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Construction

## Movement Control Order – How Does It Affect the Construction Sector?

### Introduction

Since 16 March 2020, Malaysia has been abuzz following the announcement by the Prime Minister of the implementation of a Movement Control Order (“**MCO**”). The MCO restricts the movement of anyone to, from and within an infected area.

Following the above announcement, the Government of Malaysia has gazetted the Prevention and Control (Measures Within the Infected Areas) Regulations 2020 (“**Regulations**”) which take effect from 18 March 2020 to 31 March 2020 (“**Restriction Period**”). Under the Regulations, the whole of Malaysia has been defined as an infected area.

In line with the MCO, all premises including, *inter alia*, government and private premises have been ordered to close, with the exception of any premises involved in the provision of **essential services**. Under the Regulations, essential services include the following:

- banking and finance;
- electricity and energy;
- fire;
- port, dock and airport services and undertakings, including stevedoring, lighterage, cargo handling, pilotage and storing or bulking of commodities;
- postal;
- prison;
- production, refining, storage, supply and distribution of fuel and lubricants;
- healthcare and medical;
- solid waste management and public cleansing;
- sewerage;
- radio communication including broadcasting and television;
- telecommunication;
- transport by land, water or air;
- water;
- e-commerce;

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- defense and security;
- food supply;
- wildlife;
- immigration;
- customs;
- hotels and accommodations; and
- any services or works determined by the Minister as essential or critical to public health or safety.

(collectively, “**Essential Services**”)

Following the Prime Minister’s announcement, the different sectors of the construction industry have sought clarification and guidance as to whether the type of construction, operation and/or maintenance work that they perform are classified or may be construed within the purview of Essential Services and/or be considered as critical works.

To provide clarity, the Ministry of Works (“**KKR**”)<sup>1</sup> has made a further announcement that all construction work shall be subject to the MCO. Accordingly, all construction and maintenance work must stop. Only critical works are allowed to continue.

This FAQ strives to provide answers to the pertinent questions, addressing the perspective from both the public and private sectors and of the construction industry in general, as well as a brief commentary on the MCO and its effect on specific industry(ies) and what steps need to be taken by these sectors during the Restriction Period.

Questions		Public Sector	Private Sector
1.	Is construction within the essential services under the MCO?	<p>No.</p> <p>Construction works do not qualify as an Essential Service under the Regulations.</p> <p>KKR has also confirmed that the MCO applies to all construction works. <i>(FAQ dated 18 March 2020).</i></p>	<p>No.</p> <p>Construction works do not qualify as an Essential Service under the Regulations.</p>

<sup>1</sup> “Works Ministry : All construction work must stop unless critical”, Wednesday, 18 March 2020, The Malay Mail ([www.malaymail.com](http://www.malaymail.com)).

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Questions		Public Sector	Private Sector
2.	Any exception?	<p>Yes. According to the FAQ issued by KKR, the exception is for “Critical Works”. “Critical Works” are works which if not continued with, could cause danger and harm to workers, the public or the environment.</p> <p>Examples of critical works cited by KKR are:</p> <ul style="list-style-type: none"> <li>(a) Slope Repairs;</li> <li>(b) Pothole Repairs;</li> <li>(c) Traffic Management Control (TMC);</li> <li>(d) Periodical checks of lifts/travellators/escalators and other critical mechanical and electrical equipment;</li> <li>(e) Repairs of lifts/travellators/escalators and other critical mechanical and electrical equipment;</li> <li>(f) Maintenance works at premises of critical services;</li> <li>(g) Upgrading works at premises of critical services;</li> <li>(h) Traffic Light Repairs;</li> <li>(i) Construction of Bailey Bridge at location of any collapsed bridge;</li> <li>(j) Tunnelling Works;</li> <li>(k) Other emergency works as specified under the contract; and</li> <li>(l) Other works which if not completed would result in danger.</li> </ul> <p>For renovation works on business premises which are halted as a result of the MCO and are deemed as a security risk by reason of being incomplete, permission from KKR and the Construction Industry Development Board (“CIDB”) must be obtained prior to resuming the renovation works.</p> <p><i>(FAQ published by the Ministry of Domestic Trade and Consumer Affairs on 18 March 2020)</i></p>	
3.	What about emergency situations?	<p>MCO applies across the board, unless the works are:</p> <ul style="list-style-type: none"> <li>(a) Essential Services; or</li> <li>(b) critical works within the guidance provided by KKR.</li> </ul> <p>Therefore, any situation which does not fall under the specific categories above, should be assessed on a case to case basis. Parties are also advised to refer to the construction contract for any agreed emergency situations.</p> <p>Clarification may be obtained from KKR by contacting the relevant officer on the following helpline: <b>010 5619069 / 011 29220709</b>.</p>	

