COVID-19 – Movement Control Order and its Effect on Construction Contracts

Malaysia has imposed a Movement Control Order ("**MCO**") effective from 18th March 2020 to 28th April 2020 as a measure to curb the spread of COVID-19.

During the 1st and 2nd phases of MCO (from 18th March 2020 to 14th April 2020), MCO applies to building projects, except for "critical works" which are defined as those which can cause harm or damage to workers, public or environment if they are put to a stop. Examples of critical works are set out at item 4 of the FAQs as updated by the Minister of Works ("**MOW**") on 24th March 2020. However, one can apply for exemption if a recommendation is obtained from the project superintendent/project director for government projects and from the resident engineer/principal submitting person for private projects. Thereafter the exemption may be extended if approval is obtained from the persons identified at item 5 of those FAQs (*See the FAQs updated by the MOW on 24th March 2020 at* https://www.pmo.gov.my/2020/03/soalan-lazim-faqs-berkaitan-perintah-kawalan-pergerakan-kementerian-kerja-raya-malaysia-kkr/)

As for the 3rd phase of MCO (from 15th April 2020 to 28th April 2020), several construction projects and services related to construction works identified at Annex 1 of the Media Release issued by the Ministry of International Trade and Industry ("**MITI**") are allowed to operate provided the (i) application submitted is approved by the MITI and (ii) requirements of the Standard Operating Procedure are complied with (*see the Media Release issued by MITI on 10th April 2020 at* https://www.pmo.gov.my/2020/04/approval-to-operate-additional-sectors-to-bolster-the-economy-post-covid-19/)

In this article, we will look at 2 situations, one where there are express provisions governing the delays caused by MCO in a typical construction contract in Malaysia and the other where express provisions are not provided for.

Provisions Governing Delays Caused by the MCO

The provisions within a typical construction contract which recognise the time impact of an incident, such as MCO is the extension of time ("**EOT**"). This governs the contractor's entitlement to time, and ought to be distinguished from clauses which govern the termination of the contractual obligations.

Common terms specifying the delaying event caused by the MCO includes *force majeure*, delay caused by appropriate authority, suspension order by authority, change in legislation/law, etc. The contractor would be entitled to claim for an EOT if the MCO results in one of the events expressly set out in the EOT provisions. One must be mindful that these are merely provisions that regulate time entitlement under a contract. These clauses do not allow a party to terminate or walk away from the construction contract. Specific provisions are required for that.

In this article, we will examine some contractual provisions which may entitle a contractor to more time for its works, in view of the onset of the COVID-19 pandemic and the MCO. Both these events ought to be viewed as distinct events. Conceivably, the COVID-19 pandemic may have a longer and more widespread effect that the MCO.

Typical Construction Contracts

In the Malaysian construction sector, several standard form contracts underlie the contractual relationship between the parties on site. As between the developer and the main contractor, for instance, oft-used standard form contracts are the Agreement and Conditions of PAM Contract (although now in the 2018 edition, we will discuss the 2006 edition as this is likely the more widely used version today) ["**PAM Contract**"], the FIDIC Yellow Book (now in its 2017 edition, but we will discuss the 1999 edition as this is also likely the more widely used version today) ["**FIDIC**"] and AIAC Standard Form Contract (2019 edition) which is the second edition ["**AIAC SFC**"].

(1) What is *Force Majeure*?

Force majeure is French for "*superior force*". It does not bear a specific legal definition in Malaysia. Where *force majeure* is regulated in a construction contract, one has to turn to that contract for its legal definition.

(a) PAM Contract – Clause 23.8(a)

> *23.8(a) "Force Majeure"*

Article 7(ad) defines a *force majeure* event as "*any circumstances beyond the control of the Contractor caused by terrorist acts, governmental or regulatory action, epidemics and natural disaster*."

Governmental or regulatory action would include the 42-day MCO imposed by the Government of Malaysia due to the COVID-19 pandemic. Likewise, the pandemic itself falls within this definition of a *force majeure* event. Where the MCO affects the contractor's progress of works, the contractor would be entitled to an EOT under **Clause 23.8(a)**.

