

## Client Alert

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For further information, please contact:

**Janice Tay**  
Partner  
+603 2298 7838  
janice.tay@wongpartners.com

**Chih-Wen Ooi**  
Associate  
+603 2299 6428  
chihwen.ooi@wongpartners.com

**Kimmy Khoo**  
Legal Executive  
+603 2299 6545  
litigroup8.kl@wongpartners.com

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

*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.*

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.

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.

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 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.

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**

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

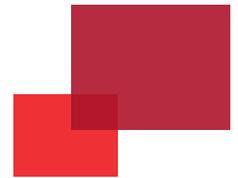
### Summary of regulatory updates

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:

- **A press release by the National Security Council under the Prime Minister's Department dated 18 March 2020<sup>1</sup>**

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<sup>1</sup> For further information: click [here](#).



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.

- **Frequently asked questions ("FAQ") by the Ministry of Works revised 24 March 2020<sup>2</sup>**

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.

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

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

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

- (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.

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.

- **FAQ by the Ministry of Domestic Trade and Consumer Affairs dated 18 March 2020<sup>3</sup>**

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.

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<sup>2</sup> For further information: click [here](#).

<sup>3</sup> For further information: click [here](#).



- **Advisory note by the Malaysian Institute of Architects ("PAM") dated 18 March 2020<sup>4</sup>**

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.

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.<sup>5</sup>

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.

### **An Entitlement to Time and Money**

Examples of clauses in the standard form contracts which may be relied upon are summarised below<sup>6</sup>.

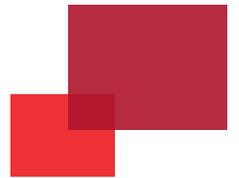
	<b>PAM 2018</b>	<b>IEM</b>	<b>PWD 203A</b>	<b>FIDIC</b>	<b>AIAC</b>
	<b>CLAUSES</b>				
<b>EOT</b>	23.0	43.0	43.0	8.5	23.0
<b>L&amp;E</b>	24.0	44.0	44.0	20.0	24.0

<sup>4</sup> For further information: click [here](#).

<sup>5</sup> For further information: click [here](#)

<sup>6</sup> The contracts referred to here are:

- (i) Agreement and Conditions of Pertubuhan Arkitek Malaysia Contract 2018 (With Quantities) ("**PAM 2018**");
- (ii) Institute of Engineers Malaysia Conditions of Contract 1989 ("**IEM**");
- (iii) Public Works Department Form 203A (Rev. 2010) ("**PWD 203A**");
- (iv) Fédération Internationale Des Ingénieurs-Conseils Conditions of Contract for Construction 2017 ("**FIDIC**"); and
- (v) Asian International Arbitration Centre Standard Form of Building Contract 2019 ("**AIAC**").



## EOT

The procedure in making an application for EOT is largely similar in most standard form contracts. An example is Clause 23.0 of PAM 2018<sup>7</sup> which provides that:

- (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
- (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.

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

- Clause 23.8(a) - *force majeure*<sup>8</sup> 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*".
- Clause 23.8 (w) – the suspension of the execution of works by the contractor if the architect and/or consultant informs the contractor in writing<sup>9</sup> of their withdrawal from the supervision of execution of the works required under the local building by-laws for whatever reasons; or
- Clause 23.8 (x) – suspension of the whole or part of the works by an order of a statutory authority<sup>10</sup> provided the suspension is not due to any negligence, omission, default and/or breach of contract by the Contractor.

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

## L&E

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)<sup>11</sup> where works have been or are likely to be materially affected by reason of a suspension of the works through a statutory authority. However, L&E is not claimable where an application is premised on a *force majeure* event.

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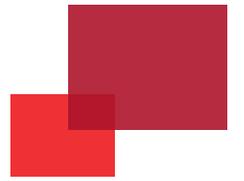
<sup>7</sup> See e.g. Clause 43.0 of IEM, Clause 43.0 of PWD 203A, Clauses 8.4-8.5 and 20.2 of FIDIC and Clauses 23.0-23.1 of AIAC

<sup>8</sup> 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. 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.

<sup>9</sup> See e.g. Clause 43(e) of IEM, Clause 43.1(e) of PWD 203A, Clause 23.8(c)(xiii) of AIAC.

<sup>10</sup> See e.g. Clause 43.1(e) of PWD 203A, Clause 8.6 of FIDIC and Clause 23.8(c)(xiv) of AIAC.

<sup>11</sup> 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.



In making a claim for L&E, a similar procedure as that in an EOT application applies.<sup>12</sup>

### Costs due to Price Fluctuations

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.

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:

	CLAUSE	PROVISION
IEM	54	Not claimable, contractors to bear the risk
PWD 203A	30.0	Maybe, depends on special provisions to the contract (if applicable)
FIDIC	13.7	Claimable, where a schedule of cost indexation is included in the contract
PAM	13.0	Not claimable, contractors to bear the risk
AIAC	13.0	Not claimable, contractors to bear the risk

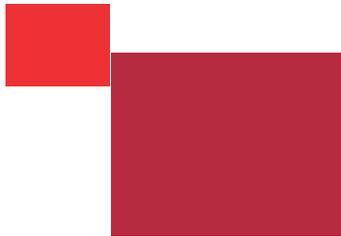
### Conclusion

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.

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.

[www.wongpartners.com](http://www.wongpartners.com)

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



<sup>12</sup> See e.g. Clause 44.2 of PWD 203A, Clause 20.2 of FIDIC and Clause 24.1(a) of AIAC.