



Impact of MCO on Businesses in Malaysia

by Lee Jing Min

On 16 March 2020, the Government of Malaysia issued a nationwide Movement Control Order (“**MCO**”) pursuant to the Prevention and Control of Infectious Diseases Act 1988¹ and Police Act 1967. The MCO was for an initial period of 18 March 2020 until 31 March 2020² and was thereafter extended twice, first until 14 April 2020³ and secondly until 28 April 2020.⁴ The Government of Malaysia also issued the Prevention and Control of Infectious Diseases (Measures Within the Infected Local Areas) Regulations 2020 (“**the Regulation**”) specifically for the MCO.

During the period of the MCO, only companies which were considered to be providing “essential services” were allowed to continue its business operations and/or operate at their business premises.

The restrictions to businesses under the MCO have had serious impact to businesses which did not fall within the definition of “essential services”. The consequences of the MCO were felt by both business owners and consumers of goods and services, namely people like you and me.

I will attempt to address the frequently asked questions (FAQ) to provide some answers and clarification to questions relating to the impact of the MCO on businesses in general, with reference to applicable laws currently in force.

What is taking place currently is unprecedented for most of us. In historical times, a similar pandemic took place a century ago with the onslaught of the Spanish flu. In fact, the Prevention and Control of Infectious Diseases Act 1988 is being enforced nationwide for the first time since its enactment.

¹ Prevention and Control of Infectious Diseases (Measures Within the Infected Local Areas) Regulations 2020 made under the Prevention and Control of Infectious Diseases Act 1998

²As announced on 16 March 2020

³ As announced on 25 March 2020

⁴ As announced on 10 April 2020



1. What are the restrictions under the MCO?

The MCO has restricted the operations of all businesses and has only allowed the provision of “essential services” and services in support of such “essential services” to continue its operations and/or to operate at their business premises for the duration of the MCO.

2. What are essential services?

“Essential Services” are those services declared by the Minister of Health under the Regulations to be “essential” to the economy of Malaysia and for the survival of the general public.

Such “essential services” would include, amongst others, banking services, electricity services, fire services, postal services such as courier and delivery services, public health services, security services, the police and military, water services, e-commerce and food supply.⁵

The list of ‘essential services’ is an exhaustive list which provided for additional services to be added to the list at the discretion of the Ministry of International Trade and Industry.

On 10 April 2020, the list of “essential services” was expanded to include services which were considered to be important to the continued support of the Malaysian economy and to the well-being of the general public such as aerospace services, limited services in the automotive industry, limited areas of the construction industry, hardware stores and self-service laundry stores.⁶

⁵ Regulation 2, Schedule of the Prevention and Control of Infectious Diseases (Measures within the Infected Local Areas) Regulations 2020

⁶ Lampiran I, Senarai Sektor, Siaran Media bertarikh 10 April 2020, Kementerian Perdagangan Antarabangsa dan Industri



All “essential services” are only allowed to operate under very strict Standard Operating Procedures as issued by Ministry of International Trade and Industry.

3. Are non-essential services allowed to operate?

All business and services not classified as “essential services” under the MCO are not allowed to operate unless they have obtained the prior written approval from the Ministry of International Trade and Industry. However, the National Security Council (**NSC**) has also issued a press statement to clarify that certain non-essential services may be allowed to operate at a minimum level as and when such services are required – for example, car repair services and towing services for emergency purposes, and construction works in progress provided that such works are necessary to ensure the safety and security of the general public subject to the prior written verification and approval by Public Works Department Malaysia (JKR) and Department of Occupational Safety and Health.⁷

4. Does the MCO means that I have to temporarily shut down my operations/business/company?

No, the MCO only requires businesses/companies not within the scope of “essential services” and/or “non-essential services” as approved by the NSC to close their business or office premises. This means that businesses are not allowed to operate at their respective places of business. However, this does not translate to mean that the businesses are required to shut down, especially if the business can continue to be operated remotely on a “work from home” (**WFH**) basis.

⁷ Lampiran B, Kenyataan Media bertarikh 18 Mac 2020, Majlis Keselamatan Negara, Jabatan Perdana Menteri.



The possibility of a business operating on a WFH basis has been exponentially expanded by the availability of the internet, the allowing of e-commerce and logistic services under the MCO by the NSC as well as the development of video conferencing applications such as Zoom, Google Hangout, Webex and Microsoft Teams.

5. *What will happen to an item which I have purchased prior to MCO but has yet to be delivered?*

As local logistic and delivery services are allowed to operate under the MCO, your purchases from online sellers, subject to the seller sending the item to you, can still be delivered to you.

