

## Covid-19, The Movement Control Order, and Liability under Business Interruption Insurance Policies

On 16 March 2020, the Prime Minister of Malaysia Tan Sri Muhyiddin Yassin announced the promulgation of a Movement Control Order (“MCO”), under the *Prevention and Control of Infectious Diseases Act 1988* and the *Police Act 1967*. Targeted at containing the ongoing Covid-19 viral outbreak, the following restrictions have been implemented upon the enforcement of the MCO:

- a comprehensive prohibition of mass movement between states and places in a state and gatherings, including religious, sports, social and cultural activities;
- restrictions on Malaysians travelling abroad;
- restrictions on the entry of all foreign tourists and visitors;
- closure of all state, government and private schools and other primary, secondary and pre-university institutions;
- closure of all public and private Institutions of Higher Learning and Skill Training Institutions; and
- closure of all non-essential government and private business premises, except those involved in the provision of essential services (such as water, electricity, oil, gas, banking & stock bourse, prisons, etc) .

As a result of the MCO, most businesses in Malaysia are unable to operate out of their usual premises and effectively carry out their usual business activities. Further, many businesses are experiencing disruptions to their supply chains, as their suppliers are unable to meet their obligations as a result of the nationwide shutdown.

At the time of writing, the MCO has been extended to 14 April 2020, and the Prime Minister has not ruled out further extensions.

Insurers may understandably be concerned as to how far they may be liable to indemnify policyholders for financial losses arising from the MCO, and the Covid-19 pandemic more generally.

## BUSINESS INTERRUPTION INSURANCE

### *Is There Cover?*

Standard coverage for business interruption is triggered only where there has been physical damage to insured property by an insured peril.

An insured can purchase additional **contingent business interruption cover**, which may have triggers not related to damage to insured property. Relevant to the current Covid-19 pandemic is the **infectious disease extension**, which will often have a multi-part trigger requiring all or a combination of (a) closure or evacuation of the whole or part of the business premises; (b) by order of a competent public authority; (c) resulting from the presence of a notifiable disease on the business's premises.

The reference to the disease being “notifiable” may refer to diseases listed in a schedule to the policy, or to the list of infectious diseases found in the First Schedule of the *Prevention and Control of Infectious Diseases Act 1988*. The First Schedule contains a catch-all provision at Item 30, which deems “any other life threatening microbial infection” as an infectious disease. This would, on its face, include Covid-19.

Depending on the policy triggers, if an insured is forced to close its business premises as a result of the MCO generally, as opposed to an actual outbreak of Covid-19 at those premises **and** a specific closure order resulting from that outbreak, the insured may have difficulty establishing that the coverage triggers were in fact present.

Another relevant endorsement is **closure by public authorities**, which typically indemnifies against losses resulting from closure of the insured's premises by order of a competent public authority due to the operation of an insured peril. To the extent it does not require the peril to be present on the premises, this would be a more straightforward claim for the insured.

## Quantification of Claims

Assuming coverage is triggered, what is the extent of policy indemnity? The key is always to remember that business interruption insurance indemnifies only in respect of losses arising from the trigger, in this case, the closure of the premises.

The standard Other / Special Circumstances / Trends Clause allows insurers to adjust for any factors which might affect the business as whole so that the indemnity calculation reflects, as far as possible, the loss caused only by the closure. The effect of business downturns caused by a wide area impact phenomenon such as a pandemic or nationwide MCO can, according to case law in England and Hong Kong, be stripped out from the calculation. This will likely reduce the indemnity available under the policy.

## CONCLUSION

As the Covid-19 outbreak continues to ramp up across South-East Asia, policyholders will inevitably be seeking to recoup part of their financial losses from their insurers. Insurers ought to urgently obtain clarity on the extent to which their policy wordings expose them to claims for business interruption and other losses, and provide the same certainty to their policyholders.

## Your Key Contacts:

### Gan Khong Aik

Partner

Gan Partnership

E: [khongaik@ganlaw.my](mailto:khongaik@ganlaw.my)

### Julian Teoh

Partner

DAC Beachcroft LLP

E: [jteoh@dacbeachcroft.com](mailto:jteoh@dacbeachcroft.com)

### Carren Thung

Senior Associate

DAC Beachcroft LLP

E: [cthung@dacbeachcroft.com](mailto:cthung@dacbeachcroft.com)

**Julian Teoh** is a Partner of DAC Beachcroft LLP based in Singapore. He has over 15 years' experience in advising re/insurers on complex claims in the Asia-Pacific region, and has advised and acted in various insurance disputes arising from the SARS epidemic in 2003. **Carren Thung** is a Senior Associate at DAC Beachcroft LLP, Singapore.

**Gan Khong Aik** is a litigation and dispute resolution partner at Gan Partnership based in Kuala Lumpur, Malaysia. His extensive practice experience includes rendering advice on insurance policies and defending proceedings instituted against major insurance companies at all levels of Malaysian courts.

**DAC Beachcroft LLP** is an international law firm headquartered in the UK. Since 2013, DAC Beachcroft, in association with **Gan Partnership**, has been serving clients in the re/insurance and re/takaful industry in Malaysia.