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Questions		Public Sector	Private Sector
4.	What is the consequence of breaching the MCO?	<p><u>Individuals:</u> Any person found to contravene the Regulations faces the prospect of a fine not exceeding RM1,000.00 or to imprisonment for a term not exceeding 6 months or to both.</p> <p><u>Body corporates:</u> Any person who, at the time of the commission of the offence was a director, manager, secretary or other similar officer of the body corporate or responsible for or assisting with the management of the affairs of the body corporate, may be charged severally or jointly with the body corporate. If the body corporate is found guilty of the offence, the said person shall be deemed to be guilty of that offence unless, having regard to the nature of his functions in that capacity and to all circumstances, he proves:</p> <p>(a) that the offence was committed without his knowledge, consent or connivance; and (b) that he took all reasonable precautions and had exercised due diligence to prevent the commission of the offence.</p>	
5.	What should I do if I wish to continue with the construction work?	Obtain a recommendation from Project Director or Superintending Officer	Obtain a recommendation from Resident Engineer, Architect or Principal Submitting Person
		<p>Once recommendation is obtained, applicant must apply to the KKR to obtain an exemption letter. The request for such exemption letter should be addressed to those persons who have the power to grant such exemption based on their respective jurisdiction, namely:</p> <p>(a) Ketua Pengarah Kerja Raya; (b) Pengarah Kerja Raya Sabah; (c) Pengarah Kerja Raya Sarawak; (d) Ketua Pengarah Lembaga Lebuhraya Malaysia; (e) Ketua Pengarah Jabatan Pengairan dan Saliran; dan (f) Pihak Berkuasa Tempatan atau Pihak Berkuasa Negeri.</p> <p><i>(Source: FAQ dated 18 March 2020)</i></p>	

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Questions	Public Sector	Private Sector
<p>6. What should I do with the machinery?</p>	<p>There is no specific guideline issued on what the contractors should do with the machineries at the construction site.</p> <p>However, as a guide, DBKL issued a notice dated 17 March 2020 requiring the contractors and its workers to take the following necessary steps:</p> <ul style="list-style-type: none"> <li>(a) to ensure the safety and cleanliness at the construction site during MCO period;</li> <li>(b) to ensure the construction works are free from damages or thefts;</li> <li>(c) to ensure the safety of documents and project records at the (construction) site;</li> <li>(d) to record work progress photos at the site at the current date (17 March 2020); and</li> <li>(e) to take all necessary steps to ensure that all obligations for the (construction) are able to continue once the Restriction Period under the MCO is lifted.</li> </ul> <p>Contractors should take note that under section 34 of the CIDB Act, they have a duty to ensure that the construction site and the means of entering and leaving such construction site are safe and not harmful to health. Hence, contractors should ensure that during the Restriction Period, the machineries are kept in a safe place to avoid any accidents that may occur at the construction site.</p> <p>Regulation 4 of the Factories and Machinery (Fencing of Machinery and Safety) Regulations 1970 (“<b>FMS Regulations</b>”) requires that every dangerous part of every driven machine, prime mover and transmission machinery shall be securely fenced in accordance with the FMS Regulations.</p> <p>Thus, contractors are advised to comply with the requirements under the FMS Regulations to ensure that all machineries at the construction side shall be kept safe and situate in a secure place during the Restriction Period to avoid any theft or damages to the machineries and to ensure safety of the site for any occupier (if any).</p> <p>For any loss and damages incurred during the MCO, including loss and damages to the machineries, the KKR published a FAQ on 18 March 2020 which takes the position that the Government shall not be held liable because the Covid-19 contagious disease is deemed as a supervening event.</p>	

