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Temporary Measures for Reducing
the Impact of Coronavirus Disease
2019 (Covid-19) Bill 2020

Introduction



- Covid-19 Bill essentially does 2 things:
 - Regulates contractual rights
 - Amends specific provisions of law on a temporary basis
- Operates for an initial maximum of 2 years but may be extended by PM
 - Not all parts are operational for 2 years
- Where are we at today?
 - Passed Dewan Negara on 22.9.2020

Where is the Bill at today?



- Passed by Dewan Negara on 22.9.2020
- Art. 66(3) FC
 - When a Bill has been passed by the House in which it originated it shall be sent to the other House; and it shall be presented to the YDPA for his assent when it has been passed by the other House... (earliest date to be presented to YDPA = 23.9.2020)
- Art 66(4) FC
 - The YDPA shall within 30 days after a Bill is presented to him (when?) assent to the Bill... (earliest date for assent = 23.10.2020)
- Art 66(4a) FC
 - If a Bill is not assented to by the YDPA within the time specified in Cl 4, it shall become law at the expiration of the time specified...as if he had assented thereto
- Art 66(5) FC
 - A Bill shall become law on being assented to by the YDPA or as provided in Cl (4a) but no law shall come into force until it has been published, without prejudice, however, to the power of Parliament to postpone the operation of any law or to make laws with retrospective effect...

Contents, generally



- Part 2: Inability to perform contractual obligations
- Temporary amendment of laws:
 - Parts 3-6 : Limitation
 - Part 7 : Insolvency
 - Parts 8-10: Hire purchase, consumer protection, distress
 - Part 11: Housing development
 - Part 12 : Industrial relations
 - Part 13 – 15 : Licensing of private employment agencies, public transport and commercial vehicles
 - Parts 16 – 18 : Administration of justice
 - Part 19 : Miscellaneous (catch-all)

Our focus



- For our purposes today, we will be focused on:
 - Part 2: Inability to perform contractual obligations
 - Part 11: Housing development

Part 2: Contractual obligations



- Validity : 18.3.2020 to 31.12.2020 (can be extended)
- 3 important points:
 - Inability to perform contractual obligations
 - Dispute resolution by mediation
 - Saving for exercise of rights prior to publication of Covid-19 bill (ie NOW)

Part 2: Contractual obligations (2)



- Inability to perform contractual obligations (s.7)
 - Includes construction contracts, construction consultancy contracts, supply contracts
 - Must be due to Covid-19 measures
 - There is no reprieve against exercise of rights if your failure to perform is not due to Covid-19 measures (pre-Covid-19 delays and defects)
 - This is NOT a “get out of jail free” card
 - If your breach is due to Covid-19 measures, then:
 - If Contractor cannot perform – no calling of PB, termination, appointment of 3rd parties, right of set-off
 - If Employer cannot pay – no suspension, termination
 - The Bill requires a non-exercise of rights for a limited period, and is NOT a waiver
 - It is NOT an automatic EOT of 9.5 months (18.3.2020 to 31.12.2020)

Part 2: Contractual obligations (3)



- Covid-19 measures encompasses not only MCO, but also CMCO, RMCO, etc
 - Whilst there seems to be some consensus about EOT (but no L&E) during the initial MCO period, it is not so simple with regard to SOPs after the initial MCO
- The SOPs do affect the productivity of contractors
 - On the one hand, Employers do not want to give EOT or L&E
 - On the other hand, Contractors want both time and costs
- The SOs need to step in, otherwise we end up with:
 - Incomplete projects – think LDs to purchasers, costs to complete, reputational damage
 - Insolvent contractors – defective works, costs of rectification during DLP

Part 2: Contractual obligations (4)



