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Doing Business in Malaysia

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Ministries, Regulatory Bodies and Agencies

| Acronym | Name | Website |
|----------------|---|---|
| BNM | Bank Negara Malaysia/Central Bank of Malaysia | http://www.bnm.gov.my/ |
| Bursa Malaysia | Bursa Malaysia Berhad | http://www.bursamalaysia.com/market/ |
| CCM/SSM | Companies Commission of Malaysia/Suruhanjaya Syarikat Malaysia | http://www.ssm.com.my/ |
| Customs | Royal Malaysian Customs | http://www.customs.gov.my/ |
| DOE | Department of Environment | http://www.doe.gov.my/portalv1/en |
| ECERDC | East Coast Economic Region Development Council | http://www.ecerdc.com.my/ |
| EPU | Economic Planning Unit | http://www.moha.gov.my/index.php/en/ |
| FELCRA | Federal Land Consolidation and Rehabilitation Authority | http://www.felcra.com.my/ |
| FELDA | Federal Land Development Authority | http://www.felda.net.my/ |
| Immigration | Immigration Department | http://www.imi.gov.my/index.php/ms/ |
| IRB | Inland Revenue Board | http://www.hasil.gov.my/ |
| IRDA | Iskandar Regional Development Authority | http://www.irda.com.my |
| KKMM | Ministry of Communication and Multimedia Malaysia/Kementerian Komunikasi dan Multimedia Malaysia | http://www.kkmm.gov.my/ |
| KLRCA | Kuala Lumpur Regional Centre for Arbitration | http://klrca.org/ |
| KPKK | Ministry of Information, Communication and Culture/ Kementerian Penerangan, Komunikasi dan Kebudayaan | http://www.penerangan.gov.my/ |
| Labuan FSA | Labuan Financial Services Authority | http://www.lfsa.gov.my/ |
| MAMPU | Malaysian Administrative Modernisation and Management Planning Unit | http://www.mampu.gov.my/web/en/mampu |
| MCMC | Malaysian Communications and Multimedia Commission | http://www.skmm.gov.my/ |

| Acronym | Name | Website |
|---------|--|---|
| MDeC | Multimedia Development Corporation | http://www.mdec.my/ |
| MDTCC | Ministry of Domestic Trade, Co-operative and Consumerism | http://www.kpdnkk.gov.my/ |
| MHA/LLM | Ministry of Highway Authority/Lembaga Lebuhraya Malaysia | http://www.llm.gov.my/background_EN.aspx |
| MIDA | Malaysian Investment Development Authority | http://www.mida.gov.my/ |
| MITI | Ministry of International Trade and Industry | http://www.miti.gov.my/cms/index.jsp |
| MOF | Ministry of Finance | http://www.treasury.gov.my/index.php?lang=ms |
| MOHA | Ministry of Home Affairs | http://www.moha.gov.my/index.php/en/ |
| MOHE | Ministry of Higher Education | http://jpt.mohe.gov.my/eng/ |
| MONRE | Ministry of Natural Resources and Environment | http://www.nre.gov.my/ |
| MOSTI | Ministry of Science, Technology and Innovation | http://www.mosti.gov.my/ |
| MOW | Ministry of Works/Kementerian Kerja Raya | http://www.kkr.gov.my/ |
| MyIPO | Intellectual Property Corporation of Malaysia | http://www.myipo.gov.my/ |
| NCIA | Northern Corridor Implementation Authority | http://www.koridorutara.com.my |
| PSD | Public Service Department | http://www.jpa.gov.my/?lang=en |
| PWD/JKR | Public Works Department/Jabatan Kerja Raya | http://www.jkr.gov.my/ |
| RECODA | Regional Corridor Development Authority | http://www.recoda.com.my |
| RMP | Royal Malaysia Police | http://www.rmp.gov.my/ |
| SC | Securities Commission | http://www.sc.com.my/ |
| SEDA | Sustainable Energy Development Authority | http://www.seda.gov.my |
| SEDIA | Sabah Economic Development and Investment Authority | http://www.sedia.com.my |
| SPAD | Land Public Transport Commission/Suruhanjaya Pengangkutan Awam Darat | http://www.spad.gov.my/ |
| UKAS | Public Private Partnership Unit/Unit Kerjasama Awam Swasta | http://www.ukas.gov.my/ |

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1 INTRODUCTION

Malaysia is strategically located in the heart of South East Asia and offers investors a dynamic and vibrant business environment with ideal prerequisites for growth and profits. Malaysia is a federal constitutional monarchy comprising of thirteen states and three federal territories in both Peninsular Malaysia and East Malaysia. Kuala Lumpur is the Federal Capital of Malaysia whereas Putrajaya is the administrative capital where the seat of government is situated.

Geography

With its land area totalling 329,847 sq. km, Malaysia consists of Peninsular Malaysia and East Malaysia (the states of Sabah and Sarawak) which are separated by the South China Sea. Peninsular Malaysia shares its border with Thailand and sits north of Singapore while East Malaysia is located on the island of Borneo and shares its border with Brunei and the Indonesian territory of Kalimantan. The country enjoys a tropical climate with hot and humid weather all year round. Annual southwest and northeast monsoons also occur from April to September and November to February respectively.

Demographics

Malaysia has a population of approximately 29.5 million consisting of different ethnic groups with the dominant racial group being the Malays, Chinese and Indian. Ethnic Malays comprise some 50% of the population; Chinese constitute around 25%; Indians constitute 10%; Eurasians and indigenous peoples make up the rest. In terms of geographical distribution, 24 million inhabit Peninsular Malaysia where the population is mostly concentrated on the west coast. East Malaysia, on the other hand is home to 5 million people.

Islam is the official religion of Malaysia with 60% of Malaysians practising the religion, but other religions such as Buddhism, Christianity, Hinduism and others are freely practised.

Language

The official language of Malaysia is Bahasa Malaysia, but English is widely used and is the preferred language when doing business. Many other languages are also widely spoken in Malaysia, such as Cantonese, Mandarin, Tamil and other tribal languages.

Currency

Malaysian Ringgit (MYR or RM).

Government

Federal Parliamentary democracy with a constitutional monarch.

Economic Profile

Malaysia is considered one of the most developed economies in South East Asia, with a GDP per capita of USD 10,876.73 in 2015 and a recorded growth of 4.5% in its GDP as of the first quarter of 2016. It is an economy that has progressed from an economy dependent on agriculture and primary commodities to a manufacturing based, and now is transforming into a service and knowledge driven economy..

All of Malaysia's development plans are prepared by the Economic Planning Unit and development planning in Malaysia canvases short to long term plans, all of which aim to set a comprehensive strategy to achieve the targets under the national development agenda, which is for Malaysia to achieve high income status by the year 2020. These plans include the New Economic Model 2011-2020 and the Economic Transformation Programme ("**ETP**"). The New Economic Model 2011-2020 targets to achieve a number of objectives. These include, among other things, re-energising the private sector, developing a quality workforce and reducing dependency on foreign labour, creating a competitive and domestic economy and strengthening the public sector. The ETP on the other hand is a series of projects and policy measures intended to accelerate the country's economic growth. The ETP aims to attract investments in Islamic Finance, Biotechnology, Services, Communications and others.

Also as part of the Government's goal to achieve high income status by the year 2020, the Government has also taken steps to liberalise several services sub-sectors by removing the Bumiputera equity requirements. Some examples of these service sub-sectors which have been or will be fully liberalised include private hospitals, medical and dental specialists, architectural,

engineering, legal, accounting (including auditing) and taxation, courier services, telecommunications (except for the category of content application service provider licence), education (including private universities, international schools, technical and vocational schools, and skills training centres), as well as departmental and specialty stores.

Economic Activities

In terms of magnitude of the various economic activities, the service sector is the largest contributor to the GDP of Malaysia. Major subsectors within services include finance, real estate and business services; wholesale and retail trade; transport and communication. The government plans to develop the services sector through the Services Sector Blueprint and aims for the services sector to increase to 58% by 2020.

The manufacturing sector is the second largest contributor to the GDP of Malaysia. Other contributing sectors to the GDP include mining and quarrying.

International Trade

Malaysia's trade policy is basically in favour of free trade, with some protection for selected industries. The government is seeking the progressive removal of many of the existing trade barriers, which amongst others, involves taking part in the ASEAN Free Trade Area ("**AFTA**") and signing free trade agreements ("**FTAs**")

In 2003, the AFTA integrated ASEAN into a single market and, with its high population of 550 million with a combined GDP of more than USD 838.2 billion, created a market that rivals regional markets in China. The AFTA removes tariffs for nearly 8,000 items for import and exports among the ASEAN member states, which in turn would result in reductions in product prices. As a result, Malaysia is an attractive investment location as well as a strategic gateway to the ASEAN market. The formation of the ASEAN Community in 2015 is also seen as a move towards a three-pillared community to strengthen regional integration comprising an ASEAN Political and Security Community; an ASEAN Economic Community; and an ASEAN Socio-Cultural Community.

Aside from the AFTA, Malaysia has also signed several regional and bilateral FTAs and several more are still at the negotiation stage. FTAs serve mainly to reduce tariff rates payable in respect of goods originating from countries which have an FTA with Malaysia. Conversely, export goods manufactured in Malaysia can also benefit from lower tariff rates in the country of import which has an FTA with Malaysia. In October 2015, negotiations for the Trans-Pacific Partnership Agreement which is a multilateral free trade agreement with 12 countries including United States, Canada, Chile, Mexico, Peru, Australia, New Zealand, Vietnam, Singapore, Brunei and Japan were concluded.

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2 LEGAL BACKGROUND AND JUDICIAL SYSTEM

A. Background

The Malaysian legal system has been largely influenced by English Common Law. Malaysia practices the concept of constitutional supremacy under which the Malaysian Federal Constitution is the supreme law of the land. The Federal Constitution sets out the roles, limitations and conferment of powers on various persons and bodies in order to facilitate the orderly and efficacious governance of the country:

(1) **The Sovereign of Malaysia (known as the Yang di-Pertuan Agong) and Rulers of the states in Malaysia**

The constitutional monarch holds the governing powers of the country, which are restricted by the terms of the Federal Constitution. Rulers of each of the States in Malaysia are also primarily responsible for the preservation of Malay customary laws and the administration of matters pertaining to the religion of Islam in Malaysia.

(2) **The Legislature (Parliament of Malaysia)**

The Malaysian legislative body is empowered to enact laws and also confer power on Ministers in government ministries to enact subsidiary legislation.

(3) **The Executive (Prime Minister and his cabinet)**

The Malaysian executive is empowered to administer laws enacted by the legislature.

(4) **The Judiciary (High Courts & Subordinate Courts of Malaysia)**

The Malaysian Judiciary is to remain legally independent from the legislature and executive. The Judiciary is tasked to uphold justice and interpret laws by the legislature.

Such demarcation of powers between the bodies above is to ensure separation of powers between the Malaysian legislature, executive and judiciary although overlaps are at times inevitable.

B. Judicial System

The Malaysian judicial system is structured to include superior courts (consisting of the Federal Court, the Court of Appeal and two High Courts) and subordinate courts (consisting of Session Courts and Magistrate Courts). There is also a Special Court established by the Federal Constitution that has the jurisdiction to try civil or criminal action instituted by or against the Yang di-Pertuan Agong or the Ruler of the States. Furthermore, there is a parallel system of state Shariah courts which have jurisdiction in relation to matters of Shariah law.

(1) **Courts**

The specific jurisdictions and functions of the Courts in Malaysia are set out as follows:

Federal Court

The Federal Court is Malaysia's apex court and is headed by the Chief Justice of the Federal Court.

The Federal Constitution also sets out the powers of the Federal Court. Article 128(1)(a) provides that the Federal Court has the exclusive jurisdiction to determine whether a law made by the Parliament or by the Legislature of a State is invalid. Article 128(1)(b) of the Constitution also states that the Federal Court has jurisdiction to determine on disputes between States or between the Federal and any State. Essentially, the Federal Court is the final interpreter of the Federal Constitution. The Federal Court is also empowered to listen to appeals from the Court of Appeal of Malaysia, but only on questions of law of public importance. Article 130 of the Federal Constitution permits that the Yang di-Pertuan Agong may refer to the Federal Court, for its opinion, any question regarding the effect of any provision in the Federal Constitution which has arisen or appears to him likely to arise, and the opinion of the Federal Court shall be pronounced in an open court.

Special Court

Article 182 of the Federal Constitution provides for there to be a Special Court which consists of the Chief Justice of the Federal Court (who shall be the Chairman of the Special Court), the Chief Judges of the High Courts and two (2) other persons who hold or have held office as judge of the Federal Court or a High Court appointed by the Conference of Rulers.

The Special Court has exclusive jurisdiction to try all offences instituted by or against the Yang di-Pertuan Agong or the Ruler of a State.

Court of Appeal

The main function of the Court of Appeal is to hear appeals of decisions from the High Courts. For criminal matters, the Court of Appeal will only hear appeals of decisions from the High Court in the exercise of its original jurisdiction, or in the exercise of its appellate jurisdiction in respect of any matter decided by the Sessions Court. Any appeal which originated from a Magistrate's Court jurisdiction can only be heard by the Court of Appeal upon obtaining leave from the Court of Appeal, and must be confined to questions of law. For civil matters, the Court of Appeal shall have jurisdiction to hear and determine appeals from any judgment or order of any High Court, whether made in the exercise of its original or of its appellate jurisdiction.

High Court

The High Courts of Malaysia (the High Court of Malaya and the High Court of Sabah and Sarawak respectively) have the jurisdiction to hear appeals of civil or criminal cases from the lower courts. The High Courts hear criminal cases involving the death penalty. The High Court also has unlimited jurisdiction for the trial of civil cases. Therefore, save and except for hearing and deciding on appeals against its own decisions as well as constitutional issues, the High Court generally has jurisdiction to hear criminal and civil cases of any nature, with no restrictions or limit on the subject matter, monetary limit, or methods of enforcing judgments.

Sessions Court

With regards to criminal cases, sessions courts have local jurisdiction to decide on criminal cases which do not involve the death penalty. In the civil context, sessions courts are empowered to decide on cases where the claim does not exceed RM1,000,000.00. Notwithstanding the restriction on claim limit, the sessions courts may try all actions and suits involving motor vehicle accidents, landlord and tenant and distress cases.

Magistrates Court

Magistrate courts have jurisdiction to try civil cases where the claim does not exceed RM100,000.00. With regards to criminal matters, magistrate courts have the jurisdiction to try offences where the maximum penalty as set out in the relevant statute does not exceed ten (10) years in prison or which are punishable with a fine only.

Children's Court

The Children's Court deals specifically with the trial and sentencing of offenders who are under the age of majority, namely minors below the age of eighteen (18).

Shariah Court

Malaysia has Shariah laws enacted by each State (and by Parliament in relation to the Federal Territories of Malaysia) which are only applicable to Muslims. Offences against Shariah laws are tried by the Shariah courts which are set up by the respective State governments. There are thirteen (13) state Shariah law departments and one (1) Shariah law department for the Federal Territories. As provided under Article 121(1A) of the Federal Constitution, the High Courts and subordinate courts have no jurisdiction in matters which fall within the jurisdiction of the Shariah Courts.

(2) Arbitration

Apart from the Malaysian courts system, parties may also refer disputes to arbitration. Arbitration is one of the main forms of alternative dispute resolution in Malaysia, and is separate from the courts system in Malaysia. Arbitration is especially relied upon in resolving disputes under certain sectors, such as the construction industry. Reasons for resorting to

arbitration include, inter alia, the contractual parties' ability to choose their own arbitrator or adjudicator, which are in most instances experts in the industry having the necessary technical know-how in relation to the subject matter of the dispute. Parties also prefer the flexibility of arbitration, confidentiality of the proceedings, and the enforceability of arbitral awards in a court of law.

Legislation

Arbitration in Malaysia is governed by the Arbitration Act, 2005 (which repealed the Arbitration Act 1952) ("Arbitration Act"). Previously, enforcement of arbitral awards was governed by a separate statute, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Act 1985 ("1985 Act"), as a result of Malaysia's ratification of the treaty and by virtue of being a signatory to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted by the United Nations Conference on International Commercial Arbitration in 1958 ("New York Convention"). The 1985 Act however was repealed and incorporated into the present Arbitration Act.

In this regard, Malaysia is home to the Kuala Lumpur Regional Centre for Arbitration ("KLRCA"), an international dispute resolution centre which is recognised as a neutral, efficient, and reliable provider of dispute resolution services.

Kuala Lumpur Regional Centre for Arbitration

The KLRCA was established in 1978 under the auspices of the Asian-African Legal Consultative Organisation ("AALCO"), and was the first regional centre established by AALCO in Asia to provide institutional support as a neutral and independent venue for the conduct of domestic and international arbitration proceedings in Asia. The KLRCA is a non-profit, non-governmental and independent international body and it was also the first centre in the world to adopt the UNICITRAL Rules for Arbitration as revised in 2010. New rules have since been created to cater to the growing demands of the global business community such as the KLRCA i-Arbitration Rules, the KLRCA Fast Track Rules as well as the KLRCA Mediation and Conciliation Rules. Beyond the provision of dispute resolution services within the region, the KLRCA also promotes international commercial arbitration in the Asia-Pacific Region, co-ordinates and assists the activities of existing arbitral institutions in the Asia-Pacific Region; and also assists in enforcement of arbitral awards.

Arbitration Clause

Arbitration under the KLRCA begins with the agreement of 2 or more parties for the reference to an arbitration proceeding under the KLRCA Arbitration Rules ("KLRCA Rules"). The KLRCA Rules cover all aspects of the arbitral process, including providing a model arbitration clause which parties could insert into their respective agreements, setting out procedural rules regarding the appointment of arbitrators and the conduct of arbitral proceedings, and establishing rules in relation to the form, effect and interpretation of the award.

Costs and Fees

In relation to costs and fees, the cost structure for arbitration depends on whether it is an international or a domestic arbitration. The fees for arbitrators would depend on the value of the subject matter in dispute; the higher the amount, the higher the arbitrator's fees. As an illustration from the fee schedule set out in the KLRCA's official website, the arbitrator's fees would be USD3,500 (exclusive of administrative fees and taxes) for an international arbitration involving an amount of dispute up to USD50,000. For a domestic arbitration involving an amount of dispute of MYR50,000, the arbitrator's fees would be estimated at MYR9,200 (exclusive of administrative fees and taxes).

Panel of Arbitrators

As at December 2015, the KLRCA has a panel of over 700 experienced domestic and international arbitrators. There are no restrictions imposed on foreign lawyers to appear before arbitral proceedings under the KLRCA. Fees are fixed with a structure that is 20% less than other arbitral institutions, and no withholding tax is imposed on arbitrators.

Advantages of Arbitration

Apart from technical expertise in the relevant industry relating to the subject matter of dispute, the main advantages of engaging the services of KLRCA are attributed to its speed in managing arbitral proceedings as well as it being cost-efficient. Arbitral awards are rendered within 3 months from date of final submission and the appointment of arbitrator is made within 48 hours of receipt of all necessary documents. In certain circumstances, arbitration may cost less than court litigation, as hearings may be briefer and the preparation work less demanding.

Interim Measures by the Malaysian Courts

Whilst the Arbitration Act generally provides for non-interference by the Malaysian courts, the High Court does have the power to grant interim measures in respect of security for costs, discovery of documents and interrogatories, giving of evidence by affidavit, securing the amount in dispute, preservation, interim custody and sale of any property which is the subject matter of a dispute and ensuring that any award which may be made in the arbitral proceedings is not rendered ineffectual by the dissipation of assets, and granting interim injunctions. The arbitral tribunal is also given almost similar powers, except that there is no power to grant an injunction or to appoint receivers.

Enforcement of Arbitral Awards

Arbitral awards issued in Malaysia, either in respect of domestic or international arbitration are binding and enforceable. In addition, pursuant to provisions under the Arbitration Act and as a result of Malaysia being a signatory to the New York Convention, arbitral awards issued in Malaysia will be recognised and enforceable in other signatory states. Similarly, arbitral awards issued in other signatory states will be recognised and enforceable in Malaysia. There are currently 149 signatories to the New York Convention.

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3 ESTABLISHING A PRESENCE

In Malaysia, persons who wish to carry on business in Peninsular Malaysia or the Federal Territory of Labuan must register under one of the following: the Registration of Businesses Act 1956 ("**ROBA 1956**"), the Companies Act 1965 ("**CA 1965**") or Limited Liability Partnerships Act 2012. Businesses (sole proprietorships and partnerships) and companies are regulated by the Registrar of Businesses ("**ROB**") and Registrar of Companies ("**ROC**") respectively. Limited Liability Partnerships are regulated by the Companies Commission of Malaysia ("**SSM**"). As at the date of this article, a Companies Act ("**CA 2016**") was gazetted on 15 September 2016. The CA 2016 is pending the determination of the enforcement date by the Attorney General's Chambers and the relevant Minister. Partial enforcement of the CA 2016 is expected to be in the first half of 2017. The new CA 2016 will replace the CA 1965 and will have a major impact on the way companies operate in the country.

Registration of Businesses Act 1956 (ROBA 1956)

Partnerships and Sole Proprietorships are governed under the ROBA 1956. Partnerships and Sole Proprietorships are not required to lodge accounts with the ROB.

Companies Act

The Companies Act is an act to provide for the registration, administration and dissolution of companies and corporations and to provide for related matters

Companies Limited by Shares, Companies Limited by Guarantee, Unlimited Companies and branches of foreign companies are governed by the Companies Act. Currently under the CA 1965, a company must be formed by at least two persons (unless the entire issued shares of the company are held by a corporation). If a company with fewer than two individual members carries on business for more than six (6) months, the company and such individual member of the company shall be guilty of an offence.

The CA 2016 allows for companies to be formed with a sole shareholder (whether individual or corporate) and a sole director. An individual may be both the sole shareholder and sole director of a company.

It is important to note that under the CA 2016, companies will no longer be required to have Memorandum and Articles of Association, although companies may still choose to adopt a Constitution. There will also not be a Table A. The CA 2016 is intended to provide the necessary provisions for the operation of a company, as evidenced by several provisions contained in the current Table A (Fourth Schedule to the Companies Act 1965) having been made into statutory provisions in the CA 2016. Examples of such provisions include the directors' right to make calls on shares, pre-emptive rights of shareholders over new shares to be issued and the ability of a company to convert shares into stock or reconvert stock into shares. Memorandum and Articles of Association of existing companies will be deemed to be the new Constitution.

With the changes made by the CA 2016, the required documents and steps for incorporation will have to also be changed. CCM has, at the date of this publication, yet to issue new guidelines or regulations on the documents required for incorporation under the CA 2016.

Under the CA 2016, all shares issued before or after the coming into force of the CA 2016 will have no par value. In tandem with this change, there is no longer a concept of authorised share capital and companies will no longer be required to maintain a share premium account and reserves. Companies can also issue shares at any price with the CA 2016 coming into force. This follows the trend in other jurisdictions such as Singapore, Australia, New Zealand and HK. In light of these changes, there may be consequential changes to the incorporation fee structure above.

A. Forms of Business Organisations

There are seven different forms of business organisation that are available in Malaysia. These are:

- (a) Limited Liability Partnership
- (b) Partnership
- (c) Sole Proprietorship
- (d) Company Limited by Shares/Private Limited Company

- (e) Company Limited by Guarantee
- (f) Unlimited Company
- (g) Branch of a foreign company

(1) Limited Liability Partnership

A Limited Liability Partnership ("**LLP**") is an alternate business vehicle introduced not too long ago in Malaysia. An LLP combines the characteristics of a private company and a conventional partnership and is regulated under Limited Liability Partnerships Act 2012.

LLP is a body corporate and has a legal personality separate from its partners (separate legal entity). Two or more individuals or bodies corporate may form an LLP for any lawful business in accordance with the term of an LLP agreement executed between them. The liabilities of the partners of an LLP are limited and has unlimited capability in conducting business and holding property. An LLP is also capable of suing and being sued.

It may be formed by professionals i.e. Lawyers, Chartered Accountants and Company Secretaries for the purpose of carrying on their professional practice. Given that the liability of the partners of an LLP is limited, the LLP business vehicle also helps start-ups and small and medium enterprises ("**SMEs**") grow their businesses without having to worry about their personal liabilities and personal assets. The registration fee for a new LLP or for the conversion of a conventional partnership or a private company into an LLP is RM500.

An LLP has a perpetual succession and any change in the partners of the LLP will not affect the existence, rights or liabilities of an LLP.

(2) Partnership

A partnership on the other hand is formed when two or more persons combine some or all of their resources, skill, ability or industry, with the objective of making a profit which will be shared by all partners. A partnership is regulated by the Partnership Act 1961.

In a partnership, all the partners are personally liable, without limit, for the debts and obligations of the partnership. When forming a partnership, any number of people up to a maximum of 20 may enter a partnership. If there are more than 20 persons that form an association or a partnership to carry on business, it must be registered as a company under the CA 1965 or some other written law in Malaysia and not as a partnership.

(3) Sole Proprietorship

A sole proprietorship is the simplest form of business ownership as compared to the rest. It is formed essentially for businesses comprising one person (the sole proprietor). The sole proprietor is entitled to all profits of the business and is personally liable, without limit, for all debts and obligations of the business.

(4) Company Limited by Shares (Sendirian Berhad or Berhad)

A company limited by shares may be a private limited company or a public limited company. A private company is identified as a "Sendirian Berhad" or "Sdn Bhd" while a public company is identified as a "Berhad" or "Bhd". A company limited by shares is a company where the personal liability of its members is limited to the amount if any, unpaid on their shares.

The articles of association of a private company restricts the right of its members to transfer their shares, restricts the number of members to 50 and prohibits members from soliciting the public to subscribe its shares. A private company is also prohibited from accepting deposit of money from the public whether with interest or not. The main difference between a public company and a private company that a public company is not subject to the foregoing restrictions. A private company may convert to a public company as it expands and, sometimes, the reverse happens.

Under the CA 1965, when incorporating a company limited by shares, there must be a minimum of two subscribers to the shares of the company and a minimum of two directors. A company is also required to appoint a company secretary who may be either a member of a professional body prescribed under the Ministry of Domestic Trade Cooperative and Consumerism ("MDTCC") or who holds an individual licence issued by SSM, and who must be named in the Memorandum and Articles of Association of the company. The CA 2016 has

simplified the requirements for incorporating a company by requiring only one subscriber and one director. This is a welcome move particularly for small businesses, start-up ventures and entrepreneurs as it facilitates the ability for one individual to maintain control over the company while having the benefit of limited liability of the company. The CA 2016 no longer requires a company secretary to be appointed at the incorporation of the company. The company has thirty (30) days from its incorporation date to appoint a company secretary.

(5) Company Limited by Guarantee (Berhad or Bhd)

A company limited by guarantee limits its member's liability to the amount the member undertakes to contribute to the company in the event the company is wound up as provided under the Memorandum of Association of the company. This amount is specified in the Memorandum of Association of the Company and is agreed and signed by all members of the company. A company limited by guarantee is typically used for non-profit purposes.

(6) Unlimited Company

An unlimited company is a company where the members' liability for its debts is unlimited. The liability of its members must be stated in the Memorandum of Association as unlimited.

A creditor of the company can sue a member personally for debts of the company but the liability of the members only arises if the company is unable to meet its debt and is wound up.

A past member of the company is liable to contribute to the debts of the company only if he ceased to be a member less than one year before winding up and he is not liable to contribute in respect of any debt or liability of the company contracted after he ceased to be a member.

(7) Branch of a Foreign Company

A foreign company is a company incorporated outside Malaysia and it can carry on business by either:

- (a) incorporating a local company with SSM; or
- (b) registering the foreign company in Malaysia with SSM.