Overseas delivery may face some complications as most courier services have stopped international delivery for the period of the MCO, thereby suspending the delivery of your item until the MCO is lifted.

However, for avoidance of any doubt, it is recommended that you contact your seller or customer service department of the delivery service directly to seek further clarification or to make alternative arrangements.

6. *What about contracts which I have entered into prior to MCO but have yet to be completed or is in the process of being completed?*

Generally, this is a situation of breach of contract if a contract has been entered but subsequently failed to be performed in accordance with the terms of the contract. The party at fault would then be responsible to bear any liabilities that arises therein.

However, the outbreak of COVID-19 and imposition of the MCO may render the performance of your contract impossible to be completed until such time the MCO is lifted.

In such a situation, the advisable approach would be for contracting parties to communicate to discuss and attempt, as far as possible, to re-negotiate the terms of the contract for the contract to continue after the MCO period as well as resolve any other issue which may arise as a consequence of the MCO.

7. What if parties are unable to come to a resolution on the issues in conflict and have reached a deadlock/impasse in negotiations?

In such event, then parties would have to rely on their contractual rights as contained within the terms and conditions of the contract in question. Parties would then be seeking to enforce their contractual rights.

The first item which parties ought to consider would be whether the legal principle of *force majeure* and/or the doctrine of frustration would apply to the situation of the COVID-19 pandemic and the MCO, which shall be explained in detail below.

8. What is “force majeure”?

Force majeure is a legal term describing the occurrence of an act/event which renders a contractual obligation impossible to perform. In order for an event to be classified as a *force majeure* event, it must be an occurrence which was beyond the expectation of parties at the time the contract was entered into e.g. war or an unexpected natural occurrence in Malaysia such as snowing, a tsunami or an earthquake, it may also refer to a global pandemic such as the one facing the world at the moment.

However, in order of a party to avail to *force majeure*, your contract must contain a *force majeure* clause.



9. ***If there is a “force majeure” clause in my contract, how can I rely on it to protect my interest under the contract?***

If there is a *force majeure* clause in your contract, then you have to first determine if the clause is applicable to the event you wish to classify as being a *force majeure* event. Most *force majeure* clauses are exhaustive and specific. The event of *force majeure* must be spelt out expressly in the *force majeure* clause of your contract and cannot be implied.

In the event the *force majeure* clause in your contract includes your *force majeure* event, then the term would also spell out the consequences of such *force majeure* event will have on the performance of each parties' obligations under the contract.

10. ***The outbreak of COVID-19 and MCO has rendered me unable to perform my contract obligations until the lifting of the MCO, can I then rely on the “force majeure” clause?***

Caution must be exercised when placing reliance on a *force majeure* clause as the majority of *force majeure* clauses usually provides for the *force majeure* event to render the contract ***impossible to perform*** in its entirety.

If the *force majeure* event renders the contract ***impossible to perform*** in its entirety, then parties may rely on the *force majeure* clause to bring the contract to an end, meaning that parties are no longer required to comply or perform their respective obligations under the contract. However, obligations which have arisen prior to the termination of the contract, due to the *force majeure* event, shall remain binding on the parties.



E.g. If I deliver goods prior to the *force majeure* event and then the *force majeure* event occurs, the obligation to pay for the goods already delivered shall remain.

If the effect of the MCO would be merely to render the performance of the contract only **temporarily** impossible to perform, then you may not be able to seek protection under the *force majeure* clause unless your *force majeure* clause allows for a temporary suspension of the contractual rights of the parties.

A lot therefore would depend on how the *force majeure* clause is drafted.

11. So, what happens if my contract does not have a *force majeure* clause or where I am unable to rely on the *force majeure* clause?

In the absence of a *force majeure* clause, parties would then have to see if the legal doctrine of frustration would apply to the contract.

12. What is the doctrine of frustration?

Doctrine of frustration as provided under **Section 57(2) Contracts Act 1950** provides that a contract is deemed “frustrated” or rather becomes void when an intervening event renders the performance of an obligation under the contract impossible to perform in its entirety.

In such a situation, the contract is deemed void, both parties are completely discharged from performing their obligations completely and are required to either restore parties back to original position prior to entering the contract or to compensate one another.⁸

⁸ Section 66 of Contracts Act 1950 and Section 15 of Civil Law Act 1956



Once again, caution must be exercised on whether the intervening event renders performance of a contract impossible or merely temporarily unperformable. The doctrine of frustration would **NOT** apply to the latter.