(b) FIDIC – Clause 19.1

> *19.1 In this Clause "Force Majeure" means an exceptional event or circumstance:*
> *(a) which is beyond a Party's control,*
> *(b) which such Party could not reasonably have provided against before entering into the Contract,*
> *(c) which, having arisen, such Party could not reasonably have avoided or overcome, and*
> *(d) which is not substantially attributable to the other Party*
>
> *Force Majeure may include, but is not limited to, exceptional events or circumstances of the kind listed below, so long as conditions (a) to (d) above are satisfied:*
> *(i) …*
> *(ii) …*
> *(iii) riot, commotion, disorder, strike or lockout by persons other than the Contractor's Personnel and other employees of the Contractor and Subcontractors,*
> *(iv) …*
> *(v) …*

All the 4 conditions set out in (a) to (d) of **Clause 19.1** must be satisfied for an event to qualify as a *force majeure*. **Clause 1.1.2.1** defines Party as "*Employer or Contractor, as the context requires.*"

The COVID-19 pandemic and the MCO are both beyond the control of the contractor. The contractor could not have foreseen the pandemic or the MCO (certainly this round of it) and thus could not have reasonably provided for imposition and subsequent extension of the MCO under existing construction contracts. The contractor must comply with the MCO and thus could not have reasonably avoided or overcome the said situation. Further, this situation is not caused by the Employer.

Provided all 4 conditions set out in **Clause 19.1** are satisfied, the contractor would be entitled to an EOT under **Clause 19.1** where his progress is delayed by the MCO as an exceptional event or circumstances.

However, for new construction contracts currently being negotiated after COVID-19 has been declared a pandemic by World Health Organization (WHO) and after the imposition of the MCO in Malaysia, it may be arguable that the contractor is required to reasonably foresee the situation and thereby reasonably provide for the MCO in its contract program. Consequently, the contractor is required to reasonably avoid or overcome the situation. In such circumstances, the MCO may not qualify as a *force majeure* event. This may well however be a moot discussion, as the next contract that is inked is likely to be after the lifting of the MCO.

It is noted that **Clause 19.1** also provides illustrations as to what is possibly a *force majeure* event. This includes a "lockout". A lockout is not defined in the FIDIC. **A Dictionary of Law (2nd Edn) by Curzon** defines "lockout" as "*the closing of a place of employment or suspension of work, or the refusal by the employer to continue to employ any number of persons employed by him in consequence of a dispute*." With the closure of constructions sites (non-critical works and unapproved construction works), it is strongly arguable that the illustration at **Clause 19.1(iii)** specifically captures the MCO.

(c) **AIAC SFC – Clause 23.8(b)(i)**

23.b(i) "Force Majeure as defined in Article 9"

Article 9.34 defines *force majeure* event as:

"*an exceptional event or circumstance which:*

(a) is beyond a Party's control;
(b) such Party could not reasonably have provided against before entering into the Contract;
(c) having arisen, such Party could not reasonably have avoided or overcome; and
(d) is not substantially attributable to the other Party.

Force Majeure may include, but is not limited to, exceptional events or circumstances of the kind listed below, so long as conditions 9.34(a) to (d) above are satisfied:

(i) …

(ii) …

(iii) riot, commotion, disorder, strike or lockout by Persons other than the personnel, servants, agents and employees of the Contractor and Subcontractors;

(iv) …

(v) …"

The *force majeure* provision in the AIAC SFC is similar to the corresponding FIDIC provision. The discussion above on the FIDIC provision applies here.

(2) What is a "lockout"?

Some construction contracts permit an EOT to be granted where there is a "lockout" from site. For example,

(a) **PAM - Clause 23.8(d)**

23.8(d)	*civil commotion, strike or lockout affecting any of the trades employed upon the Works or any of the trades engaged in the preparation, manufacture or transportation of any materials and goods required for the Works*

(b) **AIAC SFC - Clause 23.8(b)(ix)**

23.8(b)(ix)	*"Industrial action by workmen, strikes, lock-outs or embargoes affecting any of the trades employed upon the Works or in the preparation, manufacture or transportation of materials or goods required for the Works and provided the same are not attributable to any negligence, wilful act or breach by the Contractor, or any Person for whose actions the Contractor is responsible"*

Where there is no definition of "lockout" in a construction contract, one has to turn to, for instance, an authoritative textbook. **A Dictionary of Law (2nd Edn) by Curzon** defines "lockout" as "*the closing of a place of employment or suspension of work, or the refusal by the employer to continue to employ any number of persons employed by him in consequence of a dispute*."