Pursuant to the Guidelines on Foreign Participation in the Distributive Trade Services Malaysia ("**DTS Guidelines**"), with effect from 1 November 1995, the establishment of a branch in Malaysia to carry on business in wholesale or retail trade is not allowed for a foreign company. It also provides that any foreign involvement in wholesale and retail trade would require the incorporation of the business locally under the Companies Act 1965 by the foreign company. As the DTS Guidelines is merely a regulatory guideline and does not have the force of law, failure to comply is not an offence. Non-compliance could however result in administrative consequences for the company.

B. Procedure for Incorporation (Branch of a Foreign Company)

Presently, there are vital steps which individuals must comply with when going through the application process for incorporation of a company. These are as follows:

(1) Application of Name Search

A name search must be conducted to determine whether the proposed name of the company is available for registration. The steps involved are:

- (a) Completion and submission of Form 13A of the CA 1965 (Request for Availability of Name) to SSM; and
- (b) Payment of an RM30.00 fee for each name applied.

The name to be used to register the foreign company should be the same as that registered in its country of origin. Where the proposed company's name is approved by SSM, it will be reserved for three months from the date of approval.

(2) Lodgement of Registration Documents

Registration documents must be submitted to SSM within 3 months from the date of approval of the company's name by SSM, failing which a fresh application for a name search must be done (i.e. steps (a) and (b) above will have to be repeated)

(3) Documents Required for Incorporation

Currently, the following documents shall be submitted to SSM for registration:

- (a) A certified copy of the certificate of incorporation or registration of the foreign company;
- (b) A certified copy¹ of the foreign company's charter, statute or Memorandum and Articles of Association or other instrument defining its constitution;
- (c) Form 79 (Return by Foreign Company Giving Particulars of Directors and Changes of Particulars);

NOTE: If the list includes directors residing in Malaysia who are members of the local board of directors of the foreign company, a memorandum stating their powers must be executed by or on behalf on the foreign company and submitted to SSM

- (d) A memorandum of appointment or power of attorney authorising the person(s) residing in Malaysia, to accept on behalf of the foreign company any notices required to be served on such foreign company;
- (e) Form 80 (Statutory Declaration by Agent of Foreign Company);
- (f) Additional documents consisting of:
 - (i) The original copy of Form 13A;
 - (ii) A copy of the letter from SSM approving the name of the foreign company; and
 - (iii) Fees payable (in the form of a banker's cheque) to SSM, depending on the authorised share capital of the foreign company.

If any of the described registration documents are in languages other than Bahasa Malaysia or English, a certified translation of such documents in Bahasa Malaysia or English shall be required.

(4) Fees for Incorporation

| NOMINAL SHARE CAPITAL (RM EQUIVALENT) | FEES (RM) |
|--|------------------|
| Up to 400,000 | 1,000 |
| 400,001 – 500,000 | 3,000 |
| 500,001 -1 million | 5,000 |
| 1,000,001 – 5 million | 8,000 |
| 5,000,001 – 10 million | 10,000 |
| 10,000,001 – 25 million | 20,000 |
| 25,000,001 – 50 million | 40,000 |
| 50,000,001 – 100 million | 50,000 |
| 100,000,001 and above | 70,000 |

To determine the amount of registration fees required from a foreign company, the nominal share capital of the foreign company should be converted to the Malaysian currency (Ringgit Malaysia) at the prevailing exchange rate. However in the event a foreign company does not prescribe any share capital, a flat rate of RM1,000.00 must be paid to SSM.

(5) Post-Incorporation Obligations

¹ Certified copy means a copy of the document that has been certified within a period of 3 months by the Notary Public, the ROC of the place of origin or the director, manager or secretary of the foreign company by affidavit or, in the case of foreign company formed in a Commonwealth company, by statutory declaration.

Upon incorporation, the company or its agent is responsible for ensuring compliance with the CA 1965. Any change in the particulars of the company or in the company's name or authorised capital must be filed with SSM within one month from the date of change together with the appropriate fees.

Every company is required to keep proper accounting records. The company's annual return must be lodged with SSM once in every calendar year. Every company is also required to file a copy of the balance sheet of the head office, a duly audited statement of assets used and liabilities arising out of its operations in Malaysia, and a duly audited profit and loss account within one month of its annual general meeting.

In addition, the Income Tax Act 1967 ("**ITA**") provides that a company is required to retain sufficient records or documents for at least seven years from the end of the year to which the income of the business relates to for the purposes of tax assessments. Such records or documents generally refers to records and books of accounts including a cash book, sales ledger, purchase ledger and a general ledger. Supporting documents such as invoices, bank statements, paying-in slips, cheque stubs, receipt of payments, payroll records and copies of receipts issued should also be retained. This list is not exhaustive and the company should keep and retain in safe custody sufficient records to enable the income or loss of the company for the basis period for any year of assessment to be readily ascertained for the purpose of income tax. Matters related to the keeping of records and documents are set out in the Inland Revenue Board's ("**IRB**") Public Ruling No 4/2000.

C. Requirements of a Locally Incorporated Company

The current position is that a company must maintain a registered office in Malaysia where all books and documents required under the provisions of the CA 1965 are kept. The name of the company shall appear in legible Romanised letters, together with the company number, on its seal and documents.

A company cannot deal with its own shares or hold shares in its holding company. Each equity share of a public company carries only one vote at a poll at any general meeting of the company. A private company may, however, provide for varying voting rights for its shareholders.

The secretary of a company must be a natural person of full age who has his principal or only place of residence in Malaysia. He must be a member of a professional body prescribed under the MDTCC or hold an individual licence issued by SSM. The company must also appoint an approved company auditor in Malaysia.

In addition, the company shall have at least two directors who each have his principal or only place of residence within Malaysia. As stated above, under the CA 2016, a company would only be required to have a minimum of one director. Directors of public companies or subsidiaries of public companies normally must not exceed 70 years of age. A director of the company does not also need to be a shareholder of the company.

D. Procedure for Incorporation (Locally Incorporated Company)

(1) Application of Name Search

A name search must be conducted to determine whether the proposed name of the company is available for registration. The steps involved are:

- (a) Completion and submission of Form 13A of the CA 1965 (Request for Availability of Name) to SSM; and
- (b) Payment of an RM30.00 fee for each name applied.

Where the proposed company's name is approved by SSM, it will be reserved for three months from the date of approval.

(2) Lodgement of Incorporation Documents

Incorporation documents must be submitted to SSM within three months from the date of approval of the company's name by SSM, failing which a fresh application for a name search must be done (i.e. steps (a) and (b) above will have to be repeated)

(3) Documents required for Incorporation

The following documents are currently required for the incorporation of a company:-

- (a) Memorandum and Article of Association
 - (i) An original of the Memorandum and Article of Association shall each be stamped at RM100.00. The stamps are affixed at the IRB's stamp office.
 - (A) The first directors and secretaries shall be named in the Memorandum and Article of Association.
 - (B) The subscribers to the company's shares shall sign the Memorandum and Articles of Association before a witness.
 - (C) Table A of the Fourth Schedule of the CA 1965 can be adopted as the Article of Association of the company (Section 30 of the CA 1965).
 - (ii) For incorporation of a private company, the articles of association shall contain the following provisions:
 - (A) Restriction on the right to transfer the company's shares;
 - (B) Limitation on the number of members (not to exceed fifty);
 - (C) Prohibition on any invitation to the public to subscribe the shares/debentures of the company; and
 - (D) Prohibition on any public invitation to deposit money with the company.
- (b) Form 48A (Statutory Declaration by a Director or Promoter before Appointment)

The director or promoter declares under oath that the director is not a bankrupt; and the director has not been convicted and imprisoned for any prescribed offences.
- (c) Form 6 (Declaration of Compliance)

This declaration states that all the requirements of the CA 1965 have been complied with. It must be signed by the company secretary who handles the registration and who is named in the Memorandum and Articles of Association.
- (d) Additional Documents:
 - (i) Original copy of Form 13A.
 - (ii) A copy of the letter from SSM approving the name of the company.
 - (iii) A copy of the identity card of each director and company secretary.

(4) Fees for Incorporation

Currently, the fees for the incorporation of a company would depend on the authorised share capital of the company in accordance with the following schedule:

| AUTHORISED SHARE CAPITAL (RM) | FEES (RM) |
|--------------------------------------|------------------|
| Up to 400,000 | 1,000 |
| 400,001 – 500,000 | 3,000 |
| 500,001 – 1 million | 5,000 |
| 1,000,001 – 5 million | 8,000 |
| 5,000,001 – 10 million | 10,000 |
| 10,000,001 – 25 million | 20,000 |
| 25,000,001 – 50 million | 40,000 |

| AUTHORISED SHARE CAPITAL (RM) | FEES (RM) |
|--------------------------------------|------------------|
| 50,000,001 – 100 million | 50,000 |
| 100,000,001 and above | 70,000 |

(5) Post-Incorporation Obligations

Upon incorporation, the company or its agent is responsible for ensuring compliance of the CA 1965. Any change in the particulars of the company or in the company's name or authorised capital must be filed with SSM within one month from the date of change together with the appropriate fees.

Every company is required to keep proper accounting records. The company's annual return must be lodged with SSM once in every calendar year. Every company is also required to file a copy of the balance sheet of the head office, a duly audited statement of assets used and liabilities arising out of its operations in Malaysia, and a duly audited profit and loss account within one month of its annual general meeting.

In addition, the ITA provides that a company is required to retain sufficient records or documents for at least seven years from the end of the year to which the income of the business relates to for the purposes of tax assessments. Such records or documents generally refers to records and books of accounts including a cash book, sales ledger, purchase ledger and a general ledger. Supporting documents such as invoices, bank statements, paying-in slips, cheque stubs, receipt of payments, payroll records and copies of receipts issued should also be retained. This list is not exhaustive and the company should keep and retain in safe custody sufficient records to enable the income or loss of the company for the basis period for any year of assessment to be readily ascertained for the purpose of income tax. Matters related to the keeping of records and documents are set out in the IRB's Public Ruling No 4/2000.

E. Representative/Regional Office

Foreign investors can consider setting up a representative or a regional office in Malaysia to have a presence for a minimum of three years to allow investors to decide if Malaysia is a right place for them to operate a business. A representative or a regional office is not a permanent business set-up and therefore it is not governed by the ROBA 1956 or the CA 1965. Instead they are within the authority of the responsible statutory body such as Ministry of International Trade and Industry ("**MITI**") or the Central Bank of Malaysia/Bank Negara Malaysia ("**BNM**"). MITI is responsible for the registration of regional and representative office from the manufacturing, service, logistics and trading sectors whereas BNM is responsible for the banking and finance sectors.

There is a difference between a representative office and a regional office. A representative office is usually set up to collect relevant information on investment opportunities especially in the manufacturing and services sector. A representative office is also set up to enhance bilateral trade relations, promote the export of Malaysian goods and services or to carry out research and development. A representative office is also used to perform permissible activities for its head office/principal and it must be totally funded by sources outside of Malaysia. To set up a representative office, a foreign company must obtain the approval from MITI.

A regional office is typically set up as the coordination centre for the company/organisation's affiliates, subsidiaries and agents in Southeast Asia and the Asia Pacific. The regional office is also responsible for the designated activities of the company/organisation within the region it operates.

There are a few activities that are not permitted to be undertaken by a representative office or regional office, for example, any trading activities (including import and export) or any commercial activities. They are also not permitted to enter into business contracts on behalf of the foreign corporation or provide services for a fee.

A representative office or regional office only represents its head office/principal to undertake designated functions. A representative office or regional office must also confine its activities to promotion and liaison carried out on behalf of its parent company.

F. Licences/Registration

Companies seeking to commence business in Malaysia must consider the licences/registration required for the business. The following is a non-exhaustive list of general licenses/registration required for doing business in Malaysia.

(1) Business Premise Licence and Signage Licence

Generally, companies doing business in Malaysia at physical premises are required to apply for business premise licenses and signboard licenses from the relevant municipal council. Requirements for business premise and signage license vary depending on the location of the physical premises and the by-laws of the relevant municipal council.

(2) Income Tax Registration

Companies are required to register for an income tax reference number with the IRB as provided under the ITA upon commencement of business. The company will need to provide its Form 9 (certificate of incorporation) and Form 49 (returns giving particulars of directors, managers and secretaries) when registering for an income tax reference number.

(3) Goods and Services Tax Registration

The Goods and Services Tax Act 2014 provides that a business will be required to register for goods and services tax ("**GST**") with the Royal Customs of Malaysia ("**RCM**"), if it makes taxable supplies and has a taxable turnover above RM500,000 in a twelve month period. A business with taxable turnover below RM500,000 may still voluntarily register for GST. Any business not registered for GST will not be allowed to make any claims for GST paid.

(4) Wholesale Retail Trade Licence (for foreign involvement)

All proposals for foreign involvement in distributive trade must obtain the approval of MDTCC. MDTCC would issue a Wholesale Retail Trade Licence ("**WRT**"), typically with a validity of two (2) years.

Distributive trade includes the following:-

- (a) acquisition of interest;
- (b) mergers and/or takeovers;
- (c) opening of new branches/outlets/chain stores;
- (d) relocation of branches/outlets/chain stores;
- (e) expansion of existing branches/outlets/chain stores;
- (f) buying over/taking over of outlets of other operators; and
- (g) purchase and sale of properties to operate distributive trade activities prior to obtaining the approval/licence from local authorities and other agencies to operate distributive trade activities.

Distributive trade as defined in the DTS Guidelines comprises all linkage activities that channel goods and services down the supply chain to intermediaries for resale or to final buyers. Distributive traders include wholesalers, retailers, franchise practitioners, direct sellers, suppliers, who channel their goods in the domestic market, and commission agents or other representatives including those of international trading companies. By the DTS Guidelines, distributive trade shall not include (i) manufacturing companies and (ii) companies granted the status of regional establishments by the Malaysian Industrial Development Authority (MIDA), regional establishments include International Procurement Centres (IPC), Regional Distribution Centres (RDC) and Operational Headquarters (OHQ).

Various other industry-specific licenses may be applicable, depending on the nature of business of the company. These include, for example, manufacturing licence issued by MITI,

environmental licence issued by the Department of Environment, certificate of fitness for machineries issued by Department of Occupational Safety and Healthy etc.

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4 FOREIGN INVESTMENT AND LOCAL EQUITY PARTICIPATION REQUIREMENTS

Background

Malaysia applies local equity participation requirements in various economic sectors. However, the approach taken by the Malaysian Government towards local equity participation requirements for the past few years and of late has been a positive one, with the abrogation and/or liberation of local equity participation requirements for different sectors.

The precursor to the imposition local equity participation requirements was the New Economic Policy ("**NEP**"). It was implemented with the objects of eradicating poverty, restructuring society and in the long run to facilitate economic and political progress of the country. The aim of the NEP was also to ensure that local indigenous people (known as "**Bumiputera**") became full partners in all aspects of the economic life of the nation.

Later, the Malaysian government implemented new policies called the National Development Policy ("**NDP**") and the National Vision Policy ("**NVP**") with the aims of achieving a "balanced development" within a framework of rapid growth with equity as its primary thrust. In particular, one of the main objectives of the NVP was to achieve at least 30% Bumiputera participation in all industries by 2010. During this period, many government ministries were given the task to implement policies and guidelines to achieve the NVP.

In light of frequent acquisitions, take-overs and mergers and acquisitions by foreign interests of Malaysian companies and assets, the Foreign Investment Committee ("**FIC**") was formed to implement the NDP and NVP by regulating foreign interests in order to minimise imbalances of local participation in Malaysia whilst at the same time welcoming foreign investment with balanced ownership and control.

The result of this was the implementation of guidelines regulating foreign participation in acquisitions of interest, mergers and takeovers, and acquisitions of properties ("**FIC Guidelines**").

Today

Although the equitable growth or "Growth with Distribution" is still the Malaysian government's policy, the Prime Minister has acknowledged the urgent need for Malaysia to undergo a transformation in its pursuit to achieve the status of a developed nation.

Hence, on 22 April 2009, the Prime Minister announced the removal of the 30% Bumiputera equity requirement for 27 services sub-sectors. Shortly thereafter, on 30 June 2009, the Malaysian government announced further measures to liberalise a host of restrictions on foreign investments in Malaysia, including disbanding of the FIC and the repeal of the FIC Guidelines.

The disbanding of the FIC and liberalisation of certain restrictions are intended to stimulate growth and encourage further participation of foreign investments. This is not to say that restrictions on foreign investments in Malaysia have been wholly lifted.

Notably, the Malaysian government has stated that sectoral regulation by the relevant Government ministries and/or agencies continues to apply. This is no different from the implementation of the regulatory framework in Malaysia since the advent of the NDP, as sectoral regulations typically dovetail with equity conditions imposed by the FIC. As such, there continues to be requirements for local equity participation in foreign investments in certain sectors.

Repealing the FIC Guidelines does mean, however, that one layer of bureaucracy has been removed in respect of equity investments. This move will ease as well as decrease the costs of doing business in Malaysia.

The requirements for local equity participation in foreign investments are administered via 2 methods, i.e. legal and non-legal controls.

A. Administrative/Non-legal control

Generally, committees are set up under various governmental ministries and are given the task of procuring guidelines to seek to achieve the 30% Bumiputera participation envisaged in the NEP/NDP/NVP. Previously, the FIC played an important role in this regard. Since the deregulation of the FIC, the main committee which continues to enforce 30% Bumiputera

participation is the Committee on Distributive Trade (established under the MDTCC). The committee seeks to achieve Bumiputera participation through non-legal (or administrative) controls.

Ministry of Domestic Trade, Co-operatives and Consumerism (MDTCC)

"*Distributive trade*" is given a broad definition in the Guidelines on Foreign Participation in the Distributive Trade Services ("**DTG**") published by the MDTCC to comprise all linkage activities that channel goods and services down the supply chain to intermediaries for resale or to final buyers. The definition of "distributive trade" does not include: (i) manufacturing companies; and (ii) companies granted the status of regional establishments by the Malaysian Industrial Development Authority. The MDTCC requires all proposals for foreign participation in distributive trade in Malaysia and any ancillary business to obtain prior approval of MDTCC. "*Foreign participation*" is defined in the DTG to mean any interest, associated group of interests or parties acting in concert which comprises: (i) individual who is not a Malaysian citizen including Permanent Resident; or (ii) foreign company or institutions; or (iii) local company or local institution whereby the parties as stated in item (i) and/or (ii) hold more than 50% of the voting rights in the company or institution. A non-exhaustive list of foreign activities which require the prior approval of MDTCC is set out in the DTG which includes: (i) acquisition of interest in the distributive trade company; (ii) mergers and/or takeovers by foreign interests; (iii) opening of new branches/outlets/chain stores; (iv) relocation of branches/outlets/chain stores; (v) expansion of existing branches/outlets/chain stores; (vi) buying over/taking over outlets of other operators; and (vii) purchase and sale of properties to operate distributive trade activities prior to obtaining the approval/licence from local authorities and other agencies to operate distributive trade activities. The DTG provides that all distributive trade companies with foreign equity shall: (i) appoint Bumiputera director/directors; (ii) hire personnel at all levels including management to reflect the racial composition of the Malaysian population; (iii) formulate clear policies and plans to assist Bumiputera participation in the distributive trade sector; (iv) hire at least one percent (1%) of the total hypermarket workforce from persons with disabilities; (v) increase the utilisation of local airports and ports in the export and import of the goods; (vi) utilise local companies for legal and other professional services which are available in Malaysia; (vii) submit annual financial reports to the MDTCC; and (viii) comply with all by-laws and regulations of local authorities.

The DTG further provides specific incorporation, capital and equity structure conditions for (i) hypermarkets; (ii) department stores; (iii) superstores; (iv) specialty stores; (v) franchisor and franchisee; and (vi) various other distribution formats (i.e. other types of distributive trade businesses not specified in items (i) to (v) which will be considered on the merits of each case with particular reference to their contribution to the socio-economic development of Malaysia). All six (6) types of distributive trades are required to be carried out by companies incorporated locally under the Companies Act, 1965. There are different minimum capital requirements, operational conditions as well as environmental and public interest conditions for each type of distributive trade company. For instance, the DTG specifies that an impact study on existing local retailers should be carried out if the store is to be operational in a standalone building or if the business floor area is not less than 5,000 square meters. Businesses should also ensure a safe and clean environment as well as efficient use of energy. The DTG further imposes an additional equity structure condition on any foreign involvement in hypermarkets. Distributive trade companies operating hypermarkets are required to have at least thirty percent (30%) equity participation by Bumiputeras. A grace period of three (3) years for compliance may be given by the MDTCC upon approval to operate a hypermarket. This requirement also applies to operations established prior to the coming into effect of the DTG. However, hypermarket operators are not allowed to open a new branch in Malaysia unless it has fulfilled the requirement of 30% Bumiputera ownership in the company's equity structure.

Although not specifically stated in the DTG, failure to comply with the conditions and approval requirements in the DTG can result in administrative sanctions against a distributive trade company with foreign involvement such as rejection by the Malaysian immigration authorities of any application by foreigners for an employment pass.

It should be noted that the MDTCC has provided for a prohibition of foreign involvement in certain distributive trades listed in the DTG. These include: (i) supermarket/mini market (less than 3000 square meters sales floor area); (ii) provision shop/general vendor; (iii) convenience store (that opens for business for 24 hours); (iv) news agent and miscellaneous

goods store; (v) medical hall (inclined towards traditional and alternative medicines plus general dry foodstuff); (vi) fuel stations (with or without convenience store); (vii) permanent wet market store; (viii) permanent pavement store; (ix) national strategic interest; (x) textile, restaurant (non-exclusive), bistro, jewellery shops; and (xi) others as deemed fit by the MDTCC.

A key point that has been clarified by the MDTCC since the implementation of the DTG is that foreign participation in companies that are purely service providers and do not distribute or supply goods are still required to obtain the MDTCC's approval prior to the commencement of business. This sector is known as 'Unregulated Services' and falls under the purview of the 'Services Industry' division of the MDTCC. Although there is no express provision in the DTG stating that the scope of the DTG extends to companies carrying out Unregulated Services that have foreign participation, the MDTCC has taken the view that Unregulated Services would fall under the heading of 'Various Other Distribution Formats' and accordingly, would need to comply with the conditions as set out in the DTG.

The MDTCC has published a list of sub-sectors under the scope of Unregulated Services which would require the approval of the MDTCC. These include: (i) market research and public opinion polling services; (ii) management consulting services; (iii) other business services; (iv) repair services incidental to metal products/machinery and equipment; (v) other land transport services; (vi) supporting services for road transport; (vii) services related to management consulting; (viii) building-cleaning services; (ix) photographic services; (x) leasing or rental services concerning machinery and equipment without operator; (xi) leasing or rental services concerning personal and household goods; (xii) services furnished by membership organisations; (xiii) other services (e.g. dry cleaning services, hairdressing and barbers' services etc.); (xiv) research and experimental development services on social sciences and humanities; and (xv) real estate services involving own or leased property.

It should be noted that products and services governed by other Acts such as petroleum products, explosives and agricultural raw materials are subject to other acts and regulations for specific reasons. Distributive trade companies intending to carry out the distribution of such products would be required to observe different requirements, conditions and/or rules imposed by other government authorities depending on the types of goods intended to be distributed by the companies. As an illustration, distribution of pharmaceutical, medicinal and orthopaedic products would require a licence from the Ministry of Health Malaysia.

B. Legal Control

Legal control in respect of Bumiputera participation is enforced through administrative discretion conferred under statutes or subsidiary legislations. Equity ownership is controlled through the issuance of licences, permits and employment passes or in the purchase of real property and acquisitions of any interest in real property. Where the intended operations of a company or business in Malaysia require certain operating licences, equity conditions or restrictions may be imposed through the approval and issuance of such licences by government or statutory bodies, or by the Securities Commission on initial public offerings.

There is no legislation prohibiting foreign ownership of the share capital of Malaysian companies.

Nonetheless, as discussed, the relevant government department or statutory bodies may require or stipulate certain equity conditions in granting licences, permits or other governmental approvals.

Certain examples are listed below:

- **Manufacturing**

Manufacturing companies (except those with shareholders' funds of less than RM2.5 million or less than 75 full-time paid employees) are required to be licensed under the Industrial Coordination Act 1975 which is regulated by MITI. As it is difficult for a branch of a foreign company to obtain a manufacturing licence, a foreign company wishing to establish a manufacturing operation must generally incorporate a subsidiary.

The Malaysian government has in the past few years taken various steps to liberalise the restrictions on foreign participation in the manufacturing industry in Malaysia. The present policy is that 100% foreign equity will be allowed for all new investments, including investments for expansion and diversification by existing licensed manufacturers.

Whilst equity and export conditions imposed on existing licensed manufacturing companies prior to the new policy will be maintained, MITI has left open the possibility of removing any such existing conditions.

- **Services**

In general, the services sector is under the purview of different government authorities having responsibility for the respective industries and subject to the relevant laws. For example, the Malaysian Communications and Multimedia Commission is the responsible body to oversee courier services. It is also a sector regulated under the Postal Services Act 2012. On 22 April 2009, the Malaysian government had liberalised 27 service subsectors to allow 100% foreign ownership in companies carrying out these services. The subsectors include transport services, health and social services, tourism services, business services and computer and related services.

In 2012, the Malaysian government further announced that 18 subsectors will be liberalised in phases to allow 100% foreign equity participation, involving telecommunication services, healthcare services, professional services, environmental services, distributive trade, education services and courier services.

- **Trading**

As discussed above, foreign interests engaging in wholesale or retail trade (i.e. the re-sale of goods without transformation) are currently required to comply with the DTG which introduces rules and conditions in connection with specifically defined various distributive trade businesses. The DTG is not law and only a reflection of the Malaysian government's aspirations. Although there are no legal sanctions against non-compliance, the DTG can be enforced through the refusal to register branches of foreign companies engaged in such trade, and through licensing, immigration passes and business premises permits requirements.

- **Petroleum – Upstream Activities**

Petroleum Nasional Berhad ("Petronas"), a wholly-owned entity of the Malaysian government is vested with the entire ownership and control of the petroleum resources in Malaysia. It licenses upstream activities and generally requires local and Bumiputera equity ownership in entities which it deals with.

Despite the local equity requirements mentioned above, the Government's direction is towards liberalisation of local equity requirements and encouragement of foreign investment into the country. This can be seen in the Government's formulation of investor friendly policies and laws (such as the Promotion of Investments Act 1986) for incentives and taxation benefits to foreign investors (as discussed in the following chapter).

C. Foreign Employment

Where there is a shortage of trained Malaysians, companies are allowed to bring in expatriate personnel i.e. 'key post' or 'time post'. Key posts are high level managerial posts in foreign-owned private companies and firms operating in Malaysia. Key posts are posts essential for companies to safeguard their interest and investments. The expatriates are responsible in determining the company's policies in achieving its goal and objectives.

Time posts are positions filled for a specified time. There are two types of time posts. Executive time posts are intermediate level managerial and professional posts. The post requires professional qualifications, practical experience, skills and expertise related to the respective job. The expatriate are responsible for implementing the company's policies and supervision of staff. Non-executive time post are posts for the performance of technical jobs that require specific technical or practical skills and experience.

D. Free Trade Agreements

At present, Malaysia has entered into free trade agreements ("**FTA**") with 17 countries. These FTAs not only provide market access for trade in goods, but also improved market access for service providers and investments with FTA partner countries. At the regional level, Malaysia and its ASEAN partners have also established the ASEAN Free Trade Area aiming to promote similar benefits.

On 4 February 2016, Malaysia signed the Trans-Pacific Partnership Agreement ("**TPPA**") as a result of 5 years of negotiations with 11 countries namely New Zealand, Australia, Chile, Mexico, Japan, Peru, Canada, Vietnam, Singapore, Brunei and the United States. The TPPA aims at promoting economic integration to liberalise trade and investments. The Malaysian government has ratified the TPPA and, pending its coming into force, is considering the various changes to domestic law and regulations required for Malaysia to fulfil its obligations under the TPPA.

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5 INVESTMENT INCENTIVES

Malaysia offers a wide range of investment incentives in the form of tax exemptions, grants, reinvestment allowances and other benefits. Over the years Malaysia has gained more interest from investors and continues to develop new incentives to promote investment. The more pertinent incentives in the sectors of manufacturing as well as the newly introduced investment incentives are briefly set out below.

