

Client Alert

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Effect of the Restriction of Movement Order on Construction and Infrastructure Contracts in Malaysia in light of the Covid-19 Outbreak

The World Health Organisation declared the outbreak of the coronavirus ("**COVID-19**") as a public health emergency of international concern on 30 January 2020 and a pandemic on 11 March 2020. As a result of the global rapid escalation of COVID-19 and the recent spike in the COVID-19 cases in Malaysia, the Malaysian Prime Minister on 16 March 2020 announced the Restriction of Movement Order ("**Order**"), which will be effective nationwide for two weeks from 18 March 2020 to 31 March 2020 ("**Effective Period**"), to curb the outbreak. Our previous **client alert dated 17 March 2020** sets out a summary of the measures implemented under the Order.

The COVID-19 outbreak and the Order is likely to cause severe disruption not only to commercial contracts in general, but also to infrastructure and construction contracts, especially where the performance of obligations under those contracts has been rendered impossible. For the impact of COVID-19 on commercial contracts, please refer to our previous **client alert issued on 13 February 2020**. This alert seeks to address the impact of the Order on construction and infrastructure contracts in Malaysia and the steps available to the contracting parties.

Impact of the Order and Covid-19 on Construction and Infrastructure Contracts in Malaysia

Under the Order, only 'essential services' such as energy, transportation, banking and finance and healthcare are allowed to operate during the Effective Period. Certain infrastructure and construction works are not considered to be 'essential services' and therefore are not allowed to commence or continue until the end of the Effective Period.

However, based on the Ministry of Works' FAQ issued on 18 March 2020 in relation to the Order, exemptions are granted to works that are deemed to be 'critical works'. This is defined as works that if not continued, may bring danger to workers, the public or the environment. Examples given include:

- (i) hill slope repairs;
- (ii) traffic management control;
- (iii) upgrading works on facilities at premises providing critical services; and
- (iv) emergency works that are covered under the contract of works.

In order to obtain an exemption to continue with ongoing works, a contractor must have first received recommendation for such works to continue from the project director (for Government projects) or resident engineer (for private projects).





Once such recommendation has been obtained, an exemption application can be submitted to the relevant authorities. It is also worth highlighting that even for construction works relating to the 'essential services' sector, the general rule under the Order is that such construction works are to be halted during the Effective Period. For example, if the infrastructure contract relating to an 'essential service' requires the infrastructure to be completed within a certain period, it may be possible for parties to such infrastructure contract to claim the Order as a force majeure event and thereby extending the completion date because construction works cannot take place during the Effective Period.

Generally speaking, it would be unlikely for parties to infrastructure projects that have passed the construction stage and are considered to be 'essential services' to be able to rely on force majeure provisions by virtue of the Order, e.g. electricity, transportation and oil and gas, as these sectors are required to carry on business as usual.

That said, depending on how the force majeure clause is drafted in the contract, the parties to an 'essential service' project contract may still be able to invoke the force majeure clauses as a result of:

- (i) Covid-19; and/or
- (ii) disruption of services which are being relied on that are provided by 'non-essential services' providers such as information technology (IT) companies resulting from the Order and/or Covid-19,

which prevents the 'essential services' provider from performing its obligations under such contract. This is subject to the compliance of the procedural requirements (such as giving notice and duty to mitigate) of the force majeure clause.

Similarly, for construction and infrastructure contracts in sectors that are considered to be 'non-essential services', force majeure relief may be available as a result of the Order and/or Covid-19. Again, this is subject to the specific drafting of the force majeure clause and the ability of the party claiming such force majeure to prove the impact the Order and/or Covid-19 has on its performance of its obligations under the contract.

Recommended Steps

Construction and infrastructure companies are advised to take the following actions:

- (i) review the relevant contracts carefully to identify the force majeure clause and consider whether that clause or any other provisions can be relied upon in light of the Order and/or Covid-19;
- (ii) check whether there are any limitations or timelines to invoke the force majeure clause;
- (iii) consider whether the contract requires parties to take any mitigating measures; and



- (iv) consider including or expanding force majeure provisions expressly covering the eventualities of pandemics and restricted movement orders in new contracts.

Conclusion

There is no one-size-fit-all solution as every case has to be considered on its facts. Ultimately, the legal consequences of the Order and/or COVID-19 which may hinder(s) the performance of the contract will depend on how the force majeure provisions in the contract are drafted.

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