

## FAQ:

# MCO 2.0 + PROCLAMATION OF EMERGENCY = ?

On 11.01.2021, the Prime Minister of Malaysia announced the re-implementation of the Movement Control Order (“**MCO**”) in six states of Malaysia. Just a day after that, the Yang di-Pertuan Agong (“**YDPA**”) declared a nationwide state of Emergency (“**Emergency**”). Subsequently, the Defence Minister announced on 19.01.2021 that all states in Malaysia, with the exception of Sarawak, will be placed under the MCO starting 22.01.2021.

We do not aim to delve into the reasons behind the said implementation and/or proclamation. Neither do we wish to engage readers in the debate as to the constitutionality and/or legality of such implementation and/or proclamation. Rather, we shall address several frequently asked questions (FAQs) with regard to the effect of the MCO and Emergency on contractual rights and obligations.

This FAQ is an extension of and/or should be read together with our previous [FAQ1](#) and [FAQ2](#) on the MCO.

### 1. Will the proclamation of Emergency affect my contractual rights and obligations?

Pursuant to the Emergency (Essential Powers) Ordinance 2021, the YDPA or any person authorised by the YDPA may *inter alia* take temporary possession of any land, building or movable property and/or demand any resources to be utilised for any purpose the YDPA or any person authorised by the YDPA deems necessary.

As such, in the event you and/or your counterparty’s property and/or resources are taken possession of and/or utilised by the YDPA, there is a possibility that your contractual rights and obligations will be affected, especially if the property and/or resources form the subject matter of your contract.

A possible example will be when a hotel has been taken possession by the YDPA to be utilised as a quarantine center for COVID-19. In such situation, any contract involving the hotel (e.g. the sale and purchase of the hotel) will likely be hindered and/or affected.

**2. Will the implementation of the MCO affect my contractual rights and obligations?**

Only essential economic sectors are allowed to operate during the MCO period. However, the good news is that the list of essential economic sectors is more extensive this time around.

Notwithstanding the above, if you and/or your counterparty's business and/or the subject matter of your contract is not listed as an essential service by the Ministry of International Trade and Industry, then it is likely that your contractual rights and obligations will be affected.

As an example, the fitness industry will likely be affected as gyms are not allowed to open and/or physical classes are not allowed to be conducted. However, it can be seen that the fitness industry is attempting to mitigate the effect of such restriction by *inter alia* introducing online classes and allowing rental of gym equipment.

**3. What should I do if my business is affected by the MCO and Emergency?**

If your business is affected, the first thing to do is to ascertain whether you are unable to perform your contractual obligations as a result of it. If the answer is in the affirmative, a review of your existing contract and/or agreement will be beneficial in order to determine your recourse.

If your contract falls under any of the following categories:

- a. construction or supply of construction material, equipment or workers;
- b. performance bond granted pursuant to a construction contract;
- c. professional services contract;
- d. lease or tenancy of non-residential property;
- e. event contracts;
- f. contract by a tourism enterprise; and
- g. religious pilgrimage-related contract,

and you are unable to perform your contractual obligations due to the implementation of the MCO, your counterparty will not be entitled to exercise his/her rights under the contract pursuant to the Temporary Measures for Reducing the Impact of Coronavirus Diseases 2019 (COVID-19) Act 2020 (e.g. termination of contract) and *vice versa*.

As of the date of this FAQ, the above is in force from 18.03.2020 to 31.03.2021.

4. **My contract is not covered under the Temporary Measures for Reducing the Impact of Coronavirus Diseases 2019 (COVID-19) Act 2020. What should I do?**

Another possible recourse lies in the form of a *force majeure* clause which is usually present in all contracts.