A. Manufacturing Sector

The major tax incentives made available for companies investing in the manufacturing sector are the pioneer status ("**Pioneer Status**") and the Investment Tax Allowance ("**ITA**") incentives. The Malaysian Industrial Development Authority ("**MIDA**") is the body appointed to receive applications for Pioneer Status or ITA.

Pioneer Status incentive is made available for companies participating in a promoted activity or producing a promoted product. The list of promoted products or activities generally covers the manufacturing, agricultural, hotel, tourism, research and development and technical or vocational training sectors as well as certain commercial sectors connected to manufacturing.

Companies with Pioneer Status have the privilege of income tax exemption of 70% of statutory income for five years. The company pays tax on 30% share of its statutory income with the exemption period commencing from its production day. The exempt income is credited to the exempt account from which exempt dividends are distributed to the shareholders of the company. As an alternative to Pioneer Status, a company may opt for ITA. In order to qualify for ITA the companies must be of those which have not commenced production and fulfil the two criteria (i.e. Level of value-added (VA) percentage and level of technology as measured by the Managerial, Technical and Supervisory index ("**MTS Index**").

As for the benefits, ITA provides allowances of 60% on its qualifying capital expenditure (factory, plant, machinery or other equipment used for the approved project) incurred within five years from the date the first qualifying capital expenditure is incurred. The company can offset this allowance against 70% of its statutory income for each year of assessment. Any unutilised allowance can be carried forward to subsequent years until fully utilised. The remaining 30% of its statutory income will be taxed at the prevailing company tax rate.

Other incentives available for the manufacturing sector include the following:

- (a) Reinvestment Allowance ("RA") - RA is given to existing companies engaged in manufacturing, and selected agricultural activities that reinvest for the purposes of expansion, automation, modernisation or diversification of its existing business into any related products within the same industry on condition that such companies have been in operation for at least 36 months effective from the Year of Assessment 2009. The RA is given at the rate of 60% on the qualifying capital expenditure incurred by the company, and can be offset against 70% of its statutory income for the year of assessment. Any unutilised allowance can be carried forward to subsequent years until fully utilised.

A company can offset the RA against 100% of its statutory income for the year of assessment if the company attains a productivity level exceeding the level determined by the Ministry of Finance. The RA will be given for a period of 15 consecutive years beginning from the year the first reinvestment is made.

- (b) Incentive for Industrial Building System - Industrial Building System (IBS) will enhance the quality of construction, create a safer and cleaner working environment as well as reduce the dependence on foreign workers. Companies which incur expenses on the purchase of moulds used in the production of IBS components are eligible for Accelerated Capital Allowances (ACA) for a period of three years with an initial allowance of 20% and an annual allowance of 40%. Applications should be submitted to the Inland Revenue Board of Malaysia.
- (c) Group Relief - Group relief is provided under the Income Tax Act 1967 to all locally incorporated resident companies. Effective from the Year of Assessment 2009, group relief is increased from 50% to 70% of the current year's unabsorbed losses to be offset against the income of another company within the same group (including new

companies undertaking activities in approved food production, forest plantation, biotechnology, nanotechnology, optics and photonics) subject to the following conditions:

- (i) The claimant and the surrendering companies each have a paid-up capital of ordinary shares exceeding RM2.5 million;
- (ii) Both the claimant and the surrendering companies must have the same accounting period;
- (iii) The shareholding, whether direct or indirect, of the claimant and the surrendering companies in the group must not be less than 70%;
- (iv) The 70% shareholding must be on a continuous basis during the preceding year and the relevant year;

With the introduction of the above incentive, the existing group relief incentive for approved food production, forest plantation, biotechnology, nanotechnology, optics and photonics will be discontinued. However, companies granted group relief incentive for the above activities shall continue to offset their income against 100% of the losses incurred by their subsidiaries. Claims should be submitted to Inland Revenue Board of Malaysia.

B. High Technology Companies

High Technology Companies are namely those involved in promoted activities or in the production of promoted products in areas of new and emerging technologies. They are eligible and may opt for either Pioneer Status or ITA incentives. Under Pioneer Status, a high technology company would enjoy tax exemption of 100% of the statutory income for a period of five years. Unabsorbed capital allowances as well as accumulated losses incurred during the pioneer period be carried forward and deducted from the post pioneer income of the company.

In regards to ITA, as much as 60% of investment tax allowance is granted on the qualifying capital expenditure incurred within five years from the date the same is incurred. In addition, the allowance can be offset against 100% of the statutory income for each year of assessment. Any utilised allowance can be carried forward to subsequent years and fully utilised.

There is an eligibility requirement in place whereby the percentage of local research & development expenditure to gross sales of the company should be at least 1% on an annual basis. Other requirements are such as the limited period of 3 years for the company to comply and as to the qualification of the employees employed.

C. Strategic Projects

Strategic projects involve products or activities of national importance. This is meant for companies who largely deal with heavy capital investments with long gestation periods, have high levels of technology, are integrated, generate extensive linkages and have significant impact on the economy. These companies qualify and may opt for either Pioneer Status or ITA. Under Pioneer Status the companies are granted income tax exemption of 100% of the statutory income for a period of 10 years. Unabsorbed capital allowances as well as accumulated losses incurred during the pioneer period can be carried forward and deducted from the post pioneer income of the company. ITA provides for 100% on the qualifying capital expenditure incurred within five years from the date the first qualifying capital expenditure is incurred. This allowance can be offset against 100% of the statutory income for each year of assessment. Any unutilised allowances can be carried forward to subsequent years until fully utilised.

D. Incentives for Small and Medium-Scale Companies and Small-Scale Manufacturing Companies

To encourage and support the development of small and medium scale companies, a range of incentives are made available for them. Namely companies with a paid-up capital of RM2.5 million and below are deemed as small and medium-scale companies and are eligible for a reduced corporate tax of 20% on chargeable incomes of up to RM500,000.00. Meanwhile the tax rate on the remaining chargeable income is maintained at 26%.

As for small-scale manufacturing companies incorporated in Malaysia with shareholders' funds not exceeding RM500,000.00 and having at least 60% Malaysian equity, they are eligible for either the benefits under Pioneer Status or ITA. Companies with Pioneer Status are given income tax exemption of 100% of the statutory income for a period of five years. Unabsorbed capital allowances as well as accumulated losses incurred during the pioneer period can be carried forward and deducted from the post pioneer income of the company. As an alternative to Pioneer Status, the Companies may opt for the ITA's incentive of 60% (100% for promoted areas) on the qualifying capital expenditure incurred within five years. The incentive further allows for the allowance to be offset against 100% of the statutory income for each year of assessment.

There are pre-conditions of fulfilling a set of criteria before the company is deemed to be eligible for the incentives. The criteria amongst others includes level of technology as measured by the MTS Index, level value added percentages and the requirement that the paid up capital directly or indirectly owned by the first mentioned company in respect of ordinary shares of the related company shall not be more than 20%.

E. Incentives for the Machinery and Equipment Industry

(1) Production of Specialised Machinery and Equipment

Companies that undertake to produce specialised machinery and equipment, namely, machine tools, plastic injection machines, plastic extrusion machinery, material handling equipment, packaging machinery and such are eligible for income tax exemption of 100% of the statutory income for a period of ten years under Pioneer Status. Unabsorbed capital allowances as well as accumulated losses incurred during the pioneer period can be carried forward and deducted from the post pioneer income of the company. Alternatively it can opt for ITA of 100% on the qualifying capital expenditure incurred within five years from the date the first qualifying capital expenditure is incurred. This allowance can be offset against 100% of the statutory income for each year of assessment. Any unutilised allowances can be carried forward to subsequent years until fully utilised.

(2) Production of Heavy Machinery

Locally incorporated companies that reinvest in the production of heavy machinery such as cranes, quarry machinery, batching plant and port material handling equipment, are eligible for the same kind of incentives as above except that it enjoy lower amount of exemption, i.e. under Pioneer Status it is granted income tax exemption of 70% (100% for promoted areas) on the increased statutory income arising from the reinvestment for a period of five years. Unabsorbed capital allowances as well as accumulated losses incurred during the pioneer period can be carried forward and deducted from the post pioneer income of the company.

The alternative incentive is the ITA of 60% (100% for promoted areas) on the additional qualifying capital expenditure incurred within a period of five years. The allowance can be offset against 70% (100% for promoted areas) of the statutory income for each year of assessment. Any unutilised allowances can be carried forward to subsequent years until fully utilised.

(3) Production of Machinery and Equipment

Companies are ideally encouraged to reinvest their returns and the Malaysian government does so by way of incentives. This is however only for locally owned companies. Those that reinvest in the production of machinery and equipment, including specialised machinery and equipment and machine tools, would qualify for the following incentives:

- (a) Pioneer Status incentive provides income tax exemption of 70% (100% for promoted areas) on the increased statutory income arising from the reinvestment for a period of five years. Unabsorbed capital allowances as well as accumulated losses incurred during the pioneer period can be carried forward and deducted from the post pioneer income of the company; or
- (b) ITA of 60% (100% for promoted areas) on the additional qualifying capital expenditure incurred within a period of five years. The allowance can be offset against 70% (100% for promoted areas) of the statutory income for each year of

assessment. Any unutilised allowances can be carried forward to subsequent years until fully utilised.

In a bid to attract more investments into the country, Malaysia has recently introduced four new tax incentives. The focus of these tax incentives are mainly on the less developed areas, industrial area management, capital allowance to increase automation in labour intensive industries as well as for the establishment of a principal hub. The four new tax incentives are as set out below.

F. Incentive for Less Developed Areas

The Incentive for Less Developed Areas is only available for companies who undertake manufacturing or services activities in less developed areas.

This incentive, granted via Section 127(31) of the Income Tax Act, 1967, allows for an income tax exemption of 100% up to 15 years of assessment (5+5+5) commencing from the first year the company derives statutory income or an income tax exemption equivalent to 100% of qualifying capital expenditure incurred within a period of 10 years. The company must comply with the conditions and achieve the Key Performance Index (KPIs) for additional 5 years.

There are also customised incentives such as income tax exemption, stamp duty exemption and withholding tax exemption available under the same category.

G. Incentive for the Establishment of Principal Hub

A principal hub is a locally incorporated company that uses Malaysia as a base for conducting its regional and global businesses and operations. The new Principal Hub incentive scheme is an incentive provided under Section 127(3)(b) of the Income Tax Act, 1967 with annual submissions of reports to MIDA for performance evaluation. It is available to companies registered in Malaysia with a paid up capital of more than RM2.5 million. The incentive is in the form of a three-tiered rate of tax reductions based on the level of value created. This includes level of business spending, high-value job creation, high level personnel, level of value-adding functions and risks transferred to the principal Company, and revenue. It also includes import duty exemptions, foreign exchange administration flexibilities, support full off-shoring trading, and wider service coverage.

There are also facilities accorded to the Principal Hub. An approved Principal Hub company will enjoy certain facilities such as the company can bring in raw materials, components or finished products with customs duty exemption into free industrial zones, LMW, free commercial zones and bonded warehouses for production or re-packaging, cargo consolidation and integration before distribution to its final consumers for goods-based companies. There is also no local equity / ownership condition imposed. Further thereto a foreign-owned company is allowed to acquire fixed assets so long as it is for the purpose of carrying out the operations of its business plan.

H. Incentive for Industrial Area Management

This incentive is a 100% tax exemption on statutory income for 5 years starting from the date the Company commences its activities. To be eligible, the Industrial Estate (IE) must be gazetted by the State Authority as an industrial land. A newly established company or existing company appointed by a Local Authority must have an agreement on the management of IEs, be self-funded and licensed by a Local Authority. It is a mandatory criteria for the company to undertake all of the specified management, upgrading and maintenance activities within the IE. This includes roads, street lightings and draining systems; common facilities; landscaping; industrial waste collection, transfer and disposal; and database system maintenance. At least 70% of the annual income of the industrial area management must be derived from these compulsory activities. This incentive is to be provided via Income Tax (Exemption) (No.11) Order 2006.

I. Capital Allowance to Increase Automation in Labour Intensive Industries

To further spur the growth of automation, capital allowance of 200% on the first RM4 million expenditure incurred within the year of assessment 2015 to 2017 for high labour intensive industries; and on the first RM2 million expenditure incurred within the year of assessment 2015 to 2017 for other industries. To be eligible, companies need to possess a valid business licence from the local authority and a valid manufacturing licence from MITI. The Company

must have been incorporated under the Companies Act 1995 and have been in operation for at least 36 months.

J. Other Incentives

Other incentives may be applicable to the following sectors: manufacturing, agriculture, aerospace, tourism, environmental management, research and development, training, information and communication technology, Approved Service Projects (projects in transportation, communications and utilities sub-sectors approved by the Minister of Finance) and manufacturing related services:

- (a) Industrial Building Allowance - An Industrial Building Allowance (IBA) is granted to companies incurring capital expenditure on the construction or purchase of a building that is used for specific purposes, including manufacturing, agriculture, mining, infrastructure facilities, research, Approved Service Projects and hotels that are registered with the Ministry of Tourism. Such companies are eligible for an initial allowance of 10% and an annual allowance of 3%. As such, the expenditure can be written off in 30 years. Claims should be submitted to Inland Revenue Board of Malaysia.
- (b) Industrial Building Allowance for Buildings in MSC Malaysia - To encourage the construction of more buildings in Cyberjaya for use by MSC Malaysia status companies, IBA for a period of 10 years will be given to owners of new buildings occupied by MSC Malaysia status companies in Cyberjaya. Such new buildings include completed buildings but are yet to be occupied by MSC Malaysia status companies.
- (c) Deduction of Audit Fees - To reduce the cost of doing business and enhance corporate compliance, expenses incurred on audit fees by companies are deemed as allowable expenses for deduction in the computation of income tax.
- (d) Tax Incentives for Venture Capital Industry - Generally, venture capital companies ("**VCC**") is eligible for income tax exemption for 10 years subject to the investment condition as follows:
 - (i) at least 50% of funds invested in venture companies must be in seed capital; or
 - (ii) at least 70% of funds invested in venture companies must be in start-up or early stage financing.

To stimulate and further promote the funding of venture companies, VCCs investing in venture companies with at least 30% of its funds in seed capital, start-up or early stage financing are eligible for income tax exemption for five years. This incentive is effective for applications received by the Securities Commission from 30 August 2008 until 31 December 2013.

- (e) Incentive for Acquiring Proprietary Rights - Capital expenditure incurred in acquiring patents, designs, models, plans, trade marks or brands and other similar rights from foreigners qualify as a deduction in the computation of income tax. This deduction is given in the form of an annual deduction of 20% over a period of five years.
- (f) Incentive for the Use of Environmental Protection Equipment - Companies using environmental protection equipment receive an initial allowance of 40% and an annual allowance of 20% on the capital expenditure incurred on such equipment. Thus, the full amount can be written off in three years.
- (g) Donations for Environmental Protection - Donations to an approved organisation exclusively for the protection and conservation of the environment qualify for single deduction.
- (h) Incentive for Employees' Accommodation - Buildings used for employees for the purpose of living accommodation in a manufacturing operation, an Approved Service Project, hotel or tourism business, are eligible for special Industrial Building Allowance of 10% of the expenditure incurred on the construction/purchase of the building for 10 years.

- (i) Incentives for Employees' Child Care Facilities - Buildings used for employees for the purpose of living accommodation in a manufacturing operation, an Approved Service Project, hotel or tourism business, are eligible for special Industrial Building Allowance of 10% of the expenditure incurred on the construction/purchase of the building for 10 years.

K. Green Technology Incentives

As part of Malaysia's effort to strengthen the development of green technology, Malaysia has introduced various tax incentives for the green sector. These tax incentives are in the form of investment tax allowance for the purchase of green technology assets, income tax exemption and tax incentive for green technology services.

(1) Tax Incentive for Green Technology Project

Malaysia currently offers Investment Tax Allowance of 100% of qualifying capital expenditure incurred on a green technology project from the year of assessment 2013 commencing from October 2013 until the year of assessment 2020. The allowance can be offset against 70% of statutory income in the year of assessment. Unutilised allowances can be carried forward until they are fully absorbed.

This form of investment tax allowance is applicable for green technology projects which focus on renewable energy, energy efficiency, green building, green data centre, and waste management.

(2) Tax Incentive for Green Technology Services

Malaysia provides income tax exemption of 100% of statutory income from the year of assessment 2013 until the year of assessment 2020.

Services that would qualify for such exemption under this sector are those which deals with renewable energy, energy efficiency, electric vehicle (EV), green building, green data centre, green certification and verification, and green township can qualify for this tax incentive.

(3) Tax Incentive for Purchase of Green Technology Assets

Investment Tax Allowance (ITA) of 100% of qualifying capital expenditure incurred on green technology asset from the year of assessment from 25 October 2013 until the year of assessment 2020. Similar to the tax incentives benefit afforded for green technology projects, the allowance can be offset against 70% of statutory income in the year of assessment.

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6 TAXATION

A. Indirect Taxes

(1) **Goods and Services Tax ("GST")**

With effect from 1 April 2015, a new goods and service tax has been implemented to replace the previous sales and service tax². The current rate of GST is 6%.

Unlike the existing sales tax and service tax, GST is generally charged on the consumption of goods and services at every stage of the supply chain, with the tax burden ultimately borne by the end consumer.

GST is levied and charged on the taxable supply of goods and services made in the course or furtherance of business in Malaysia by a taxable person. GST can only be levied and charged if the business is registered with the Customs Department. A business will only be required to register if its annual turnover of taxable supplies exceeds the prescribed threshold, which has been fixed at RM500,000 per annum. Any business that is not registered may not charge and collect GST on the supply of goods and services made to their customers.

A taxable supply is a supply that is standard rated or zero rated. Non-taxable supplies are either exempt or out of scope supplies. GST operates on a negative concept i.e. all goods and services are subject to GST unless specifically exempted or considered to be out of scope.

The Goods and Services Tax (Exempt Supply) Order 2014 provides a full list of the goods and services that are considered an exempt supply. Some examples of exempt supplies are:

- (a) government services such as the issuance of passports, licenses, health services and school education;
- (b) transportation services such as bus, train, LRT, taxi, ferry, boat, highway tolls;
- (c) education and health services;
- (d) sale, purchase and rental of residential properties; and
- (e) selected financial services.

The Goods and Services Tax (Zero-Rated Supply) Order 2014 provides a full list of the goods and services that are subject to a "zero-rate" of GST. Some of examples of zero-rated supplies are:

- (a) basic food items such as rice, sugar, salt, flour, cooking oil, lentils, herbs and spices, salted fish, *cencalok*, *budu* and *belacan*;
- (b) piped water supply;
- (c) the first 300 units of electricity per month for domestic consumers;
- (d) infant milk; and
- (e) exported goods and services.

The difference between supplies that are exempt and zero-rated is that the supplier of exempt supplies will not be able to claim the GST paid on the input into supplies it makes to its customers, whereas suppliers of zero-rated items may still claim the input tax from the Customs Department.

Time of supply is an important feature under the GST regime as it determines when one should account for GST in the GST returns. The approach used by many countries when adopting GST is that a supply is considered to have taken place at the earliest of the following three events:

² Sales tax was a single stage consumption tax (at the rate of 10%) imposed on all goods manufactured in or imported into Malaysia for local consumption. Service tax was another form of consumption tax (at the rate of 6%) levied and charged on any taxable service consumed in Malaysia.

- (a) the time an invoice is issued;
- (b) the time any payment is received by the supplier; or
- (c) the time a taxable supply is made.

From 1 January 2016, the time for the supply of imported services has been amended pursuant to the Goods and Services Tax (Amendment) (No. 2) Regulations 2015 as being the earlier of the following events:

- (a) the time when any payment is made by the recipient; or
- (b) the time when an invoice is issued by a supplier who belongs in a country other than Malaysia or who carries on business outside Malaysia.

The tax payment by GST registrants is worked out by deducting GST credits (input tax) from GST due (output tax) in the GST return.

The GST rules differ from the existing sales tax structure where sales tax becomes due and payable when there is a sale or disposal otherwise than by sale. On the other hand, service tax is only due when payment is received, and where payment is not received, the tax is accounted for at the end of the 12-month period from the date of the invoice issued. The GST concept of time of supply is therefore generally wider than the provisions under the previous sales tax and service tax and it will be important for businesses to learn to cope with the change, as there will potentially be changes to the enterprise's cash flows under the new tax.

(2) Import duties

In Malaysia, import duty is mostly imposed *ad valorem*, but it may also be imposed on a specific basis. However, as Malaysia is moving towards trade liberalisation, import duties on a wide range of raw materials, components and machinery have been abolished, reduced or exempted.

Further, Malaysia is a member state of ASEAN and is committed to the ASEAN Common Effective Preferential Tariffs scheme. Here, all industrial goods traded within ASEAN carry import duties of 0% to 5%.

Generally, the value of goods for the purpose of computing import duties is determined largely in accordance with the World Trade Organisation ("**WTO**") principles of customs valuation.

Malaysia continues to participate in negotiations of free trade arrangements in areas of trade in goods, rules of origin, and investments. To date, Malaysia has concluded bilateral free trade agreements ("**FTA**") with Japan, Pakistan, New Zealand, India, Chile and Australia and the regional agreements under ASEAN with China, Japan, Korea, Australia/New Zealand and India. Import duties between FTA partners are subject to specific reduction and elimination schedules under these agreements.

(3) Excise duties

Excise duties are levied on a selected range of goods manufactured in Malaysia or imported into Malaysia. Goods that are subject to excise duty include beer/stout, cider and perry, rice wine, mead, undenatured ethyl alcohol, brandy, whisky, rum and tafia, gin, cigarettes containing tobacco, motor vehicles, motorcycles, playing cards and mahjong tiles. No excise duty is payable on dutiable goods that are exported. The rates of excise duty are imposed at a combination of specific and *ad valorem* rates that range from 10 sen per litre and 15% for certain types of spirituous beverages, to as much as 105% for motorcars (depending on engine capacity).

(4) Export duties

Export duties are generally imposed on Malaysia's main export commodities such as crude petroleum and palm oil.

B. Real Property Gains Tax ("RPGT")

RPGT is a tax that is imposed on capital gains arising from the sale of real property or shares in a real property company.

With effect from 1 January 2014, the RPGT rates for the disposal of real property and shares in real property companies are as follows:

| Holding Period | RPGT Rates | | |
|------------------|------------|---------------------------|--------------------------|
| | Companies | Individual (Citizen & PR) | Individual (Non-citizen) |
| Up to Year 3 | 30% | 30% | 30% |
| Year 4 | 20% | 20% | 30% |
| Year 5 | 15% | 15% | 30% |
| Year 6 and above | 5% | 0% | 5% |

The RPGT rates are not expected to burden genuine property owners as these individuals are given certain exemptions. Further, the payment of RPGT is based on net gains. This can be seen by the following:

- (a) RPGT exemption on net gains from the disposal of one unit residential property once in a lifetime by an individual who is a citizen or a permanent resident of Malaysia;
- (b) RPGT exemption on gains from disposal of property between parents and children, husband and wife, grandparents and grandchildren;
- (c) RPGT is charged only on net gains after deducting all related costs such as purchase price, renovation costs and incidental cost e.g. legal fees;
- (d) RPGT exemption on devolution of a deceased's assets on his executor under a will or on trustees of a trust created under the will; and
- (e) Exemption up to RM10,000 or 10% of the net gains, whichever is higher, is given to an individual.

C. Corporate Tax

Section 8(1)(b) of the Income Tax Act 1967 ("ITA") provides that a company is considered to be a resident company in Malaysia for tax purposes if the control and management of its affairs are exercised within Malaysia. Generally, the place where directors' board meetings are held is indicative of the place where a company resides.

(1) **Taxable income**

Resident companies are taxed on any income accruing in or derived from Malaysia while any income received in Malaysia in respect of business conducted outside Malaysia is exempted, excluding those carrying on the business of banking, insurance, sea or air transport.

For the year of assessment 2015, resident companies with paid-up capital exceeding RM2.5 million are taxed at a rate of 25%. For resident companies with paid-up capital not exceeding RM2.5 million, they are charged at a rate of 20% for the initial RM500,000 of chargeable income while the remaining chargeable income will be taxed at 25%. The tax rate for non-resident companies are fixed at 25% except for certain special classes of income.

Beginning the year of assessment 2016, the corporate tax for resident companies will decrease by 1% from 25% to 24% while income tax for small and medium enterprises will decrease by 1% from 20% to 19%.

(2) **Thin Capitalisation**

Thin capitalisation refers to a situation where a company's capital is made up of a significantly higher level of debt than equity. Countries which have a thin capitalisation regime generally set a limit on the deduction of interest expense by reference to the fixed capital of a company.

In Malaysia, the concept of thin capitalisation is introduced via Section 140A(4) of the ITA which provides that where the Inland Revenue Board is of the opinion that the value of

financial assistance granted by a person to an associated person who is a resident, is excessive in relation to the fixed capital of such person, any interest, finance charge, other consideration payable for or losses suffered in respect of the financial assistance shall, to the extent to which it relates to the amount which is excessive, be disallowed as a deduction.

Presently, there are no clear guidelines on how Section 140(A)(4) will be implemented and/or when it will be enforced.

(3) Capital gains

Capital gain is where there is an increase in the value of capital asset which is higher than its original purchase price. Tax is incurred when the value of the capital assets are realised. Aside from RPGT, Malaysia currently has no existing capital gains tax in place.

(4) Withholding tax

Withholding tax represents the portion of income of a non-resident payee which is held by a payer in Malaysia as tax and paid directly to the IRB. It is not applicable to resident companies.

Payments which are subject to withholding tax include the following:

| No. | Relevant sections in the ITA | Withholding tax rates |
|-----|---|--|
| 1. | 107A – service portion of the contract payment | 13% |
| 2. | 109 – interest derived from Malaysia | 15% |
| 3. | 109 – royalty derived from Malaysia | 10% |
| 4. | 109B – special classes of income | 10% |
| 5. | 109D – distribution of income from a real estate investment trust or property trust fund | Tax rate varies according to the following unit holder: (i) other than a resident company – 10%; (ii) non-resident company – 25%; and (iii) foreign investment institution – 10%. |
| 6. | 109E – distribution of profits out of family fund, family re-takaful fund or general fund | 25% |
| 7. | 109F – income under section 4(f) | 10% |

It is important to note that withholding tax rates may differ from country to country according to the Double Taxation Agreements entered into between the Malaysian government and the respective countries that the payee is resident in.

D. Income Tax on Expatriates in Malaysia

Expatriates are foreigners who are qualified to hold key posts or term posts within a company. A key post is one which can be held indefinitely by an expatriate. A term post refers to either an executive post, which requires professional qualifications or a non-executive post which requires technical skills and experience. Term post can be held for a maximum of 5 years. Employment of expatriates for term posts is subject to the condition that Malaysians are being trained to take over the same posts in the future.

