

客户快讯

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联系我们:

郑慧芬
Janice Tay
合伙人
+603 2298 7838
janice.tay@wongpartners.com

祝韶斌
Esther Chik
合伙人
+603 2299 7961
esther.chik@wongpartners.com

黄志文
Chih-Wen Ooi
律师
+603 2299 6428
chihwen.ooi@wongpartners.com

Kimmy Khoo
法务助理
+603 2299 6545
litigroup8.kl@WongPartners.com

Lockdown on Construction Projects - Where is My Time and Money?

建筑项目被封闭——我的时间和金钱去哪儿了？

A review of the related concepts of Force Majeure, Impossibility / Frustration and Extension of Time, and claims of Loss & Expense and differing costs due to Price Fluctuation.

与不可抗力、不可能（履行）/受挫和延期、损失和费用索赔以及因价格波动引起的成本差异等概念相关的评论。

The Restriction of Movement Order ("**Order**") announced by the Malaysian Prime Minister on 16 March 2020 and as extended on 25 March 2020 imposes a state of partial lockdown for four (4) weeks from 18 March 2020 to 14 April 2020 ("**Period**"). This necessitates the closure of all businesses except essential services to curb the outbreak of the global coronavirus (COVID-19) in Malaysia.

马来西亚首相在 2020 年 3 月 16 日宣布并于 2020 年 3 月 25 日延期的行动管制令（“管制令”）实施从 2020 年 3 月 18 日至 2020 年 4 月 14 日（“管制期”）为期四周的部分封闭。这需要除基本保障服务外的所有企业进行关闭，以遏制全球 COVID-19 疫情在马来西亚的蔓延。

The inevitability of projects being hit with disruptions makes it crucial, and timely, for businesses to make a proper assessment of one's contractual rights and entitlement in the context of the related concepts of Force Majeure, Impossibility / Frustration and Extension of Time ("**EOT**"), and claims of Loss & Expense ("**L&E**") and differing costs due to Price Fluctuation.

项目不可避免地受到上述因素冲击的事实，使得企业及时、适当地评估合同项下与不可抗力、不可能（履行）/受挫、延期（EOT）、损失和费用（L&E）索赔以及因价格波动引起的成本差异等相关的合同权利变得至关重要。

In short, the impossibility of performance may result in a total discharge of liability from a contract. A Force Majeure clause may only justify an entitlement for time but not money, as it is generally considered to be a neutral event for an entitlement to EOT only. Yet some contracts may contain terms allowing an entitlement for both time and money by way of an EOT and an L&E claim. Differing costs due to Price Fluctuations may or may not be allowable. Much will depend on the nature of the contract and surrounding circumstances.

简而言之，无法履约可能会导致合同中的责任全部解除。不可抗力条款可能只能用来保障时间而不是经济方面的权利，因为这些事件一般都会被认为是能获得 EOT 权利的中立事件。但是有些合同里可能包含通过 EOT 和 L&E 索赔的方式来同时享有时间和经济权利的条款。因价格波动而引起的成本差异可能被允许也可能不被允许。这在很大程度上取决于合同的性质和相关的情况。



The concepts of Force Majeure and Impossibility / Frustration have been dealt with in our **Client Alert dated 13 February 2020**, with a focus on construction and infrastructure contracts in our **Client Alert dated 20 March 2020**. You can also read a summary of the measures implemented under the Order with our **Client Alert dated 17 March 2020**

关于不可抗力 and 不可能（履行）/受挫的概念，我们已经在 [2020年2月13日](#) 的客户快讯以及 [2020年3月20日](#) 有关疫情对建筑和基础设施合同影响的客户快讯中阐述过。阁下也可以通过本所 [2020年3月17日](#) 的客户快讯了解关于行动管制令的总结。

This Alert summarises the effect of regulatory updates and examines the entitlement of EOT, L&E and increased costs due to Price Fluctuations.

