

## Covid-19 and the AIAC SFC – The Impact of the Movement Control Order on Building Sites

This is the third in our series of articles on the impact of the Movement Control Order (“MCO”) on building projects. In this article, we look at several Frequently Asked Questions (“FAQs”) from the standpoint of the Standard Form of Building Contracts (2019 Edition) issued by the Asian International Arbitration Centre (“AIAC”) [“AIAC SFC”].

### FAQ (1): Does the MCO entitle the Contractor to an Extension of Time (“EOT”) under the AIAC SFC?

Yes. The Contractor is entitled to EOT in the event Covid-19 is considered one of the “Time Impact Events” under **Clause 23.8**, provided the mechanisms for an EOT application are complied with.

### FAQ (2): Which “Time Impact Events” under AIAC SFC are applicable to the MCO?

There are a few. The “Time Impact Events” under AIAC SFC are divided into “Non-Employer’s Events” set out at **Clause 23.8(b)** and “Employer’s Events” set out at **Clause 23.8(c)**.

#### (a) Clause 23.8(b)(i): Is this a *force majeure* event?

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) ...”

All the 4 conditions set out in (a) to (d) of **Article 9.34** must be satisfied for an event of delay to qualify as a *force majeure*. **Article 9.43** defines “Party” as “*Employer or the Contractor, as the context requires.*”

The spread of Covid-19 is beyond the control of the Contractor. The Contractor could not have foreseen the pandemic and thus could not have reasonably provided for the imposition and subsequent extension of the MCO under existing 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 **Article 9.34** are satisfied, the Contractor would be entitled to an EOT under **Clause 23.8(b)(i)** where his progress is delayed by the MCO as an exceptional event or circumstance.

However, for new contracts being negotiated after Covid-19 has been declared a pandemic by World Health Organisation (WHO) it may be arguable that the Contractor is required to reasonably foresee the situation and thereby reasonably provide for the MCO in its contract administration.

Consequently, the Contractor is required to reasonably avoid or overcome the situation. In such circumstances, the MCO will 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.

**Article 9.43** further provides possible *force majeure* situations, which includes a “lockout”. A “lockout” is not defined in the AIAC SFC. **A Dictionary of Law (2<sup>nd</sup> 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”.

**Article 9.46** defines “Persons” as “*a natural person, sole proprietorship, firm (partnership) or body corporate.*” Although “Persons” by definition appears not to encompass the Minister of Works, Minister of Health and the Government of Malaysia, the illustration given at **Article 9.34(iii)** is intended to exclude lockouts by the Contractor (or his subcontractor) himself, as a basis for an EOT. This definition by no means excludes the MCO from being a *force majeure* event.

**(b) Clause 23.8(b)(iv): Is this a delay by Nominated Sub-Contractors or Nominated Sub-Suppliers?**

*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**") provides for "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** of AIAC SFC.

Thus, where the Nominated Sub-Contractor or Nominated Suppliers are similarly delayed by reason of the MCO, **Clause 23.8(b)(iv)** entitles the main contractor to an EOT under the main contract.

**(c) Clause 23.8(b)(vii): Is this an unforeseeable change in law?**

*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"*

**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."

**Article 9.3** defines "Appropriate Authority" as "statutory authority having jurisdiction over the Works".

"Works" is defined in **Article 9.67** 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."

The Government of Malaysia gazetted the **Prevention and Control of Infectious Diseases (Measures within the Infected Local Areas) Regulations 2020 ["PCID Regulations"]** setting out the MCO effectively from 18.3.2020 to 31.3.2020. On 25.3.2020, the Government of Malaysia extended the MCO from 1.4.2020 to 14.4.2020.

The introduction of PCID Regulations was an unforeseeable change in law which was not reasonably foreseeable by an experienced contractor when the tender documents were submitted. Further, it can be said that the extension of the MCO as an unforeseeable change to an existing regulation. In such circumstances, the Contractor would be entitled to an EOT under **Clause 23.8(b)(vii)**.

**(d) Clause 23.8(b)(viii): Is this a delay caused by Appropriate Authority?**

*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"*

The MCO implemented by the Ministry of Works and its relevant agencies may cause delay to the Contractor's work progress on site as the MCO led to temporary shutdown of sites, restricted the movement of labour and materials to the site and disruption of supply chain, save for critical works which will be discussed at **FAQ 2(e) below**.

This delaying event requires:

- (a) the MCO to have been followed diligently by the Contractor,
- (b) an experienced contractor could not reasonably have foreseen the MCO when the tender documents were submitted, and
- (c) the delay event is of no fault of the Contractor or persons under the umbrella of the Contractor.

Where the MCO results in a delay to the on-site progress of the Contractor and the 3 conditions are satisfied, the Contractor will be entitled to an EOT under **Clause 23.8(b)(viii)**.

**(e) Clause 23.8(b)(ix): Is this a *lockout*?**

*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"*

The term "lockout" is discussed at **FAQ 2(a) above**.

The MCO is applicable to all construction and maintenance works except for critical works. Critical works are works that, if put to a stop can cause harm to employees, the public or the environment.

Examples of critical works are set out at item 4 of the FAQs issued by the Ministry of Works. However, one can apply for exemption if the exemption comes from project superintendent/project director for government projects; resident engineer/principal submitting person for private projects. (see the FAQs issued by the Ministry of Works at <https://www.pmo.gov.my/2020/03/soalan-lazim-faqs-berkaitan-perintah-kawalan-pergerakan-kementerian-kerja-raya-malaysia-kkr/>)

As such, where the MCO results in a lockout at the site for which the Contractor is not accountable, the Contractor would be entitled to an EOT under **Clause 23.8(b)(ix)**.

**(f) Clause 23.8(c)(xiv): Is this a suspension order by the Appropriate Authority?**

*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"*

Similarly, this delaying event requires there to be no fault of the Contractor. The term "Appropriate Authority" and "Works" were discussed at **FAQ 2 (c) above**.

MCO is a suspension order issued by the Government of Malaysia as a measure to prevent the spread of Covid-19. In the construction sector, it was implemented by the Ministry of Works and its relevant agencies. As the MCO was not issued due to negligence, omission, default and/or breach of contract by the Contractor, the Contractor would arguably be entitled to an EOT under **Clause 23.8(c)(xiv)** if the Contractor is required to stop his works in compliance with the MCO.

### FAQ (3): What must the Contractor do to claim the EOT?

The 2 main requirements are – **notification and particulars**.

**Clause 23.1(b)** requires notification of an intention to claim EOT and particulars of the MCO. This must be made within 28 days of becoming aware or should have been aware of the MCO, that is the announcement of the MCO.

**Clause 23.1(c)** then requires a claim submission of all necessary particulars and substantiations as to how the MCO has affected the progress of works. This must be made within 28 days after the end of the delaying event, that is when the MCO is lifted by the Government of Malaysia.

### FAQ (4): How about loss and expense arising from the MCO?

Not all the delaying events entitle the Contractor to loss and expense claim. The Contractor's entitlement to loss and expense is governed under **Clause 24.1**.

Only a delay caused by the MCO, which materially affects the Contractor's works on site pursuant to **Clause 23.8(c)(xiv)** (*i.e.* suspension of works by an Appropriate Authority), entitles the Contractor to loss and expense claim. This is provided the loss and expense claim cannot be reimbursed to the Contractor under any provisions of the AIAC SFC and provided the mechanisms for a loss and expense claim in **Clause 24.1(a)(i) to (iv)** are complied with.

Contractors should therefore be mindful of cost control measures during the enforcement of the MCO.

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