The effect of the Temporary Measures for Reducing the Impact of Coronavirus Disease 2019 (COVID-19) Bill 2020 (the "COVID-19 Bill") on Tenancies

On the 25th of August 2020, the Dewan Rakyat passed the Temporary Measures for Reducing the Impact of Coronavirus Disease 2019 (Covid-19) Bill 2020 ("**Covid-19 Bill**"). The Bill was passed by a simple voice vote in the House. The purpose of this Covid-19 Bill is to temporarily suspend non-performance of contractual obligations in several different sectors due to effects of the Covid-19 pandemic.

For a general overview, the Covid-19 Bill consists of 19 parts and 59 sections, modifying 16 written laws and these modifications will have retrospective effect. This means that the laws in the Covid-19 Bill will attach new consequences to an event that occurred ***prior*** to its enactment.

As it stands, the COVID-19 Bill is expected to come into force perhaps sometime in late September or early October 2020

In the context of tenancies, the most pertinent parts of the Covid-19 Bill would be Part II: Inability to Perform Contractual Obligations and Part X: Modification to the Distress Act 1951.

Effect of the Bill on Distress Actions

Part X (10) of the Covid-19 Bill deals with the modifications in relation to distress actions. This part will have retrospective effect with the provisions coming into effect on 18th of March 2020, the day when the Movement Control Order (MCO) first came into operation.

Under the proposed modifications, before the 31st of December 2020, Landlords cannot recover arrears of rent which is due for the period from 18th of March 2020 until the 31st of August 2020 by executing a warrant of distress (Section 30).

There is however, a saving provision (Section 31) which states that any execution of the warrant of distress **that has been issued before the date of publication of this Act** shall be dealt with under the Distress Act 1951 as if the Distress Act 1951 had not been modified by this Act.

In short, this means that until the day the Bill/ Act is published, a Landlord's right to distress will be governed under the current Distress Act 1951. After that, a Landlord's right to distress will still be governed under the Distress Act but it will be subject to Sections 29 to 31 of the Act i.e no arrears of rent for the period from 18 March 2020 to 31 August 2020 can be distrained.

Thus, Landlords who wish to recover arrears of rent due from the tenants for the period from 18 March 2020 to 31 August 2020 by way of distress must act quickly to obtain the writ of distress *before* the date of publication of the Act, in order to avoid being affected by the temporary prohibition laid down in Section 30.

Effect of the Bill on exercising rights under Tenancy Agreements

Part II (2) of the Covid-19 Bill deals with inability by parties in performing contractual obligations. This part of the Covid-19 Bill is deemed to come into operation from 18th of March 2020 until the 31st of December 2020. The Bill however does allow the Minister to extend the operation period by order published in the Gazette.

Section 7 of the Covid-19 Bill states:

> "The inability of any party or parties to perform any contractual obligation arising from any of the categories of contracts specified in the Schedule to this Part due to the measures prescribed, made or taken under the Prevention and Control of Infectious Diseases Act 1988 [Act 342] to control or prevent the spread of COVID-19 **shall not give rise to the other party or parties exercising his or their rights under the contract**."

The seven categories of contracts which are mentioned in Section 7, include "lease or tenancy of non-residential immoveable property".

Basically, Section 7 imposes a temporary prohibition on any party of a scheduled contract to take any action against the non-performing party during the period from **18th March 2020 to the 31st of December 2020**. It is important to note however that this prohibition applies only to "inability" to perform "due to measures prescribed, made or taken under the Prevention and Control of Infectious Diseases Act 1988 (Act 342) to control and to prevent the spread of Covid-19". These two elements are crucial in that:

(i) the Tenant must be *unable* to perform. Arguably, it being merely "difficult" to perform the obligations, should not bring it within the scope of section 7; and

(ii) the inability is due to measures prescribed, made or taken under Act 342. In the context of tenancies, most tenants would point to the inability to operate during the MCO. It is noted however that the restrictions were eased during the period of CMCO and RMCO, albeit with SOPs in place. The Tenant should presumably be able to show the linkage between the measures imposed and his actual "inability" to perform. It is possible that we may in future see challenges being brought before the Courts on the scope of section 7, and much may depend on the judicial approach taken towards interpretation of the provision.

The Bill then mentions that any dispute arising from this may be settled by mediation (Section 9). The Minister may determine the mediation process (helping parties appoint a mediator, conducting the mediation etc) and upon the conclusion of a mediation and parties reaching an agreement, the parties shall enter into a binding settlement agreement in writing. However, mediation is **not** mandatory.

Like Part X, Part II also contains a saving provision, in Section 10. Similar to Section 31 of the Bill, Section 10 states that until the Act has officially been published, any "termination, depoit or performance bond forfeited, damages received, any legal proceedings, arbitration or mediation commenced, and judgment or award granted and any execution carried out" from 18th March 2020 is deemed to have been validly terminated, forfeited, received, commenced, granted or carried out.

Thus, all actions which arose from and/or in relation to enforcing a contractual obligation by the other party shall be deemed to have been validly carried out if done before the date the Act is published. In short, if a Landlord wishes to terminate a contract, forfeit deposit, or commence a suit due to the Tenant's inability to perform as a result of measures prescribed, made or taken under Act 342, he should do so *before* the Covid-19 Act is published, else his hands shall be tied until Part II ceases to be in operation.

Modifications to debt threshold for bankruptcy

In tandem with the Insolvency (Amendment) Bill 2020, the minimum debt threshold required before a bankruptcy petition can be filed will also be increased from RM50,000.00 to RM100,000.00. Thus, a Landlord who has an existing judgment against an individual tenant and who seeks to have it enforced by way of bankruptcy proceedings, should keep the soon to be increased threshold in mind and take action promptly, if affected.

With that, we at CCLC welcome any further queries in relation to the Covid-19 Bill. As the Covid-19 Act has not been passed and enforced yet, parties have the opportunity to enforce or preserve certain existing rights by being decisive and taking action quickly before the Act comes into force.

CCLC regularly advises on a wide range of housing and tenancy matters, litigation, commercial contracts and corporate exercises including mergers and acquisitions, joint venture transactions, corporate restructuring, and banking and financing. Feel free to contact us if you have any queries, and we would be happy to assist.

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