The number of expatriate posts granted is based on the merits of each case and the employer will need to justify the reason for employing the expatriates. Companies will also be required to comply with the following minimum paid-up share capital if they wish to apply for expatriate post:

| Equity held | Minimum paid-up share capital (RM) |
|---|------------------------------------|
| 100% Malaysian-owned | 250,000 |
| Jointly-owned by Malaysian and foreigner | 350,000 |
| 100% foreign-owned | 500,000 |
| Foreign-owned companies (foreign equity of 51% and above) operating in the wholesale, retail and trade sectors. | 1,000,000 |

Application for expatriate posts must first be made to one of the following 6 authorised body and/or agencies based on the company's core business:

- (a) Malaysian Industrial Development Authority ("**MIDA**");
- (b) Multimedia Development Corporation ("**MDeC**");
- (c) Public Service Department ("**PSD**");
- (d) BNM;
- (e) Securities Commission ("**SC**"); and
- (f) Expatriate Committee.

| No. | Agency | Position/Field |
|-----|---|--|
| 1. | Malaysian Industrial Development Authority (MIDA) | Expatriate post in the following fields in the private sector: (i) Manufacturing company (new or existing) which is involved in expansion plans (ii) Manufacturing Related Services - Regional Office, Operational Headquarters, Overseas Mission, International Procurement Centre etc. (iii) Hotel & Tourism Industry (iv) Research & Development Sector |
| 2. | Multimedia Development Corporation (MDeC) | Expatriate Post and Skilled Foreign Worker in Information Technology based companies which have been granted Multimedia Super Corridor (" MSC ") status |
| 3. | Public Service Department (PSD) | (i) Doctors and nurses working in government hospitals or clinics (ii) Lecturers and tutors employed in Government Institutes of Higher Education (iii) Contract Posts in Public Services |

| No. | Agency | Position/Field |
|-----|--------------------------------|--|
| | | (iv) Recruitment process jobs offered by the Public Service Commission/Suruhanjaya Perkhidmatan Awam (" SPA ") or government related agencies |
| 4. | Central Bank of Malaysia (BNM) | Expatriate posts in the following sectors: (i) Banking (ii) Finance (iii) Insurance |
| 5. | Securities Commission (SC) | Expatriate posts in Securities and Share market. |
| 6. | Expatriate Committee | Expatriate posts in private and public sectors other than those under MIDA, MDeC, PSD, BNM and SC's jurisdiction |

Once the application for expatriate post is approved by the relevant authorised body and/or agencies, the employer can proceed to submit the application for employment pass with the Expatriate Services Division, Immigration Department of Malaysia. There are three (3) different categories of employment pass available:

- (a) Category I – applicant must have minimum salary of RM5,000 and employment contract for a minimum period of 24 months.
- (b) Category II – applicant must have a minimum salary of RM5,000 and employment contract for a period of not exceeding 24 months.
- (c) Category III – applicant must have basic salary between RM2,500 to RM4,999 and employment contract for a period not exceeding 12 months.

(2) Taxable Income

(a) Tax rate

- (i) Tax rate for an expatriate in Malaysia is dependent on his or her residential status and not by the nationality or citizenship. An expatriate will be considered as a resident for purposes of taxation if his duration of stay in Malaysia is 182 days or more in a calendar year. Different tax rates apply to resident and non-resident individuals. The maximum income tax for a resident is 28% for the assessment year of 2016 while income tax for non-resident is at a flat rate of 28% without any tax deduction.
- (ii) An individual is not taxable if he or she is employed in Malaysia for less than 60 days; employed on board of a Malaysian ship; 55 years old and is a pensioner from Malaysian employment; receiving tax-exempted dividends and/or receiving interest from banks.

(b) Types of Taxable Income

Section 4 of the ITA lists out following types of income upon which tax is chargeable:

- (i) gains or profits from a business;
- (ii) gains or profits from employment;
- (iii) dividends, interests or discounts;
- (iv) rents, royalties or premiums;
- (v) pensions, annuities or other periodical payments not falling under any of the foregoing paragraphs; and
- (vi) gains or profits not falling under any of the foregoing paragraphs.

The expatriate will be subject to the Monthly Tax Deduction system where employers are required to deduct pre-determined amount of tax from the employees' monthly remuneration. Remuneration is inclusive of the following:

- (A) salary and wages;
- (B) overtime payment;
- (C) commission;
- (D) tips and gratuities;
- (E) allowances, bonuses and/or incentives;
- (F) directors' fees;
- (G) perquisite;
- (H) employee's share option scheme.

(3) Concession

If an expatriate falls under the category of resident for purpose of taxation, he is entitled to any tax deduction and/or tax relief as determined by the IRB.

There are specific concessions which are applicable only for expatriates who are employed in Labuan. An expatriate employed in a managerial capacity with a Labuan entity in Labuan, co-located office or marketing office in Labuan is exempted from payment of income tax on 50% of gross income received by the expatriate until the year of assessment 2020.

Under the Income Tax (Exemption) (No.8) Order 2011, a co-located office is defined as "*a co-located office of a Labuan entity approved by the Labuan Financial Services Authority which operates in other parts of Malaysia to perform the functions assigned by the Labuan entity*", whereas a marketing office is defined as "*a marketing office of a Labuan entity approved by the Labuan Financial Services Authority which is located in other parts of Malaysia to facilitate meetings with clients and establish contacts with potential clients except exercising trading activities on behalf of the Labuan entity*".

In addition, the Income Tax (Exemption) (No. 7) Order 2011 exempts an expatriate who is employed as a director of a Labuan entity from payment of income tax from the year of assessment 2011 until the year of assessment 2020.

The Public Ruling No.12/2011 issued by the IRB on 20 December 2011 provides for different tax treatment for non-citizens who are employed in any operational headquarters company, regional office, international procurement centre company or regional distribution centre company in Malaysia as approved by the Minister of Finance. Any non-citizen individuals who are working at the abovementioned companies are taxed only based on their portion of chargeable income which is attributed to the number of days they work in Malaysia; any income derived from their employment exercised outside of Malaysia is tax-exempted.

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7 BANKING AND FINANCE

The banking and financial services sector in Malaysia is primarily made up of commercial banks, Islamic banks, international Islamic banks, investment banks and other financial institutions. As at July 2016, there are some 27 commercial banks, 16 Islamic banks, 3 international Islamic banks and 12 investment banks in Malaysia, a number of which are foreign-owned. These financial institutions provide a whole suite of conventional, Islamic banking, and investment banking services.

There are also several development financial institutions ("**DFIs**") in Malaysia set up to develop and promote strategic sectors such as agriculture, SMEs, and the export sector. These DFIs provide credit, financial guarantees, and advisory services to their respective target sectors.

A. **Governing Authorities & Functions**

There are a number of governing bodies that are tasked with overseeing the banking and financial services industry and the activities carried out in the sector. Chief amongst those bodies are BNM, which is Malaysia's central bank, and the SC, which regulates activities in the debt and equity markets.

(1) **Bank Negara Malaysia (BNM)**

BNM is the Central Bank of Malaysia established in 1959 under the then Central Bank of Malaya Act 1958 (now known as the Central Bank of Malaysia Act 2009 ("**CBMA**")) to act as the authority responsible, amongst others, to:

- (a) act as financial adviser, banker and financial agent of the Malaysian government;
- (b) regulate the banking and financial services industry and ensure stability of the country's financial system;
- (c) ensure prudent conduct of monetary policy; and
- (d) manage domestic liquidity and exchange rates.

BNM is the key regulator for most if not all financial institutions in Malaysia and wields a wide range of powers, from issuing general guidelines to all financial institutions to specific directions to a specific entity, to maintain the stability of the financial system. It reports to the Minister of Finance, Malaysia ("**Minister**") and keeps the Minister informed of matters pertaining to monetary and financial sector policies and issues.

(2) **Securities Commission Malaysia (SC)**

The SC is a statutory body established in 1993 under the Securities Commission Act 1993 to regulate fund raising activities (debt and equity) and to encourage and promote the development of the securities and derivatives markets in Malaysia. The SC's regulatory functions include:

- (a) supervising exchanges, clearing houses and central depositories;
- (b) acting as the registering authority for prospectuses of corporations;
- (c) being the approving authority for corporate bond issues;
- (d) regulating all matters relating to securities and derivatives contracts;
- (e) regulating the take-over and mergers of companies;
- (f) regulating all matters relating to unit trust schemes;
- (g) licensing and supervising all licensed persons;
- (h) encouraging self-regulation; and
- (i) ensuring proper conduct of market institutions and licensed persons.

The SC is vested with investigative and enforcement powers and it reports to the Minister.

(3) **Labuan Financial Services Authority ("LFSA")**

LFSA was established in 1996 under the Labuan Financial Services Authority Act 1996. LFSA is the statutory body responsible for the development and administration of the Labuan

International Business and Financial Centre ("**Labuan IBFC**"). Labuan IBFC offers a wide range of business and investment structures facilitating cross-border transactions, business dealings and wealth management needs.

B. Legislation

(1) Financial Services Act 2013

The principal legislation governing the banking and financial services industry in Malaysia is the Financial Services Act 2013 ("**FSA**"), which sets out the provisions relating to the banking and financial services industry and the exchange control regime of Malaysia. BNM is empowered under the FSA to issue guidelines, standards, and notices on a wide range of matters relating to the industry, from capital adequacy frameworks to prudential limits and standards (e.g. statutory reserve requirements, liquidity framework, and best practices for credit risk management) to financial reporting. The guidelines, standards, and notices may contain guidance which are encouraged to be adopted or requirements which must be complied with.

Under the FSA, persons who wish to operate commercial or investment banks must apply for a licence from the Minister, while those who wish to carry on business of money-broking or financial advisory must apply to BNM to do so. Under the FSA, the Minister's approval is required if the acquisition/disposal of shares in a licensed person (such as a bank) exceeds any multiple of 5%, or if such acquisition or disposal of interest in shares of the licensed person will result in the interest in shares of the acquirer exceeding 50% or the person disposing of the same, falling below 50% or in any way results in a loss of control over the licensed person.

The FSA also introduces the concept of a financial holding company and empowers BNM to exercise oversight over financial groups for the purposes of promoting the safety and soundness of the banking and financial services industry. Certain prudential requirements that apply to licensed institutions (such as banks) now also apply to financial holding companies, and BNM may specify standards on prudential matters to the holding company.

BNM is also empowered to safeguard the balance of payments position and the value of the currency of Malaysia. In addition to the provisions of the FSA, BNM issues exchange control notices to regulate the money market and foreign exchange market.

(2) Capital Markets and Services Act 2007

The Capital Markets and Services Act 2007 ("**CMSA**") is one of the main pieces of legislations governing fund raising activities in the debt and equity markets in Malaysia. It is a comprehensive piece of legislation which prescribes the law *inter alia* on who may offer capital market services and the licensing regime, prohibited conduct in the market, and regulations on the issues of securities and take-overs and mergers.

The SC is empowered under the CMSA to issue guidelines and practice notes that the SC considers desirable. The SC has continuously issued such guidelines and practice notes and have consistently updated those guidelines to ensure that they are market standard and also reflect international best practices.

C. Services

Sources of financing available to businesses include loan funding, development finance, export credit, and funding from debt issues.

The types of loan funding offered by local financial institutions are no different from those generally offered in other jurisdictions – this includes bilateral and syndicated loans, trade finance, development finance, and export credit. It is to be noted that foreign currency facilities may be subject to certain thresholds and requirements set out in the FSA and the relevant exchange control notices issued by BNM.

Debt issues (bond and sukuk) in Malaysia require the approval of the SC, and such issues are required to be made in accordance with the relevant guidelines issued by the SC.

ISLAMIC FINANCE/BANKING

Malaysia's unique financial system is of a dual nature, comprising both the Islamic financial system and the conventional financial system that operate in parallel. A main feature of the conventional system is the interest payable on money deposited in banks and on loans granted by banks, which is a feature prohibited under *Shariah* principles (Islamic principles). The Islamic financial system, which has been operating in Malaysia for over 30 years, strives to provide an interest-free banking system regulated by *Shariah* principles as an alternative to the conventional system. BNM is the regulator for both the Islamic and conventional systems in Malaysia and allows for a level playing field for both systems to operate.

D. Islamic financial institutions in Malaysia

Both Islamic and commercial banks and banking institutions may offer Islamic financial products. This section lists all the financial institutions that are licenced to provide Islamic financial services.

(1) Islamic Banks

Islamic banks (licenced under the repealed Islamic Banking Act 1983, which has been replaced by the Islamic Financial Services Act 2013 ("**IFSA**")) operate strictly based on and are regulated by *Shariah* principles. The list of licensed Islamic banking institutions in Malaysia as published on BNM's website³ is as follows:

| No. | Islamic Banks |
|------------|---|
| 1. | Affin Islamic Bank Berhad |
| 2. | Al Rajhi Banking and Investment Corporation (Malaysia) Berhad |
| 3. | Alliance Islamic Bank Berhad |
| 4. | AmBank Islamic Berhad |
| 5. | Asian Finance Bank Berhad |
| 6. | Bank Islam Malaysia Berhad |
| 7. | Bank Muamalat Malaysia Berhad |
| 8. | CIMB Islamic Bank Berhad |
| 9. | HSBC Amanah Malaysia Berhad |
| 10. | Hong Leong Islamic Bank Berhad |
| 11. | Kuwait Finance House (Malaysia) Berhad |
| 12. | Maybank Islamic Berhad |
| 13. | OCBC Al-Amin Bank Berhad |
| 14. | Public Islamic Bank Berhad |
| 15. | RHB Islamic Bank Berhad |
| 16. | Standard Chartered Saadiq Berhad |

3 <http://www.bnm.gov.my/index.php?ch=li&cat=islamic&type=IB&fund=0&cu=0>

(2) Foreign International Islamic Banks

In addition to the abovementioned Islamic banking institutions, there are foreign international Islamic banks which are licenced to conduct Islamic banking business in international currencies other than Ringgit with residents and non-residents. The list of licenced international Islamic banks in Malaysia as published on BNM's website⁴ is as follows:

No. International Islamic Bank

1. Alkhair International Islamic Bank Bhd
2. Deutsche Bank Aktiengesellschaft
3. PT. Bank Syariah Muamalat Indonesia, Tbk

(3) Commercial Banks

Commercial banks licenced under the now repealed Banking and Financial Institutions Act 1989 which has been replaced by the FSA are also allowed to offer Islamic banking services in parallel with their conventional banking services. The list of licenced commercial banks in Malaysia as published on BNM's website⁵ is as follows:

No. Commercial Banks

1. Affin Bank Berhad
2. Alliance Bank Malaysia Berhad
3. AmBank (M) Berhad
4. BNP Paribas Malaysia Berhad
5. Bangkok Bank Berhad
6. Bank of America Malaysia Berhad
7. Bank of China (Malaysia) Berhad
8. Bank of Tokyo-Mitsubishi UFJ (Malaysia) Berhad
9. CIMB Bank Berhad
10. Citibank Berhad
11. Deutsche Bank (Malaysia) Berhad
12. HSBC Bank Malaysia Berhad
13. Hong Leong Bank Berhad
14. India International Bank (Malaysia) Berhad
15. Industrial and Commercial Bank of China (Malaysia) Berhad
16. J.P. Morgan Chase Bank Berhad
17. Malayan Banking Berhad
18. Mizuho Bank (Malaysia) Berhad
19. National Bank of Abu Dhabi Malaysia Berhad
20. OCBC Bank (Malaysia) Berhad
21. Public Bank Berhad
22. RHB Bank Berhad
23. Standard Chartered Bank Malaysia Berhad
24. Sumitomo Mitsui Banking Corporation Malaysia Berhad

4 <http://www.bnm.gov.my/index.php?ch=li&cat=iib&type=IIB&lang=en>

5 <http://www.bnm.gov.my/index.php?ch=li&cat=banking&type=CB&fund=0&cu=0>

25. The Bank of Nova Scotia Berhad
26. The Royal Bank of Scotland Berhad
27. United Overseas Bank (Malaysia) Berhad

(4) Development Financial Institutions

Other financial institutions licenced by BNM providing Islamic banking services would be the development financial institutions ("**DFIs**"), which are institutions governed by the Development Financial Institutions Act 2002, established by the Malaysian government with a view to developing and promoting key sectors of strategic importance to the development objectives of the country.

The list of DFIs published by BNM on its website⁶ are as follows:

No. DFIs prescribed under Development Financial Institutions Act 2002

1. Bank Pembangunan Malaysia Berhad
2. Bank Perusahaan Kecil & Sederhana Malaysia Berhad (SME Bank)
3. Export-Import Bank of Malaysia Berhad (EXIM Bank)
4. Bank Kerjasama Rakyat Malaysia Berhad
5. Bank Simpanan Nasional
6. Bank Pertanian Malaysia Berhad (Agrobank)

No. DFIs not prescribed under Development Financial Institutions Act 2002

1. Malaysian Industrial Development Finance Berhad
2. Credit Guarantee Corporation Berhad
3. Lembaga Tabung Haji
4. Sabah Development Bank Berhad
5. Sabah Credit Corporation
6. Borneo Development Corporation (Sabah) Sdn Bhd
7. Borneo Development Corporation (Sarawak) Sdn Bhd

E. Applicable legislation and governing bodies

(1) Bank Negara Malaysia

BNM is the main regulatory authority for the entire financial sector of Malaysia. It was established under the Central Bank of Malaysia Act 1958 (which has been repealed and replaced by the Central Bank of Malaysia Act 2009) ("**CBMA**") and holds the mandate to promote monetary and financial stability and sets monetary policy, in the form of guidelines, circulars or notices issued from time to time.

(2) Islamic Financial Services Act 2013

Islamic Financial Services Act 2013 ("**IFSA**") is a significant legislation in Islamic banking, finance and investment in Malaysia. The IFSA sets out the regulatory framework for Malaysia's Islamic financial sector with the principal regulatory objectives of promoting financial stability and compliance with Shariah. Similar to the FSA, IFSA equips the BNM with regulatory and supervisory powers. Islamic financial institutions are regulated by the IFSA to promote financial stability and compliance with Shariah principles. Under the IFSA, all persons undertaking Islamic banking business are required to hold valid licences issue the Minister.

In promoting compliance with Shariah, IFSA imposes a duty on Islamic financial institutions to ensure compliance with Shariah at all times and also empowers the BNM to issue standards

⁶ http://www.bnm.gov.my/index.php?ch=fs_mfs&pg=fs_mfs_dfi&lang=en

on Shariah requirements to facilitate institutions in complying with Shariah. The Islamic financial institutions are required to comply with the rulings of the SAC established under the Central Bank of Malaysia Act 2009.

Under the IFSA, all licenced Islamic financial institutions are required to establish an internal *Shariah* committee to ensure that all the relevant activities, business and affairs are *Shariah*-compliant. Any person appointed to the *Shariah* committee of any financial institution must meet certain requirements set by BNM and must also have obtained the prior approval of BNM. All Islamic financial products offered by any financial institution must be approved by its internal *Shariah* committee.

(3) Shariah Advisory Council

The Shariah Advisory Council ("**SAC**") is a reference body which serves as an advisor to BNM on all *Shariah* matters pertaining to Islamic banking and Islamic finance. It was established by BNM pursuant to the CBMA and is the highest *Shariah* authority in Islamic finance in Malaysia. The members of SAC comprise of qualified Shariah scholars with authority to issue religious rulings on financial transactions. Its main functions are to ascertain the position on any financial matters based on *Shariah* law and issue a ruling upon reference made, to advise BNM on any *Shariah* issues relating to Islamic financial business and provide advice to any Islamic financial institution. All rulings made by the SAC prevail over any rulings made by any other *Shariah* body or committee constituted in Malaysia.

(4) Malaysia International Islamic Financial Centre

Malaysia International Islamic Financial Centre ("**MIFC**") was launch in 2006 with a primary objective to promote Malaysia as an international Islamic finance hub through strategic initiatives with the focus area of sukuk origination, international Islamic banking, international Takaful, human capital development and Islamic fund and wealth management. MIFC plays a vital role in the development of Islamic finance in Malaysia by facilitating relationship between the international Islamic financial markets, bridging and expanding investment and trade relations between the Middle East, West Asian and North African regions with East Asia.

(5) Bursa Suq Al-Sila

A commodity trading platform launched by Bursa Malaysia, the Malaysian stock exchange, in collaboration with BNM and the SC to facilitate Islamic financial transactions, particularly those involving the application of commodity *Murabahah*. This electronic web based platform provides a means of conducting commodity trades necessary for the operation of Islamic financial products based on the *Murabahah* principle.

F. Shariah concepts in Islamic finance

Some common *Shariah* concepts in Islamic finance are as follows:

Wadiah (Safekeeping)

In this contract or arrangement, a person leaves or deposits his property with the financial institution for safekeeping or protection. This concept is commonly used in deposit-taking activities, custodial services and safe deposit boxes.

Wakalah (Agency)

Wakalah refers to a contract whereby a person (the principal) appoints another person as his agent to act on his behalf, usually for a fee. An illustration of this type of contract is in property financing, where the buyer is required to pay the seller and the financial institution, as the agent for the buyer (as principal), pays the purchase price to the seller in return for a fee for services rendered. This concept is usually employed along with other *Shariah* concepts when Islamic financial institutions structure their products.

Mudarabah (Trade Partnership)

This is a type of contract where one of the parties contributes the capital (the investor) and the other party provides the expertise, labour and entrepreneurial skill (the entrepreneur). Profit earned is split between the parties, but any losses suffered are borne by the investor. This concept is present in certain types of deposit-taking activities, where the investor is the

depositor and the financial institution is the entrepreneur. Profit is divided based on a pre-agreed ratio and any loss is borne by the depositor as investor.

Musharakah (Joint Venture)

In this concept, both parties contribute or invest capital. Profit is shared based on a pre-agreed ratio, and losses are borne by both parties based on the proportion of capital contribution. This concept is present in contract financing and may be used as part of the *Shariah* structure for home financing (that is, the portion where the capital is contributed by both the financial institution and the customer in the form of 90% purchase price and 10% down payment, respectively).

Murabahah (Cost plus Profit)

Murabahah involves the sale of goods at a price including a profit margin, with both cost price and profit disclosed and agreed between the parties before entering into the transaction. Financing by way of this concept involves the sale of an asset by the financial institution to the customer in return for deferred payments consisting of both cost and profit, and the asset is then sold by the customer for the cost price equivalent to the amount of financing required. This concept is commonly employed in *sukuk* (Islamic bond) issuances, with a commodity as the underlying asset, and all commodity trades conducted via a dedicated electronic platform called the Bursa Suq Al-Sila.

Ijarah (Lease)

Ijarah is where an asset is purchased by the financial institution and leased to the customer, who has to pay periodic payments to the financial institution in return for the use of the asset. This is a common concept in motor vehicle financing products.

G. Types of financing

The types of financing provided by Islamic financial institutions in Malaysia may be broadly categorised as follows:

- (a) deposit facilities, such as current accounts and savings accounts based on *Wakalah* or *Mudarabah*;
- (b) trade financing facilities such as letters of credit based on *Wakalah* contracts, *Musharakah* contracts and *Murabahah* contracts, letters of guarantee and working capital financing based on *Murabahah* contracts.
- (c) corporate financing facilities such as project financing based on *Mudarabah*, floating facilities based on *Ijarah*, *sukuk* issuances based on *Murabahah*; and
- (d) consumer financing such as home financing involving the principles of *Musharakah* and *Ijarah* and vehicle financing based on *Ijarah*;

All Islamic banking and finance products offered by Islamic financial institutions operating in Malaysia must first be approved by the SAC.

In addition, offering of certain corporate financing products such as ringgit or foreign currency denominated private debt securities, *sukuk*, structured products or asset-backed securities have to comply with additional guidelines issued by the SC. The Guidelines on Unlisted Capital Market Products Under the Lodge and Launch Framework ("**LOLA**") issued by the SC set out the requirements that must be observed for purposes of making available the securities. For instance, the name of ringgit denominated *sukuk* must not be misleading and must reflect the underlying *Shariah* principle, such as *sukuk* that are structured under the *Murabahah* principle must be named *Sukuk Murabahah* and a *Shariah* adviser must be appointed.

H. Incentives for Islamic financing

The Malaysian government has introduced certain incentives to promote the development of the Islamic financial market and to encourage growth in the Islamic banking sector. Some of the incentives are as set out below:

Income Tax (Deduction For Expenditure On Issuance Of Sukuk) Rules 2015

A company shall be given a revenue deduction on an amount equal to the expenditure incurred on the issuance of sukuk approved or authorised by, or lodged with, the SC or approved by the Labuan Financial Services Authority. This applies from assessment year 2016 until 2018.

Income Tax (Exemption) (No.14) Order 2007

A special purpose company incorporated solely for the issuance of the Islamic securities which adopt the principles of *Mudharabah*, *Musyarakah*, *Ijarah* or *Istisna* approved by the SC, shall be exempted from the payment of income tax in respect of statutory income derived from the issuance of Islamic securities.

Income Tax (Exemption) (No.15) Order 2007

The Minister exempts a company resident in Malaysia in a basis period for a year of assessment from the payment of income tax in respect of statutory income derived from a business of providing *Shariah* fund management services to foreign investors in Malaysia from assessment year 2007 to year assessments 2016. The fund managed shall be in accordance with *Shariah* principle certified by the SC.

Income Tax (Exemption) (No. 3) Order 2016

The Minister exempts an individual resident in Malaysia from the payment of income tax in respect of the profits from an investment received by it within the period of 3 consecutive years of assessment starting from the first year of assessment the profits are received provided, *inter alia*, that the investment is made starting from 1 April 2016 to 31 March 2019 through an investment account platform established by a licensed Islamic bank or prescribed institution to finance any venture or project in Malaysia in any industry or sector undertaken by a small and medium enterprise in accordance to the criteria stated in the ***Stamp Duty (Exemption) (No. 23) Order 2000***

All instruments relating to the issue of, offer for subscription or purchase of, or invitation to subscribe for or purchase, debentures approved by the SC and the transfer of such debentures, are exempted from stamp duty.

Stamp Duty (Exemption) (No. 2) Order 2004

All instruments executed between a customer and a financier under an Asset Sale Agreement or an Asset Lease Agreement made under the principles of the *Shariah* for the purpose of renewing any Islamic revolving financing facility are exempted from stamp duty.

Stamp Duty (Exemption) (No. 3) Order 2004

All instruments relating to a purchase of property by any financier for the purpose of lease back under the principles of the *Shariah*, or any instrument by which the financier shall assume the contractual obligations of a customer under a principal sale and purchase agreement, are exempted from stamp duty.

Stamp Duty (Remission) Order 2011

The stamp duty on any instrument relating to an Islamic financing facility executed between a customer and a financier for the purpose of rescheduling or restructuring any existing Islamic financing facility is remitted to the extent of the duty that shall be payable on the balance of the principal amount of the existing Islamic financing facility.

Stamp Duty (Exemption) (No. 2) Order 2011

All instruments executed between a customer and a financier in accordance with the principles of *Shariah* as approved by the SAC on Islamic Finance established under the CBMA for the purpose of renewing any Islamic revolving financing facility are exempted from stamp duty if the instrument for the existing Islamic revolving financing facility had been duly stamped.

Stamp Duty (Remission) Order 2010

The duty on any instrument executed between a customer and a financier in accordance with the *Shariah* as approved by the SAC on Islamic Finance as established under the CBMA pursuant to the change of scheme for financing an existing loan from conventional to *Shariah* is remitted to the extent of the duty that would be payable on the balance of the principal amount of the existing loan.

Stamp Duty (Remission) Order 2015

20% of the stamp duty chargeable on the principal or primary instrument of financing under item 27(a) of the First Schedule to the Act made in accordance with the principles of *Shariah* as approved by the SAC on Islamic Finance established under the Central Bank of Malaysia Act 2009 for the purpose of financing the purchase of a residential property is remitted. This applies from 1 January 2016 until 31 December 2017.

I. Dispute settlement in Islamic Finance

(1) Jurisdiction of the courts

The Malaysian civil courts have jurisdiction with regard to Islamic banking and finance cases. The civil courts have jurisdiction to decide on all matters aside from *Shariah* matters, which must be referred to the SAC. Any dispute involved issues concerning *Shariah* is referred to the SAC for consultation. All rulings on any *Shariah* matters made by the SAC will be binding on the courts.

(2) Alternative dispute resolution

Arbitration – parties may choose to refer their dispute to arbitration which involves the final and binding determination of the dispute by one or more impartial persons, often having the necessary expertise. In Malaysia, the Kuala Lumpur Regional Centre for Arbitration ("**KLRCA**") was established as a forum for the settlement of disputes through arbitration, and provides institutional support as a neutral and independent venue for arbitration proceedings. Arbitration of Islamic banking and finance disputes comes under the purview of the KLRCA i-Arbitration Rules, which are a specialised set of *Shariah* compliant rules governing the arbitration process.