- Dispute resolution by mediation (s.9)
 - “May” – means not mandatory
- Must be read in the context of s.7
 - Pre-Covid-19 bill – Employer not motivated to mediate. Mediation just means contractor wants more time or money, so why mediate? As long as works not under suspension, almost all rights are stacked in Employer's favour. Disputes can only be resolved after practical completion when the Employer is no longer under pressure. It is the Contractor who bears the burden to perform the contract under pressure of inadequate EOTs, non-approval of L&ES, under-certification, etc.
 - Post Covid-19 bill – Employers cannot exercise rights and face pressure to work with appointed contractor to complete the project, cannot terminate, cannot set-off, cannot appoint 3rd party contractors
- Minister of Law may regulate mediations
 - In progress
 - It will never be made mandatory, so it will not improve on what the Bill already provides
 - But there is now motivation for Employers to mediate because of the Bill
 - At the end of the day, all parties must learn to distinguish between positions and interests
 - What is your contractual position
 - May not be best for your ultimate commercial interest

Part 2: Contractual obligations (5)



- S.10 : Saving provision
- “any contract terminated ... PB forfeited ... from 18.3.2020 until date of publication of Act ... deemed to have been validly terminated, forfeited, (etc) ... “
- Bear in mind Covid-19 bill only applies for disruptions to contract due to Covid-19 measures, so in reality the rights of parties under the contract remain intact if the breach is not due to Covid-19 measures
 - If you are in breach not due to Covid-19 measures, you can still be terminated, have your PB called, etc whether the Covid-19 bill is published or not
 - If you are in breach due to Covid-19 measures, you still face the risk of contractual measures until the Covid-19 bill is published

Part 11: Housing Development



- ss 32 – 38
- s 32
 - retrospective effect from 18.3.2020
- s 33
 - covers scheduled agreements entered into before 18.3.2020
- s 34
 - no late payment charges on purchaser from 18.3.2020 to 31.8.2020
 - Purchaser can apply to Minister to extend moratorium until 31.12.2020
 - It does NOT say that developer cannot terminate!

Part 11: Housing Development (2)



- s 35
 - No LAD from 18.3.2020 to 31.8.2020
 - Developer can apply to Minister to extend moratorium until 31.12.2020
 - Similarly, it does NOT say that the Purchaser cannot terminate!
 - No "deeming" provision to take VP
- s 36
 - 18.3.2020 to 31.8.2020 (or such extended period) excluded from calculation of DLP
- S 37
 - No effect on claims made before publication of the Act
 - Late payment charges or LAD paid before publication of Act not refundable
- s 38
 - Any claim to Housing Tribunal which has expired from 18.3.2020 to 9.6.2020 - purchaser entitled until 31.12.2020 to claim

Part 11: Housing Development (3)



- Important:
 - Whilst there is extension of DLP to purchasers (possibly 18.3.2020 to 31.12.2020 - ie 9.5 months), there is NO corresponding extension of DLP period for contractors
 - Expiry of DLP period and release of 2nd moiety under the construction contract is not affected by the extension of DLP under the S&P

Take-away re the Covid-19 Bill



- For developers
 - Whilst you have some relief of LAD, conversely you lose the right to charge late payment interest + face an extended DLP
 - There is no provision for you to impose the extended DLP on contractors
- For contractors
 - The Bill gives you some relief in terms of time and performance up to at least 31.12.2020 but it is not a "get out of jail for free" card. The Bill does not grant an automatic EOT or waiver of LAD for the exempted period
- For SOs
 - Congratulations! History has thrust upon you this opportune moment
 - You have a choice to make:
 - Business as Usual – you may well be contributing to incomplete projects and insolvent contractors, in addition to the project being caught in a lengthy dispute resolution process
 - Make a new way – because you know the realities on site, you are in the best position to help parties balance their competing interests (NOT rights)

A word about rights vs interests



- Rights are what you are entitled to, interests are what you actually want to protect
- For example:
 - If you have a monetary judgement, you have a right to wind-up your debtor
 - Your interest is to collect money, not to wind-up the debtor
- Rights are important when it comes to dispute resolution but it is not the ideal approach to manage ongoing relationships
- Hopefully, Covid 19 would help all of us to think more about our interests as opposed to our rights, especially in our contractual relationships
 - Rights are intended to protect interests, but rights and interests are not always aligned



That's it folks!

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