



COVID-19 LOCKDOWN: LEGAL PERSPECTIVES FOR DEVELOPMENT PROJECTS

At the time of writing, Malaysia is entering the second phase of lockdown due to the widespread pandemic of COVID-19. Embattled Malaysian Prime Minister Tan Sri Muhyiddin Yasin announced the Restricted Movement Order from 18 March 2020 until 14 April 2020 (“**COVID-19 Lockdown Order**”). It may be further extended too.

In this challenging time, the team from Azmi & Associates have published various industry related articles on managing the aftermath of the COVID-19 outbreak, specifically when the Lockdown Order has forced the entire population to stay at home. You may find our discussions on [force majeure](#), [frustration of contract](#), [mergers & acquisitions](#), [banking matters](#), and [loan restructuring](#) amongst others, touching on issues affected by the COVID-19 Lockdown Order.

This knowledge sharing will attempt to shed some lights and guidance on the effects of the COVID-19 Lockdown Order to the construction and housing industry from the perspectives of managing ongoing constructions and best practices that can be adopted by developers, contractors and other industry players.

Project Development at a Standstill?

The COVID-19 Lockdown Order only allows essential services to continue operation. Unfortunately, construction or housing development is not part of essential services under the Lockdown Order. Therefore, all construction activities have to comply with the Lockdown Order and suspend all activities on site. Obviously this has created a lot of anxieties amongst industry players such as developers, contractors, buyers and financiers. From their various perspectives, we foresee a few things:

- Developer may suffer liquidated damages if there is any delay in delivery of vacant possession.
- End financiers might also delay drawdown, this will cause cashflow constraints to developer hence delaying payment to contractors, risk of late payment interest.
- Contractors unable to proceed with construction, they will definitely incur holding cost, loss and expense.
- Buyers will have to continue paying progressive interest/profit to the bank if there is no delivery of vacant possession.

Force Majeure Event: A Force Beyond Our Control

Wouldn't it be easier if everyone considers this as a force majeure event, something that no one can control? Unfortunately, under the law, we can only declare a force majeure event if such event is covered in the contract; it cannot be assumed.

The form of sale contracts under the Housing Development Act 1966, namely Schedule G (for landed properties) and Schedule H (for stratified properties) do not have any clause or reference at all for force majeure event. Even the Federal Court has decided in the case of *S.E.A. Housing Corp Sdn Bhd*[1] where a force majeure defence does not apply to standard SPA forms under the Housing Development Act.

This means, developers cannot invoke force majeure to escape penalty for late delivery or to obtain extension of time. So, what are the possible methods for developers to mitigate this kind of losses caused by COVID-19. We consider a few options:

Application to the Minister for Extension of Time

Previously, it is possible (and quite the norm) for developers to apply to the Controller of Housing for an extension of time to deliver vacant possession under Regulations 11(3) of Housing Development (Control and Licensing) Regulations 1989 (HDA Regulation). Indeed, COVID-19 pandemic may fall within the circumstances provided in the said Regulation 11(3) which is special circumstances or hardship or necessity compliance with any of the provisions in the contract of sale is impracticable or unnecessary.

However, in the 2019 case of *Ang Ming Lee*[2], the Federal Court decided that the Controller has no powers to grant any extension to a developer for completion of a development and that the 11(3) HDA Regulation is ultra vires the Housing Development Act and therefore the provision is invalid. Unfortunately, the Federal Court did not express any view as to whether the Minister himself may grant developers such an extension of time as it had found that the Impugned Letter in this case was signed by the Controller with no indication that it was done on behalf of the Minister.

Having said that, it is well within the authority of the Minister himself to issue such approval for extension of time, or any other directive for that matter with regards to mitigating potential losses due to the Lockdown Order.

In approaching this, it is best if developers can make a concerted approach, possibly via REHDA, to obtain a blanket order for extension of time from the Minister. REHDA may also structure and propose stimulus package specifically for the housing industry. This is not something new, they have been many incentives in the past to counter any effect of economic recession to the housing industry.

Stakeholders & Contract Management

First and foremost, please do not assume all contracts are the same, with regards on how to manage the COVID-19 Lockdown Order. It is very important to know precisely what you have signed, get someone to look into it again and be fully informed on what you have signed. For some simple guidance, HDA purchase contracts don't have force majeure clause. Construction contracts, depends on what form is use, JKR, PAM, FIDIC will have different treatment and process in managing event beyond control like COVID-19 Lockdown Order. Be sure also to look at your financing contracts, as they are most likely to be sided with the financiers. The moratorium would supersede that but still please check with each bank whether you need to do anything to activate the moratorium. Some insurance companies for instance have asked those who are affected by the COVID-19 Lockdown Order to submit documentation before making available the moratorium package.

For projects where delays are anticipated or have already occurred due to the COVID-19 Lockdown Order, developers should immediately take steps to:

- Notify buyers, contractors, vendors, suppliers as to the COVID-19 Lockdown Order
- DO NOT issue stop work order
- Have a clear understanding of payment obligations that may fall due during the affected period.

If all notifications and communications are addressed in orderly manner, we do not anticipate much issue or resistance to put matters back in order once the Lockdown Order is withdrawn. In the worst case scenario, if any party refuses to acknowledge any adjustment to the contract, for instance extending time for delivery, there is always avenue to terminate the contract by ground of frustration, though this is to the extreme really.

Make Full Use of Government Incentives

The Government has also announced various inventive or stimulus packages to control any negative economic and social impact of COVID-19 Lockdown Order. This is the time when all affected buyers, developers, contractors, architects, engineers, lawyers, surveyors and everyone to make full use of all incentives where available. The most popular one is the 3 to 6 months moratorium on financing repayment. Buyers especially, should take this up and have a strategy of how to utilise the fund after the expiry of the moratorium period. Contractors, suppliers, service providers, SMEs should

get in touch with their advisors or governing body to have a full understanding of all the packages made available by the Government. We foresee further waves of stimulus or changes in government policies (the next big one could be GST?) as the COVID-19 outbreak gradually make a full impact on the economy.

Important Information

Azmi & Associates has set up Azmilaw Covid Task Force to look into all issues arising from COVID-19 and MCO. Clients are welcomed to contact their usual Partner who will bring their issues to Azmilaw Covid Task Force for our further action.

1. S.E.A. Housing Corp Sdn Bhd v. Lee Poh Choo [1982] CLJ Rep 305
2. Ang Ming Lee & Ors V. Menteri Kesejahteraan Bandar, Perumahan Dan Kerajaan Tempatan & Ors [2019] 1 LNS 1741

Prepared by:



Zuhaidi Mohd Shahari
Partner, Projects
DL: 603 2118 5006
E: zuhaidi@azmilaw.com



Nur Hafizah Abu Bakar
Associate, Projects
DL: 603 2118 5052
E: nurhafizah@azmilaw.com

Corporate Communication

Azmi & Associates

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