本客户快讯旨在总结监管更新的影响并研究 EOT、L&E 索赔以及由于价格波动而要求增加成本的权利。

Summary of regulatory updates

监管更新总结

The issuance of the Order saw the publication of various guidelines and clarification on the impact of the Order, amongst those relevant include the following:

管制令发布后，又相继出台了不止指南和澄清。其中最相关的有：

- **A press release by the National Security Council under the Prime Minister's Department dated 18 March 2020¹**
2020年3月18日首相府下属国家安全委员会的新闻发布¹

Construction and renovation services are not essential services and are to cease operations. An exception applies only to in-progress construction affecting safety and security subject to assessment by the Public Works Department and the Department of Occupational Safety and Health.

建筑和装修服务都是非基本保障服务，应停止施工。例外情况仅适用于经过公共工程部和职业安全与健康部评估的影响安全和安保的在建工程

- **Frequently asked questions ("FAQ") by the Ministry of Works revised 24 March 2020²**
马来西亚工程部于2020年3月24日修订的常见问题解答²

Construction works deemed critical are allowed to continue during this Period. Among non-exhaustive examples of critical works include: slope repairs, refilling of potholes, traffic management control, checks on machines, lifts, escalators, maintenance and upgrade of premises providing critical services, repair of traffic lights, building of Bailey bridges, tunneling works, emergency works, works on site for the prevention of Aedes mosquito and pests and other works which will pose a danger if not completed.

允许被认定为关键性的建筑工程在管制期内继续进行。以下是部分关键性工程的例子：山坡/滑坡修复、路面坑槽填补、交通管制、机器/电梯/自动扶梯检

注释¹ For further information: click [here](#). 更多详情请点击此处链接

注释² For further information: click [here](#). 更多详情请点击此处链接



修、提供关键服务场所的维护和升级、交通信号灯修理、在桥坍塌处活动便桥（Bailey Bridge）的建造、隧道工程、紧急工程、现场预防伊蚊和害虫的工程以及其他若不完成则将构成危险的工程。

However even before these works are to continue, an application for exemption has to be recommended by the:

但是即使是关键性工程，在继续进行这些工作之前，也必须获得以下人员有关推荐继续施工的建议以申请豁免：

- (a) enforcement officer or project director for government projects; or
- (b) resident engineer or principal submitting person³ for private projects.

- 1) 政府项目的执行官或项目总监；或
- 2) 私人项目的驻地工程师或主要提呈者（principal submitting person³）

After a recommendation is obtained, the exemption application can be extended to those with jurisdiction to grant the exemption such as:

获得此类建议后，可以将豁免申请提交到有豁免权的主管部门负责人，例如：

- (a) Chief Director of the Ministry of Works
- (b) Director of the Ministry of Works Sabah;
- (c) Director of the Ministry of Works Sarawak;
- (d) Chief Director of the Malaysian Highway Authority;
- (e) Chief Director of the Department of Irrigation and Drainage;
- (f) Local Authorities or State Authorities.

- 1) 工程部总监
- 2) 沙巴工程部总监
- 3) 砂拉越工程部总监
- 4) 马来西亚大道局总监
- 5) 水务局总监
- 6) 地方或州执法部门

The Government will not be responsible for any losses that may be incurred due to the potential delays to the completion of any construction work from the Order.

由于管制令造成的任何可能的完工延迟，政府将不承担任何损失。

- **FAQ by the Ministry of Domestic Trade and Consumer Affairs dated 18 March 2020⁴**

国内贸易和消费者事务部于 2020 年 3 月 18 日公布的常见问题解答⁴

Ongoing renovation work must be postponed unless the work involves building safety issues and with prior approval of the Ministry of Works and the Construction Industry Development Board have been obtained.

