

# Shearn Delamore & Co.

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## Time and Costs Issues in The Construction Industry Arising from The Movement Control Order

1. In view of the COVID-19, the Malaysian government implemented the Movement Control Order (“MCO”) effective throughout Malaysia from 18 March 2020 to 31 March 2020<sup>1</sup>. The initial MCO period was further extended to 28 April 2020. Following the announcement of the MCO, all construction works shall cease or be suspended during the MCO period, except for certain critical works<sup>2</sup>. The Government had recently lifted the restriction for certain types of construction projects and services related to construction works, subject to making application to the Ministry of International Trade and Industry and strict compliance of the guidelines/conditions laid down by the government departments<sup>3</sup>.
2. As a result of the MCO, issues of delay, extension of time (“EOT”) to complete the works and payment of loss of expense (“L&E”) may arise between the employer and the contractor. Central to these issues is the question whether the present MCO constitutes a force majeure event. This article will examine whether the MCO constitutes a force majeure event under eight commonly used standard forms of construction contracts in Malaysia and whether a contractor is entitled to claim for EOT and/or L&E by reason of the MCO. For brevity, our views are summarised in the table hereinbelow.

### *Force Majeure under the Standard Forms Contracts*

3. A force majeure clause is inherent in nearly all standard form contracts in Malaysia. It prescribes the parties’ rights and obligations when an extraordinary event or circumstance beyond their control arises and which prevents one or both from fulfilling their obligations as originally required under the contract. What constitutes force majeure and how, if at all, it impacts upon the rights and obligations of the parties under the contract is entirely dependent on the contractual provisions. Force majeure therefore cannot generally be implied into the contract.
4. Under the **PAM form of contracts**, force majeure is defined as “*any circumstances beyond the control of the Contractor caused by terrorist acts, governmental or regulatory action, epidemics and natural disasters*”. Under this definition, both the MCO and the COVID-19 pandemic should be classified as force majeure events.
5. Under the **PWD form of contracts**, force majeure is not specifically defined to include epidemics, pandemics or governmental or regulatory action. The definition does include “*natural catastrophe*” and “*operation of the forces of nature*”, which one may argue to include the COVID-19 pandemic. However, there appears to be no clear proposition from any Malaysian or commonwealth authorities or dictionary definition that an epidemic or pandemic does come within the meaning of “*natural catastrophe*” or “*operation of the forces of nature*”. These terms usually refer to natural disasters such as earthquakes, volcano eruption, tsunami, unusual floods or droughts and the like;

but not epidemics or pandemics. Therefore, there may be some difficulty in construing an epidemic or pandemic as a “*natural catastrophe*” or “*operation of the forces of nature*”, especially since other standard form contracts (such as the PAM form and the 1999 FIDIC Red and Yellow books) specifically mention “*epidemic*” in addition to “*natural catastrophes*” and “*natural disasters*”. Nevertheless, the Ministry of Finance Malaysia appears to have taken the position that in relation to government procurement contracts, the COVID-19 outbreak is considered a force majeure event<sup>4</sup>. However, the FAQ does not have the force of law and the same, if challenged, will have to be decided by the Courts.

6. Under the **1999 FIDIC Red and Silver books**<sup>5</sup>, the MCO and the COVID-19 outbreak are likely to be regarded as a “*Force Majeure Event*”, which is defined as an exceptional event or circumstance.
7. Under the **IEM form of contracts**, the concept of force majeure comes under the definition of “*Employer’s Risks*”. However, similar to the PWD form of contracts, the definition does not specifically mention epidemics, pandemics or governmental or regulatory action but uses the term “*operation of the forces of nature*”. Therefore, whether the MCO and the COVID-19 outbreak come within the meaning of “*Employer’s Risks*” remains to be seen.
8. Parties should ensure compliance with the notification and other procedural requirements as stipulated in the force majeure clause.

#### *Entitlement to Claim for EOT and L&E*

9. Under the standard form contracts, if it is established that the COVID-19 outbreak and/or the MCO constitute a force majeure event, a contractor is usually entitled to claim for EOT to complete the works, but not for L&E unless the contract specifically allows for it.
10. Even if the COVID-19 outbreak and/or the MCO do not constitute force majeure events, the contractor may still separately be entitled to claim for EOT and/or L&E. For instance, the contractor may claim based on instructions issued by the employer, superintending officer of the project or any relevant authorities to suspend or postpone the works in line with the MCO or based on compliance with governmental order and directives such as the MCO, even though the MCO itself may not be a force majeure event in both these instances.
11. Contractors must ensure that they comply with the contractual requirement to give notice and all other procedural requirements in relation to making a claim for EOT and/or L&E to avoid such claims becoming barred. Contractors must also be prepared to prove the impact and delay to the works and associated L&E caused by the MCO.