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7.	What should I do with the workers?	<p>The Ministry of Human Resource published a FAQ on 19 March 2020 stating the following:</p> <ul style="list-style-type: none"> <li>(a) The workers shall be paid throughout the Restriction Period. The contract of service shall continue notwithstanding the implementation of the MCO;</li> <li>(b) The employers shall pay full salary to the workers based on the agreed rate under the contracts of service. Where there is no fixed rate, the employers shall ensure that the salary of workers does not fall below the minimum basic salary prescribed under the Minimum Wage Order 2020.</li> <li>(c) Employers cannot force their workers to utilise their annual leave.</li> </ul>	
8.	What is the time implication on the performance of the contract? If there is a time implication and I am entitled to claim, who do I make an EOT application to?	<p>Arising from the MCO, there will be delays in the performance obligations thus resulting in a delay to the project as a whole.</p> <p>The Government has recommended that applications seeking for an extension of time (“<b>EOT</b>”) shall be made in accordance with the procedure and provisions of the underlying contract executed between the parties.</p> <p>The standard form of contract usually adopted is the PWD Contract. Typically, under the PWD Contract, an application seeking for an EOT is made to the Superintending Officer.</p>	<p>Similarly, hereto the performance obligations under the contract will be delayed consequent upon the implementation of the MCO.</p> <p>As recommended by the Government, any applications seeking for an EOT must be made to the relevant approving party pursuant to the underlying contract executed by the contracting parties.</p> <p>Under the Malaysian Institute of Architects (“<b>PAM</b>”) Contract 2018 (with quantities), a contractor may apply to the Architect for an EOT when the delay is caused by a Relevant Event which includes circumstances beyond the control of the Contractor, e.g. epidemics, and shall further comply with the procedures, processes and conditions contained in the PAM Contract as a condition precedent to an entitlement of EOT.</p>
9.	What about cost impact due to disruptions arising from MCO?	<p>On 18 March 2020, the KKR has, in tandem with the MCO, announced and ordered that save and except for any “critical works”</p>	<p>On 18 March 2020, the PAM issued an advisory note cautioning all contractors to comply with the requirements under the MCO, and to</p>

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Questions	Public Sector	Private Sector
	<p>and exempted works as approved by the KKR, Malaysian Highway Authority, Department of Irrigation and Drainage, and/or State Authority, all construction and maintenance works must cease immediately.</p> <p>The consequences of the foregoing order essentially envisage a suspension order to be issued by the relevant project director and/or superintending officers under the relevant underlying contract(s).</p> <p>Where construction and maintenance services have been suspended, it is inevitable that costs and operating expenses will continue to be incurred by Contractors. Evidently, based on the suspension provisions under the standard PWD form of contract, during any suspension period, Contractors are required to continue to perform obligations which are not affected by the instruction to suspend (i.e. the MCO), including to pay wages<sup>2</sup>, to effect and maintain insurances and performance bonds.</p> <p>With regards to whether contractors are entitled to claim for losses and/or expenses incurred arising from a suspension order, against the Government, contractors may give notice in writing to the project director and/or superintending</p>	<p>temporarily suspend construction works at project sites for the duration of the Restriction Period. The Architect is advised to remind the contractors in writing, of the obligations under the PAM Contract to comply with all laws pertaining to the Works.</p> <p>The question of whether contractors are able to make claims to recover for losses incurred, arising from the suspension resulting from the MCO, against the employer, is dependent of the terms of their respective underlying contract.</p> <p>Similar to the Public Sector, any employers and/or contractors in the Private Sector who breach the MCO shall be deemed to be in breach of its obligations to comply with all laws pertaining to the Works under the contract, and will additionally incur more costs in the form of fines under the SDBA, Regulations, and such other applicable legislations.</p>