注释³ "Principal Submitting Person" 通常是项目的专业建筑师或工程师

注释⁴ For further information: click [here](#). 更多详情请点击此处链接



除非正在进行的装修工程涉及建筑物安全问题并且已获得工程部和建筑业发展委员会的事先批准，否则必须推迟该工程。

- **Advisory note by the Malaysian Institute of Architects ("PAM") dated 18 March 2020⁵**

马来西亚建筑师协会（PAM）2020年3月18日的参考意见⁵

Architects are advised to notify contractors on the need to comply strictly with the Order during the Period and this is in compliance with Clause 4.1 of PAM 2018 where the contractor is to comply with any laws, regulations and by-laws of any statutory authority with jurisdiction over the works in respect of the execution of the works. During the restricted period when construction works are suspended, the Contractor is to take all necessary measures to maintain and secure the site premises.

建议建筑师通知承包商需要在管制期内严格遵守管制令。这也是 PAM 2018 模板合同下第 4.1 条款对承包商的要求，即承包商应遵守任何对项目运行有管辖权的法定机构颁布的法律、法规和细则。在建筑工程因管制令暂停期间，承包商应采取一切必要措施对场地进行维护和保护。

Compliance with the Order should be taken seriously as it was reported on 19 March 2020 that enforcement officers from the Kuala Lumpur City Hall conducted inspections at approximately fifty construction sites across the city and ordered two construction firms to shut down operations immediately after having found to be carrying out housekeeping at site. One construction firm was also compounded with a RM 50,000 fine for carrying out work despite a notice to stop work, and disregarding the Order.⁶

企业应严格遵守该管制令。因据早前报道，吉隆坡市政厅的执法人员于 2020 年 3 月 19 日对整个城市的约 50 个建筑工地进行了检查/视察，并勒令两家仍在进行工地清理的建筑公司立即停工。另外，一家建筑公司因无视管制令并在接到停工通知后仍继续工作而被处以 5 万马币的罚款。⁶

The compound was issued under section 70(13) of the Street, Drainage and Building Act 1974 (Act 133) and it is an offence where any person fails to comply with any lawful order or written direction of the local authority or with any term attached by the local authority to any modification or waiver of any of the requirements of any by-law. Upon conviction, a person shall be liable to a fine not exceeding RM 50,000 or to imprisonment not exceeding three (3) years or to both and shall also be liable to a further fine of RM 1,000 for every day during which the offence is continued after conviction.

市政厅是根据《1974年街道、排水和建筑法》（第133号法案）第70（13）条签发的传票。而且任何人不遵守当地政府主管部门的任何合法命令、书面指示或不遵守其针对任何细则的修改、豁免或要求的附加规定，则属违法。一经定罪，可处不高于5万马币的罚款或不超过三年的监禁，或两者兼施。若在定罪后该罪行持续发生，责可再处以每天1千马币的罚款。

注释⁵ For further information: click [here](#). 更多详情请点击此处链接

注释⁶ For further information: click [here](#). 更多详情请点击此处链接



An Entitlement to Time and Money

时间和经济权利

Examples of clauses in the standard form contracts which may be relied upon are summarised below⁷.

下面总结了标准模板合同中可援引的条款范例。⁷

	PAM 2018	IEM	PWD 203A	FIDIC	AIAC
	CLAUSES 条款				
EOT	23.0	43.0	43.0	8.5	23.0
L&E	24.0	44.0	44.0	20.0	24.0

EOT

延期

The procedure in making an application for EOT is largely similar in most standard form contracts. An example is Clause 23.0 of PAM 2018⁸ which provides that:

在大多数标准模板合同中，提出 EOT 申请的程序大致相似。举一个 PAM 2018 模板合同中第 23.0 条规定⁸的例子：

- (a) the contractor is to provide written notice of its intention to claim EOT together with an initial estimate of the EOT required within 28 days of the commencement of a relevant event (commonly known as a delay event); and

承包商应在相关事件（通常称为延误事件）发生的 28 天内以书面通知的形式告知其有意提出 EOT 申请的意图以及所需 EOT 时长的初步估算；且

- (b) thereafter within 28 days of the end of a relevant event, the Contractor is to provide particulars of the cause(s) of delay for assessment.