Standard Form of Construction Contracts	Force Majeure	Entitlement to EOT	Entitlement to L&E
Agreement and Conditions of PAM Contract 2006 (with and without quantities)	<b>Yes</b> [Article 7(ad) of Articles of Agreement]	<b>Yes</b> , on the basis of: (i) force majeure; (ii) compliance with terms and conditions of any appropriate authority; or (iii) suspension of the whole or part of the works by order of an appropriate authority [Clauses 23.8(a), 23.8(p) and 23.8(w)]	<b>No</b> [Clause 24]
Agreement and Conditions of PAM Contract 2018 (with and without quantities)	<b>Yes</b> [Article 7(ad) of Articles of Agreement]	<b>Yes</b> , on the basis of: (i) force majeure; (ii) compliance with terms and conditions of any appropriate authority; or (iii) suspension of the whole or part of the works by order of an appropriate authority [Clauses 23.8(a), 23.8(q) and 23.8(x)]	<b>No</b> [Clause 24]
Government of Malaysia Standard Form of Contract PWD Form 203 (Rev 1/2010)	<b>Probably not</b> , unless the Court determines that epidemic or pandemic comes within the meaning of “ <i>natural catastrophe</i> ” or “ <i>operation of the forces of nature</i> ” [Clause 58.2(c)]	<b>Yes</b> , on the basis of inability to secure goods, materials and/or services essential to the works during the course of the MCO [Clause 43.1(i)]	<b>No</b> [Clause 44]
Government of Malaysia Standard Form of Contract PWD DB (Rev 1/2010)	<b>Probably not</b> , unless the Court determines that epidemic or pandemic comes within the meaning of “ <i>natural catastrophe</i> ” or “ <i>operation of the forces of nature</i> ” [Clause 67.2(c)]	<b>Yes</b> , on the basis of inability to secure goods, materials and/or services essential to the works during the course of the MCO [Clause 49.1(i)]	<b>No</b> [Clause 49.2]

Standard Form of Construction Contracts	Force Majeure	Entitlement to EOT	Entitlement to L&E
FIDIC Conditions of Contract for Construction for Building and Engineering Works Designed by the Employer (Red book) First Edition 1999	<b>Yes</b> [Clause 19.1]	<b>Yes</b> , on the basis of: (i) force majeure; or (ii) unforeseeable shortages in the availability of personnel or goods caused by epidemic or governmental actions [Clause 19.4(a), 8.4(b) and 8.4(d)]	<b>No</b> [Clause 19.4(b)]
FIDIC Conditions of Contract for EPC / Turnkey Projects (Silver book) First Edition 1999	<b>Yes</b> [Clause 19.1]	<b>Yes</b> , on the basis of force majeure [Clause 19.4(a) and 8.4(b)]	<b>No</b> [Clause 19.4(b)]
IEM Form of Contract for Mechanical and Electrical Engineering Works, Third Edition, 2017	<b>Probably not</b> , unless the Court determines that epidemic or pandemic comes within the meaning of “ <i>operation of the forces of nature</i> ” [Clause 19.4(1)(d)]	<b>No</b> , in which case time for completion may become at large unless the Court determines that epidemic or pandemic comes within the meaning of “ <i>operation of the forces of nature</i> ” [Clause 45.1(1)(c)]	<b>No</b>
IEM Form of Contract for Civil Engineering Works, Third Edition, 2017	<b>Probably not</b> , unless the Court determines that epidemic or pandemic comes within the meaning of “ <i>operation of the forces of nature</i> ” [Clause 20.4(1)(d)]	<b>No</b> , in which case time for completion may become at large unless the Court determines that epidemic or pandemic comes within the meaning of “ <i>operation of the forces of nature</i> ” [Clause 44.1(1)(c)]	<b>No</b>



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<sup>1</sup> MCO is made pursuant to the **Prevention and Control of Infectious Diseases Act 1988** and the **Police Act 1987**.

<sup>2</sup> See Ministry of Works Malaysia’s FAQs dated 18.3.2020, which is available [here](#) and the updated FAQs dated 1.4.2020, which is available [here](#).

<sup>3</sup> See the Ministry International Trade and Industry’s press release on 10.4.2020, which is available [here](#) and press release on 16.4.2020 is available [here](#). See also, <https://www.thestartv.com/v/miti-construction-companies-only-allowed-to-operate-at-50-capacity-throughout-mco?rc=59b24d51b7aca>.

<sup>4</sup> See Ministry of Finance Malaysia’s FAQs, QA No. 1 at page 2. The full content of the Ministry of Finance Malaysia’s FAQs is available [here](#).

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<sup>5</sup> FIDIC First Edition 1999 (*Conditions of Contract for Construction for Building and Engineering Works Designed by the Employer*) and FIDIC Silver book First Edition 1999 (*Conditions of Contract for EPC/Turnkey Projects*).