



CONSTRUCTION INDUSTRY: EFFECT OF COVID-19 & MOVEMENT CONTROL ORDER

20th March 2020

INTRODUCTION

These are unprecedented times. With the increasing numbers of patients being tested positive for COVID-19 (Corona Virus) nationwide, the Prime Minister of Malaysia has announced a Movement Control Order (“MCO”) from 18.03.2020 to 31.03.2020. Save for “essential services”, all public or private premises are ordered to close during the MCO period.

Construction is not recognised as “essential service” under Schedule 2 of the Prevention and Control of Infectious Diseases (Measures within the Infected Local Areas) Regulations 2020. However on 18.03.2020, the National Security Council announced that “in-progress construction” affecting the “safety and security” would be permitted to continue during the MCO period, subject to the evaluation by the Public Works Department and the Department of Occupational Safety and Health (“DOSH”). On the same day, the Ministry of Works also clarified that the exemption is only for critical works and provided examples of the same.

In other words, the construction industry, save for the aforesaid exempted works, will be affected by the MCO and generally, by the COVID-19 pandemic.

These unprecedented times present the construction industry with challenges unheard of before. Whilst uncertainty looms, the construction industry may wish to take note of the following:-

DELAY AND EXTENSION OF TIME APPLICATION

Inevitably, as the pandemic continues to ravage the country, the progress of construction works will be impacted and delayed. Question arises as to whether the Contractor is entitled to apply for Extension of Time due to the delay arising from the MCO and/or the Covid-19 and whether the Employer is obliged to consider such application?

While the mechanism of Extension of Time is originally designed to safeguard the Employer’s interest and to prevent the time being set at large due to the Employer’s act(s) of prevention, most of the standard construction contract has evolved to allow extension of time for delaying event which is due to no fault of either party such as force majeure, lock-out, compliance with laws and/or orders from the appropriate authority, such as the MCO.

For ease of reference, we have compiled a list of delaying events in the standard construction contracts commonly used in Malaysia as reference:-

CLAUSE		STANDARD CONTRACT
Clause 23.7(i) Clause 23.7(iv)	Force Majeure; Lockout;	PAM Contract 1998



Clause 23.8(a) Clause 23.8(d) Clause 23.8(p) Clause 23.8(w)	Force Majeure; Lockout; Compliance with any changes to any law, regulations, by-law or terms and conditions of any Appropriate Authority and Service Provider; 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;	PAM Contract 2006
Clause 43(a) Clause 43(i)	Force Majeure (note: Clause 58 does not specifically include epidemic as an event of force majeure); the Contractor's inability for reason beyond his control and which he could not reasonably have foreseen at the date of closing of tender of this Contract to secure such goods, materials and/or services as are essential to the proper carrying out of the Works;	JKR/PWD 203A (Rev 1/2010) Contract
Clause 8.4(b) Clause 8.5 Clause 13.7 Clause 19	Unforeseeable shortages in the availability of personnel or Goods caused by epidemic; Delays caused by authorities; Adjustments for Changes in Legislation; Force Majeure;	FIDIC
Clause 24.1(a) Clause 24.1(c)	Force Majeure; Lock-outs;	CIDB Contract

However, it is imperative to note that any application for extension has to refer to the wordings of the respective construction contract. In the circumstance where the construction contract allows for an extension of time, it is of utmost importance that condition precedent (if any), e.g. the notification requirement and notification timeline, is strictly observed and duly complied with when the application of EOT is to be made.

The High Court had recently reiterated the importance of complying with the condition precedent in the case of **Sunissa Sdn Bhd v Kerajaan Malaysia dan Jabatan Kerja Raya Malaysia (Civil Suit No. WA-21C-7-10/2018)**, where failure to adhere resulted in the Contractor losing its contractual entitlements.

FORCE MAJEURE

Standard forms of contract usually contain a clause providing for force majeure events. Generally, force majeure events are situations where “parties have little or no control, that might impede or obstruct performance of the contract”.

Such clauses may also provide the definition or limitation of such events and correspondingly, the effect of such clauses on the performance of the contract. The Courts have often time taken a strict approach in interpreting such clauses.

As such, it is imperative to study your force majeure clause to ascertain:-

- 1) Whether the force majeure extends to governmental or regulatory actions or epidemics, pandemics, diseases or events of similar nature?

- 2) If the force majeure clause does not cover the above events, are there any broad catch all provisions that cater for events beyond the control of parties?
- 3) What are the consequences of the occurrence of such events? For example, some standard form of contracts may allow extension of time premised on force majeure events.

Once the aforesaid matters have been identified, the contracting party relying on such clause should start ascertaining the effect of the force majeure and collates supporting information or documentation to support the exercise of such clause, for example in an application for extension of time based on the force majeure event.

It is also material to note that the Director General of the World Health Organization had in his opening remarks at the media briefing on COVID-19 on 11.03.2020 stated that WHO had made an assessment that “COVID-19 can be characterized as a pandemic” and this, together with the MCO, will be supportive and/or persuasive in the application for Extension of Time.

Subject to the terms of the individual contract, the question then becomes whether the MCO is governmental or regulatory action, beyond the control of parties, rendering the MCO as a force majeure event.

FRUSTRATION OF CONTRACTS

The doctrine of frustration applies where “due to a change of circumstances a contract is rendered legally and physically impossible of performance”. Section 57(2) of the Contracts Act 1950 provides that such contract would be rendered void when such contract becomes impossible or unlawful to be performed.

There are 3 elements within section 57(2) that should be satisfied in order for frustration to apply:-

- (1) The event relied by parties for frustrating the contract has not been provided for in the contract;
- (2) The party relying on the event is not responsible for the same;
- (3) The “event which is said to discharge the promise must be such that renders it radically different from that which was undertaken by the contract.”

As such, in order for the MCO and/or the COVID-19 pandemic to constitute as an event frustrating the contract, the party relying on such event must show that their obligations under contract has been rendered “radically different”. It is important to note that a “contract does not become frustrated merely because it becomes difficult to perform.

If frustration can be proven and the contract is declared void consequently, section 66 of the Contracts Act 1950 and section 15 of the Civil Law Act 1956 provides for restitution or compensation for work done prior to the contract being frustrated and adjustment of parties’ rights and obligations respectively.



PRICE FLUCTUATION

The COVID-19 outbreak may result in shortage of labour and materials and when supplies dwindle, prices may increase. Under such circumstances, which party is supposed to absorb such additional costs? The employer or contractor? It very much depends on whether the construction contract contains a price fluctuation clause.

The price fluctuation clauses usually provide a mechanism to deal with the effects of inflation and for the contractor to be reimbursed for price changes to specified items over the duration of the project.

Where the contract does not provide for such price fluctuation mechanism and is a strict lump-sum contract, the contractor will not be entitled to claim for the price fluctuation of the materials, goods and labours from the employer.

The table below sets out the commonly used standard form of construction contract in Malaysia and whether they provide for price fluctuation:-

FORM OF CONTRACT	PRICE FLUCTUATION CLAUSE
PAM 1998	No
PAM 2006	No
PWD 203a	Yes (If Special Provisions to the Condition of Contract for Fluctuation of Price is incorporated)
FIDIC	Yes

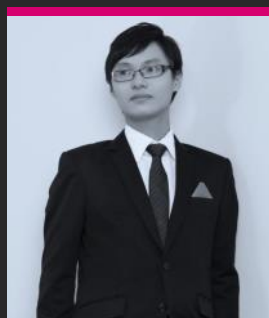
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