<sup>2</sup> Refer to Q7 of this Report

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	<p>officers, indicating their intention to claim for direct loss and/or expense suffered as the result of a suspension instruction issued under the respective underlying PWD contract. Such direct loss and/or expense would however finally be ascertained by the project director and/or superintending officers. On this note, it is worth noting that the KKR has taken the position, in its 18 March 2020 announcement, that no compensation claims can be made against the Government. The KKR opined that the effect of the MCO requiring stoppage of work is made in pursuance of the Government's efforts to alleviate further escalation and avert a public health crisis in Malaysia due to Covid-19.</p> <p>A Contractor or any person who ignores or refuses to comply with a suspension order will not only risk breaching its contract with the Government but will additionally incur more costs in the form of fines under the Street, Drainage and Building Act 1974 ("<b>SDBA</b>"). Under the SDBA, any person who resumes performance of works which have been suspended, may be liable on conviction to a fine not exceeding RM50,000.00 or to imprisonment for a term not exceeding 3 years or to both and shall also be liable to a further fine of RM1,000.00 for every day during which the offence is continued after conviction. The</p>	

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		<p>foregoing does not include fines and imprisonment arising from other laws and regulations such as the Regulations.</p> <p>On 19 March 2020, it has been reported that a construction firm in Kuala Lumpur was compounded for not adhering to the ongoing MCO. The firm was imposed with a RM50,000.00 fine for carrying out work despite having been given notice to stop work for two weeks.<sup>3</sup></p>	
10.	Is the MCO a force majeure event?	<p>Under PWD 203, Force Majeure events are listed as:</p> <ul style="list-style-type: none"> <li>(a) War (whether declared or not), hostilities, invasion, act of foreign enemies;</li> <li>(b) Insurrection, revolution, rebellion, military or usurped power, civil war, terrorism;</li> <li>(c) Natural catastrophe including but not limited to earthquakes, floods, subterranean spontaneous combustion or any operation of the forces of nature against which an experienced contractor could not reasonably have been expected to take precautions;</li> <li>(d) Nuclear explosion, radioactive or chemical contamination or radiation (unless caused by the negligence act, omission or</li> </ul>	<p>There is no generally applicable concept of “force majeure” under Malaysian law. However, Malaysian law does enable parties to a contract to provide for force majeure events.</p> <p>Contracting parties are free to incorporate force majeure clauses into the contracts which will enable suspension of performance or excuse the affected party from performing its obligations under the contract which are affected by a force majeure event.</p> <p>The crucial question to be determined whether the MCO is a force majeure event depends on the definition or scope of the “force majeure events” as stipulated under the contract.</p> <p>For instance, under PAM Contract 2018 (with quantities), “force majeure events” are defined as “any <b>circumstances beyond the control of the Contractor</b> caused by terrorist</p>

<sup>3</sup> <https://www.thestar.com.my/metro/metro-news/2020/03/19/oh-039that039-ban-construction-firm-fined-rm50k-for-operating-during-mco>

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		<p>default of the Contractor, its agents or personnel);</p> <p>(e) Pressure waves caused by aircraft to other aerial devices travelling at sonic or supersonic speeds; and</p> <p>(f) riot, commotion or disorder, unless solely restricted to employees of the Contractor or its personnel, servants or agents.</p> <p>The list of Force Majeure events under PWD 203 is exhaustive. An event such as the issuance of the MCO (being a governmental or regulatory action, directive, instruction and/or order) is not listed within the events of Force Majeure specified within the provisions of the PWD 203.</p>	<p>acts, <b>governmental or regulatory action</b>, epidemics and natural disasters” (see Article 7 (ad)).</p> <p>Based on the definition of “force majeure events” listed in the PAM Contract 2018 (with quantities), the MCO being a law imposed by the Government is a “force majeure event”. Under the terms of the PAM Contract 2018 (with quantities), Contractors are obligated to comply with the MCO. The MCO and its effect requiring stoppage of construction work is a circumstance beyond the control of the contractors. This is consistent with the advisory note published by the PAM President on 18 March 2020.</p>
11.	What do the standard contracts say?	<p><u>For Building and Construction industry:</u></p> <p>On 18 March 2020, the KKR issued a FAQ based on the MCO. In response to a question whether projects affected by the implementation of the MCO will be allowed to claim for extension of time, the KKR indicated that the affected party(ies) right to claim for an extension of time to fulfil their contractual obligations shall be determined and dependent on the provisions of the contract signed between the contracting parties.</p> <p>Under the PWD Form 203A (Rev. 1/2010) and PWD Form DB (Rev. 1/2010) (“<b>PWD Forms</b>”), both</p>	<p><u>For Building and Construction industry:</u></p> <p>On 18 March 2020, PAM issued an advisory note on the duties and obligations of the Architect and Principal Submitting Person for on-going construction on the project sites due to the implementation of the MCO.</p> <p>PAM has indicated that the Architect and Principal Submitting Person are advised to notify their respective Contractors to comply strictly with the MCO during the Restriction Period, and any further directives by the Government of Malaysia to alleviate further escalation and avert a public</p>