On this definition of a "lockout", it is quite arguable that where the MCO results in a site closure (non-critical works and unapproved construction works) or work suspension, the contractor would be entitled to an EOT under **Clause 23.8(d)** of the PAM Contract or **Clause 23.8(b)(ix)** of the AIAC SFC.

(3) Suspension Order by an Appropriate Authority

Where suspension order by an Appropriate Authority is regulated in a construction contract, one has to turn to that contract for any further conditions as may be imposed under the contract. For example,

(a) **PAM Contract - Clause 23.8(w)**

> *23.8(w) suspension of the whole or part of the Works by order of an Appropriate Authority provided the same is not due to any negligence, omission, default and/or breach of contract by the Contractor and/or Nominated Sub-Contractors*

This delaying event requires there to be no fault of the contractor or nominated sub-contractor. **Article 7(b)** defines Appropriate Authority as "*any statutory authority having jurisdiction over the Works*." **Article 7(bf)** defines Works as "*works described in the Articles of Agreement and referred to in the Contract Documents and includes any changes made to these works in accordance with the Contract.*"

MCO is a suspension order issued by the Government of Malaysia as a measure to prevent the COVID-19 spread. It is however implemented by several agencies within the construction sector. As the MCO was not issued due to negligence, omission, default and/or breach of contract by the contractor and/or nominated sub-contractor, it may be contended that an implementation by an agency that is a statutory authority would entitle the contractor to an EOT under **Clause 23.8(w)** if the contractor's completion is affected.

(b) **AIAC SFC - Clause 23.8(c)(xiv)**

> *23.8(c)(xiv) suspension of the whole or part of the Works by order of an Appropriate Authority provided that the same is not attributable to any negligence, wilful act or breach of contract by the Contractor, or any Person for whose actions the Contractor is responsible*

As with the PAM Contract, this delaying event in AIAC SFC too requires there to be no fault of the contractor or any Persons of contractor's responsibility.

Article 9.3 defines Appropriate Authority as "*statutory authority having jurisdiction over the Works*". **Article 9.67** defines Works as "*Works described in the Articles of Agreement and are the whole of the materials, labour, plant and other things necessary and requisite for the proper execution of the Contract as shown on the Contract Drawings and described by or referred to in the Employer's Requirements, Specification, the Contract Bills and the Conditions, and include any changes made to these works in accordance with the Conditions*."

Article 9.46 defines Persons as "*a natural person, sole proprietorship, firm (partnership) or body corporate."* The provision on suspension order by an Appropriate Authority in the AIAC SFC is similar to the corresponding PAM Contract provision. The discussion above on PAM Contract applies here.

(4) Delays caused by (Appropriate) Authority

Some construction contracts provide for EOT where there are delays caused by certain governmental authorities. For example,

(a) **FIDIC - Clause 8.5**

> *8.5 If the following conditions apply, namely:*
>
> *(a) the Contractor has diligently followed the procedures laid down by the relevant legally constituted public authorities in the Country,*
> *(b) these authorities delay or disrupt the Contractor's work, and*
> *(c) the delay or disruption was Unforeseeable,*
>
> *then this delay or disruption will be considered as a cause of delay under sub-paragraph (b) of Sub-Clause 8.4 [Extension of Time for Completion].*

Clause 1.1.6.2 defines Country as "*country in which the Site (or most of it) is located, where the Permanent Works are to be executed*." **Clause 1.1.6.7** defines Site as "*places where the Permanent Works are to be executed and to which Plant and Materials are to be delivered, and any other places as may be specified in the Contract as forming part of the Site.*"

Clause 1.1.6.8 defines Unforeseeable as "*not reasonably foreseeable by an experienced contractor by the date for submission of the Tender*." **Clause 1.1.1.8** defines Tender as "*Letter of Tender and all other documents which the Contractor submitted with the Letter of Tender, as included in the Contract.*"

This delaying event requires
(a) the MCO to be followed diligently by the contractor;
(b) MCO delayed or disrupted the contractor's works carried out on Site; and
(c) The MCO imposed is an unforeseeable event when an experienced contractor could not reasonably have foreseen the MCO when the tender documents were submitted.

