire).

A better view is that the cause of the worker's infection, and whether it could have reasonably been prevented by the contractor, must be considered. It may be that the initial burden will rest with the contractor to show that all SOPs have been complied with, and perhaps all other reasonable steps taken protect the health and safety of the site. If this is satisfied, it is entirely arguable that the infection and resulting shut down is not an event attributable to any fault of the contractor.

In such an instance, it is arguable that the contractor would be entitled to an EOT if there is a consequent shutdown, pursuant to the following provisions:

- **PAM Contract**, Clauses 23.8(a), (d), (p) or (w)
- **FIDIC Form**, Clauses 8.5 or 19.1
- **AIAC SFC**, Clause 23.8(b)(i), (vii), (ix) or (xiv)

Of course, where a contractor does not adhere to the SOP or is unable to show that reasonable safeguards had been taken, the contractor is unlikely to be entitled to the EOT. Most standard form provisions will disentitle the contractor to EOT if the delays were caused by some negligence or omission by the contractor.

## Opting Not to Operate

With the difficulties that ensue, would it be preferable for the contractor to maintain its suspension of the works? The answer here is clearer.

With the relaxation of the MCO, if work on the site can in fact continue, then suspension of works is self-imposed. Most standard form contracts do not encourage such conduct by the contractor, and may disentitle the contractor to EOT.

Contending that the re-commencement of work may ultimately lead to a shut down because, for example the site cannot be secured, may be too tenuous an argument to take. It may also be viewed as being speculative. If one intends to take this argument, it has to be supported by cogent independent evidence of the cause and effect.

<sup>3</sup> *Tenaga Nasional Bhd v Ahmad Zaki Resources Bhd* [2013] 9 MLJ 511

<sup>4</sup> *Dow v AMEC Group Ltd* [2018] SC 247

## Conclusion

In conclusion, a contractor would generally be expected to re-commence work upon relaxation of the MCO, and take reasonable steps to prevent infection of the workers. Compliance with the SOPs is a minimum requirement. Under most standard form contracts, the contractor would still be entitled to EOT, and on certain instances L&E, if compliance with the SOPs result in a delay or disruption of their works. If a shutdown is brought about by an infection on site, then the contractor will first be placed to show that they have complied with the SOPs and have taken reasonable steps to safeguard the site.

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