

COVID-19 Act: The Protections for Housing Developers and Homebuyers

In this article, we zoom into the modifications made by the Temporary Measures for Reducing the Impact of Coronavirus Disease (COVID-19) Act 2020 (“**COVID-19 Act**”) to the Housing Development (Control & Licensing) Act 1966 (“**HDA 1966**”).

Scope of Application

Upon the enforcement of the COVID-19 Act on 23 October 2020, the modifications made to the HDA 1966 discussed below will come into effect on 18 March 2020 retrospectively. These modifications apply to Schedule G, H, I and J (“**Statutory SPAs**”) of the Housing Development (Control and Licensing) Regulations 1989 (“**HDR 1989**”) entered into before 18 March 2020. Effectively, other types of sale and purchase agreements, e.g. commercial properties under construction, are not covered by these modifications.

Yet, construction contracts are entitled to protection under Part II of the COVID-19 Act which prescribes for “Inability to Perform Contractual Obligation”. Therefore, there might be instances where the contractors invoke Part II of the COVID-19 Act against the developers to relieve their inability to perform their contractual obligations under the construction contracts, as discussed in the our previous article titled “[COVID-19 Act: The Impact on Construction Contracts and Construction Disputes](#)”.

Late Payment Charges

The COVID-19 Act provides that the housing developers shall not impose late payment charges on homebuyers who failed to pay instalment for the period from 18 March 2020 to 31 August 2020 (“**Period**”). Homebuyers may apply to the Minister of Housing and Local Government (“**Minister**”), who may extend the Period up to 31 December 2020 via a written direction to the housing developer, if he is satisfied that additional time is required by the homebuyers.

Authors



Tan Min Lee
Partner



Benjamin Kho Jia Yuan
Pupil-in-Chambers

This relief is limited to homebuyers whose failure to pay was due to the measures taken under the Prevention and Control of Infectious Diseases Act 1988 (“**PCID Act**”) to control or prevent the spread of COVID-19. It is foreseeable that disputes may arise between contracting parties on whether there is a causal link between a homebuyer’s failure to pay and the measures under the PCID Act such as, the Movement Control Order (MCO), Conditional MCO and Recovery MCO. It is insufficient for the homebuyers to claim that their failure to pay is caused by the pandemic in general, instead such failure must be a direct consequence of the measures under the PCID Act.

Delivery of Vacant Possession and Liquidated Damages

Essentially, the relief provided under the COVID-19 Act are two folds. Firstly, the period between 18 March 2020 and 31 August 2020 (“Prescribed Period”) is excluded from the calculation of time for the delivery of vacant possession that was agreed contractually. Secondly, the computation of liquidated damages for housing developers’ failure to deliver vacant possession will exclude the Prescribed Period. Housing developers may apply to the Minister to extend the period up to 31 December 2020.

Conventionally, housing developers are required to deliver vacant possession within the time frame stipulated under the Statutory SPAs, failing which they will be penalised with liquidated damages for any such delay. The reliefs under the COVID-19 Act provide a breather for the housing developers, as time stops to run during the Prescribed Period.

Defect Liability Period (“DLP”)

The COVID-19 Act provides that the calculation of the DLP and the time for the housing developer to carry out works to repair and make good the defects shall exclude the Prescribed Period. Thus, in effect, the DLP is extended for about 166 days for all homebuyers. Similarly, homebuyers may apply to the Minister to extend the period up to 31 December 2020.

This relief addresses the common concern of homebuyers - whether the prescribed DLP will run during MCO. Since the Statutory SPAs do not have any exemption clause or *force majeure* clause, parties have to assume that time continues to run. Notably, a possible scenario that may occur is that for those construction contracts with their DLP period running with the same length as that of statutory SPAs under the HDR 1989, the DLP of the construction contract would end earlier, due to the extended DLP in the statutory SPAs. In effect, the housing developers have to serve a longer DLP to their purchasers when their contractors are no longer contractually obligated to rectify defects after the DLP has lapsed. As such, the housing developers may need to incur additional costs and not be able to claim back from the contractors, if a defect is notified by the homebuyer after the DLP in the construction contract has ended.

Saving Provisions

The reliefs discussed above shall not affect any legal proceedings commenced, any judgment or award to recover the late payment interest payable by the homebuyer or liquidated damages payable by the housing developer during the period from 18 March 2020 until 23 October 2020. In addition, any late payment charges paid by the purchaser and liquidated damages paid by the developer before the COVID-19 Act takes effect shall be deemed to have been validly paid and is not refundable.

Limitation Period for Claims before the Tribunal for Homebuyer Claims

The COVID-19 Act states that if the limitation period to file claims under Section 16N(2) of the HDA 1966 has expired during the period from 18 March 2020 to 9 June 2020, the homebuyer is entitled to file the claim from 4 May 2020 to 31 December 2020 and the Tribunal for Homebuyer Claims shall have the jurisdiction to hear the claims.

In a nutshell, it is expected that both developers and homebuyers will still benefit from the COVID-19 Act as a whole. It is foreseen that aggrieved parties would take the opportunity of the “saving” provision if they opined that the COVID-19 Act does not favour their positions. It will be a welcoming move for the government to introduce further measures or amendments to improvise the protections or reliefs under the COVID-19 Act, in addition to address the absent of protection to developers of commercial properties. After all, the COVID-19 Act aims to safeguard businesses from the economic devastation caused by the pandemic.

*For any enquires on the COVID-19 Act, please contact **Tan Min Lee** (minlee@ganlaw.my).*

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*This article is for general information only and should not be relied upon as legal advice.
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