Where the 3 conditions in **Clause 8.5** are satisfied and that the MCO affects the contractor's progress of works, the contractor would be entitled to an EOT under **Clause 8(4)(b).**

Arguably, an experienced contractor could reasonably foresee the effect of the COVID-19 and MCO for new construction contracts currently being negotiated or entered in the midst of the COVID-19 outbreak or after the announcement of the MCO.

(b) **AIAC SFC - Clause 23.8(b)(viii)**

> *23.8(b)(viii) delay caused by any Appropriate Authority and Service Provider in carrying out, or in failing to carry out their work which affects the Contractor's work progress, provided always that the Contractor has diligently followed the procedures, terms and conditions laid down by the Appropriate Authority and Service Provider; the delay was Unforeseeable; and such delay is not attributable to any negligence, wilful act or breach of contract by the Contractor, or any Person for whose actions the Contractor is responsible*

Article 9.65 defines Unforeseeable as "*not reasonably foreseeable by an experienced contractor by the date for submission of the Tender.*" Tender is defined in **Article 9.64** as "*Form of Tender, which was completed by the Contractor for the Works, and all other documents which the Contractor submitted with the Form of Tender, as included in the Contract*."

This delaying event requires
(a) the MCO to be followed diligently by the contractor;
(b) the MCO imposed is an unforeseeable event when an experienced contractor could not reasonably have foreseen the MCO when the tender documents were submitted; and
(c) there to be no fault of the contractor or any Persons of contractor's responsibility.

As discussed in the FIDIC provision, the contractor would be entitled to an EOT under **Clause 23.8(b)(viii)** if the 3 conditions are satisfied and that the MCO affects the contractor's progress of works, and is arguably not the case for new contracts in place.

(5) Change in Legislation or Law

Where there has been a change in legislation or law, certain construction contracts may allow an EOT for the impact of such change. One needs to consider the definition of what amounts to a change in legislation or law. Some contracts define this to include the introduction of new laws or regulations. For example,

(a) **FIDIC - Clause 13.7**

> *13.7 […]*
>
> *If the Contractor suffers (or will suffer) delay… as a result of these changes in the Laws or in such interpretations, made after the Base Date…*
>
> *[…]*

Clause 1.1.6.5 defines Laws as "*all national (or state) legislation, statutes, ordinances and other laws, and regulations and by-laws of any legally constituted public authority*."

Clause 1.1.3.1 defines Base Date as "*the date 28 days prior to the latest date for submission of the Tender*." Tender is defined at 4(a) above.

Where the performance of a contractor will or is delayed by the new order issued, i.e. MCO, to curb the COVID-19 outbreak, the contractor would be entitled to an EOT under **Clause 13.7**. This EOT claim is only applicable when the MCO is issued 28 days prior to the latest Tender submission.

(b) **AIAC SFC - Clause 23.8(b)(vii)**

> *23.b(vii) compliance with any Unforeseeable changes to any law, regulations, by law or terms and conditions of any Appropriate Authority and/or Service Provider*

The definitions of Unforeseeable and Tender are set out at (4)(b) above.

As discussed in the FIDIC provision, the contractor would be entitled to EOT under **Clause 23.8(b)(vii)** when the contractor's performance is delayed by the MCO.

(6) Unforeseeable shortages in the availability of personnel or Goods

Where the unforeseeable shortages in labour or material is regulated by the construction contract, one has to turn to that contract for any further requirements as may be imposed under the contract. For example,

(a) **FIDIC - Clause 8.4(d)**

> *8.4(d) Unforeseeable shortages in the availability of personnel or Goods caused by epidemic or governmental actions.*

There are 2 broad elements to this provision. There must be (i) unforeseeable shortages of either "personnel" or "Goods" and (ii) this must be due to an epidemic or governmental action.

