

LHAG Insights

Dispute Resolution



ABOUT THE AUTHORS



Ho Ai Ting
Partner

Dispute Resolution

E: hat@lh-ag.com



Aaron Mah Zhee Haang
Associate

Dispute Resolution

E: mzh@lh-ag.com

5 JANUARY 2022

COVID-19 (Amendment) Act 2021: Additional Modifications to HDA 1966

As part of the continuous effort to mitigate the adverse impacts posed by the pandemic on various economic sectors, Malaysian lawmakers have sought to amend the Temporary Measures for Reducing the Impact of Coronavirus Disease 2019 (COVID-19) Act 2020 (**COVID-19 Act**).

On 14 December 2021, the Temporary Measures for Reducing the Impact of Coronavirus Disease 2019 (COVID-19) (Amendment) Bill 2021 was tabled for its first reading before the House of Representatives of the Parliament. The Bill was passed without amendments after its second and third readings on 16 December 2021. The Senate subsequently passed the Bill on 22 December 2021. For the purpose of this update, the Bill is referred to as the **Amendment Act**.¹

In relation to the Housing Development (Control and Licensing) Act 1966 (**HDA 1966**), s 5 of the Amendment Act seeks to insert a new Part XIA to the COVID-19 Act containing six new provisions, namely ss 38A to 38F.

Key takeaways

In essence, the new ss 38A to 38F revolve around the issues of late payment charges payable by purchaser in the event of late instalment payment, time for delivery of vacant possession (**VP**) / completion of common facilities by housing developer, and computation of defect liability period (**DLP**) under the prescribed

¹

<https://www.parlimen.gov.my/files/billindex/pdf/2021/DR/DR%2017%20-%20BM.pdf>
(accessed 29 December 2021)

contract of sale in Schedules G, H, I and J of the Housing Development (Control and Licensing) Regulations 1989² (**SPAs**).

The key takeaways from the six new provisions are as follows:

(a) Late payment charges

- For SPAs entered with developer before 31 May 2021, developer shall not impose late payment charges on purchasers for their unpaid instalment during 1 January 2021 to 31 December 2021 due to measures prescribed, made or taken under the Prevention and Control of Infectious Diseases Act 1988 (**PCIDA 1988 Measures**) – s 38B. This, on the face of it, appears to be an automatic entitlement granted to the purchasers.

(b) Time for delivery of VP/completion of common facilities

- For SPAs entered with developer before 31 May 2021, developer *may* apply to the Minister of Housing and Local Government (**KPKT Minister**) for any period from 1 January 2021 to 31 December 2021 (**VP Relief Period**) to be excluded from computing the time for delivery of VP or completion of common facilities of a housing accommodation – ss 38C(1) and (4).
- The KPKT Minister may grant such application if he/she is satisfied that the developer was unable to deliver VP or complete common facilities due to the PCIDA 1988 Measures; in such case, the VP Relief Period shall not be taken into account to compute the time for delivery of VP or completing common facilities and assessment of liquidated damages (**LAD**) in case of late delivery of VP/completion of common facilities – s 38C(2) and (5).
- The KPKT Minister, however, will not consider any application made after the expiry of time limit for delivery of VP/completion of common facilities stipulated in the SPAs – s 38C(3).
- Developer cannot invoke the usual deeming provision on delivery of VP if the purchaser, due to the PCIDA 1988 Measures, is unable to enter into possession or occupation of the property from the date of service of a notice to take VP during the period from 1 June 2021 to 31 October 2021 or any VP Relief Period granted by the KPKT Minister – s 38D.

² Amendment Act, s 38A

(c) DLP

The period from 1 June 2021 to 31 October 2021 is excluded from the calculation of:

- the DLP after the date the purchaser takes VP;
- the DLP after the date of completion of common facilities; and
- the time for developer to carry out works to repair and make good any defect, shrinkage and other faults in a housing accommodation and common facilities.

(d) Saving clause

- Exclusion or extension granted under ss 38B, 38C, 38D and 38E shall not affect:
 - (i) exclusion or extension granted earlier under ss 34, 35 and 36 of the COVID-19 Act – s 38F(1).
 - (ii) legal proceedings commenced or judgment/ award obtained from 24 October 2020 until the date immediately before the operation of the new Part XIA, to recover late payment charges or LAD – s 38F(2).
- Late payment charges or LAD already paid before the operation of the new Part XIA shall be deemed to have been validly paid and shall not be refunded to the payer – s 38F(3).

Our views

Developers and purchasers will be relieved to know the Amendment Act accords similar reliefs provided by the COVID-19 Act. However, given the similar saving clause in s 38F, not all developers and purchasers are able to claim these additional reliefs.

In respect of the developer's application to seek VP Relief Period under s 38C(1), the provision does not suggest prior consent of the purchasers is required before such application is made to the KPKT Minister. The same provision also does not specify the yardstick of the causative element, i.e. the criteria to be considered by the KPKT Minister in determining whether the developer's inability was "due to" the PCIDA Measures, for developers to be entitled to the VP Relief Period. The determination of such application appears to be at the sole discretion of the KPKT Minister.



Head Office

Level 6, Menara 1 Dutamas
Solaris Dutamas
No. 1, Jalan Dutamas 1
50480 Kuala Lumpur
Malaysia
Tel: +603 6208 5888
Fax: +603 6201 0122

Johor Office

Suite 21.01
21st Floor, Public Bank Tower
No.19, Jalan Wong Ah Fook
80000 Johor Bahru, Johor
Tel: +607 278 3833
Fax: +607 278 2833

Penang Office

18-33-A3 Gurney Tower
Persiaran Gurney
10250 Georgetown
Pulau Pinang

Email

enquiry@lh-ag.com

Website

www.lh-ag.com

As at the date of this publication, the Amendment Act has not been published in the *Gazette* and is not yet in force. It is, however, likely to be gazetted in the coming weeks. It is therefore prudent and timely for developers and purchasers to take steps to review existing contracts of sale and ascertain whether they are in a position to claim the additional reliefs discussed above.

Ho Ai Ting and Aaron Mah Zhee Haang

If you have any queries pertaining to this update, or on housing-related disputes, please contact partner [Ho Ai Ting](mailto:hat@lh-ag.com) (hat@lh-ag.com).