Mediation – a method of conflict resolution whereby a mediator facilitates both parties to negotiate a voluntary solution to the dispute. There are certain centres offering mediation services in Malaysia, such as the KLRCA (pursuant to the KLRCA Mediation Rules) and the Malaysian Mediation Centre established by the Bar Council of Malaysia. The KLRCA has come up with the KLRCA Mediation Rules, which cover all procedural aspects of the mediation process.

(3) Financial ombudsman scheme

The financial ombudsman scheme is a method of alternative dispute resolution which has recently been introduced via the IFSA. It is described in the IFSA as a scheme for the resolution of disputes between an eligible complainant and a financial service provider in respect of financial services or products and intends to set a financial ombudsman as an intermediary between parties in a dispute, similar to mediation. However, the exact mechanics of the operation of this scheme is not yet apparent as it is not yet in operation, nor have any regulations or structure been implemented.

J. Taking Security in Malaysia

Security can be taken over various types of assets in Malaysia. The forms of security defers from one asset to another. The types of assets and the common forms of security over these assets are as follows:

(1) Real estate

Real estate is land, which is statutorily defined (land) to include the surface of the earth and all substances forming that surface; the earth below the surface and substances therein; buildings on land and anything attached to land or permanently fastened to anything attached to land (whether on or below the surface); standing timber, trees, crops and other vegetation growing on land; and land covered by water.

The most common forms of security over real estate are as follows:

Charges

Charges can be created over real estate to secure a debt, annuity or any other amount other than a debt. Where a charge is created over land, the chargee acquires a legal interest in the land. However, the chargor retains ownership of the land. A chargee can enforce his security by way of a sale of the land if the chargor defaults. Charges are the predominant form of security taken by banks and financial institutions when financing the purchase and development of real estate.

Statutory liens

Liens are usually used when the loan is for a small amount and is required for a short duration. A lien is created when the registered owner or lessee of land has an intention to create the lien, and as security for a loan, deposits the issue document of title or duplicate lease with the lender. The lender then applies for entry of a lien-holder's caveat.

Assignments

Absolute assignments of the borrower's rights, title and interests in a sale and purchase agreement are usually effected in favour of banks and financial institutions financing the purchase of real estate, where the title documents to the real estate were not yet issued.

(2) Tangible movable property

Examples of tangible movable property include aircraft and ships; motor vehicles; plant and machinery; stock-in-trade; and equipment.

The most common forms of security over tangible movable property are as follows:

Mortgages

Security is created over aircraft and ships by a statutory mortgage in accordance with the Civil Aviation Regulations 1996 and the Merchant Shipping Ordinance 1952.

Debentures

A debenture is a security document that is usually entered into when creating a fixed and floating charge over the assets and undertaking of a borrower. It is common for tangible movable property such as plant and machinery, motor vehicles (which are not the subject of a hire-purchase agreement) and equipment to be charged by way of a fixed charge in a debenture. However, stock-in-trade is charged by way of a floating charge to enable the borrower to continue to deal with it. Where specific property is the subject of a charge, it is common for a list containing details of such property to be attached to the debenture.

Fixed charges

The creation of a fixed charge has the immediate effect of appropriating a specific asset to the satisfaction of a debt in the event of a default by the borrower/chargor. It deprives the chargor of the right to deal with the appropriated asset without the consent of the chargee.

Floating charges

A floating charge is a charge on the assets that allows the assets to be dealt with in the ordinary course of business until some event occurs that causes the floating charge to crystallise into a fixed charge. When a floating charge crystallises into a fixed charge, the chargor then can no longer deal with those assets. A crystallised floating charge fastens on all assets presently owned as well as all future assets from the moment the company acquires an interest in the assets.

(3) Financial instruments

The financial instruments over which security is most commonly granted are shares and debt securities (for example, bonds). Security can be granted over the security provider's rights in shares, both certificated (for example, unlisted shares in private companies) and non-certificated (for example, shares in listed companies), owned by the security provider, and bonds and other tradable/untradeable debt securities. A fixed charge cum assignment is the

most common form of security created over certificated and non-certificated (listed) shares and debt securities.

(4) Claims and receivables

Common types of claims and receivables include debts and other rights to the payment of money; rights to require (in project financing, for example) performance of a non-financial obligation; rights to claim under insurances; and cash deposited with banks. Security is created over claims and receivables by an assignment by way of security.

(5) Cash deposits

It is common to grant security over cash deposits by charging and assigning the bank accounts that contain the deposit in favour of the lender/security holder. Where the lender is the account bank, it is common to reinforce that charge by granting set-off rights to the lender with respect to the deposit. Where the deposit is in the form of a fixed deposit, the security holder usually takes possession of the fixed deposit certificate.

(6) Intellectual property

The common types of intellectual property in Malaysia are industrial designs; patents; trade marks; and copyright. Security over intellectual property can be taken by either assignment; or fixed charge. A registered industrial design can be the subject of a security interest in the same way as other personal or movable property (section 29(5), Industrial Designs Act 1996). There is no equivalent legislation for patents, trade marks and copyright. It appears that similar legislation to the Industrial Design Act has been proposed and is in the drafting stage; however, it is many years away from becoming law. Intellectual property as a separate security class has not to date been generally taken as security in Malaysia. It is most commonly captured by debentures creating fixed and floating charges over the assets of the party providing the debenture.

K. Guarantees

Guarantees are commonly used in Malaysia and can be granted by individuals or corporate entities. A guarantee's main terms must be in writing and signed by or on behalf of the guarantor to be enforceable. The beneficiary of the guarantee must also provide consideration for the guarantor's promise. Additionally, where the guarantees are issued in favour of non-resident lenders, the prior written approval of BNM may be required under the relevant BNM notices. (see Chapter 9 – Foreign Exchange Administration)

L. Release of Security over Assets

In order to release a charge registered over real property, a lender must execute a discharge of charge form prescribed by the relevant real estate legislation and file the form at the relevant registry or land office. Notification must also be lodged with CCM for the release of the charge through the filing of forms prescribed by the Companies Act 1965.

A lender can release a lien over real estate by giving a notice in writing to the Registrar to withdraw the lien holder's caveat on the real estate.

In other types of security, when outstanding sums are settled in full, the assignee usually executes a deed of receipt and re-assignment in favour of the assignor whereby the property in question is reassigned to the assignor. The assignee also revokes the power of attorney registered at the High Court.

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8 FOREIGN EXCHANGE ADMINISTRATION

Foreign exchange control in Malaysia is implemented under the Financial Services Act 2013 ("FSA") and administered by BNM.

History

On 1 September 1998, the Malaysian government, as part of its package of policy responses to the 1997 economic crisis in South East Asia, announced and introduced new selective exchange control measures to curb the internationalisation of the Ringgit, and to regain monetary policy independence. These exchange control measures imposed have been liberalised throughout the years. The introduction of the FSA, which replaces both the Banking and Financial Institutions Act, 1989 and the Exchange Control Act, 1953, have made the legislative documents for exchange control more concise and easier to make reference to.

Although BNM has indicated that foreign exchange rules will be progressive liberalised, this remains to be confirmed by the future actions of the Malaysian government. There remains a risk that the previously rigid exchange control measures may be re-imposed especially in view of the current economic climate. In the event of such re-imposition or introduction of other exchange control measures, foreign investors in Malaysia may be limited from carrying out certain trades or transactions, such as not being able to carry out the repatriation or payment between Residents and Non-Residents of Malaysia for a specified period of time, or may only do so after paying tax or levy, or obtaining consent from BNM.

Statutory Instruments

The foreign exchange control rules are governed under notices issued by BNM pursuant to the FSA. These notices set out the prudential measures governing the monetary and financial rules applicable to both "Residents" and "Non-Residents". The version of the notices, as at the date of this document can be found at BNM's website⁷. Currently, there are 7 notices on the following categories:

1. Dealings in Currency, Gold and Other Precious Metals
2. Borrowing and Guarantee
3. Investment in Foreign Currency Asset
4. Payments
5. Security, Islamic Security, Financial Instrument or Islamic Financial Instrument
6. Import and Export of Currency
7. Export of Goods

"Residents" and "Non-Residents"

The definition of "Resident" and "Non-Resident" can be found in Section 213 of the FSA, the relevant extracts of which are as follows:

"Non-Resident" means:

- (a) *any person other than a Resident;*
- (b) *an overseas branch, a subsidiary, regional office, sales office or representative office of a Resident company;*
- (c) *Embassies, Consulates, High Commissions, supranational or international organisations; or*
- (d) *a Malaysian citizen who has obtained permanent Resident status of a country or territory outside Malaysia and is residing outside Malaysia.*

7 http://www.bnm.gov.my/index.php?lang=en&ch=en_newfea&pg=en_newfea_circulars&ac=1&eld=box1

"Resident" means:

- (a) a citizen of Malaysia, excluding a citizen who has obtained permanent Resident status in a country or a territory outside Malaysia and is residing outside Malaysia;
- (b) a non-citizen of Malaysia who has obtained permanent Resident status in Malaysia and is ordinarily residing in Malaysia;
- (c) a body corporate incorporated or established, or registered with or approved by any authority, in Malaysia;
- (d) an unincorporated body registered with or approved by any authority in Malaysia; or
- (e) the Government or any State Government.

For the avoidance of doubt, any company which is registered under SSM is considered a "Resident" company, regardless of the composition of its shareholders.

Exchange Control Notices

The following sets out the foreign exchange control as described in the Exchange Control Notices, and also that in the summary of rules prepared by the FSA as set out in the website described above. For ease of reference, the following summaries are divided to those applicable to Residents and Non-Residents.

Pursuant to the Declaration on Entities Created, Incorporated, etc. in Labuan, BNM declares that all Labuan entities (save and except for a Labuan entity which carries on (a) Labuan banking business or (b) Labuan insurance or takaful business) are Non-Residents for purposes of, amongst others, the Exchange Control Notices.

A. Rules Applicable to Residents

Investment

Residents are free to undertake any amount of investment in foreign currency assets offered in Malaysia by a Resident or abroad with foreign currency funds sourced from abroad. If a Resident wishes to invest abroad with domestic ringgit borrowing converted into foreign currency, there is a limit of RM 50 Million (in aggregate) for the group of Resident entities with parent-subsidiary relationship per calendar year, or up to RM 1 million (in aggregate) for individual Residents per calendar year. Resident unit trust companies and other types of intermediaries may invest abroad on behalf of both Residents and Non-Residents for up to 100% of Net Asset Value (NAV) belonging to the Resident client without domestic ringgit borrowing, Non-Resident clients, and Shariah compliant funds, and 50% NAV for Resident clients with domestic ringgit borrowing. Licensed Takaful operators may invest abroad up to 100% of the NAV of ringgit or foreign currency investment-linked funds of their clients.

Borrowing

Resident entities may obtain any amount of foreign currency borrowing subject that a RM 100 million prudential limit is in place for Resident entities borrowing from a Non-Resident. For Resident individuals, an RM 10 million limit is imposed for foreign currency borrowing from any licensed onshore bank and Non-Resident, other than immediate family members.

There is an RM 1 million in aggregate limit for borrowing in ringgit from Non-Residents and the RM 1 million shall be based on the aggregate borrowing of the resident entity and other resident entities within its group of entities with parent-subsidiary relationship. Resident entities however may obtain any amount of ringgit borrowing to finance activities in the real sector in Malaysia from Non-Resident entities within its group, or their Non-Resident direct shareholders. Resident individuals may obtain any amount of ringgit borrowing from immediate family members.

In addition, Resident entities are allowed to borrow in ringgit in any amount from a non-resident through the issuance of:

- (a) ringgit private debt securities or Islamic private debt securities under the Private Debt Securities Guidelines or Islamic Private Debt Securities Guidelines issued by the Securities Commission Malaysia and such private debt securities or Islamic private

debt securities shall exclude non-tradable private debt securities or Islamic private debt securities issued to:

- (i) Non-Resident which is not part of its group of entities; or
 - (ii) Non-Resident entities within its group of entities or its non-resident direct shareholder other than for the purposes of financing activities in the real sector in Malaysia from a Non-Resident entity within its group of entities or its non-resident direct shareholder; or
- (b) ringgit debt securities or Islamic debt securities by the Federal Government.

Payment and Receipts

With respect to foreign currencies, making and receiving payments may be made between a Resident and a Non-Resident under the following circumstances:

- (a) a derivative denominated in foreign currency offered by the Resident unless it has been approved by BNM;
- (b) a derivative denominated in foreign currency offered by the Non-Resident; or
- (c) a derivative denominated in or referenced to ringgit unless it has been approved by BNM.

Notwithstanding the above, payment in foreign currency is allowed for:

- (a) a derivative denominated in foreign currency, other than exchange rate derivative with reference to ringgit, purchased by a licensed onshore bank for its own account;
- (b) an interest rate swap denominated in foreign currency between a Resident and Labuan banks to manage interest rate exposure arising from borrowing in foreign currency; or
- (c) a derivative denominated in foreign currency, other than exchange rate derivatives, offered on a Specified Exchange stipulated under the CMSA undertaken through a Resident futures broker by a Resident with firm commitment.

For the purpose of payment arising from the settlement of services, a Resident is allowed to receive such payment in foreign currency from a Non-Resident in any manner.

Residents are allowed to pay or receive in foreign currency from another Resident for the following:

- (a) transactions between Resident and a licensed investment bank, a licensed international takaful operator or an international currency business unit of a licensed takaful operator in carrying out its business, as the case may be;
- (b) settlement for domestic trade in goods or services by resident entities with export earnings to another resident entity using foreign currency funds in foreign currency account II or proceeds from approved foreign currency trade financing facility in accordance with the requirements under the notices;
- (c) settlement for the sale or purchase of any:
 - (i) security or Islamic security;
 - (ii) financial instrument or Islamic financial instrument denominated in foreign currency approved by the Bank; and
 - (iii) foreign currency derivatives, other than exchange rate derivatives transacted on a Specified Exchange under the CMSA,
- (d) settlement for a commodity murabahah transaction between resident participants undertaken through resident commodity trading service providers;
- (e) settlement for education or employment overseas; and
- (f) for any purpose between immediate family members.

If the payment between Resident and Non-Resident or between Residents are for purposes not as set out above, the parties would be required to obtain the express written consent of BNM to proceed with such payment.

Sale and Purchase of Currency

There are no restrictions save that with respect to purchase and sale of ringgit against foreign currencies, Residents must do so with a licensed onshore bank.

Export of Goods

All export proceeds must be repatriated to Malaysia in full as per the sales contract which must not exceed 6 months from the date of export – failure to do so within the period would require an application being made to BNM. A Resident with annual gross exports of goods exceeding RM 50 million is required to report to BNM on a quarterly basis for all goods exported in that quarter, within 21 days after the end of each reporting quarter in the calendar year. Notwithstanding so, the report shall be submitted to BNM whether or not there is any export of goods in that quarter.

The settlement with the Non-Residents can be undertaken in both ringgit and foreign currency.

Where the settlement for export is to be made by a Non-Resident in ringgit in Malaysia, the ringgit shall be sourced from the following:

- (a) the buying of ringgit as set out in the notices;
- (b) an external account of the Non-Resident;
- (c) an external account of any Non-Resident financial institution or appointed overseas office, on behalf of the Non-Resident (the settlement between the Non-Resident financial institution or the appointed overseas office and the Non-Resident shall be in foreign currency and there shall be no ringgit financing provided by the Non-Resident financial institution or the appointed overseas office); or
- (d) a ringgit trade financing facility as allowed under the notices.

Foreign Currency Accounts

There are no restrictions on the opening and maintaining of foreign currency accounts with licensed onshore banks and Non-Resident banks.

Guarantees

Approval is only required for the obtaining of financial guarantees from Non-Residents exceeding RM 100 million equivalent in aggregate (unless such Non-Resident is part of its group of entities, in which case approval is not required), and the issuing of financial guarantees exceeding RM 50 million equivalent in aggregate to a Non-Resident which is not part of its group of entities. Financial guarantees exceeding RM 50 million equivalent in aggregate that do not require approval must be registered within seven business days after issuing or obtaining the financial guarantee.

Securities

Residents may issue securities or Islamic securities in foreign currency to any person, or in ringgit in Malaysia to Non-Residents.

Import and Export

There are no restriction on the import and export of foreign currencies. However, Residents may only hold a maximum of ringgit equivalent to USD 10,000 when travelling in and out of Malaysia.

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B. Rules Applicable to Non-Residents

Investment

Non-Residents may invest in any form of ringgit assets either as direct or portfolio investments, and the investments can be funded through:

- (a) conversion of foreign currency to ringgit with licensed onshore banks (other than licensed international Islamic banks) or through their appointed overseas office of the licensed onshore bank's banking group;
- (b) foreign currency borrowings from licensed onshore banks; or
- (c) ringgit borrowing from licensed onshore banks (other than licensed international Islamic banks) for real sector activities and for the purchase of residential and commercial properties in Malaysia except for the purchase of land only.

Non-Residents may remit out divestment proceeds, profits, dividends or any income arising from investments in Malaysia, although repatriation must be made in foreign currency.

Borrowings

Non-Residents are free to obtain and issue, respectively, foreign currency financing from licensed onshore banks and foreign currency denominated sukuk/bonds, to be used in and outside Malaysia.

With respect to ringgit financing, the following applies:

| Borrower | Lender | Limit/Purpose |
|---|---|--|
| Non-Resident other than financial institution | Licensed onshore banks (excluding licensed international Islamic banks) | Free to obtain any amount to finance- <ul style="list-style-type: none"> • real sector activities in Malaysia; • the settlement for the purchase of goods or services with a Resident; or • the purchase of residential and commercial properties in Malaysia except for the purchase of land only. |
| | <ul style="list-style-type: none"> • Resident stockbroking corporation • Licensed onshore banks with stockbroking license | <ul style="list-style-type: none"> • Free to obtain margin financing |
| | <ul style="list-style-type: none"> • Licensed insurer or a licensed Takaful operator | <ul style="list-style-type: none"> • Up to the attained cash surrender value of any life insurance policy or family takaful certificate purchased by the Non-Resident |
| | <ul style="list-style-type: none"> • Resident companies and individuals • Individuals who are immediate family member • Employer in Malaysia | <ul style="list-style-type: none"> • Free to obtain any amount to finance real sector activities in Malaysia • Any amount and purpose • Any amount pursuant to the terms and conditions of service and for use in Malaysia |
| Non-Resident | <ul style="list-style-type: none"> • Licensed onshore banks (excluding licensed international | <ul style="list-style-type: none"> • Free to obtain overdraft facilities to facilitate settlement of shares or ringgit |

| Borrower | Lender | Limit/Purpose |
|--|----------------|--|
| custodian bank or Non-Resident stock broking corporation | Islamic banks) | instruments traded: <ul style="list-style-type: none"> ○ on Bursa Malaysia; or ○ through the Real Time Electronic Transfer of Funds and Securities System (RENTAS), to avoid settlement failure due to inadvertent delays of payment by Non-Residents. |

Payments and Receipt

Settlement for trade in goods and services with Residents can be undertaken in both foreign currency and ringgit.

Sale and Purchase of Currency

Non-Residents are free to buy or sell foreign currency against another foreign currency in Malaysia with a licensed onshore bank. For the purchase and sale of ringgit against foreign currency, Non-Residents may do so with licensed onshore banks (excluding licensed international Islamic banks) freely on spot and forward basis, with the overseas' office of a licensed onshore bank's banking group on behalf of its non-resident clients for settlement of trade in goods or services with a Resident or the purchase and sale of ringgit assets, and with any non-resident financial institution for settlement of trade in goods or services with a Resident.

Foreign Currency Accounts

There are no restrictions on the opening and maintaining of ringgit accounts and foreign currency accounts with licensed onshore banks. Funds in these accounts are free to be remitted abroad in foreign currency.

Securities

Non-Residents may issue securities or Islamic securities denominated in foreign currency in Malaysia to any person.

Import and Export

There are no restriction on the import and export of foreign currencies on Non-Residents. However, Non-Residents may only hold a maximum of ringgit equivalent to USD 10,000 when travelling in and out of Malaysia.

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9 CAPITAL MARKETS

The Bursa Malaysia or Malaysia Exchange, code MYX, is an exchange holding company approved under section of the Capital Markets and Services Act 2007. It was previously known as Kuala Lumpur Stock Exchange ("**KLSE**") which dates back to 1930 when the Singapore Stockbrokers' Association was set up as a formal organisation dealing in securities in Malaya. In 1937, it was re-registered as the Malayan Stockbrokers' Association, but it still did not trade public shares.

In 1960, the Malayan Stock Exchange was formed and public trading of shares began on 9 May. In 1961, the Board system was introduced whereby two trading rooms, one each in Singapore and Kuala Lumpur, were linked by direct telephone lines into a single market with the same stocks and shares listed at a single set of prices on both boards.

The Stock Exchange of Malaysia was officially formed in 1964 and in the following year, with the secession of Singapore from Malaysia, the common stock exchange continued to function under the name Stock Exchange of Malaysia and Singapore ("**SEMS**").

In 1973, with the termination of currency interchangeability between Malaysia and Singapore, the SEMS was separated into The Kuala Lumpur Stock Exchange Bhd ("**KLSEB**") and the Stock Exchange of Singapore ("**SES**"). Malaysian companies continued to be listed on SES and vice-versa. In 1994, it was re-named KLSE. KLSE took over operations of KLSEB as the stock exchange in 1976 as a company limited by guarantee.

On April 14 2004, KLSE was renamed Bursa Malaysia Berhad, following their demutualisation exercise, the purpose of which was to enhance their competitive position and to respond to global trends in the exchange sector by making themselves more customer-driven and market-oriented.

On 18 March 2005, Bursa Malaysia Berhad was listed on the Main Board of its own exchange, Bursa Malaysia Securities Berhad ("**Bursa Securities**")⁸. It operates a fully-integrated exchange, offering a comprehensive range of exchange-related facilities including listing, trading, clearing, settlement and depository services. Bursa Securities is a single consolidated group comprising equities, derivatives and offshore markets

After a revamp in August 2009, its Main and Second Boards were unified to become the Main Market of Bursa Securities while the alternative sponsor-driven ACE Market replaced the Malaysian Exchange of Securities Dealing and Automated Quotation Market which only focused on technology and high growth sectors. With the revamp, the Main Market of Bursa Securities consists of established companies with strong track records while the ACE Market facilitates the listing of emerging companies with growth potential.

The Labuan International Financial Exchange ("**LFX**") is an international financial exchange based in Labuan and is wholly owned by Bursa Malaysia Berhad. LFX was established to complement the various business financial services available in Labuan. LFX is a one-stop financial exchange offering full services from the submission of application to approval, listing, trading and settlement of the instruments listed.

According to the Annual Report 2015 by Bursa Securities, total market capitalisation of all listed stocks as at 31st December 2015 was RM 1,695 billion. There were a total of 1,739 companies listed on Bursa Securities and they can be divided into public listed companies ("**PLCs**"), Listed Real Estate Investment Trusts ("**REITs**"), Listed Exchange Traded Funds ("**ETFs**") and Listed Structured Warrants.

8 Corporate History, <<http://www.bursamalaysia.com/corporate/about-us/corporate-history/>>

Primary Listing for Local Companies

The table below summarises key listing criteria on the Main Market and ACE Market respectively.

| Bursa Stock markets | Main Market | ACE Market |
|-----------------------------------|--|---|
| Mode of Listing | <p>The Issuer should satisfy one of the following tests for listing:</p> <p><u>(a) Profit test</u></p> <ul style="list-style-type: none"> Cumulative consolidated profit after tax of at least RM20 million for the latest 3 to 5 financial years prior to listing; A minimum of after-tax profit of RM6 million <u>for the most recent financial year</u>; <p><u>(b) Market capitalisation test</u></p> <ul style="list-style-type: none"> Total market capitalisation of at least RM500 million calculated based on the issue or offer price as stated in the listing prospectus and post-listing enlarged issued and paid up share capital; Issuer must have been incorporated and generated operating revenue for at least a <u>full financial year</u> <p><u>(c) Infrastructure project corporation test</u></p> <ul style="list-style-type: none"> Have the right to build and operate an infrastructure project within or outside Malaysia, with project costs of not less than RM500 million; The concession or licence for the infrastructure project has been awarded by the relevant government or state agency, with remaining concession or licence period of at least 15 years | No minimum operating track record or profit requirement |
| Public Shareholding Spread | At least 25% of its post-listing share capital has to be in the hands of minimum 1,000 shareholders holding not less than 100 shares each | At least 25% of its post-listing share capital has to be in the hands of 200 shareholders holding not less than 100 shares each |
| Approval | The listing has to be approved by both the SC and Bursa Securities | Only the approval of Bursa Securities is necessary |
| Native Equity Requirement | Allocation of 50% of the public shareholding spread to Malaysian native investors on best effort basis | <p>No such requirement upon listing.</p> <p>Allocation on best effort basis of 12.5% of the Issuer's enlarged share capital to native investors, within 1 year after achieving Main Market profit track record, or 5 years after being listed on ACE Market, whichever is</p> |

| Bursa Stock markets | Main Market | ACE Market |
|---------------------|-------------|------------|
| | | earlier. |

Regulatory framework

Listings on Bursa Securities are regulated under the CMSA which is the primary legislation governing Malaysian capital market, together with various equity-related guidelines issued by the SC such as Equity Guidelines, Business Trust Guidelines and Real Estate Investment Trust Guidelines.

As a self-regulated organisation under the CMSA, Bursa Securities has also issued its Listing Requirements for the Main Market and ACE Market respectively to regulate the capital market conducts of the listed companies.

Other types of listings on Bursa Main Market

(1) Primary listing of foreign corporations on Main Market or ACE Market

A foreign corporation seeking primary listing on Bursa Securities ("**Foreign Applicant**") must fulfil the following listing criteria prior to its listing on the Main Market or ACE Market:

- (a) Standards of laws and regulations

The Foreign Applicant must be incorporated in a jurisdiction that is subject to corporate and other appropriate laws which have standards at least equivalent to those in Malaysia, in particular those relating to corporate governance, shareholders and minority interest protection and regulation of take-overs and mergers. Otherwise, listing of the applicant may still be approved if such foreign corporation varies its constituent documents so as to comply with such local standards.
- (b) Approval of foreign regulatory authorities

The Foreign Applicant must obtain approval of all relevant regulatory authorities of its country where it is incorporated or carries out its business before its issuance of listing prospectus in Malaysia.
- (c) Local registration under the CA 1965

The Foreign Applicant must be registered with the ROC as a registered branch under the CA 1965.
- (d) Accounting and auditing standards

The accounting standards of the Foreign Applicant shall be in accordance with the Financial Reporting Act 1997 which include International Accounting Standards, while the auditing standards adopted by the Foreign Applicant shall be that applied in Malaysia or International Standards in Auditing.
- (e) Valuation of assets

Standards for valuation of assets shall be that applied in Malaysia or in accordance with International Valuation Standards.
- (f) Translation of documents

All documents for application of listing that are submitted to the SC and Bursa Securities (including financial statements), which are in a language other than English, must be accompanied by a certified English translation.

(g) Currency denomination

Applicant is required to consult Bursa Securities and obtain approval of the Controller of Foreign Exchange for quotation of securities in a foreign currency.

(h) Resident directors

Companies with predominantly Malaysia-based operations are required to have majority of directors whose principal or only place of residence is in Malaysia, while companies with predominantly foreign-based operations must have at least one director whose principal or only place of residence is in Malaysia.

(2) Secondary listing of foreign corporations on Main Market

In addition to compliance to paragraph (1) above, a foreign corporation seeking a secondary listing on the Main Market of Bursa Securities is required to fulfil the following listing criteria prior to its listing:

- (a) Already have a primary listing on the main market of a foreign stock exchange which is a member of World Federation of Exchanges and be in full compliance with the listing rules of such foreign stock market; and
- (b) The stock market where the foreign corporation is primarily listed must have standards of disclosure rules at least equivalent to those on Bursa Securities.

