



AN OVERVIEW OF THE REAL ESTATE (REGULATION AND DEVELOPMENT) ACT, 2016

Introduction

After much deliberation in the Indian Parliament, on March 25, 2016, the Real Estate (Regulation and Development) Act, 2016 (the “**Act**”) was enacted. The Act seeks to regulate the real estate sector, and pave the way for speedier dispute resolution between property consumers and real estate developers. The provisions of the Act will be supplementary to existing real property laws in India; however, in case there is a conflict, the provisions of the Act will prevail.

Objects of the Act

Broadly, the Act aims to address the problems faced by real estate consumers in India and attempts to address their main concerns, i.e., misrepresentation of the project details by the promoters; misuse of funds; delays in completion of real estate projects; and the highhandedness of promoters in calling for payments from consumers and changing building plans. The Act aims to regulate real estate transactions between promoters and consumers, and has introduced new concepts like registration of real estate projects; deposit of funds received by a promoter for a real estate project in a separate designated account; displaying project-related details on the promoter’s website to ensure transparency; and mandating promoters to obtain adequate insurance to cover title and cost escalation risks in projects.

Key provisions of the Act

Real Estate Regulator

The Act provides for the setting up of the Real Estate Regulatory Authority (the “**Regulator**”) in every state in India within one (1) year of the commencement of the Act. However, until the Regulator is set up, the government must designate one of its officers to serve as the Regulator. The Regulator will have powers similar to those vested upon civil courts, namely, (a) summoning of persons and examining them on oath; (b) requiring discovery and production of documents; and (c) issuing commissions for examination of witnesses.

Among other tasks, the Regulator has been tasked with: (i) facilitating the growth of the real estate sector; (ii) protecting buyers’ interests; (iii) creating a single window system to ensure time bound project approvals and clearances; (iv) regulating real estate agents (“**Agents**”); and (v) advising the government on real property matters, as required. To this end, wide powers have been bestowed on the Regulator.

Registration of Real Estate Projects

The Act broadly defines the term “real estate project” to mean: (i) the development of a building or a building consisting of apartments; (ii) converting an existing building (in whole or part) into apartments; and (iii) the development of land into plots or apartments for the purpose of selling all or some of the apartments, plots or buildings, and includes the common areas, the development works, improvements and structures thereon, and all easements, rights and appurtenances. An “apartment” is defined to include residential, commercial and other premises.



The Act requires real estate promoters to register every residential or commercial project with the Regulator before it is offered for sale to prospective customers. However, if: (a) the promoter has received the completion certificate for a project prior to commencement of the Act; (b) the project is for renovation, repair or re-development, which will not involve marketing, advertising, selling or making any new allotment of an apartment, plot or building; (c) the area of the land proposed to be developed does not exceed five hundred (500) square meters or where the number of apartments proposed to be developed and sold does not exceed eight (8), then the promoter does not have to register a project.

Under the Act, each project will require a separate registration with the Regulator. Although this will increase transparency in the system, it will also lead to voluminous paperwork for the project developer.

Registration of Agents

Agents, who play a vital role in intermediating property transactions, will also have to register themselves with the Regulator and quote their registration number on the transaction documents.

Disclosures by Promoters and Agents

Disclosures

In relation to every project, promoters will have to make detailed disclosures about the sanctioned and layout plans, the carpet area of the saleable units, the stage wise construction timelines, the names of the real estate agents, the planning permissions, the names and addresses of the contractor(s), architect(s), structural engineer(s), if any, and other persons connected with the project, along with the format of the agreement to be executed with the customers. Moreover, promoters will have to update these details on a quarterly basis.

Adherence to Plans

Any deviation or alteration in plans, structural designs and specifications of the plot, apartment or building will require the consent of two-thirds (2/3) of the total number of consumers (not including the promoter) and also the Regulator. However, minor additions or alterations due to architectural and structural reasons may be undertaken without the foregoing consent.

Promoter's Declaration

When applying for registration of a project, the promoter has to submit a declaration on oath (the "**Declaration**"), *inter alia*, stating: (a) that the promoter has the legal title to the land on which the development is proposed and the land is free from encumbrances; (b) the timelines for completion of project; and (c) that the promoter shall deposit 70% of the amount received from consumers in a separate designated account with a scheduled bank and that the promoter will have to utilize these amounts only for the purpose of the construction and land cost of that particular project.



Additionally, the promoter must also get its accounts audited within six (6) months from the end of every financial year by a Chartered Accountant and produce a statement of accounts verified by such Chartered Accountant that the promoter has complied with the requirement of depositing 70% of the amount received from consumers with a scheduled bank, and that it was utilized only for funding the project.

Promoter's Obligations

The promoter cannot accept a sum of more than 10% of the cost of the apartment, plot or building as an advance, without first entering into and registering an agreement for sale in the prescribed form.

The promoter has to complete the conveyance of all the apartments, plots, buildings and common areas to the allottees (or the association of allottees) within three (3) months from the date of issuance of an occupation certificate or within the period provided by local law. Until the completion of the conveyance of all the apartments, plots, buildings, common areas to the allottees (or the association of allottees), the promoter will have to carry out all obligations specified in the Act.

In case structural defects in the apartments, plots or buildings sold come to light within five (5) years from the date of handing over possession, the promoter will have to rectify such defects within thirty (30) days of notice without any additional charge to consumers.