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	<p>these standard forms of contract compel the Contractor to comply in all respects with any law, regulation or by-law, or any order or directive issued by any public authority and/or public service company relating to the Works (“<b>Statutory Requirements</b>”).</p> <p>The PWD Forms define an “Event of Force Majeure” as an event beyond the control of both Parties. The PWD Forms further provides an exhaustive list of the events which are deemed as an “Event of Force Majeure”. It is noted that the list of Event of Force Majeure contained within the PWD Forms does not extend to any circumstances beyond the control of the Parties which are caused by governmental or regulatory action, directives, instructions and/or orders. Accordingly, it would appear that the Parties may not be able to rely on the Force Majeure provision in order to excuse the inability to perform the affected Party’s obligations under the contract.</p> <p>The effect of the MCO would require construction activities on project sites to be suspended during the Restriction Period, save for any works which are required to maintain and secure the safety and security of the Work and project site. The PWD Forms provides that the Superintending Officer of the project may at any time instruct the Contractor to suspend part or all of the Works. Suspension of Works</p>	<p>health crisis in Malaysia due to Covid-19.</p> <p>Under the PAM Contract, it is a requirement for Contractors to comply with any laws, regulations, by-laws, terms and conditions of any appropriate authority (“<b>Statutory Requirements</b>”). It is further cautioned and provided in the PAM Contract that during the period where the construction works are suspended, the Contractor shall need to take all necessary measures to maintain and secure the safety and security of the Work and project site.</p> <p>The PAM Contract defines “Force Majeure” as any circumstances beyond the control of the Contractor caused by terrorist acts, <u>governmental or regulatory action</u>, epidemics or natural disasters. The MCO appears to come within the definition of “Force Majeure”, and the PAM Contract allows the Contractor to apply for an extension of time, and loss and/or expense, subject to the Contractor’s compliance with the procedures, processes and conditions contained in the PAM Contract with regards to applications for Extension of Time and Loss and/or Expense caused by matters affecting the regular progress of the Works.</p>

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	<p>on the Project would be in line with the intention of the MCO. During the suspension period, the Contractor shall be required to protect, store and secure the Works or part thereof against any deterioration, loss or damage.</p> <p>If the progress of the Works has been materially affected by the delay due to the suspension of Works and/or the Contractor incurs direct loss and/or expenses beyond that reasonably contemplated to comply with the suspension instruction and in resumption of the Works, and provided that: (a) the delay and/or expenses was not foreseeable by the Contractor; (b) the delay and/or instructions or acts of the Superintending Officer are not due to and/or required to remedy any act, negligence, default or breach of the Contractor, the Nominated Sub-Contractor and/or Nominated Supplier; (c) the Contractor took measures to protect, store and secure the Works from deterioration, loss or damage; (d) the Contractor took all reasonable steps to avoid or reduce the delay; and (e) the Contractor took all necessary action to mitigate the expenses incurred, the Contractor is entitled to give notice to claim for an extension of time and direct loss and/or expense, subject to compliance with the procedure and timelines specified in the PWD Forms in submitting its claim, failing which the Contractor shall not be entitled to such claim and</p>	

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	<p>the Government shall be discharged from all liability in connection with the claim.</p> <p><u>For Electricity &amp; Energy industry:</u> In respect any repair, maintenance and/or operation works pertaining to the electricity and energy industry, the National Security Council has classified these type works as “essential services” pursuant to the Official Media Statement issued on 18 March 2020. Nonetheless the exception allowing the relevant business and/or manufacturing of components required for the supply of an essential service e.g. electricity and water to operate, will still require an express approval from MITI.</p> <p>Pursuant to the Power Purchase Agreements (“PPAs”), the Power Producer shall comply with all Laws applicable to it and/or to the energy generating facility (“<b>Facility</b>”). Hence if any construction works for the development of a Facility may be affected upon the implementation and enforcement of the MCO, and where the Power Producer may encounter potential disruption and delay in performing its obligation to achieve the Commercial Operations of the Facility by the Scheduled Commercial Operation Date under the PPAs, the Power Producer may rely on the Force Majeure provision in the PPA. Under the PPAs, a “Force Majeure Event” (“<b>FME</b>”) is usually defined</p>	