在相关事件结束后的 28 天内，承包商应提交延误原因的详情以供评估。

注释⁷ The contracts referred to here are: 所提到的合同包括

- (i) Agreement and Conditions of Pertubuhan Arkitek Malaysia Contract 2018 (With Quantities) 马来西亚建筑师协会标准合同协议和条款 2018 版(含工程量) ("PAM 2018")
- (ii) Institute of Engineers Malaysia Conditions of Contract 1989 马来西亚工程师协会 1989 年版标准合同条款 ("IEM")
- (iii) Public Works Department Forms of Contracts 203A (Rev. 2010) 马来西亚公共工程局 203A 合同模板（2010 年修改版）("PWD 203A")
- (iv) Fédération Internationale Des Ingénieurs-Conseils Conditions of Contract for Construction 2017 ("FIDIC") 国际咨询工程师联合会建筑合同标准条款 2017 版
- (v) Asian International Arbitration Centre Standard Form of Building Contract 2019 ("AIAC"). 亚洲国际仲裁中心建筑合同标准模板 2019 版

注释⁸ See e.g. Clause 43.0 of IEM, Clause 43.0 of PWD 203A, Clauses 8.4-8.5 and 20.2 of FIDIC and Clauses 23.0-23.1 of AIAC 参见例如这些模板合同中的相关条款



In making this application, one may be able to rely on the following relevant events under PAM 2018:

在提出此申请时，在 PAM 2018 模板合同下，一方可能可以援引以下条款中规定的相关事件：

- Clause 23.8(a) - *force majeure*⁹ which is defined in Article 7 as "any circumstances beyond the control of the contractor caused by terrorist acts, governmental or regulatory action, epidemics and natural disasters".

第 23.8 (a) 条 - 不可抗力⁹在第 7 条中被定义为“由于恐怖主义行为、政府或监管行动、流行病和自然灾害所引起的超出承包商控制范围的任何情况”。

- Clause 23.8 (w) – the suspension of the execution of works by the contractor if the architect and/or consultant informs the contractor in writing¹⁰ of their withdrawal from the supervision of execution of the works required under the local building by-laws for whatever reasons; or

第 23.8 (w) 条 - 如果建筑师和/或顾问以书面形式¹⁰通知承包商根据当地建筑法或其他任何原因退出对工程执行的监督，承包商可停止工作；或

- Clause 23.8 (x) – suspension of the whole or part of the works by an order of a statutory authority¹¹ provided the suspension is not due to any negligence, omission, default and/or breach of contract by the Contractor.

第 23.8 (x) 条 - 根据法定机构¹¹的命令中止全部或部分工程，前提是中止的原因不是承包商的任何疏忽，遗漏，违约和/或违反合同。

It is noteworthy that the choice of a relevant event for EOT would affect one's entitlement for L&E.

值得注意的是，为 EOT 选择相关事件将影响一方获得 L&E 索赔的权利。

L&E

损失和费用

Depending on the wording of the L&E clause(s) in the contract, Contractors may be eligible to L&E claims due to the inactivity from this Period. Taking PAM 2018 again as an example, a Contractor may be able to rely on Clause 24.3(n)¹² where works have been or are likely to be materially affected by reason of a suspension

注释⁹ See e.g. Clause 43(1) of IEM, Clauses 43.1(a) and 58 and (i) of PWD 203A, Clauses 8.5(d) and 18.1-18.4 of FIDIC (Exceptional Events), Clause 23.8(b) and Article 9.34 of AIAC.

参见这些模板合同中的相关条款

Do note that *Force Majeure* does not specifically include an epidemic under Clauses 43.1(a) and 58 of PWD 203A however a provision is made in Clause 77.

请注意，不可抗力条款在 PWD 203A 模板第 43.1 (a) 和 58 条并未专门包括流行病，但是在第 77 条中做出了规定。

注释¹⁰ See e.g. Clause 43(e) of IEM, Clause 43.1(e) of PWD 203A, Clause 23.8(c)(xiii) of AIAC.

注释¹¹ See e.g. Clause 43.1(e) of PWD 203A, Clause 8.6 of FIDIC and Clause 23.8(c)(xiv) of AIAC.

