

COVID-19 Bill: Are Housing Developers Relieved From LAD?

By [Ho Ai Ting](#), Aaron Mah Zhee Haang and Wong Eu Ca Matthew *



24 August 2020

On 12 August 2020, the Temporary Measures For Reducing the Impact of Coronavirus Disease 2019 (COVID-19) Bill 2020 (DR 6/2020)¹ was tabled for its first reading before the House of Representatives of the Parliament of Malaysia (**COVID-19 Bill**). The COVID-19 Bill, which seeks to provide temporary measures including to modify the provisions of certain legislations to reduce the impact of the pandemic, was finally introduced nearly five months after the government took drastic preventive measures by implementing the unprecedented Movement Control Order (**MCO**) on 18 March 2020.

The pandemic, as well as the MCO, have irreversibly and indiscriminately impacted businesses of all industries. To housing developers, one of the imminent knock-on effects of the MCO manifests from the potential financial exposure in the form of liquidated ascertained damages (**LAD**) payable arising from the delay in delivering vacant possession (**VP**) of properties in accordance with the time stipulated in the statutory sale and purchase agreements (**SPAs**)² prescribed by the Housing Development (Control and Licensing) Regulations 1989 (**HDA Regulations**). Up until the introduction of the COVID-19 Bill, housing developers were uncertain as to how to tackle issues relating to late delivery of VP. A glimpse of hope came when the Minister of Housing and Local Government (**Minister**) indicated during an interview³ in April 2020 that, among others, housing developers would have an extension of time to complete their projects and that homebuyers could not claim the LAD incurred during the MCO period.

COVID-19 Bill: Proposed Modifications to HDA 1966

Clauses 32 to 38 of the COVID-19 Bill deal with modifications to the Housing Development (Control and Licensing) Act 1966 (**HDA 1966**) in relation to the statutory prescribed SPAs entered into before 18 March 2020. The proposed modifications address, among others, issues relating to delivery of VP, LAD, defect liability period and late payment charges on unpaid instalments by homebuyers.

Specifically, cl 35 deals with matters relating to delivery of VP and LAD. Cl 35(1) seeks to exclude the period of 18 March 2020 to 31 August 2020 (**Relevant Period**) from the calculation of time for delivery of VP and LAD, notwithstanding the relevant clauses in the statutory prescribed SPAs.

* **Ho Ai Ting** (hat@lh-ag.com) is a partner with the firm's Dispute Resolution Practice. Aaron Mah Zhee Haang (mzh@lh-ag.com) and Wong Eu Ca Matthew (wec@lh-ag.com) are associates with the Dispute Resolution Practice and are part of a team headed by Ho Ai Ting.

¹ <https://www.cijlaw.com/files/bills/pdf/2020/MY_FS_BIL_2020_06.pdf>

² Schedules G, H, I and J

³ LHAG Update (21 April 2020), "[Liquidated Ascertained Damages Incurred During the MCO](#)"

For completeness, the COVID-19 Bill also, among others, seeks to:

- (a) exclude the Relevant Period from the calculation of the defect liability period and the period for developers to carry out works to repair or make good defects and other faults in the properties;⁴
- (b) prevent developers from imposing late payment charges on unpaid instalments against homebuyers for the Relevant Period;⁵
- (c) prevent developers from invoking the deeming provision on delivery of VP of the property under the statutory prescribed SPAs, if the homebuyer is unable to enter into possession or occupation of the property from the date of service of a notice to take VP during the Relevant Period or any extension period granted by the Minister for delivery of VP under cl 35(3) of the COVID-19 Bill;⁶
- (d) allow homebuyers to file claims that have expired during the period from 18 March 2020 to 9 June 2020 in the Tribunal for Homebuyer Claims from 4 May 2020 to 31 December 2020.⁷

In all the proposed modifications under clauses 34 to 36 of the COVID-19 Bill, the Minister may, upon the application of a homebuyer or developer, as the case may be, extend the Relevant Period up to 31 December 2020 if the Minister is satisfied that additional time is required by the applicant concerned. Such procedure appears to give effect to the recent Federal Court decision in *Ang Ming Lee v Menteri Kesejahteraan Bandar, Perumahan Dan Kerajaan Tempatan*,⁸ where it was held, among others, that the Minister is empowered to regulate the terms and conditions of the statutory prescribed SPAs. However, the COVID-19 Bill is silent on two aspects:

- (a) the grounds or circumstances upon which an application to extend the Relevant Period can be made; and
- (b) the manner and procedure for making such application.

If the COVID-19 Bill is enacted into law and comes into operation, it is hoped that the Ministry of Housing and Local Government (**KPKT**) will issue further directives or guidelines for the benefit of housing developers or homebuyers, as the case may be, in relation to their application to the Minister to extend the Relevant Period. This would also ensure conformity and transparency in the KPKT when considering and determining such application.

Notwithstanding the foregoing, we should highlight that not all housing developers stand to benefit from the proposed modifications under clauses 34 to 36 of the COVID-19 Bill, as evident by the saving provision in cl 37(1), which reads:

“Saving

37. (1) The modifications in sections 34, 35 and 36 shall not affect any legal proceedings commenced, or any judgment or award obtained, to recover late payment charges payable by the purchaser or liquidated damages payable by the developer or any other sum during the period from 18 March 2020 until the date of publication of this Act.”

⁴ COVID-19 Bill, cl 36

⁵ *Ibid*, cl 34

⁶ *Id*, cl 35(4)

⁷ *Id*, cl 38

⁸ LHAG Update (29 November 2019), [“The End: No More Extension of Time to Housing Developer”](#)

This saving provision effectively preserves the validity of any legal proceedings commenced or judgments obtained before the COVID-19 Bill is enacted into law. In other words, housing developers who have existing legal actions filed or judgments obtained against them from 18 March 2020 until the COVID-19 Bill is enacted into law will not be able to claim the relief offered by the COVID-19 Bill. Further, cl 37(2) of the COVID-19 Bill states that any late payment charges paid by the homebuyer or LAD paid by the housing developer before the COVID-19 Bill is enacted into law shall be deemed to have been validly paid under the HDA 1966/HDA Regulations, and that such payment shall not be refunded to the payer.

Conclusion

Currently, while cl 35 of the COVID-19 Bill *prima facie* grants an automatic extension of time to housing developers to deliver VP of the properties, it appears that such relief would only benefit housing developers who have not had proceedings or judgments taken against them from 18 March 2020 until the date on which the COVID-19 Bill is enacted into law. There is every possibility that homebuyers may capitalise on the twilight period from now until the date the COVID-19 Bill is enacted into law by taking immediate action against the housing developers. If this happens, the very objective of cl 35 of the COVID-19 Bill will be defeated.

Note: As at the date of this publication, the provisions of the COVID-19 Bill are yet to be set in stone as the COVID-19 Bill will be subjected to the second reading before the House of Representatives of the Parliament of Malaysia and the ensuing Parliamentary debates.

Litigation Partners



Jack



Mong



Andrew



Sean



Kumar



Lambert



Vijay



Shan



Ai Ting



Oh Sheng