A foreign corporation seeking listing on Bursa Securities must be incorporated in a jurisdiction that is subject to corporation laws and other laws and regulations where appropriate which have standard at least equivalent to those in Malaysia, particularly with respect to corporate governance, shareholders and minority interest protection and regulation of take-overs and mergers. Where the jurisdiction in which the applicant is incorporated does not provide laws and regulations which are at least equivalent to those provided in Malaysia, it is possible to provide those standards by means of varying the applicant's constituent documents. The SC may approve the listing of the applicant, subject to the applicant making such variations to its constituent document. In relation to this, the applicant must submit a comparison of such standards of laws and regulations of the jurisdiction in which the applicant is incorporated and those provided in Malaysia, together with the proposed variations to its constituent documents to address any deficiency in such standards, in its listing applications to the SC and Bursa Securities.

The applicant must have been registered with the ROC under Part XI Division 2 of the CA 1965 and must obtain the approval of all relevant regulatory authorities of the jurisdiction in which it is incorporated and carries out its core business, as may be required, before issuing its listing prospectus.

With regard to accounting and auditing standards, the applicant must prepare its financial statements and reports in accordance with the approved accounting standards as defined in the Financial Reporting Act 1997, which include International Accounting Standards. In this regard, a professional accountant qualified under the Accountants Act 1967 and from an international accounting firm must confirm that the applicant's financial statements comply with the said approved accounting standards.

In the event that the applicant prefers its securities to be quoted in a currency other than Ringgit, the applicant has to consult Bursa Securities and obtain approval of the Controller of Foreign Exchange.

(3) Special Purpose Acquisition Company ("SPAC")

A SPAC is a company that is initially listed on stock market without existing business operations but formed exclusively to make acquisitions using proceeds raised from its listing on stock market. Funds are raised by SPACs based primarily on the prior track record of the individuals forming the management team who promote the investment venture, with a minimum fund size to be raised of RM150 million. The key features of a SPAC are as follows:

- (a) Incorporation of SPAC

A SPAC must be incorporated in Malaysia under the CA 1965. The SC may allow for the SPAC to be incorporated in a country outside Malaysia where the requirements and criteria for primary listing of foreign companies (as set out earlier) are complied with.

- (b) Credible Management

A SPAC is required to have a credible management team who can identify and acquire appropriate target assets that will meet the business strategy as disclosed in the prospectus, based on their relevant track record, qualifications, competence and experience relevant to specific industries. Members of the management team is expected to perform their individual roles, including understanding the nature of their obligations and those of the SPAC.

(c) **Investor Protection**

A SPAC must place at least 90% of its gross proceeds from the Initial Public Offering ("IPO") in a trust account managed by an independent custodian. Such proceeds may only be invested in low-risk securities such as those issued by the Malaysian government, before it is utilised for any acquisitions to achieve the SPAC's business strategy. The acquisitions to be carried out must have an aggregate fair market value equal to at least 80% of the amount in the trust account ("**Qualifying Acquisition**"), which must be completed within a permitted timeframe of no later than 36 months from the date of listing. If the SPAC does not complete Qualifying Acquisition within the 3-year timeframe from listing, the SPAC must liquidate and return all proceeds to its IPO investors.

(d) **Minimum Management Team Ownership and Moratorium**

The management team is required to collectively own at least 10% of the SPAC at its listing. Furthermore, the shares and warrants of the SPAC held by the management team are not allowed to be sold, transferred or assigned until the completion of the Qualifying Acquisition. Upon completion of the Qualifying Acquisition, sell down by the management team is allowed on a staggered basis over a period of 2 years.

(4) Business trust ("BT")

BT is a unit trust scheme by which underlying assets constitute an on-going business. Essentially a BT is a trust that functions through a trustee-manager to own and operate a business for the benefit of unit holders. The trustee-manager is required to manage the fund in a prudent manner and will be accountable to the unit holders, failing which it could be removed as the trustee-manager. A BT structure offers greater flexibility when compared with a company incorporated in Malaysia since a BT is able to make distributions to its investors from its operating cash flow, subject to solvency requirements, while a Malaysia-incorporated company can only make distributions out of profits. A BT's total market capitalisation must be at least RM1 billion based on issue or offer price in order to obtain a primary listing on the Main Market of Bursa Securities. Where the listing of a BT is sought based on strength of the BT group of companies, the BT and its subsidiary entities must have common controlling unit holders or controlling shareholders of at least one full financial year prior to submission to the SC. Alternatively, for purposes of listing, the core business underlying the BT must have been in operation and generating operating revenue for at least one full financial year prior to submission to SC. A foreign BT established outside Malaysia could be recognised under CMSA for application of listing on Bursa Securities. Units in BTs listed on Bursa Securities can be traded like equity stocks.

(5) Real Estate Investment Trust ("REIT")

REIT is a fund or trust with the underlying assets of income-producing commercial real estate such as shopping complexes, industrial properties, hotels and office blocks, being managed by a management company. The management company for a REIT is allowed to deduct distribution paid to its unit holders directly from its corporate taxable income. In order to enjoy this tax-free status in distribution of profits to unit holders, the REIT is required to have most of its assets and income to be tied to real estate and distribute at least 90% of its total income to unit holders on annum basis. Units in REITs listed on Bursa Securities can be traded like equity stocks.

(6) Minority Shareholders' Watchdog Group ("MSWG")

The MSWG was setup in August 2000 as a non-profit government initiative to spearhead shareholder activism, particularly to protect the interests of retail and minority shareholders in Malaysia. The objective of the MSWG is to encourage good governance amongst public listed companies, to preserve shareholder rights, to minimise risks to shareholders, and ultimately to enhance value of the shareholders and the capital market over time.

MSWG's objectives are set out in a Charter under its Memorandum and Articles of Association. These objectives include:

- (a) To become the Forum on minority shareholders' experiences in the context of the Malaysian Code on Corporate Governance, the Securities Commission's Disclosure-Based Regulations, and the Capital Markets Masterplans.
- (b) To become the Think-Tank and Resource Centre for minority interest and corporate governance matters in Malaysia.
- (c) To develop and disseminate the educational aspects of corporate governance.
- (d) To become the platform to initiate collective shareholder activism on questionable practices by management of public listed companies.
- (e) To influence the decision making process in public listed companies as the leader for minority shareholders' legitimate rights and interests.
- (f) To monitor for breaches and non-compliance in corporate governance practices by public listed companies.
- (g) To initiate where appropriate, reports to regulatory authorities and transforming MSWG into an effective deterrent of such events or activities that can be against the interest of the minority shareholders⁹.

In recognition of its public mandate to spearhead shareholder activism – which is one of the key tenets of corporate governance – the Capital Market Development Fund has been supporting the MSWG since 2005.

To date, the MSWG has been successful in building up their credibility by their active participation in AGMs and EGMs, where the MSWG highlight concerns and issues relevant to retail and minority shareholders¹⁰.

(7) Capital Markets Promotion Council¹¹

The Capital Markets Promotion Council was established in 2013 as part of the efforts by the Malaysian Government and the SC to promote the country's value proposition across various segments of the capital market both in the domestic and international arena. In 2014, SC launched the Capital Markets Malaysia (CM2) brand, representing the multi-faceted Malaysian capital market with its wide range of conventional and Islamic products, supported by a strong governance infrastructure. With a tagline "Financing the Future", it showcases the significance of capital market in facilitating future financial growth, innovation and wealth creation.

CM2 serves as a platform to ensure consistency and coordination between various stakeholders of the capital market in promoting the offerings and expertise of the market and through different communication channels. An integrated international agenda facilitates the promotion of the Malaysian capital marketplace, bringing together investors and investment opportunities.

(8) Expanding Investment Avenues

Developmental efforts by the SC also focused on enhancing the capital market's capacity by expanding access to capital market financing for smaller and innovative businesses while also facilitating sustainable and socially responsible investments.

Recognising the role of small and medium enterprises (SMEs) in spurring job creation and economic growth, the SC has developed the "SME Investment Partners" programme in 2014 which enables SMEs to obtain non-collateralised financing and management expertise from a pool of qualified private investors. The formulation of a framework for equity-based crowd-

9 Minority Shareholder Watchdog Group, Who we Are <<http://www.mswg.org.my/page.php?pid=36&menu=sub>>
10 Capital Market Development Fund, Minority Shareholder's Watchdog Group <http://www.cmdf.org.my/364_221_221/Web/WebPage/Minority-Shareholder-s-Watchdog-Group/Minority-Shareholder-s-Watchdog-Group.html>

11 Capital Markets Malaysia (CM2) Official Website <<http://capitalmarketsmalaysia.com>>

funding also illustrates SC's ongoing efforts to establish a regulatory safe harbour for financial innovation.

The launch of the Sustainable and Responsible Investment (SRI) sukuk framework provided impetus for greater availability of investible assets for investors, and capitalised on synergies from the close alignment between the principles of socially responsible investment and the ethics of Islamic finance. Initiatives to enhance the SRI information architecture, such as the introduction of the Environmental, Social and Governance (ESG) index and ongoing efforts to encourage the adoption of integrated reporting in Malaysia also collectively facilitate the profiling of SRI to both the domestic and international audience.

(9) Recent Developments¹²

To achieve greater regulatory efficiency, the SC continues to review the primary market regulations regarding capital-raising, disclosure and retail fund approvals. In its efforts to promote internationalisation of the Islamic capital market, the SC has announced its plans to develop blueprints to enhance Malaysia's Islamic fund and wealth management value proposition, which resulted in the resolutions resolved and issued by the Shariah Advisory Council of the SC as at 22 December 2015.¹³ At the same time, the SC will continue to broaden financing avenues and build greater scale across market segments.

To effect the regulatory streamlining and market development efforts pursued in 2015, the SC has announced that it will undertake the following major initiatives in 2016¹⁴:

- (a) launch of a revised Malaysian Code on Corporate Governance;
- (b) introduction of the Peer-to-Peer (P2P) Lending Framework;
- (c) launch of the Islamic Fund and Wealth Management Blueprint; and
- (d) continuing effort towards centralising information to enhance transparency, increase information access to investors, promotion of secondary market liquidity and measures to increase the offering of bonds and sukuk to the retail market.

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12 Securities Commission Official Website, Press Release "Malaysian capital market grew to RM2.76 trillion in 2014 " dated 5 March 2015 <http://www.sc.com.my/post_archive/malaysian-capital-market-grew-to-rm2-76-trillion-in-2014/>

13 Resolutions of the Shariah Advisory Council of the Securities Commission, for 2012-2014; Securities Commission Official Website < http://www.sc.com.my/wp-content/uploads/eng/html/icm/Resolution_SAC_2012-2014.pdf>

14 http://www.sc.com.my/post_archive/malaysian-capital-market-grows-across-all-segments/

10 EMPLOYMENT LAW

In Malaysia, there is a wealth of employment related legislation that provides a framework for the employer-employee relationship. The principal statutory laws are discussed below.

A. Employment Act 1955

The Employment Act 1955 ("**EA 55**") applies throughout West Malaysia and the Federal Territory of Labuan. It applies only to employees whose wages do not exceed RM2,000 a month and certain categories of employees irrespective of their wages such as manual labourers, supervisors of manual labourers, drivers, domestic servants, etc. For those who do not fall under this category, their rights are dependent on their contract of employment. The rationale behind this is that those with a higher earning capacity possess an equal bargaining power with their employers in the negotiation of the terms of their contract. The EA 55 requires certain minimum benefits and rights to be granted to employees. Failure to do so may amount to a breach on the part of the employer, although such a breach would not nullify the employment contract itself but rather the EA 55 benefits would apply instead of the lower benefits conferred by the employment contract.

An employment contract may be in a form of a *contract of service* which is pre-condition for an employer-employee relationship or a *contract for service*. The former is a contract where an employee is engaged to perform for an employer who exercises control and discretion over the said employee. It is here that an employer-employee relationship is established. The latter is quite simply a contract with an independent contractor.

Summary of Material Provisions in the Employment Act 1955

| Section | Subject | Provision |
|-----------------|--------------------|--|
| 60 | Work on a rest day | Employees are not required to work on a rest day unless he is engaged in work which is required to be carried on continuously by 2 or more shifts. |
| 60A | Hours of work | Employees are not required to work for the periods below except with overtime payments. (a) more than 5 consecutive hours without a period of leisure of not less than 30 minutes duration; (b) more than 8 hours in a day; (c) in excess of a spread over period of 10 hours in a day; (d) more than 48 hours in a week. There is an exception in situations such as emergencies and urgent work to be done to machinery or plant. Also no employer shall require an employee under any circumstances to work for more than 12 hours in any one day. |
| 60D | Holidays | Employees are entitled to a paid holiday at his ordinary rate of pay on 11 of the gazetted public holidays, 5 of which is pre-set with the other 6 to be selected by the employer at their discretion. If any of the public holiday falls on a rest day; or any other public holiday, the working day following the rest day or the other public holiday shall be a paid holiday in substitution of the first mentioned public holiday. |
| 60(3) 60D(3) | Overtime | Employees shall be paid at a rate of 1.5 times his hourly rate for any overtime work. Employees shall not be required to work more than 104 hours a month on overtime. For any overtime work in excess of the normal hours of work on a paid public |

| Section | Subject | Provision |
|----------|---------------------|--|
| | | <p>holiday, the employee shall be paid at a rate which is no less than 3 times his hourly rate of pay. For overtime work carried out by an employee on his rest day, he shall be paid at a rate which is no less than 2 times his hourly rate of pay. For overtime work carried out by an employee employed on piece rates in excess of the normal hours of work on any paid holiday, the employee shall be paid no less than 3 times the ordinary rate per piece.</p> |
| 60E | Annual Leave | <p>An employee shall be entitled to paid annual leave of:</p> <ul style="list-style-type: none"> (a) 8 days if employed for a period of less than 2 years; (b) 12 days if employed for a period of 2 years or more but less than 5 years; (c) 16 days if employed for a period of 5 years or more, <p>For employees who have not completed 12 months of continuous service with the same employer during the year in which his contract of service terminates, his entitlement to paid annual leave shall be in direct proportion to the number of completed months of service.</p> |
| 60F | Sick Leave | <p>An employee shall be entitled to paid sick leave where no hospitalisation is necessary:</p> <ul style="list-style-type: none"> (a) 14 days if employed for less than 2 years; (b) 18 if employed for 2 years or more but less than 5 years; (c) 22 days if employed for 5 years or more; or <p>If hospitalisation is necessary, entitlement is to 60 days each calendar year.</p> |
| 37 | Maternity Allowance | <p>Female employees are entitled to 60 consecutive days for each confinement. A female employee shall not be entitled to any maternity allowance if at the time of her confinement she has 5 or more surviving children. To be entitled for maternity allowance the employee must have been employed by the employer for a period of, or periods amounting in the aggregate to, not less than 90 days during the 9 months immediately before her confinement; and she has been employed by the employer at any time in the four months immediately before her confinement.</p> |
| 19 & 24 | Wages | <p>Every employer shall pay to each of his employees not later than the 7th day after the last day of any wage period the wages, less any lawful deductions.</p> |
| 61 & 60K | Registration | <p>Every employer shall prepare and keep one or more registers containing such information of each employee. For the employment of foreign employees, the employer is required to furnish particulars of such employee with the Director General of Labour within 14 days of the employment.</p> |

B. Sabah Labour Ordinance and Sarawak Labour Ordinance

The employment law in East Malaysia is regulated by the Sarawak Labour Ordinance for Sarawak and the Sabah Labour Ordinance for Sabah. The protection and benefits granted mirrors that of the EA 55 with a few differing provisions. The Ordinances provide the conditions under which a "child" (below 15 years) and "young person" (15 years and above but having not attained 18 years) may be employed. Further there is a requirement for any employer wishing to employ any "non-resident employee" (a person not from Sabah or Sarawak) to obtain a licence to employ from the Director of Labour Sabah/Sarawak. Both the Ordinances cover employees on a contract of service with an employer and whose wages do not exceed RM2,500 a month (as opposed to RM2,000 in the EA 55).

C. Occupational Safety and Health Act 1994 ("OSHA 94")

At common law an employer owes a duty of care towards his employees to ensure as far as reasonably possible the good health and safety of the employees. The OSHA 94 provides the framework to secure the safety, health and welfare among workforce and to protect others against risks to safety or health in connection with the activities of persons at work. Employers with more than 5 employees are required to formulate a written Safety and Health Policy. The OSHA 94 specifies the general duties of employers, manufacturers, suppliers and employees. Pursuant to Section 30 of the OSHA 94, every employer shall establish a Safety and Health Committee at workplace if there are 40 or more persons employed at the place of work.

D. Factories and Machinery Act 1967

Sections 10 to 25 of the Factories and Machinery Act 1967 impose on the occupier of a factory certain minimum standards of safety and welfare for employees who work within factory premises. Examples include foundations and floors to be of sufficient strength, roofs to be of sufficient strength, provisions against fire, etc.

E. Employees' Social Security Act, 1969

Employers and employees are also obligated to contribute to this insurance fund. The contribution rate is set out in the Third Schedule of the Employees' Social Security Act 1969 and is dependent on the monthly salary of the employee. As the ceiling rate for contribution is RM4,000 a month, employees who earn more than the ceiling rate are deemed to be earning RM4,000 a month for the purposes of contribution to this insurance fund.

F. Workmen's Compensation Act 1952

Similarly, this is an insurance fund whereby the employer has to make mandatory contributions which would enable the employees to claim compensation in the event of injuries sustained in the course of their employment. It is to be noted that employees in the context of this Act means foreign employees only whose monthly earning does not exceed RM500 or manual workers irrespective of wages.

G. Trade Unions Act 1959

While the Industrial Relations Act 67 governs the relationship between trade unions and employers, the Trade Unions Act 1959 deals with the creation of the trade union, its procedures and requirements it has to adhere to. Employers also have a statutory right to form a trade union.

Pursuant to Section 10 of the Trade Unions Act 1959 ("**TUA 1959**"), any group of seven or more workers may form a trade union. Once a decision is made to form a union, the application for registration with the Director General of Trade Unions must be made within a month. The application is to be signed by at least seven members and accompanied by the prescribed fees and a copy of the rules of the union. The application shall include the name of the union with its address. Further, the names, addresses and occupation of the members making the application along with the union's officers should be mentioned on the application. Finally, Section 2 of the TUA 1959, states that for a union to be registered, its intended members must come from the same or similar trade, occupation or industry.

H. **Immigration Requirements**

For employers who are desirous of hiring expatriates, an employment pass would have to be applied from the Immigration Department. The expatriate must receive a minimum salary of RM5000.00 and a 2 years employment contract at the least. On a side note, there is a list of positions that are not allowed/encouraged to be applied for expatriate posts for example, certain posts in the sector of geoscience and engineering amongst others. Further to that, there are minimum paid up capital and equity requirements to be adhered to which is updated from time to time by the Immigration Department. For foreign employees seconded to Malaysia, an employment contract in Malaysia is to be signed between the local employer and the seconded employee. Provisions to be included in such contract would be similar to that for a local employee such as job position, salary of not less than RM5,000 per month (for employment pass purposes), etc.

I. **Industrial Relations Act 1967**

The Industrial Relations Act 1967 ("**IRA 67**"), unlike the EA 55, applies to throughout Malaysia. It deals with trade union matters, trade disputes (amongst employers, employees and trade unions) and collective agreements amongst others. The IRA 67, protects the rights of employers and employees to form trade unions as well as procedural provisions for recognition of trade unions along with the overseeing the collective bargaining process in reaching a collective agreement which is to be deposited with the Court to be granted cognisance. Further, matters in regards to trade disputes may be referred by the Minister of Human Resources to the Industrial Court. These include anything from constructive dismissal to retrenchment matters. Section 29 of the IRA 67 provides the powers granted to the Industrial Court which includes the jurisdiction to hear trade disputes with the decision of the Industrial Court being final though there is a statutory right to appeal to the High Court on questions of law pursuant to Section 33A of the IRA 67. The IRA 67 further provides that an employee may only be dismissed by his employer with just cause and excuse. The concept of termination at will only to employment contracts does not apply in Malaysia.

J. **Employees Provident Fund Act 1991**

Every employer is required to contribute to this fund at the specified rates. As of July 2014, the contribution rates are as below:

| Category of Employees | Employer's Rate | Employee's Rate |
|------------------------------------|------------------------|------------------------|
| Monthly salary of RM5,000 or below | 13% | 8% - 11% |
| Monthly salary of above RM5,000 | 12% | 8% - 11% |

Note: For employees aged 60 years and above the rate is at 50% if the rate mentioned above depending on the amount of salary

Contribution to this fund is not mandatory for foreigners working in Malaysia. However, a foreigner who is employed in Malaysia could opt to contribute to the fund voluntarily. Notwithstanding this, unlike the employer contribution rates enjoyed by Malaysian citizens as per the table above, an employer in Malaysia is only obliged to contribute a minimum of RM5.00 per month to the foreigner's fund regardless of how much the foreigner earns unless the contract of employment provides otherwise.

K. **Termination of Employment**

An employer may exercise their right to terminate an employee's employment contract for reasons such as a misconduct under Section 14 of the EA 55, in breach of contracts by the employee, retrenchment, retirement (60 years), end of a probation period (if performance is not satisfactory) or for fixed term contracts it ends when the contractual period comes to an end. Termination at will as mentioned is not allowed in Malaysia due to the 'just cause and excuse' provision in the IRA 67. Hence, an employer can terminate a contract by giving notice with valid reasons. An employee has 60 days to report dismissal if he is of the opinion it was not made with just cause and excuse. As for misconducts, an employer may punish an

employee only after due inquiry has been made (for example a domestic inquiry). The employer shall investigate the alleged misconduct and provide the employee with a fair opportunity to be heard and to defend himself in front of an independent panel. Failure to comply with such requirements may provide the employee with a right to claim for unfair dismissal against the now former employer.

Termination on Grounds of Redundancy

The Industrial Courts generally recognise that retrenchment of an employee on grounds of redundancy is sufficient cause and excuse to dismiss the employee. Redundancy is a situation where there has been a cessation of, or diminution in, the requirements of the business as a result of various factors such as closure of business, re-organisation, reduction in production, etc. In order to lawfully retrench its employees on grounds of redundancy, an employer must comply with each of the following requirements, failing which a retrenched employee could claim for unfair dismissal against the former employer:

- (a) There must be a legal basis and justification and it must be genuine and bona fide;
- (b) The services of the employee affected must be made redundant; and
- (c) The retrenchment carried out must comply with the law, the terms of employment and any collective bargaining agreement, the Code of Conduct for Industrial Harmony (the "Code") and other acceptable industrial practice.

The Code provides that if retrenchment of employees becomes necessary despite having taken appropriate measures, the employer should amongst others, give as early a warning, as practicable, to the employees concerned and introduce schemes for voluntary retrenchment and retirement and for payment of redundancy and retirement benefits. The employer should select employees to be retrenched in accordance with objective criteria such as applying the Last-In-First-Out principle (LIFO) or taking into account their nationality, age, ability, experience, skill, family situation, etc.

To effect a retrenchment exercise, the Employment (Termination and Lay-Off Benefits) Regulations 1980 requires statutory minimum notice period and statutory termination benefits to be provided to all employees covered under the EA. Employees who are not covered under the EA are not entitled to any statutory benefits but they are however entitled to their contractual notice period and any contractual severance payments.

A retrenchment exercise must be notified to the nearest Labour Office.

L. National Wages Consultative Council Act 2011

The National Wages Consultative Council Act 2011 ("**NWCCA 2011**") was enacted to establish a National Wages Consultative Council ("**NWCC**"). The NWCC is the main platform for the determination of wages, including determining the rate and mechanism for the implementation of the minimum wage in Malaysia. Pursuant to Section 23 of the NWCCA 2011, the Minimum Wages Order 2016 (the "**Order**") was implemented. The objective of the Order is to ensure that all employees in Malaysia earn more than the poverty line income level of RM800 per month. The Order applies across the board, covering both local and foreign employees, with the singular exclusion of those who are classified as domestic servants under the Employment Act 1955 (for example: maids, gardeners, private chefs and drivers). The minimum wage for employees in Peninsular Malaysia is set at RM1,000 per month whilst employees in East Malaysia are entitled to RM920 per month.

Note: During the 2016 Budget Announcement, the Malaysian government announced that the minimum wage would be increased from RM900 to RM1,000 per month in Peninsula Malaysia and from RM800 to RM920 for Sabah and Sarawak.

M. Minimum Retirement Age Act 2012

This Minimum Retirement Age Act 2012 provides for the minimum retirement age of an employee at 60 years old.

Although the minimum retirement age has been fixed at 60 years, an employee may choose to retire earlier than 60 years of age provided that this has been agreed upon in their contract of service or collective agreement.

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11 FOREIGN INVESTMENT IN REAL PROPERTY

A. BACKGROUND TO MALAYSIAN LAND LAW

(1) Torrens System in Malaysia

- (a) The 'Torrens system' was named after Sir Robert Torrens and introduced in South Australia in 1858. The Torrens system is a system of registration of titles to land (as distinct from registration of deeds). The Torrens system is basically a system of recognition of titles to and dealings in land to improve efficiency and effectiveness of land administration. The courts have taken cognisance of this as in this passage from the case of *Poh Yang Hong v Ng Lai Hin & Ors* [2013] 8 CLJ 964:

"The system of land registration adopted by Parliament and codified in the NLC 1965 is based on the Torrens system of registration. The core principle of this system of registration is that the register is everything. The Torrens system strives for simplicity and certitude in transfers of Torrens system land or registered land".

- (b) The main characteristics of the Torrens system are:
- (i) It confers indefeasible title upon registration. However, section 340(2) of the National Land Code 1965 ("**NLC**") stipulates that indefeasibility can be defeated where the transferee himself is guilty of fraud, forgery or misrepresentation or on grounds of mistake, a void instrument or title being unlawfully acquired.
 - (ii) Any dealing in respect of an alienated land or interest in land must be registered with the relevant land registry in order to confer title or interest on the new proprietor or interest holder.
- (c) Two principles flow from the Torrens system as follows:
- (i) Mirror Principle – the register reflects accurately and completely the current facts about a registered owner and all details of a piece of land. This means if a person were to sell a piece of land, the new title has to be identical to the old one in terms of description of land, except for the owner's name; and
 - (ii) Curtain Principle – one does not need to go behind the Certificate of Title as it contains all the information about the title. This means that all the necessary information regarding the ownership of the land is on the Certificate of Title and if a person were to sell a piece of land, the purchaser could depend on the information provided on the Certificate of Title.

(2) Indefeasibility of title

One of the most important advantages of the Torrens system is the indefeasibility of title as provided under section 340(1) of the NLC. According to section 340(1) of the NLC, upon registration, the party in whose favour the registration has been effected will obtain an indefeasible title to or interest in the land. Abdul Malik Ishak J in the case of *Muthammah a/p Govindan v Masri bin Mohamed & Anor* [2000] 5 MLJ 518 defined the phrase 'indefeasible title' as a title of an interest which is free of all adverse claims or encumbrances not noted in the register. It is quite obvious that the effect of registration is to defect all prior unregistered claims. However, being a general principle, the concept of indefeasibility is not absolute because under certain circumstances a registered title or interest may be set aside or defeated by a person who has a better claim. In law, these circumstances are amply spelt out under section 340 of the NLC and by case laws.

B. FOREIGN INVESTMENT IN REAL PROPERTY

Malaysia continues to attract interest from foreign investors and one of the most popular investments is in the real estate sector. As part of the effort to facilitate greater foreign investments in property transactions, the Malaysian government and its state governments have put in place various measures and guidelines. As such, our focus in this chapter will be on the guidelines introduced by the Malaysian government as well as restrictions imposed on foreign interests while investing in the Malaysian real property sector.

(1) Who is considered a "foreigner" or "foreign interest" in Malaysia?