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	<p>as an event, condition, or circumstance or its effect which: (a) is beyond the reasonable control of and occurs without fault or negligence of the affected party; and (b) causes a delay or disruption in the performance of the affected party's obligation despite all reasonable efforts to prevent or mitigate its effects. In some PPAs, the non-exhaustive list of FME include: (a) work stoppages other than those solely affecting the affected party claiming reliance on the FME; and (b) any FME affecting the performance of any person that is a party to the EPCC Contract or other contract between the Power Producer and such person relating to the construction, operation or maintenance of the Facility and ancillary facilities.</p> <p>Provided that the MCO and its consequent effect of work stoppage falls within the definition of FME under the PPAs, and where a Power Producer is rendered unable by reason of the FME to perform its obligation under the PPAs, the Power Producer may give notice to claim and rely on the FME in order that those obligations of the Power Producer shall be suspended or excused to the extent their performance is affected by the FME. The PPAs usually provide that if an FME affects the power Producer before the Commercial Operation Date and delays occurrence of the Commercial</p>	

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	<p>Operation Date past the Scheduled Commercial Operation Date, the Scheduled Commercial Operation Date shall be extended by one day for each day the Commercial Operation Date is delayed due to the effect of an FME. But there are express provisions in the PPAs which provide that the Power Producer shall not be entitled to make any claims for costs during the continuance of such FME affecting the Power Producer.</p> <p><u>For Infrastructure industry:</u> Pursuant to the Official Media Statement issued on 18 March 2020, the National Security Council has classified In-Progress Infrastructure under Construction Works that affects safety and security as “non-essential services” under the MCO. These works may be allowed to operate, subject to an assessment by the Ministry of Works and Department of Occupational Safety and Health.</p> <p>Under Project Delivery Partner Agreements (“<b>PDP Agreements</b>”), the Employer or Government may at any time instruct the Project Delivery Partner (“<b>PDP</b>”) to suspend the Works and/or the Services. In such instance, on the instruction received, the PDP shall suspend the performance of its Services and procure the relevant Works Package Contractors (“<b>WPCs</b>”) to suspend the execution of the Works, and where applicable,</p>	

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	<p>delivery of equipment, plant and/or materials. Provided that the PDP shall during the suspension period, properly protect and secure or procure the WPC to properly protect and secure, the Works, all plant and materials affected at the project site, against any deterioration, loss or damage, the PDP shall be entitled to make a claim for additional monies, and/or an extension of time under, arising out of, or in any way connected with the PDP Agreements, including any direction of the Employer/Government, subject to compliance with the procedures, processes and conditions specified in the PDP Agreement including to mitigate the delays.</p> <p>Provided that the MCO and its effects fall within the definition of a FME under the PDP Agreements, the PDP may rely on the FME provisions to excuse any delay in performing its obligation under the PDP Agreements to the extent that such delay has been caused by a FME and the time for completion of any obligation to achieve the Completion Date shall be extended by the amount of delay caused by such FME.</p>	

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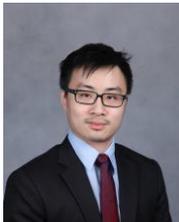
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## Our Regional Presence



Christopher & Lee Ong is a full service Malaysian law firm with offices in Kuala Lumpur. It is strategically positioned to service clients in a range of contentious and non-contentious practice areas. The partners of Christopher & Lee Ong, who are Malaysian-qualified, have accumulated considerable experience over the years in the Malaysian market. They have a profound understanding of the local business culture and the legal system and are able to provide clients with an insightful and dynamic brand of legal advice.

Christopher & Lee Ong is part of Rajah & Tann Asia, a network of local law firms in Singapore, Cambodia, China, Indonesia, Lao PDR, Malaysia, Myanmar, the Philippines, Thailand and Vietnam. Our Asian network also includes regional desks focused on Brunei, Japan and South Asia.

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