

The effect of the Temporary Measures for Reducing the Impact of Coronavirus Disease 2019 (COVID-19) Bill 2020 (the “COVID-19 Bill”) on the Housing Development Industry in Malaysia

The Covid-19 pandemic, which led to the Movement Control Order (MCO) being enforced nationwide on 18 March 2020 and followed by a back-to-back CMCO and RMCO that was recently extended until 31 December 2020, has severely affected the housing development industry in Malaysia.

On 25 August 2020, the COVID-19 Bill was passed at the Third Reading in Dewan Rakyat, with amendments to be made to the Housing Development (Control and Licensing) Act 1966 (“**the HDA**”). The Bill aims to provide temporary relief for those who are unable to perform their contractual obligations due to the Covid-19 pandemic in the housing development industry.

This brief update highlights Part XI of the COVID-19 Bill which is titled “Modification to the Housing Development (Control And Licensing) Act 1966” and analyses the implications of the same.

A. Modification to the Housing Development (Control And Licensing) Act 1966

Section 32 of the COVID-19 Bill provides that modifications to the HDA are deemed to have come into operation on 18 March 2020. Hence, this bill which will next be brought to the Dewan Negara for debate and approval, if passed as law, will have a retrospective effect.

B. Interpretation

Section 33 provides that the “agreement” referred to in Part XI of the COVID-19 Bill shall mean agreement for the contract of sale for the sale and purchase of housing accommodation in the forms prescribed in Schedules G, H, I and J of the Housing Development (Control and Licensing) Regulations 1989 entered into before 18 March 2020.

C. Late Payment Charges

With the implementation of the COVID-19 Bill, a Developer is precluded by the COVID-19 Bill from imposing late payment charges on the Purchaser for any instalment unpaid for the period from 18 March 2020 to 31 August 2020. It is further note that there is an avenue for the Purchaser to apply to the Minister for an extension of the period granted above and if the Minister is satisfied that additional time is required, may by a written direction to the Developer, extend the period in which the Developer shall not impose any late payment charges on the Purchaser, up to 31 December 2020.

However, the COVID-19 Bill appears to lack certainty on the grounds for allowing extensions, timeline for the entire application process and the procedures for applying for an extension, which may eventually cause confusion and delay in the making of such applications for an extension.

D. Delivery of vacant possession and liquidated damages

With the implementation of the COVID-19 Bill, the period from 18 March 2020 to 31 August 2020 is also excluded from the calculation of:-

- (a) the timeline to deliver vacant possession of housing accommodation to the Purchaser; and
- (b) the liquidated damages in the event of a failure of the developer to deliver vacant possession of a housing accommodation on time.

The COVID-19 Bill also provides a recourse to the Developer who requires additional time to deliver vacant possession, to apply to the Minister for an extension of the period granted above where the Minister may if satisfied, by a written direction, grant to the Developer an extension up until 31 December 2020 in which such extension shall have the same effect as the period referred above.

It appears though that there is no amendment proposed in the COVID-19 Bill regarding the completion of the common facilities and resulting liquidated damages in the event of a late completion. Hence, it is advisable for the Developer to ensure the common facilities are in its readiness to be delivered to the Purchasers, to avoid any possible claim by any of the Purchasers for the agreed liquidated damages which, under the agreement, is claimable by the Purchasers separately from liquidated damages for late delivery of vacant possession.

E. Purchaser deemed to have taken vacant possession

Section 35(4) of the COVID-19 Bill provides that for Purchaser who was unable to enter into possession of occupation from the date of service of a notice to take vacant possession by the Developer during the period from 18 March 2020 to 31 August 2020 (or any extension period granted by the Minister to the Developer to deliver vacant possession as mentioned in Item D above), the Purchaser shall not be deemed to have taken such vacant possession in accordance to the agreement.

On this premise, it is important for the Developer and Purchaser to compute and finalise the date of vacant possession by taking into account the exclusion period granted above as the actual date will later be decisive as to the date of commencement of the defect liability period, the payment of charges and sinking fund, outgoings and insurance etc.

F. Defect Liability Period

Section 36 of the COVID-19 Bill addresses the defect liability period in an agreement in which the period from 18 March 2020 to 31 August 2020 was proposed to be excluded from the calculation of:-

- (a) the defect liability period after the date the Purchaser takes vacant possession of a housing accommodation; and
- (b) the time for the developer to carry out works to repair and make good of the defect, shrinkages and other faults in a housing accommodation.

Similar to the above, a Purchaser may apply to the Minister for an extension of the period granted above and the Minister may, if satisfied that additional time is required by the Purchaser, grant the Purchaser an extension period up to 31 December 2020, by a written direction made to the Developer to the effect.

Notwithstanding the exclusion period granted above, the Developer shall regardless, be attentive to the Purchasers' request for defects rectification that have been notified to the Developer prior to 18 March 2020 as, upon failure by the Developer to rectify, the Purchaser shall have the right to carry out the repair works themselves subject to the terms of the "agreement".

G. Modifications shall not affect or annul a legal proceeding and its judgement

Notwithstanding of the modifications proposed in Sections 34, 35 and 36 of the COVID-19 Bill (Items C, D, E & F mentioned above), the COVID-19 Bill provides that such modifications shall not affect any legal proceedings commenced, or any judgement or award obtained, to recover the late payment charges payable by the Purchaser or the liquidated damages payable by the Developer or any other sum during the period from 18 March 2020 until the full enforcement of the COVID-19 Bill.

On this premises, any late payment charges on any unpaid instalments that have been paid by the Purchaser, or liquidated damages resulted from the late delivery of vacant possession that have been paid by the Developer prior to the full enforcement of the COVID-19 Bill, shall be deemed to have been validly paid under the HDA and its regulations, and the same shall not be required to be refunded to the parties who have paid.

H. Section 16N of the HDA – Limitation of Jurisdiction

The COVID-19 Bill further provides that for a Purchaser (includes subsequent Purchaser) whose limitation period to file a claim in the Tribunal for Homebuyer Claims ('Tribunal') has expired during the period from 18 March 2020 to 9 June 2020, the Purchaser is allowed to file the claim from 4 May 2020 to 31 December 2020 and the Tribunal shall have jurisdiction to hear such claim.

Conclusion

Notwithstanding that the COVID-19 Bill has not stepped in in time to provide a timely response to the impacts of Covid-19, the proposed amendments in the COVID-19 Bill is nonetheless seen as addressing the repercussions of the Covid-19 by providing a temporary relief to the affected parties.

As it stands, the COVID-19 Bill is not expected to come into force until perhaps sometime in late September or early October 2020. Under Part XI of the COVID-19 Bill, parties are reminded that any application for extension of time until 31 December 2020 and the period of extension granted thereof is on a case to case basis granted at the Minister's discretion. As such, it is important for the parties to, in addition to the relief granted in the COVID-19 Bill, use their best endeavours to satisfy their obligations in the agreement at all times.

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