Under the Guideline on the Acquisition of Properties issued by the Economic Planning Unit of the Prime Minister's Department ("**EPU Guideline**"), foreign interest means any interest, associated group of interest, or parties acting in concert that comprises of: (a) individual who is not a Malaysian citizen; and/or (b) individual who is a Permanent Resident; and/or (c) a foreign company or institution; and/or local company or local institution whereby the parties as stated in item (a) and/or (b) and/or (c) hold more than 50% of the voting rights in that local company or local institution.

(2) Conditions and restrictions on acquisition of properties by a foreign interest

Before a foreign interest is allowed to acquire any property, the EPU Guideline must be taken into consideration. Apart from that, the acquisition of the property by the foreign interest must get the approval from the State Authority.

EPU Guideline

Prior to this, the Malaysian government has introduced a Guideline on the Acquisition of Properties by Local and Foreign Interests issued by the Foreign Investment Committee ("**FIC Guideline**") to regulate and administer foreign investment in Malaysia. Under the FIC Guideline, any acquisition of property by a foreign interest, including permanent resident, requires the approval of the FIC. However, many feel that the FIC Guideline was no longer relevant because of its restrictive nature. Therefore, in an effort to attract foreign investors, the Malaysian government has decided to repeal the FIC Guideline and to replace it with the EPU Guideline effective on 30 June 2009.

Under the EPU Guideline, there are only two situations that would require EPU's approval for the acquisition of property. First, when there is a direct acquisition of property valued at RM20 million and above which results in the dilution in the ownership of property held by Bumiputera interest and/or government agency. Second, when there is an indirect acquisition of property by other than Bumiputera interest through acquisition of shares, resulting in a change of control of the company owned by Bumiputera interest and/or government agency, having property more than 50 percent of its total assets, and the said property is valued more than RM20 million. In order to acquire a property as mentioned in the two situations above, a company needs to satisfy the equity and paid-up capital conditions as listed in the EPU Guideline.

Other than the above, a foreign interest is only allowed to acquire a residential unit valued at RM 1 million and above. This acquisition however does not require the approval of the EPU but falls under the purview of the State Authority.

Apart from that, there are also a number of transactions that do not require the approval from the EPU such as the acquisition of residential unit under the "Malaysia My Second Home" Programme, acquisition of industrial land by manufacturing company and acquisition of properties by a company that has obtained the endorsement from the Secretariat of the Malaysian International Islamic Centre, among others.

A foreign interest is also allowed to purchase all types of properties in Malaysia except for properties valued less than RM1 million per unit, residential units under the category of low and low-medium cost, properties built on Malay reserved land and properties allocated to Bumiputera interest in any property development project ("**Bumiputera Lot**") as determined by the State Authority.

It must be noted however that since land matter falls under the jurisdiction of the state government, each state authority has the discretion to vary the EPU Guideline on the acquisition of property by a foreign interest based on the location and type of property:

(a) Johor

- (i)** Johor has its own policy on the acquisition of property by foreign interest which was effective on 1 May 2014. Under this policy, foreign interest in Johor is only allowed to acquire property in secondary market (sub-sales) from existing property owned by foreign interest. If the foreign interest would like to acquire property owned by Malaysians, it will be considered on a case-to-case basis.

- (ii) Other than that, unlike the restriction on the acquisition of Bumiputera Lot imposed under the EPU Guideline, a foreign interest in Johor may be allowed to own Bumiputera Lot in a housing project after the said units obtained approval from Johor State Secretary Office (Housing Division) subject to the existing balance of the foreign interest quota. Foreign interest may also own Bumiputera Lot duly registered in the name of Bumiputera in sub-sales after obtaining the approval from the State Authority. However, the Johor government restricts the type of properties that can be acquired by a foreign interest. For example, a foreign interest in Johor cannot acquire a single storey terrace unit or 1½ storey terrace unit, single or two storey of shop or office lot, stall or service workshop among others.

(b) Selangor

- (i) Selangor has issued its own guideline on acquisition of properties by foreign interests or permanent residents in Selangor which came into effect on 1 September 2014.
- (ii) The areas in Selangor have been divided into three Zones under this guideline as follows:

| Zone 1 | Zone 2 | Zone 3 |
|--------------------|-----------------------|----------------------|
| Daerah Petaling | Daerah Kuala Selangor | Daerah Hulu Selangor |
| Daerah Gombak | Daerah Kuala Langat | Daerah Sabak Bernam |
| Daerah Sepang | | |
| Daerah Hulu Langat | | |
| Daerah Klang | | |

- (iii) Under the guideline, foreign interests and permanent residents are only allowed to acquire residential properties valued more than RM 2 million in areas categorised as Zone 1 and Zone 2 whereas residential properties in the area classified in Zone 3 can be acquired if the residential properties are valued at RM 1 million or above. Besides that, foreign interests can only acquire commercial and industrial properties in Selangor in all three zones if the values of the properties start from RM 3 million. Furthermore, there are also restrictions against foreign interests from acquiring landed properties, agricultural lands and properties sold through public auction in Selangor.
- (iv) Apart from Selangor, foreign interests are only allowed to acquire properties in Penang, if the properties are valued at RM 2 million or more on the island and RM 1 million or more on the mainland. This applies to all types of property in Penang effective from 1 February 2014.

(c) Malacca

Malacca also introduced its own guideline on acquisition of properties by foreign interests entitled "Malacca State Guidelines on Acquisition of Properties by Foreign Interests" where foreigners are only allowed to acquire not more than 3 units of commercial properties while applications made by foreign companies will be considered on a case to case basis. In addition, the purchase price for each property to be acquired by foreign companies must be more than RM1 million per unit for landed properties with individual titles and RM500,000 per unit for properties with strata titles.

(d) Negeri Sembilan, Perlis and Putrajaya

Negeri Sembilan, Perlis and Putrajaya have adopted the EPU guideline on the acquisition of property by foreign interest.

- (e) Kedah
 - (i) In Kedah, a foreign interest is allowed to acquire certain type of residential properties, for instance, double storey houses and bungalows if the properties are valued at RM1 million or above. Foreign interest is not allowed to acquire residential properties categorised as single storey terrace house, low cost apartment, properties built on Malay reserved land and Bumiputera Lot. Besides that, foreign interests do not need to apply for State Authority approval for the acquisition of industrial lands in Kedah if the minimum price is RM1million.
 - (ii) For commercial properties, foreign interests are allowed to acquire three storey shops and office units subject to minimum price of RM1million. Foreigners are not allowed to acquire single or two storey shops, stalls or service workshops.
- (f) Penang
 - (i) Since 1 July 2012, the minimum price of a strata property to be acquired by a foreign interest on the island and Seberang Perai area is RM1million. If a foreign interest intends to acquire a landed property on the island or the Seberang Perai area, the price of that landed property must be a minimum of RM2million. However, a permanent resident in Penang is allowed to acquire properties in Penang subject to a minimum price of RM250,000.
 - (ii) In addition, a foreign interest is not allowed to acquire the following properties:
 - (A) low cost and low-medium cost terrace house;
 - (B) low cost and low-medium cost flat;
 - (C) property allocated to Bumiputera interest in any property development project; and
 - (D) property built on a Malay Reserve Land.
 - (iii) A foreign interest is also not allowed to acquire agricultural lands in Penang. However, in the event that the foreign interest intends to acquire at least 5 acres of the agricultural land, the State Authority will consider the application provided that:
 - (A) the foreign interest is involved in a commercial agricultural activity using modern and high technology;
 - (B) the foreign interest is involved in producing agricultural products to be exported;
 - (C) the foreign interest is involved in developing agricultural activities with modern technology and approved by PORLA, PORIM or MARDI;
 - (D) if the agricultural land to be developed as agro tourism, golf course, holiday homes and others;
 - (E) if the agricultural land is situated in a zoning area other than agriculture; or
 - (F) if the State Authority considers that a project to be developed on that agricultural land needs to be executed.
- (g) Kelantan
 - In Kelantan, a foreign interest is only allowed to purchase a commercial unit, industrial land or agricultural land if the property is valued at RM500,000 or above.

Similarly, a foreign interest can only purchase a residential unit in Kelantan if the minimum price of the unit is RM500,000.

Approval from the State Authority under section 4333B of the National Land Code 1965

Besides obtaining EPU approval, foreign interests are required to obtain State Authority approval for the acquisition of properties in Malaysia. The application process could take about three to six months to complete. However, the State Authority approval under this section is not required for the acquisition of industrial land.

(3) Real Property Gains Tax ("RPGT")

RPGT is a tax on chargeable gains derived from disposal of property based on the RPGT Act 1976. Effective from 1 January 2014, the RPGT rates imposed on non-citizens and foreign companies are as follows:

| Disposal | Non-Citizens (does not include permanent resident) | Foreign Company |
|-----------|--|-----------------|
| < 3 years | 30% | 30% |
| < 4 years | 30% | 20% |
| < 5 years | 30% | 15% |
| > 5 years | 5% | 5% |

(4) Stamp Duty

Stamp duty is payable on the instrument to effect a transfer of land. The following are the rates of stamp duty payable:

| Conveyance, assignment or transfer | | | | |
|---|------------|-------------------------------|-------------------|---|
| Properties | Value (RM) | Rate | Duty payable (RM) | Loan |
| On the first | 100,000 | RM1 per RM100 or part thereof | 1,000 | Ad valorem rate of RM0.50 for every RM100 or part thereof |
| On the next | 400,000 | RM2 per RM100 or part thereof | 8,000 | |
| | 500,000 | | 9,000 | |
| In excess of | 500,000 | RM3 per RM100 of part thereof | | |

Effective from 1 January 2018, the rate of stamp duty on the instrument to convey, assign or transfer in excess of RM1million will be increased from 3% to 4%.

C. Conclusion

Premised on the foregoing, one may note that the Malaysian government has over the years increased the relevant thresholds for foreign investment in real property. It would therefore be pertinent for a foreign investor to consider the various conditions before investing in the Malaysian real property sector.

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12 FRANCHISE LAW

In a slow economy, starting a franchise business seems to have been a preferred business model compared to the others so much so that the Ministry of Domestic Trade, Cooperatives and Consumerism ("**MDTCC**") is considering to amend the Franchise Act 1998 ("**Act**") to further enhance the industry due to its RM26.8 million gross domestic product contribution in 2015 – The Star Online, 17 June 2016.

Like any business model, with the right framework, franchising can be a successful business expansion strategy as opposed to traditional business models. However, before becoming a successful franchisor, the franchisor should also consider the requirements of the Act that heavily regulates the franchise industry in Malaysia.

A. The Law and its Scope

The franchise industry in Malaysia is mainly governed by the Act. It provides for the registration of as well as regulation of any franchise related matters. It also provides an extensive definition of what is considered a franchise under the Act.

Generally, a franchise refers to a contract / an agreement where a franchisee is granted the right to operate a franchise business following a set of rules / guidelines (also known as franchise system) along with the right to use the trade mark, trade secret or any confidential information by the franchisor. In addition, unlike a licensing arrangement, a franchisor has the right to exercise continuous control over the franchisee's franchise business during a franchise term. Under the Act, a franchise term must be for a period of 5 years and above ("**Minimum Term**").

B. Registration Requirements

Preliminary requirements

The Act requires a franchisor (be it local or foreign) to register its franchise with the Franchise Development Division of MDTCC ("**Franchise Division**") before a franchise business commences operation / a franchise business is offered for sale.

An application can be submitted online by anyone through the Malaysian Franchise Express portal at <http://myfex.kpdnkk.gov.my/portal/> ("**Application**"). To facilitate the registration process, a franchisor should consider operating at least 1 franchise outlet for 3 years due to the Act's requirement to have the franchisor's current audited financial statements of 3 years ("**Statements**") submitted to the Franchise Division.

A master franchisee may not need to submit the Statements if certain requirements are met for example, the master franchisee has operated the franchise business for more than 1 year or the master franchisee has only been incorporated for less than 3 years. However, before a master franchisee submits the Application to the Franchise Division to obtain its approval that the Statements is not required, the master franchisee should consider whether such an application will impact any party's commercial arrangements on the commencement / operation of the franchise business due to the length of time required by the Franchise Division to approve these approvals.

(1) **Registration of a franchisor (whether local or foreign)**

According to the Act, a franchisor refers to a person who grants a franchise to a franchisee and includes a master franchisee in relation to its relationship with a sub-franchisee.

Generally, a fine will be imposed by the Registrar of Franchise ("**Registrar**") if a franchisor is found by the Registrar to have failed to register as required by the Act as follows:

- (a) a fine not exceeding RM250,000.00 for a body corporate; or
- (b) a fine not exceeding RM100,000.00 if the person who defaults is not a body corporate.

(2) **Registration of a franchisee of a foreign franchisor**

Before a franchisee intends to commence the franchise business, the franchisee who has been granted a franchise from a foreign franchisor shall apply to register the franchise with the Franchise Division.

Likewise, where a franchisee has been granted approval from a foreign franchisor to sell the franchise business, the franchisee is also required to register such approval with the Franchise Division.

(3) Registration of a franchisee of a local franchisor

Where a franchisee has been granted a franchise from a local franchisor or a local master franchisee, the franchisee must register the franchise business with the Franchise Division by way of the Application within 14 days from the date of signing the franchise agreement between the franchisor and the franchisee.

(4) Sale of franchise by a foreigner in Malaysia

Where a foreign person intends to sell a franchise in Malaysia or to any Malaysian citizen, the foreign person is required to submit an Application to the Franchise Division.

C. The Franchise Agreement and the Disclosure Documents

As part of the registration requirements, the Act requires a copy of the franchise agreement to be submitted to the Franchise Division for approval before it is signed between the parties. After obtaining the approval from the Franchise Division, the Act requires the franchisor to provide a set of documents / information (ie all the documents / information submitted by the franchisor in support of the Application) to the franchisee at least 10 days before the franchise agreement is signed by the franchisee.

Additionally, the Act also provides for certain mandatory provisions to be included in the agreement. Failure to include these provisions will render a franchise agreement null and void. Some of the provisions are:

(1) Confidential information and prohibition against similar business

The franchisee must provide to the franchisor a written guarantee that during the term and for two years after the franchise agreement has ended, the franchisee, its directors and their spouses and immediate family, and its employees will not disclose confidential information or engage in businesses similar to the franchise operated by the franchisor.

(2) Cooling off period

A franchise agreement must also provide for a cooling off period of not less than 7 working days during which the franchisee has the option to terminate the agreement and be refunded all monies paid to the franchisor, save for reasonable expenses incurred by the franchisor in preparing the agreement.

(3) Extension of a franchise term

The Act requires the Minimum Term for a franchise with an option for the franchisee to apply for an extension of the franchise term on similar conditions for a further term or not less favourable than the conditions in the previous franchise agreement. Save where the franchisee has breached the terms of the previous franchise agreement or where the franchisee gives the franchisor a written notice of his intent not to renew the franchise agreement, the franchisor may only refuse to renew the franchise if he agrees to compensate the franchisee. In the event the franchisee intends to apply for an extension of the Minimum Term, the franchisee must give a written notice to the franchisor not less than 6 months prior to the expiration of the franchise term.

Alternatively, the franchisor may waive any provision in the franchise agreement which prohibits the franchisee from conducting substantially the same business under another trade mark in the same area prior to the expiration of the franchise agreement.

(4) Termination

Under the Act, a franchisor may not terminate a franchise agreement before the expiration date except for a "good cause". An example of a "good cause" is when a franchisee fails to remedy a breach after the franchisor has given a notice of, and an opportunity to remedy, the breach.

Though a franchise term must not be less than the Minimum Term, a franchise term may be terminated before the expiry of the minimum term in the following circumstances:-

- (a) where both parties to the franchise agreement agree to a termination; or
- (b) where the court has decided that there are certain conditions in the franchise agreement which merit the agreement to be terminated earlier than the minimum term.

(5) General requirements

Where a franchisee is required to make payment for the purpose of the promotion of the franchise, the franchisor must establish a promotion fund to be managed under a separate account, used solely for the purpose of payment by franchisees for the promotion of the product under the franchise.

(6) Annual report

The franchisor must submit an annual report to the Registrar in the prescribed form within 6 months from the end of each financial year of the franchise business. The Act allows the Registrar to cancel the registration of the franchise on its own accord if the annual report is not submitted.

(7) Advertisement of franchise

Any person who wishes to publish, distribute or use any advertisements offering to buy or sell a franchise is required to file a copy of the advertisement with the Registrar at least 5 days before the first publication, distribution or use of the advertisement.

D. Conduct and obligations of a franchisor and a franchisee

(1) Conduct of parties

- (a) The Act provides for the conduct of the parties as follows:-
 - (i) the franchisor and the franchisee must act in an honest and lawful manner and must endeavour to pursue the best franchise business practice of the time and place;
 - (ii) the franchisor and the franchisee in their dealings with one another shall avoid substantial and unreasonable overvaluation of fees and prices;
 - (iii) the franchisor and the franchisee in their dealings shall avoid conduct which is unnecessary and unreasonable in relation to the risks to be incurred by one party; and
 - (iv) the franchisor and the franchisee in their dealings shall avoid the conduct that is not reasonably necessary for the protection of the legitimate business interests of the franchisor, franchisee or franchise system.
 - (v) The franchisee must also operate the business separately from the franchisor, and the relationship of the franchise with the franchisor must not at anytime be considered as a partnership, service contract or agency i.e. if Party A has equity participation in Party B, Party B shall not be regarded as a franchisee of Party A and do not fall within the definition of a "franchise".

(2) Obligations of a franchisor and a franchisee

- (a) In the event of a breach of contract by a franchisee, a franchisor must give a written notice about the breach and allow the franchisee time to remedy the breach. The franchisor must also provide assistance to a franchisee to operate his business, such as the provision or supply of materials and services, training, marketing and business or technical assistance.
- (b) One of the obligations of a franchisee is that, a franchisee must pay the franchise fees, royalty fees, promotion fees or other payment as provide din the franchise agreement to the franchisor. It is vital that a franchisor and a franchisee protects the consumer's interests at all times.

E. Offences and Penalties

The Act provides for various offences and penalties, amongst others, are as follows:-

(1) Holding out a franchise business

A person who assumes / uses the term "franchise" / any words indicating the carrying of a franchise business without the required approval from the Franchise Division will usually be liable for:

- (a) a fine not exceeding RM250,000.00 for a body corporate; or
- (b) a fine not exceeding RM100,000.00 if the person who defaults is not a body corporate.

F. General penalty for any other offence not specifically provided under the Act

A person who commits an offence under the Act for which no penalty is expressly provided shall, on conviction, be liable to the following:-

- (a) a fine not less than RM10,000.00 and not more than RM50,000.00 for a body corporate; or
- (b) a fine of not less than RM5,000.00 and not more than RM25,000.00 if the person who defaults is not a body corporate.

The legal framework of franchising in Malaysia brings greater protection for Malaysian businesses. Through proper implementation, the Act will encourage innovation and economic growth. But franchisors should also be aware of the laws in place to establish franchise systems.

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13 ENVIRONMENTAL LAWS

In promoting sound and sustainable development for environment preservation in Malaysia, the Malaysian government has established legal and institutional frameworks to ensure that environmental factors are considered at the early stages of project planning. Legal and institution arrangements for environmental protection fall under the purview of the Malaysian Department of Environment ("**DOE**") which is under the jurisdiction of the Ministry of Natural Resources and Environment ("**MONRE**").

In Malaysia, Environmental Impact Assessment ("**EIA**") is required for activities prescribed under the Environmental Quality (Prescribed Activities) (Environmental Impact Assessment) Order 2015. Those industrial activities that are not subject to the mandatory EIA requirements are nevertheless subject to various regulations under the Environmental Quality Act, 1974, as mandated by S34A of the Environmental Quality Act 1974 ("**EQA**"). The EIA is conducted with the aim of achieving the following objectives:

- (a) To examine and select the best project options available;
- (b) To identify and incorporate into the project plan appropriate abatement and mitigating measures;
- (c) To predict significant residual environmental impacts;
- (d) To determine/predict the amount of residual environmental impacts; and
- (e) To identify the environmental costs and benefits of a particular project to the community.

A. Environmental Requirements

Under the EQA and the regulations, industrial activities require the following approvals from the Director General of Environmental Quality prior to project implementation:

- (a) EIA reports - under Section 34A of the EQA (for prescribed activities);
- (b) Site suitability evaluation (for non-prescribed activities);
- (c) Written permission to construct - under Section 19 of the EQA (for prescribed premises-scheduled wastes treatment and disposal facilities, crude palm oil mills and raw natural rubber processing mills);
- (d) Written approval for installation of incinerator, fuel burning equipment and chimney – under Environmental Quality (Clean Air) Regulation, 1978, EQA; and
- (e) Licence to use and occupy prescribed premises and prescribed conveyances - under Section 18 of the EQA.

(2) Environmental Impact Assessment for Prescribed Activities

Prescribed Activities

- (a) All prescribed activities must necessarily obtain EIA approval from the Director General of Environment prior to attaining the approval of the relevant Federal or State Government authority for the implementation of the project.
- (b) If the proposed activity is categorised as a "prescribed activity" under the Environmental Quality (Prescribed Activities) (Environmental Impact Assessment) Order 2015, an EIA study needs to be conducted and thereafter, the EIA report has to be submitted to the Director General of Environmental Quality for approval. Depending on the type of prescribed activity, an EIA report will also be required for public display and public comment at place and within the time determined by the Director General of Environmental Quality, to obtain public comment in relation to that report.

EIA Study and Report

An EIA Study has to be conducted by competent individuals who are registered with the Department of Environment ("**DOE**") under the EIA Consultant Registration Scheme. The DOE will reject EIA reports which are conducted by individuals who are not registered with the DOE.

The list of prescribed activities can be found under the First and Second Schedules of the Environmental Quality (Prescribed Activities) (Environmental Impact Assessment) Order 2015.

DOE also requires that a Detailed Environmental Impact Assessment ("DEIA") be conducted for certain activities, which include the following:

- (a) Iron and steel industry
- (b) Pulp and paper mills
- (c) Cement plant
- (d) Construction of coal-fired power plant
- (e) Construction of dams for water supply and hydroelectric power schemes
- (f) Land reclamation
- (g) Incineration plant for schedule wastes and solid wastes
- (h) Construction of municipal solid wastes landfill facility

Notwithstanding the list of activities prescribed by the DOE which requires a DEIA, the Director General of Environment has the prerogative to request a detailed assessment of a project which has significant impacts to the environment of projects which are located in or adjacent to environmentally sensitive areas.

(3) Site Suitability Evaluation for Non-Prescribed Activities

- (a) All potential industrial sites for the establishment of new industrial activities which are not subject to EIA Order, particularly the small and medium scale industries ("SMI"), are also advised to refer to the DOE for consideration and advice on site suitability.
- (b) In considering the site suitability, the DOE will take into account the gazetted structure/local plans, surrounding land use, provision of set-backs or buffer zones, the capacity of the area to receive additional pollution load, and waste disposal requirements.
- (c) For potentially hazardous type of industries, the project proponent may be required to submit a Risk Assessment Study to the DOE as part of the site consideration, in accordance with the EIA Guidelines for Risk Assessment 2004, as published by the DOE.

(4) Written Permission

Any person intending to carry out activities as listed below shall obtain prior written permission from the Director General of Environmental Quality:

Construction on any land or any building; or carrying out works that would cause the land or building to become prescribed premises as stipulated under Section 19 of the EQA:

- (a) scheduled wastes treatment and disposal facilities;
- (b) crude palm oil mills; and
- (c) raw natural rubber processing mills.

Any person intending to carry out any work on any vehicle or ship, or premises that would cause the vehicle or ship or premises to become a prescribed conveyance or prescribed premises as stipulated under Section 19 of the EQA.

(5) Written Approval

Any person intending to carry out activities as listed below shall obtain prior written approval from the Director-General of Environment Quality:

- (a) New installation near dwelling area as detailed out in Regulation 4 and First Schedule of the Environmental Quality (Clean Air) Regulations 1978.
- (b) Any erection (including incinerators), installation, resiting or alteration of fuel burning equipment that is rated to consume pulverised fuel or solid fuel at 30 kg or more per

hour, or liquid or gaseous fuel at 15 kg or more per hour as stipulated in Regulation 36 of the Environmental Quality (Clean Air) Regulations 1978.

- (c) Any erection, installation, resiting, or alteration of any chimney from or through which air impurities may be emitted or discharged as stipulated in Regulation 38 of the Environmental Quality (Clean Air) Regulations 1978, save for a chimney serving a private residence.

(6) Licence to Occupy Prescribed Premises and Prescribed Conveyances

- (a) A licence is required to occupy and operate prescribed premises namely as below:
 - (i) crude palm oil mills,
 - (ii) raw natural rubber processing mills, and
 - (iii) treatment and disposal facilities of scheduled wastes
- (b) Application shall be made after obtaining written permission and written approval. Licensing fee will be charged for every licence issued for palm oil, raw natural rubber processing mills and facilities for treatment and disposal of schedule waste, and prescribed conveyances.
- (c) From 15 August 2005 onwards, licence is required to use prescribed conveyances as stipulated in the Environmental Quality (Prescribed Conveyance) (Scheduled Wastes) Order 2005. A conveyance is categorised as prescribed conveyance namely: any vehicle or ship of any description which are:
 - (i) propelled by a mechanism contained within itself;
 - (ii) constructed or adapted to be used on land or water; and
 - (iii) used for the movement, transfer, placement or deposit of scheduled wastes.

(7) Environmental Requirements on Scheduled Wastes

- (a) Section 34(B) of the EQA states that the DOE's prior written approval is required for a person to place, deposit or dispose of Scheduled Wastes, except at prescribed premises approved by the DOE. Any person who contravenes this section shall be punishable with imprisonment for a term not exceeding 5 years and shall also be liable to a fine not exceeding RM500,000.
- (b) The list of Scheduled Wastes can be found in the First Schedule of the Environmental Quality (Schedules Wastes) Regulations 2005.
- (c) Every waste generator shall within 30 days from the date of generation of scheduled wastes, notify the Director General of Environmental Quality of the new categories and quantities of scheduled wastes which are generated.
- (d) Land farming, incineration, disposal and off-site facilities for recovery, storage and treatment can only be carried out at prescribed premises licensed by the DOE. However, with the signing of the Scheduled Waste Treatment and Disposal Agreement between the Malaysian government and Kualiti Alam Sdn. Bhd, granting Kualiti Alam an exclusive concession for off-site scheduled waste treatment and disposal for Peninsular Malaysia, all off-site treatment and disposal (incineration, wastewater treatment, storage and secure landfill) of Scheduled Wastes are not allowed.

(8) Non-Compliance with the EQA

Investors should be aware of possible two-fold consequences when they infringe provisions of the EQA. A wrongdoer who infringes provision(s) of the EQA may be held liable not only for his breach but also for the non-compliance of the notice to remedy such committed breach.

For example, where a person breaches Section 31(1) and (2) of the EQA (Order to require owner or occupier to install, operate, repair etc.) and fails to remedy the breach within a certain period, Section 31(3) EQA states that the offender shall be guilty of an offence and liable to a fine not exceeding RM25,000 and/or imprisonment for a period not exceeding 2

years. In addition, the offender shall pay a further fine of RM1,000 per day so long as the offence continues.

Section 41 of the EQA states that the general penalty for breaches of provisions within the EQA shall result in a fine not exceeding RM10,000 and/or imprisonment for a period not exceeding 2 years.

Section 43 of the EQA states that breaches of provisions of the EQA or any of its Regulations committed by a company, the director, officer or individual(s) acting in such capacity shall be deemed to be guilty of that offence unless he or she is able to prove that the offence was committed without his consent. If found guilty, the director will not only be subject to a penalty in the form of a fine but possibly to imprisonment for such contravention of the EQA.

B. Incentives for Environmental Management

With a view to encouraging investments on the environmental sector into Malaysia, various tax incentives have been allocated pursuant to the Promotion of Investments Act 1986 and the Income Tax Act 1967 for companies actively engaging in the following activities:

- (a) forest plantation projects
- (b) waste recycling activities;
- (c) energy conservation services;
- (d) energy generation using renewable energy resources; and
- (e) generation of renewable energy for own consumption.