An example of a *force majeure* clause which may be applicable in this instance is as follows:

*“Events falling within Force Majeure shall include but are not limited to acts of God or force of nature, landslide, lightning, earthquake, flood, fire, explosion, storm or storm warning, tidal wave, tsunami, typhoon, shipwreck and perils to navigation, act of terrorism, act of war (declared or undeclared) of foreign enemy, strike (excluding strikes, lockouts or other industrial disputes or action solely amongst employees of supplier or its sub-contractor(s)), act or omission of sovereign or those purporting to represent sovereign states, blockade, embargo, quarantine, public disorder, sabotage, **declaration of state of emergency**, nuclear explosion, expropriation, moratorium, radioactive or chemical contamination or coup d’état or any events beyond the control of the Parties or either of them.*

*If an Event of Force Majeure has occurred and any party reasonably considers such Event or Force Majeure applicable to it to be of such severity or to be continuing for a period of more than six (6) months, then the Parties may mutually terminate this Agreement.”*

The applicability of a *force majeure* clause is entirely dependent on the wordings of the clause. A more in depth discussion of a *force majeure* clause can be found in our previous [FAQ1](#) and [FAQ2](#).

5. **My contract has a *force majeure* clause similar to the above. Can I walk away from my contractual obligations?**

In the most straightforward situation, you may be able to “walk away” from your contractual obligations and/or parties may be entitled to a “clean breakup” provided that you have taken all measures to avoid the application of *force majeure* or to mitigate the effect to no avail and/or you have fulfilled all the requirements under your contract (e.g. minimum time frame and/or notice requirement).

However, this is, again, dependent on the wordings of your contract. Some contracts may provide for an option for parties to suspend their obligations pending the cessation of the *force majeure* event.

**6. In light of the Emergency, my counterparty wants to rely on a *force majeure* clause to terminate the contract. Can I do anything to stop him/her?**

You and/or your counterparty have the duty to take measures to avoid the application of *force majeure* event and/or to mitigate the effect. As an example, if your contract has a clause for suspension of obligations in lieu of termination, it may be arguable that the contract should be suspended until the Emergency is revoked and as such, a termination is not necessary in the circumstance.

Depending on the wordings of the contract, there may be other obligations and/or requirements that are to be fulfilled and/or other factors that have to be taken into account prior to the termination of the contract. Hence, parties' rights to terminate the contract pursuant to a *force majeure* clause have to be ultimately determined on a case by case basis.

In any event, if you disagree that a *force majeure* event has occurred, you may dispute the same in accordance with the method of dispute resolution provided for in your contract and/or as provided under the law.

**7. My contract has been terminated due to a *force majeure* event. Can I claim for any damages and/or compensation?**

Generally, a typical *force majeure* clause will negate parties' rights to claim for damages and/or compensation. Nevertheless, parties' rights to claim for compensation and/or damages, if any, are subject to the provision for the same in the contract and are to be assessed on a case by case basis.

**8. What if my contract does not have a *force majeure* clause?**

In the absence of a *force majeure* clause, a party may rely on the common law doctrine of frustration, which will discharge both parties from performing their contractual obligations.

However, the doctrine of frustration will only apply in very limited circumstances, a brief discussion of which can be found in our previous FAQ [here](#).

9. **Moving forward, what are the steps that I should take in order to protect my contractual rights?**

In light of the ongoing pandemic and the possibility of more “lockdowns” in the future, it is highly recommended to review all your existing contracts in order to ensure that your rights are sufficiently protected. This may include introducing a new *force majeure* clause and/or revising your existing clauses by allowing temporary suspension of parties’ obligations. Parties are also encouraged to communicate with each other in order to discuss on ways to mitigate any possible losses arising from the Emergency and/or MCO.

Please do not hesitate to contact us if you require further assistance and/or information on this matter.

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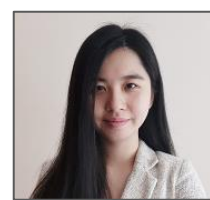
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*Disclaimer: The contents do not constitute legal advice, are not intended to be a substitute for legal advice and should not be relied upon as such.*

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