As "personnel" is not defined in FIDIC, it may encompass a shortage of personnel of consultants, or even arguably personnel of any public authorities and private utility companies that may be required for the works.

"Goods" are defined in **Clause 1.1.5.2** as "*Contractor's Equipment, Materials, Plant and Temporary Works, or any of them as appropriate*". Each of the term referred to is further defined below.

- **Clause 1.1.5.1** defines Contractor's Equipment as "*all apparatus, machinery, vehicles and other things required for the execution and completion of the Works and the remedying of any defects. However, Contractor's Equipment excludes Temporary Works, Employer's Equipment (if any), Plant, Materials and any other things intended to form or forming part of the Permanent Works*." Temporary Works is defined in **Clause 1.1.5.7** as "*all temporary works of every kind (other than Contractor's Equipment) required on Site for the execution and completion of the Permanent Works and the remedying of any defects*." Permanent Works is defined in **Clause 1.1.5.4** as "*permanent works to be executed by the Contractor under the Contract*."

- **Clause 1.1.5.3** defines Materials as "*things of all kinds (other than Plant) intended to form or forming part of the Permanent Works, including the supply-only materials (if any) to be supplied by the Contractor under the Contract*."

- **Clause 1.1.5.5** defines Plant as "*apparatus, machinery and vehicles intended to form or forming part of the Permanent Works*."

MCO is clearly a governmental action, whilst the COVID-19 outbreak is pandemic. Either way, the second element of **Clause 8.4(d)** is present. Where the MCO imposed results in an unforeseeable shortage of personnel or Goods, the contractor would be entitled to an EOT under **Clause 8.4(d)**, if such unforeseeable shortage caused a delay in the completion of the works.

(7) Delay by Nominated Sub-Contractors or Nominated Sub-Suppliers

Where the delay caused by the nominated sub-contractors or nominated sub suppliers is regulated in the construction contract, one may turn to that contract for the conditions imposed under the contract.

(a) **AIAC SFC - Clause 23.8(b)(iv)**

> *23.8(b)(iv) Delay on the part of Nominated Sub-Contractors or Nominated Suppliers for the reasons as set out in Clause 19.6 of the Standard Form of Building Sub-Contract issued by the AIAC*

Clause 19.6 of the Standard Form of Building Sub-Contract issued by the AIAC ("**Sub-Contract**") refers to the "Time Impact Events" for EOT entitlement of Sub-Contractor, which incorporates Nominated Sub-Contractors or Nominated Suppliers.

Where there is a delay of the Nominated Sub-Contractor or Nominated Suppliers under Clause 19.6(a), (n), (o), (u) or (v) of the said Sub-Contract, the contractor is entitled to an EOT claim under **Clause 23.8(b)(iv)**. The delaying events set out in the said Clause 19.6 of the Sub-Contract mirror those in **Clause 23.8**. Thus, where the Nominated Sub-Contractor or Nominated Suppliers are similarly delayed by reason of the MCO, **Clause 23.8(b)(iv)** entitles the contractor to an EOT under the main contract, i.e. AIAC SFC.

What Follows After?

If the contractor is of the view that he is entitled to an EOT, such entitlement is not an automatic right. The contractor is required to comply with the mechanisms of an EOT application provided for in the construction contract.

Commonly, the EOT application is 2-tier – the first being notification of an intention to claim EOT followed by a formal application for EOT itself, i.e. submissions of complete particulars to substantiate the EOT claim.

Strict adherence to these notification and particulars requirements is usually required by the construction contract.

Loss and Expense Claims

Not all delaying events entitle the contractor to a loss and expense ("**L&E**") claim. Most construction contracts have separate L&E provisions. As such, the contractor would be entitled to a L&E claim if the MCO results in one of the events expressly set out in the L&E provisions of the construction contracts.