13. *Is the doctrine of frustration applicable due to the outbreak of COVID-19 and MCO?*

The doctrine of frustration would only apply to situations where the performance of the contract has been rendered impossible by the intervening or 'frustrating event'.

In all likelihood, the doctrine of frustration would **NOT** apply to the current situation of the COVID-19 outbreak and the imposition of the MCO especially where parties are able to continue to perform and meet their contractual obligations once the MCO has been lifted.

14. *If I have sent my car to the workshop before the MCO but has yet been successfully repaired/serviced for me, will I be able to get back my car during period of MCO?*

The practical answer would be no, as your workshop would most likely be closed during this period. However, with the allowance of automotive workshops to open (with conditions) during the MCO as announced on 10 April 2020, you may be able to collect your car provided your workshop has obtained the approval from the relevant Ministry to operate its business and provided your workshop complies with the standard operating requirements imposed.

Until such time you are able to collect your car and pay your workshop for the work done on your car, your workshop will continue to maintain an unpaid seller's lien over your car. On the flip side, your workshop has



a responsibility to maintain the safekeeping and the condition of your car until such time you collect the same from them.

It is recommended that you contact your workshop directly to make further arrangements in respect of your car.

We would, however, advise you to stay home and stay safe and only collect your car once the MCO is lifted, unless you truly require your car for emergency usage.

15. *Can I claim for the loss of use of my car in such a situation?*

It appears unlikely for such a claim to succeed as your workshop shall hold an unpaid seller's lien over your car until such time you are able to pay for their services provided. You will, however, be prevented by the movement restriction imposed by the MCO from attending at your workshop to make payment and collecting your car. Unless this can be done, your workshop has a right to retain your car but on the condition that they continue to safekeep and maintain the condition of your car.

16. *For a contract for supply of machineries for construction project, can I claim or can a claim be made against me for the loss of use since the machineries cannot be supplied?*

Unless the construction project falls within the definition of "essential services" under the MCO, there will be no construction site for machineries to be supplied or delivered to!

As to whether a claim can be made on such basis, it would firstly depend on whether there is a clause in the contract to govern such a situation i.e. a *force majeure* clause. If not, then whether or not the supply of machineries can proceed once the MCO is lifted.



17. Is “force majeure” and/or doctrine of frustration applicable in situation above?

If the contract is rendered totally impossible to perform, parties may attempt to bring the contract to an end either via the *force majeure* clause in your contract (if any) or the doctrine of frustration.

Do note that upon the contract being terminated due to the *force majeure* event, past obligations which have arisen prior to the *force majeure* event shall remain binding on parties. Post-termination, parties shall also continue to have a duty to mitigate their losses.

If, however, the supply of machineries can proceed once the MCO is lifted, then this will most likely not fall within the terms of being a *force majeure* event, depending on the contents of the *force majeure* clause in your contract, nor would you be able to avail to the doctrine of frustration.

Parties would then have to negotiate for a possible suspension of contractual obligations for the period of the MCO.

18. Based on the above, what are the steps I should take if any of the situations is applicable to me?

Firstly, if there is an issue arising out of your contract/orders/purchases as a result of the COVID-19 and/or MCO, you should check and review if your contract has the abovementioned “force majeure” clause or any default clauses.

Secondly, you would need to determine if the COVID-19 outbreak and the MCO and its extensions have rendered the performance of your contract/orders/purchases totally impossible.



If it does not and only renders the performance of your contract/orders/purchases temporarily impossible, then you should proceed to contact your other contracting party to agree to temporarily suspend all contractual rights, obligations and responsibilities until such time the MCO is lifted and the performance of your contractual obligations and responsibilities can proceed.

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The contents of this article are intended for information and academic discussion only and should not be construed or considered as legal advice. You are recommended to seek you own specific professional legal advice for your situation.

Our lawyers are currently on WFH mode during the MCO period and we shall continue to provide our services as usual. If you have any queries or require any legal services, please email us any one of our lawyers at their respective email addresses:-

- 1) Mr. Yip Huen Weng: yip@josephinelkchow.com
- 2) Ms. Chia Hui Ming: huiming@josephinelkchow.com
- 3) Mr. Simon C K Hong: simon@josephinelkchow.com
- 4) Mr. Lee Jing Min: jingmin@josephinelkchow.com
- 5) Ms. Pearly Chua: pearly@josephinelkchow.com

Consultation over video conferencing, if required, may also be arranged at your request.

All information in this article is correct as at 21 April 2020