注释¹² See e.g. Clauses 43(1)-44 of IEM, Clause 44.1 of PWD 203A, Clause 18.4 of FIDIC and Clauses 24.1(a) and 23.8(c) of AIAC.

参见上述模板合同中的相关条款



of the works through a statutory authority. However, L&E is not claimable where an application is premised on a *force majeure* event.

取决于合同中 L&E 条款的措辞，承包商有可能有资格就管制期的停止状态获得 L&E 索赔。再次以 PAM 2018 为例，承包商或许可以依据第 24.3 (n) 条¹²：工作已经或极有可能因法定机构要求的停工而受到严重影响。但是如果以不可抗力事件为由进行申请，则不能主张 L&E 索赔。

In making a claim for L&E, a similar procedure as that in an EOT application applies.¹³

L&E 索赔与 EOT 申请程序¹³相似。

Costs due to Price Fluctuations

因价格波动带来的成本

It is likely for these unprecedented times to result in cost price fluctuations of labour and materials which may increase costs. Check the contract terms to determine the party who is to bear the unexpected surges to the contract price.

这段前所未有的时期很可能导致人工和材料成本的价格波动，从而造成成本的增加。请检查合同条款，确定应由谁来承担合同价格的意外上涨。

In general, the nature of fixed-priced contracts places the risk on contractors to absorb these price fluctuations unless it can be passed on. In standard form contracts, this would depend on the presence of price fluctuation clauses and a snapshot of the positions taken are set out below:

一般而言，除非能够转嫁，否则固定价格合同的性质决定了承包商将承担价格波动的风险。在标准模板合同中，这将取决于价格波动条款是否存在。这些条款在各合同中的位置列示如下：

	CLAUSE 条款	PROVISION 规定
IEM	54	Not claimable, contractors to bear the risk 不可索赔，承包商承担风险
PWD 203A	30.0	Maybe, depends on special provisions to the contract (if applicable) 也许，取决于合同的特殊条款（如果适用）
FIDIC	13.7	Claimable, where a schedule of cost indexation is included in the contract 如果合同中包含成本指数编制表，则可索赔
PAM	13.0	Not claimable, contractors to bear the risk 不可索赔，承包商承担风险
AIAC	13.0	Not claimable, contractors to bear the risk 不可索赔，承包商承担风险

注释¹³ See e.g. Clause 44.2 of PWD 203A, Clause 20.2 of FIDIC and Clause 24.1(a) of AIAC. 参见上述模板合同中的相关条款



Conclusion

结论

In the midst of the current lockdown in response to COVID-19 coronavirus, take the time to conduct a full risk assessment on the impact on your business activities and evaluate options and remedies. Reassure all parties that you intend to follow through on your scope of work (if applicable) so there are no possible retaliatory claims for anticipatory breach, seek EOTs if delays are anticipated.

www.wongpartners.com

Wong & Partners
Level 21
The Gardens South Tower
Mid Valley City
Lingkaran Syed Putra
59200 Kuala Lumpur

在当前因 COVID-19 疫情封闭的情况下，建议您花时间对贵司的业务活动进行全面的风险测评，并评估备选方案和补救措施。为防止针对预期违约行为的任何可能的报复性索赔，建议向所有利益相关方传达贵司愿意继续履行工作职责/合约下的工作（如果适用）的意愿。如果预计会有延误，请使用/申请 EOT。

If there is a need to invoke a claim, consider potential obligations to mitigate the effect on non-performance. At all times, take note of whether there are specified notice requirements that require you to provide notice to the other party within a certain number of days from the event. Seek legal counsel as there may be unanticipated consequences.

如果需要提出索赔，请考虑潜在的义务以减轻因不履行合约的影响。请在任何时候都需注意是否有特定的通知要求，需要贵司在事件发生后的特定天数内向另一方进行通知。如有需要，建议向专业机构寻求法律援助，因为可能有其他未预料到的后果。