Under the PAM Contract, the contractor's entitlement to L&E is governed by **Clause 24**. The circumstances in **Clause 24.3** concern delaying events which, in one way or the other, is attributable to the employer, architect or consultants. Given that the MCO is not an event attributable to the employer, architect or consultants, none of the **Clause 24.3** circumstances allow the contractor to claim L&E due to delays by reason of the MCO.

The FIDIC form is more generous to the contractor. **Clause 13.7** (changes in legislation) allows for claims to be made for additional costs arising from the changes in the Laws whereas **Clause 19.4** (*force majeure*) allows a L&E claim, provided the MCO results in a lockout. The contractor's entitlement to L&E is subject to the mechanism compliance in **Clause 20.1**.

Under the AIAC SFC, the contractor's entitlement to L&E is governed by **Clause 24.1**. Only a delay caused by MCO under **Clause 23.8(c)(xiv)** (suspension of works by an Appropriate Authority) entitles the contractor to a L&E claim, provided the mechanism in **Clause 24.1(a)(i)** to **(iv)** are complied with.

Similar to the mechanisms of an EOT application, the contractor is required to comply with the common 2-tier mechanisms for a L&E claim – the first being notification of an intention to claim L&E followed by a formal application for L&E itself, i.e. submissions of complete particulars to substantiate the L&E claim.

Strict adherence to these notification and particulars requirements is usually required by the construction contract.

Absent of Provisions Governing Delays Caused by the MCO

In the event a construction contract does not have provisions governing delays caused by the MCO, one may rely on the doctrine of frustration.

Section 57 of the Contracts Act 1950 ("CA 1950") appears to capture the instances of frustration:

> *57. (1) An agreement to do an act impossible in itself is void.*
>
> *(2) 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.*

A contract that has become impossible, is void and therefore unenforceable.

The Courts generally do not lean in favour of allowing a party to escape his construction contract based on an alleged event of frustration. Frustration within its legal definition must be proven. The Federal Court in the case of **Pacific Forest Industries Sdn Bhd & Anor v Lin Wen-Chih & Anor [2009] 6 MLJ 293** states that:

> *"A contract does not become frustrated merely because it becomes difficult to perform...The doctrine of frustration is only a special case to discharge a contract by an impossibility of performance after the contract was entered into…"*
>
> *"…that frustration occurs whenever the law recognises that without the default of either party, a contractual obligation becomes incapable of being performed as the circumstances in which the performance is called for would render it a thing radically different from that which was undertaken by the contract…"*

The delays arising from the MCO may well cause the contractor's performance of the works on site more difficult or costly. That, on its own, would not be sufficient for frustration to be established. It is a question of fact and degree for every case. Arguably, the MCO on its own, which causes suspension of works on site for 42 days, may not turn the construction contract into a thing radically different from what the parties have contracted for.

MCO may therefore be insufficient to frustrate a construction contract. A prolonged MCO, or prolonged effects of an MCO, may give rise to frustration. Again, this is dependent on the facts of each given case.

Where the contract is frustrated, a construction contract is automatically not binding on the parties. Parties are entitled to statutory reliefs governed under **Sections 15 and 16 of the Civil Law Act 1956 ("CLA 1956")**. Pursuant to **Section 15(2) of the CLA 1956**, the Courts can: -

(a) allow one party to recover all sums paid to the other before frustration;
(b) cease sums to be payable when sums are payable before frustration; and
(c) allow a party to retain or recover the whole or part of the sums paid or payable, provided expenses were incurred for the performance of the construction contract by that party before frustration (sums cannot exceed the expenses incurred).

Going Forward

Where the construction contracts expressly provide for delays caused by the MCO, parties ought to review the contractual provisions to ascertain what is needed to be done next. Compliance with the contractual mechanism is very important to take advantage of a contractual right.

If the contract is silent on these provisions, the facts of each case will have to be examined against the legal principle of frustration under **Section 57 of the CA 1950** and the **Pacific Forest Industries case**.

In either case, the contractor ought to be mindful of cost control measures during the enforcement of MCO. Most standard form of construction contracts impose a duty on the contractor to avoid or reduce delays in their work progress, notwithstanding that such delays were not caused by the contractor.

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