The promoter cannot charge or mortgage a real estate project after executing an agreement for sale. Moreover, the real estate project cannot be transferred to a third party without the prior written consent of two-thirds (2/3) of the allottees (not including the promoter) and also of the Regulator.

Agent's Obligations

An Agent is required to register with the Regulator and also preserve all prescribed records and books. An Agent also has to aid a buyer to obtain the possession of all documents that the buyer is entitled to at the time of booking of any plot, apartment or building.

The Act specifically prohibits an Agent from facilitating a transaction involving a real estate project which has not been registered with the Regulator and getting involved in any "unfair trade practice," which has been defined to include advertisement of services that are not intended to be offered.

Rights and Duties of Consumers

The Act gives a prospective consumer access to all necessary information about a project (in the form of filings made with the Regulator), which would otherwise be confidential to the promoter. Consumers have a right to claim possession of their property based on the time lines set out by the promoter in the declaration.

Separately, it is the buyer's duty to make payments as per the agreement for sale, including all ancillary payments towards registration charges, municipal taxes, water and electricity charges, maintenance charges, ground rent, and other charges, if any, as agreed in the agreement for sale. The Act also requires the buyer to pay interest (at a rate to be prescribed) in the event there is a delay in making the



foregoing payments. Allottees (i.e., consumers) are required to take physical possession of the apartment, plot or building within two (2) months of the receipt of the occupancy certificate. Lastly, the buyer has an obligation to form an association, co-operative society or federation of buyers and also participate in the registration of the conveyance deed of the apartment, plot or building.

Dispute Resolution

The Act sets up a separate and elaborate mechanism for adjudication of disputes that may arise under the Act.

Adjudicating Officers

For the purpose of determining compensation or interest payable by a promoter to consumers and *vice versa*, the Act provides for appointment of adjudicating officers.

Aggrieved consumers whose disputes concerning compensation or interest are pending adjudication before the forums established under the Consumer Protection Act, 1986, will have the option of applying to get their matters transferred to the adjudicating officer.

Real Estate Appellate Tribunal

The Act provides for establishing a Real Estate Appellate Tribunal (the “**Appellate Tribunal**”) mainly to hear appeals from orders passed by the Regulator and the adjudicating officers. The Appellate Tribunal will have powers similar to those vested upon civil courts (listed above), but will not be bound by the Indian Evidence Act, 1872 and the Code of Civil Procedure, 1908.

An appeal against the decision of the Appellate Tribunal will lie before the High Court of the applicable state, which is required to decide an appeal within sixty (60) days.

Penalties and Imprisonment

Heavy penalties can be imposed by the Regulator on promoters and Agents guilty of non-compliance of the provisions of the Act. The amount can range anywhere from 5% to 10% of the estimated cost of the project. Defaulters can also be punished with imprisonment, which can extend up to three (3) years.

In case of an offence committed by a company, every person who, at the relevant time, was in charge or responsible for the conduct of the business of the company shall be deemed to be guilty of the offence. The onus will be on the person claiming ignorance to prove that the offence was committed without his/her knowledge.

An Agent who does not get registered can be punished with a fine of INR10,000 (approx. US\$150) for every day of contravention, which may cumulatively extend to 5% of the cost of the plot, apartment or building, as the case may be, of the real estate project in which the Agent might be involved.



If a consumer fails to comply with the orders of the Appellate Authority, then the consumer can be penalized with a penalty which may cumulatively extend to 10% of the cost of the real estate project in which he/she may be involved or with imprisonment which may extend to one (1) year or with both.

All offences that are punishable with imprisonment under the Act are compoundable offences, and an application for compounding can be made at any time before or after prosecution is commenced.

Impact of the Act on Foreign Investors

A significant amount of private equity funding has gone into various real estate projects across India. Typically, a special purpose vehicle (“**SPV**”), which is a joint venture company between the promoter and the fund, develops a project. The deeming provision in the Act imposes liability on every person in charge of the promoter company. As such, fund managers serving on the boards of such SPVs or otherwise in charge of the business of SPVs may also be liable under the Act if there is any breach.

Conclusion

The Act is tailor-made to protect consumers in the real estate sector.

One of the most beneficial features of the Act is the disclosure of the project details and the time schedule for construction. This will bring in much needed transparency and accountability in the real estate sector.

In addition, stringent penalties and criminal punishment has been imposed on the promoter in case of breach. Thus far, aggrieved consumers have had to approach consumer tribunals or civil courts to get their grievances redressed. But now, they can approach the real estate regulator, who will, hopefully, be able to mete out speedier justice.

It is a known fact that the real estate sector in India has seen a big slump in the last few years. Inventory worth millions of dollars remains unsold on account of various reasons. In view of the foregoing, from the promoter’s perspective, the additional set of compliances imposed on the promoter will add to project costs and may eventually be passed on to the consumers.

Further, the statutory deposit of 70% of the promoter’s funds in a designated account will impact the liquidity of the promoter further and may become a major dampener to undertake new projects.

Considering the huge impact of the Act on promoters, we understand that various associations of real estate promoters are gearing up to challenge the Act before the constitutional courts in India. Therefore, it does not appear that the last word has been written on the Act.