Depending on the activity and subject to the terms and conditions imposed by Malaysian Investment Development Authority (MIDA), the incentives that these companies are entitled to may include:

- (a) Pioneer Status – income tax exemption at varying percentages of statutory income within a specified period
- (b) Investment Tax Allowance – on the qualifying capital expenditure incurred within a specified period.

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14 INTELLECTUAL PROPERTY

The laws and regulations enacted in Malaysia with respect to intellectual property generally conform to the international standards for its protection. Malaysia is a signatory to or member of the following international conventions and treaties:

- (a) Paris Convention;
- (b) Berne Convention;
- (c) Agreement on Trade Related Aspects on Intellectual Property Rights;
- (d) World Intellectual Property Organisation;
- (e) WTO; and
- (f) Patent Cooperation Treaty ("**PCT**").

Malaysia is also committed to the ASEAN Economic Community Blueprint which requires Malaysia to accede to and enforce the Madrid Protocol and the Hague Agreement by 2015.

The Malaysian Intellectual Property Corporation ("**MyIPO**") is responsible for the registration of trade marks, patents, copyrights and industrial design. MyIPO's website can be found at the following address: www.myipo.gov.my

A. Trade Marks

A trade mark is a mark used in relation to a business and it includes a "device, brand, heading, label, ticket, name, signature, word, letter, numeral or any combination thereof." Proprietors of trade marks may assert their rights to the trade marks either through the legal recourses made available to them for registration under the Trade Marks Act 1976, or for non-registered trade marks, through the tort of passing off.

(1) Unregistered Trade Marks

The tort of passing off is an action founded in common law which protects the goodwill of a person or business which may be damaged by usurpation of a trade mark. It provides protection for both unregistered and registered trade marks, but is the only recourse available for unregistered trade marks.

To bring a valid cause of action for passing off, the following elements must be established:

- (a) there is goodwill and reputation of the business of the proprietor;
- (b) misrepresentation made by the infringer which leads the public to believe that the goods or services of the infringer are associated with the goods and services of the proprietor; and
- (c) the goodwill and reputation of the proprietor's business have suffered damage by reason of such misrepresentation.

An action in passing off is essentially an action seeking a remedy for damage caused to the goodwill and reputation of the plaintiff's business. The basis of the action lies on the misrepresentation of the wrongdoer. It is worth noting that such misrepresentation may be express or implied. For example, the misrepresentation may be implied through the packaging of the goods. The scope of an action in passing off is therefore wider than infringement of a registered trade mark.

(2) Registered Trade Marks

Registration of trade marks under the Trade Marks Act 1976 grants a proprietor the exclusive right to use the trade mark in Malaysia. A certificate of registration provides easy prima facie evidence of ownership of the trade mark. Under the Trade Descriptions Act 2011, a proprietor is required to have a registered trade mark in order to apply for a trade description order from the High Court – a declaratory order declaring that a trade mark or get-up used by an infringer is false – to initiate enforcement.

In order for a trade mark to be registrable, it must be considered "distinctive", which should comprise at least one of the following:

- (a) the name of an individual, company or firm represented in a special or particular manner;
- (b) the signature of the applicant for registration or of some predecessor in his business;
- (c) an invented word or words;
- (d) a word having no direct reference to the character or quality of the goods or services not being, according to its ordinary meaning, a geographical name or surname; or
- (e) any other distinctive mark.

An applicant may be an individual, a sole proprietorship, a partnership, an association or a body corporate. If the applicant does not reside or carry on business in Malaysia, the applicant must appoint a trade mark agent to act on its behalf. Applications for registration of trade marks may be filed at MyIPO either manually or online.

Once an application is made, MyIPO will examine the application. MyIPO may object to the application on grounds that the trade mark is not registrable for failure of being distinctive (or any other reason under law), or there are other similar registrations and applications that are identical or confusingly similar. If the application is accepted, the application will be advertised in the Malaysian government Gazette for a period of 2 months. If there are no successful oppositions by third parties within such gazette period, the trade mark will be successfully registered, whereupon the applicant will be granted a certificate of registration for the trade mark.

Under the Trade Marks (Amendment) Regulations 2011, trade mark applicants may, for a fee, file for expedited examination provided the request is submitted within four months from the initial trade mark application date.

A trade mark is valid for 10 years from the date of application and is renewable upon expiry.

B. Patents

A patent is a monopoly right over an invention for a limited period of time. The invention has to be technical in nature and must contribute to any field of technology. In Malaysia, patents are protected under the Patents Act 1983.

To qualify for patent protection, the invention must satisfy all of the following requirements:

- (a) it must be novel and must not have been made known to the public anywhere in the world before the filing date or priority date of the application;
- (b) it is non-obvious in that it would not have occurred to a person reasonably skilled in the particular field to come up with the same invention; and
- (c) it is capable of industrial application in any kind of industry.

An invention is not novel if there had been prior disclosure of essential elements of the invention anywhere in the world, including prior patent applications.

However, prior patent disclosures may be disregarded in the following circumstances:

- (i) where prior disclosure of the invention was made in confidence; or
- (ii) where prior disclosure of the invention was made by the applicant of the patent himself or his predecessor in title and such disclosure occurred within one year preceding the date of the patent application.

Applications for registration of a patent may be filed at MyIPO. The applicant will have to lodge, amongst others, the specification of the invention which comprises the description of the invention, drawings and a set of claims that define the invention for the purpose of patent protection. In addition, the applicant will have to lodge an abstract which is a summary of the invention that includes the most essential elements of the invention. The abstract is not part of the specification but is used in the publication of the application. A successful patent registration in accordance to the above would grant the applicant patent protection within Malaysia.

In addition to the above registration, the applicant may also opt to file an international application under the PCT system, which makes it possible to seek patent protection for an

invention simultaneously in each of a large number of countries by filing an "international" patent application.

As the PCT is in force in Malaysia, patent protection may also be obtained by either entering the national phase of a PCT application 30 months from the earliest priority date.

A patent is valid for 20 years from the date of filing of the application.

C. Copyright

Copyright protection in Malaysia is automatic and accorded by the Copyright Act 1987 without any requirement for registration or other action. Copyright gives the creator of an original work, for a limited period, exclusive rights to do certain acts with the work.

Copyright is granted to the following works:

- (a) musical works;
- (b) literary works;
- (c) artistic works;
- (d) dramatic works;
- (e) films;
- (f) sound recordings;
- (g) broadcasts; and
- (h) published editions.

Copyright however may only subsist in a work if it complies with all of the following:

- (a) it belongs to one of the categories of copyright-protected works as set out above;
- (b) the work complies with the requirement as to form in that it has been written down, recorded or reduced to or in any other material form;
- (c) the work is original. Originality here does not denote novelty. A work is original if it originates from the author who had made sufficient effort to produce such work. The amount of effort required is not defined and is a question of fact; and
- (d) the work complies with qualifications for copyright as follows:
 - (i) the author is a permanent resident of Malaysia or member country of the Berne Convention;
 - (ii) the work is first published in Malaysia or in any member country of the Berne Convention; and
 - (iii) the work was created in Malaysia or in any member country of the Berne Convention

The duration of copyright protection granted is as follows:

- (a) For literary, musical or artistic works, a copyright subsists during the life of the author plus 50 years after his death.
- (b) For published editions, copyright subsists for 50 years from the beginning of the calendar year in which the work was first published.
- (c) For sound recordings, copyright subsists for 50 years from the beginning of the next calendar year following the year which the recording was first published.
- (d) For broadcasts, copyright in a broadcast subsists for 50 years from the beginning of the next calendar year following the year in which the broadcast was first made.
- (e) For films, copyright in a film subsists for 50 years from the beginning of the next calendar year following the year which the film was first published.

Copyright owners will have the exclusive right to control the doing of the following acts in Malaysia in relation to the work:

- (a) reproduction of the work in any material form;
- (b) communication to the public;
- (c) performance, playing or showing to the public;
- (d) distribution of copies of the work to the public by sale or other transfer of ownership;
- (e) commercial rental and lending to public.

A copyright infringement occurs when any of the activities under the exclusive control of the copyright owner are conducted without his authorisation.

D. Industrial Design

An industrial design is a novel visual appearance of an article which can be reproduced by industrial means and defined as the features of shape, configuration, pattern or ornament applied to an article by an industrial process or means, being features which in the finished article appeal to and are judged by the eye, though may be constituted by elements which are three-dimensional (*the shape of the article*) or two-dimensional (*pattern, ornament*). Industrial designs are protected by the Industrial Designs Act 1996.

Industrial design does not include the following:

- (a) method or principle of construction; or
- (b) features of shape or configuration of an article which:
 - (i) are dictated solely by the function which the article has to perform.
 - (ii) are dependent upon the appearance of another article of which the article is intended by the author of the design to form an integral part.

Registered industrial designs are protected in that it may not be lawfully copied or imitated without the registered owner's authorisation.

For an industrial design to be registrable, it has to be new and not disclosed anywhere in the world prior to application for registration.

The initial duration of registration for a Malaysian industrial design is 5 years from the date of filing the application for registration. An application can be renewed for 4 further 5-year periods, giving a maximum period of protection of 25 years

An application to register an industrial design may be filed with MyIPO. Upon successful completion of a formal examination, the design will be registered and a registration certificate will be issued.

E. Geographical Indication

Protection of a geographical indication is accorded by the Geographical Indication Act 2000 and Geographical Indications Regulations 2001. A geographical indication is a sign used on products that have a specific geographical origin and possess qualities or a reputation that are due to that origin.

The geographical indication must identify a product as originating in a given place. In addition, the qualities, characteristics or reputation of the product should be essentially due to the place of origin. Since the qualities depend on the geographical place of production, there is a clear link between the product and its original place of production.

A geographical indication indicates where the goods are produced and has characteristics that are attributable to the place of the geographical origin. e.g. 'Sabah Tea'. Geographical indications can be used on natural or agricultural products.

When an application for registration of a geographical indication complies with the requirements and is not contrary to public order or morality, a certificate of registration will be issued to the applicant.

Such a certificate shall be prima facie evidence of the facts stated in the certificate and of the validity of the registration.

A certificate of registration is valid for 10 years from the date of filing and is renewable upon the expiry of 10 years.

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15 INFRASTRUCTURE

A. Public Private Partnerships

(1) Introduction

In Malaysia, the Government undertakes several forms of Public-Private Partnerships ("PPP"). The two main forms of PPP in Malaysia are Privatisation and Private Finance Initiative ("PFI").

Collaboration between the private and public sector in Malaysia can be traced back to 1981 when the Government introduced the Malaysian Incorporated Policy. This meant that the nation was to be run like a corporation with the private sector forming the commercial and economic arm of the national enterprise, whilst the government made policies, gave directions and provided support.

The Privatisation Policy was launched in 1983 to support the Malaysia Incorporated Policy through various policies and guidelines such as the Privatisation Policy 1983, Guidelines on Privatisation 1985 and Privatisation Master Plan 1991.

The Ninth Malaysian Plan ("9MP") introduced the PFI as a new measure under the privatisation programme in Malaysia. Changes in privatisation brought about by the PFI include focusing on projects proposed by the Government based on national development priorities. The 9MP also hoped to increase opportunities for the private sector to participate in the development of the infrastructure and utilities division through the PFI.

In the Tenth Malaysian Plan ("10MP"), the government reinforced its commitment to PPP and identified 52 high-impact PPP projects worth RM63 billion for implementation. Under the 10MP, the private sector could also participate in several projects led by Government-linked companies ("GLCs"). To help the private sector finance these projects, a facilitation fund of RM20 billion ("**Facilitation Fund**") was set up to assist the private sector bridge the viability gap for projects that have strategic impact and huge economic spill overs.

In 2015, the Malaysian Government introduced the Eleventh Malaysian Plan ("11MP"). The 11MP plans to strengthen the infrastructure sector to support economic expansion. In their plans to strengthen infrastructure, the Government will focus amongst others, on building an integrated need-based transport system. Some of these infrastructures will be undertaken through PPP. The 11MP also provides strategies which will be formulated in consultation with the private sector.

The terms PFI and PPP are often used interchangeably. Based on the definition provided in the 9MP, PFI means:

"..the transfer to the private sector of the responsibility to finance and manage a package of capital investment and services including the construction, management, maintenance, refurbishment and replacement of a public sector asset...which creates a stand-alone business. The private sector will create the asset and deliver a service to the public sector client. In return, the private sector will receive payment...commensurate with the levels, quality and timeliness of the service provision throughout the concession period. The structure of the lease rental payment for the PFI projects will guarantee a total return to the concessionaire's capital investment expenditures including financing cost repayment and profit to investment. The asset and facilities will be transferred to the public sector at the expiry of the concession period".

According to the Public-Private Partnership Guidelines (2009) drafted by the Public-Private Partnership Unit ("3PU"), otherwise known as "UKAS" or "**Unit Kerjasama Awam Swasta**", the PFI principles form a subset of the PPP principles.

UKAS is a government agency within the Prime Minister's Department responsible for PPP in Malaysia and was established in April 2009. It has the following main functions:

- (a) carrying out PPP projects through privatisation and PFI;
- (b) managing the Facilitation Fund;
- (c) consulting on the terms and conditions for PPP and Facilitation Fund concessions;

- (d) inspecting and evaluating technical and financial proposals of the PPP projects'; and
- (e) developing strategic collaborations with foreign agencies.

UKAS maintains a website at the following link: <http://www.ukas.gov.my> and all matters related to PPP implementation including tender advertisements, policies and guidelines are posted on the website.

(2) Guidelines and Publications on PPP

There are no legislations governing PPP projects. However, the following are key publications released on PPP:

- (a) Malaysian Incorporated Policy 1983;
- (b) Privatisation Policy 1983;
- (c) Guidelines on Privatisation 1985;
- (d) Privatisation Master-plan 1991;
- (e) Private Finance Initiative under the Ninth Malaysia Plan;
- (f) Public-Private Partnership Guidelines 2009;
- (g) Private Finance Initiative under the Tenth Malaysia Plan; and
- (h) Facilitation Fund Guidelines (2015).

(3) Structure of PPP

The Public-Private Partnership Guidelines (2009) was drafted by 3PU ("**3PU Guideline**") and it sets out the key principles of Malaysia's PPP programmes as embodied in the 9MP. The 3PU Guidelines acknowledged that the terms "PPP" and "PFI" may be used interchangeably and that "PFI" is a subset of "PPP".

The 3PU Guideline defines PPP as involving "the transfer to the private sector of the responsibility to finance and manage a package of capital investment and services including the construction, management, operation, maintenance, refurbishment and replacement of public sector assets such as buildings, infrastructure, equipment and other facilities, which creates standalone business." This definition has been taken from the definition of PFI under the 9MP.

According to the 3PU Guideline, in these PPP projects, the private party contracts to deliver public infrastructure-based services over a long period of time. The private party will raise its own funds to finance the whole or part of the assets that will deliver the services based on agreed performances. The public sector will, in turn, compensate the private party for these services.

Some of the key features of PPP projects are as follows:

- (a) The public sector specifies the output of a service while the private sector determines the required input to achieve the specified output as set out by the public sector.
- (b) Payment for services of the private sector is based on pre-determined targets and standards of performance as set out by the public sector.
- (c) The private sector is responsible for the design, construction, finance and maintenance of the assets of the PPP project.
- (d) The ownership of the assets of the PPP project will be transferred to the Government at end of concessionaire.
- (e) The risk is allocated between both public and private sectors depending on who is best able to manage the risk.
- (f) Projects awarded are based on lowest total cost over concession period, known as Whole Life Cycle Costing ("**WLCC**").

The 3PU Guidelines states that the main driver of the PPP Programme is Value for Money ("**VfM**"), which is the optimum combination of whole life cost and quality to meet the users' requirements. Generally, VfM may be achieved through:

- (a) allocation of risks between the private and public sector;
- (b) long term nature of contracts which embodies WLCC;
- (c) the use of output specification which allows bidders of PPP projects to innovate to reduce costs;
- (d) competition that provides fair value of the project;
- (e) performance-based payment mechanism; and
- (f) private sector management expertise and skills.

(4) Parties involved in a PPP contract

There are several parties involved in a PPP contract, roles and responsibilities of which are set out in the table below:

| Public Sector | Special Purpose Vehicle ("SPV") | Financiers | Construction Contractors |
|---|--|---|---|
| Identifies, assess and prioritises projects for implementation. | Raises the funds to develop and maintain the assets. | Responsible for the financing of the project is provided by the combination of equity investors and debt providers. | Responsible to carry out construction works according to the contract with the SPV. |
| Prepares and manages the projects for competitive bidder process. | Makes payments to the subcontractors, financiers and other creditors. | | |
| Provides clear objectives and scoping of the projects, output specifications, payment mechanism and KPIs. | Delivers the agreed services to the public sector according to the levels, quality and timeliness of the service provision throughout the contract period. | | |
| Responsible to ensure equitable and optimal allocation of risks. | Ensures the assets are well maintained and available for use throughout the concession period. | | |
| Responsible for contract management and performance monitoring. | Ensures that revertible assets/facilities are transferred in good working order to the public sector at the end of the concession period. | | |
| Responsible for safeguarding public interests. | | | |

(5) Submission of PPP Proposals

The 3PU Guideline state that a PPP proposal will only be considered if there is a need on the part of the Government for the project after taking into account the benefits/probity as a whole including socio-economic impacts, value for money and costs savings to the Government, quick delivery of the project and service enhancement and increased level of accountability, efficiency and effectiveness.

The 3PU Guidelines also state that the selection of PPP projects involves a 'filtering process' whereby certain general criteria should be met and they are set out as follows:

- (a) output specification can be clearly identified and quantified;
- (b) economic life of the asset or service should be at least 20 years;
- (c) projects with technological obsolescence risk (technology used which will be superseded in short term) will not be considered; and
- (d) project sponsor must be financially strong with a paid up capital of the SPV to be at least 10% of the project value.

All PPP proposals should be submitted directly to the relevant ministry/agency. Information required for submission of PPP proposals include the following:

- (i) an executive summary of the submission;
- (ii) evidence of financial stability and statement of financial capability, including access to capital (debt and equity) and Letters of Support from potential lenders;
- (iii) evidence of performance capability and expertise;
- (iv) a detailed business plan and financial plan;
- (v) PPP modality options and the preferred option, concession period, risk analysis and allocation and financing scheme; and
- (vi) proposed payment mechanism based on service-delivery output specifications and KPIs.

(6) Tender Advertisements and Process Flow of PPP Projects

Tender advertisements are posted on the UKAS website and also advertised on various media outlets. According to the 3PU Guidelines, once bidding is closed, the relevant ministry or agency will shortlist 3 companies for submission to UKAS. The PPP Committee in UKAS will then evaluate and endorse the best company and approval in principle must be obtained from the Cabinet. Once the terms and conditions with the selected company has been negotiated and finalised, a memorandum is presented to the Cabinet on the finalised terms and conditions. The PPP Agreement is then signed and the PPP project is implemented.

The Public Private Partnership Committee comprises of representatives from:

- (a) the Prime Minister Department;
- (b) the Minisry of Finance;
- (c) Attorney General's Chamber;
- (d) Economic Planning Unit;
- (e) Department of Director General of lands and Mines;
- (f) Department of Valuation and Property Services; and
- (g) the respective ministries or agencies.

(7) Models for Implementing PPP projects

According to the Official Portal of the PPP Unit, some of the models of implementing PP projects adopted in Malaysia are as follows.

- (a) **Build-Operate-Transfer ("BOT")**
This model is adopted for projects which are traditionally implemented by the Government such as public works projects. A private company will be granted a concession to undertake the financing and construction of a project and operate it for a designated period during which it is entitled to the revenue such as user charges. At the end of the concession period, the facility will be transferred to the Government at no cost. This model is commonly used for highway development and development of sewerage facilities.
- (b) **Build-Operate-Own ("BOO")**
This model is similar to a BOT project except at the expiration of the concession period, the asset is not transferred to the Government. This model is more common in power plants developed by Independent Power Producers (IPPs).
- (c) **Build-Lease-Transfer ("BLT")**
A private company is granted a concession to finance and build public facilities which upon completion will be leased to the Government. The private company will be entitled to the lease rental for the duration of the concession period but similar to the BOT model, at the expiration of the concession period, the facilities will be transferred to the Government. An example of a BLT project is the development of the Government complex in Putrajaya.
- (d) **Build-Lease-Maintain-Transfer ("BLMT")**
This is Similar to the BLT model above, a private company is granted a concession to finance, build and maintain public facilities which upon completion will then be leased to the Government. However, in this model, the payment of the lease rental by the Government to the private company is contingent upon the private company meeting service quality level or key performance indexes (KPIs) which are agreed upon in the concession agreement. At the end of the concession period, the facilities will be transferred to the Government. An example of development using this model is the Universiti Teknologi MARA (UiTM) campuses.

Recently, the Government has also introduced the Build, Lease, Operate, Maintain and Transfer approach.

(8) Facilitation Fund

The facilitation fund proposed under the 10MP is a Government initiative to facilitate the funding of PPP projects. The Government has set up a facilitation fund with an initial size of RM20 billion to support development projects implemented by the private sector. It is the Government's contribution through the cooperation of the public and private sectors. Based on the Facilitation Fund Guidelines published in May 2015, the objectives of the Facilitation Fund are to:

- (a) provide support to new private investments as an incentive to help investments become a reality;
- (b) focus on strategic prioritised areas of the State;
- (c) create strategies and implement medium and large scale projects with significant economic benefits;
- (d) enhance investor confidence and make Malaysia a preferred destination for investments; and
- (e) ensure the best ideas of the private sector be given due attention to promote innovation and competition.

The Facilitation Fund should be utilised to finance the development of basic infrastructure of a project such as access roads, bridges, utilities as well as land acquisitions for highway projects. Under the Facilitation Fund, the Government will provide support in the form of grant or conditional adjustable grant as a tipping point to bridge project viability gap. Distribution of the Facilitation Fund will be made on reimbursable basis or progressive payment. Generally

the funding limit through the Facilitation Fund is the lower of (i) 10% of the total project cost or (ii) RM200million.

Key characteristics of projects that will be considered under the Facilitation Fund include:

- (a) Investments that have high impact to the economic growth and has added value and high multiplier effects, including projects in sectors which have been identified as one of the National Key Economic Areas or as an initiative under the Malaysian Five Year Development Plan;
- (b) potential to create sustainable employment opportunities to Malaysian citizens particularly at the management and professional levels;
- (c) potential to contribute towards enhancing the country's economic competitiveness;
- (d) projects shall be technically feasible and commercially viable on a standalone basis;
- (e) value of the project investment (fixed investment) are as follows:
 - (i) is not less than RM100 million; or
 - (ii) RM 50 million and above for health services and logistics sectors; or
 - (iii) for *Bumiputera* investments worth between RM 50 million to RM 200 million, the application may be made through *Unit Peneraju Agenda Bumiputera* ("**TERAJU**"); or
 - (iv) for domestic interments which involve the maintenance and conservation of the environment or green technology worth not less than RM 20 million; and
- (f) projects with strategic value in line with the strategic thrusts outlined under the Five Year Development Plan.

Projects with the following characteristics are not eligible to be considered for the Facilitation Fund:

- (a) projects in the financial/banking sector;
- (b) projects involved in property development except for:
 - (i) *Perumahan Rakyat 1Malaysia* ("**PR1MA**");
 - (ii) real estate development projects in areas recently opened (green field) and less developed residential areas that do not have any basic infrastructures; or
 - (iii) *Program Perumahan Penjawat Awam 1Malaysia* ("**PPA1M**") which have been approved or recommended by the Special Committee of PPA1M; or
 - (iv) property development by Malay or *Bumiputera* companies above Malay reserved lands;
- (c) projects in the incubator or R&D stage;
- (d) projects which involve mergers & acquisitions;
- (e) projects that have received government allocation and/or funded by funds provided by the Government;
- (f) government procurement projects;
- (g) investment in foreign countries;
- (h) projects that are highly dependent on Government support;
- (i) Projects whereby the Government needs to bear a significant portion of the risks; and
- (j) additional funding applications for projects Facilitation Fund which have been approved.

Application for grant must be submitted to UKAS. The project proposals must contain the following information:

- (a) profile of the company;

- (b) executive summary;
- (c) detailed business plan;
- (d) employment opportunities that will be created and impact to the domestic economy;
- (e) details of the Facilitation Fund applied (amount, scope and utilisation);
- (f) project implementation timeline and Facilitation Fund disbursement schedule; and
- (g) detailed project financing document including IRR, ROE, ROI and cash flows analysis.

(9) Financial Procurement

For the private sector to fund these PPP projects, channel of funds may come from internal funding through equity or issuing bonds. Otherwise, getting listed on the stock exchange ("**Bursa Malaysia**") for equity funding is another option.

It is easier for infrastructure project companies which core business is that of infrastructure projects ("**IPCs**") to be listed on Bursa Malaysia as IPCs need not satisfy the profit test or the market capitalisation test, but must satisfy the IPC test as follows:

The applicant, either directly or through its subsidiary company, must have the right to build and operate an infrastructure project, whether located in Malaysia or outside Malaysia:

- (i) with project costs of not less than RM500 million; and
- (ii) for which a concession or licence has been awarded by a government or a state agency, in or outside of Malaysia, with a remaining concession or licence period of at least 15 years from the date of submission to the Securities Commission of Malaysia ("**SC**").

The SC may consider the listing proposal by an applicant with a shorter remaining concession or licence period from the date of submission to the SC, if the applicant fulfils the profit requirements under the profit test.

(10) Examples of PPP Projects in Malaysia

Since the introduction of the privatisation programme, hundreds of privatised projects have been implemented throughout the country. Telekom Malaysia announced the signing of two PPP agreements with the Government of Malaysia for the implementation of the High Speed Broadband Project Phase 2 ("**HSBB-2**") and the Sub-Urban Broadband Project ("**SUBB**"). Both projects will allow TM to provide a last mile access network to homes and businesses utilising fibre-to-the-home ("**FTTH**"), Ethernet-to-the-home ("**ETTH**") and VDSL2 technologies. Other notable projects include infrastructure facilities such as the North-South Highway, the development of the Light Rail Transit ("**LRT**"), the Tanjung Pelepas Port and the development of the Kuala Lumpur International Airport ("**KLIA**") projects.

In July 2016, the Office of Public-Private Partnerships of the Asian Development Bank ("**ADB**") and Melaka Green Technology Corporation signed a transaction advisory services agreement which is pitched to pave the way for a public-private partnership project to install energy efficient road lights in the state of Melaka known as the Melaka Road Lighting project. The Melaka Road Lighting project proposes the installation of more than 100,000 smart light-emitting diode road lamps across Malacca using a digital networked lighting system. The Melaka Road Lighting project is expected to cost around \$50 million and will be financed using private capital. It has been reported that under the advisory agreement, ADB will carry out a detailed project study, develop a bankable PPP structure, design a procurement strategy to identify and select a suitable private sector partner, and advise on the selection of and negotiation with the private sector partner. A key feature of the Melaka Road Lighting project is a planned "pay through savings" model with the financing costs to be reimbursed over time as a result of reduced spending on lighting through the replacement of older, more energy-intensive lamps.

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B. Rails

(1) Introduction to rail transportation in Malaysia

The rail transportation in Malaysia started in 1885 when the first railway track was built linking Taiping to Port Weld to transport tin. From a mere 12.8KM of track, it has grown tremendously over the years to the current 1,677KM linking inter cities of West Coast (between Singapore and the state of Perlis) and East Coast (between the state of Negeri Sembilan and Kelantan) in Peninsular Malaysia. In East Malaysia, there is a 134KM railway linking Tanjung Aru near Kota Kinabalu and Tenom in the interior of Sabah state.

Malaysia Industry-Government Group for High Technology ("**MIGHT**") reports in the National Rail Industry Development Roadmap that from the 1990s to 2013, the Malaysian government has invested more than RM50 billion and in 2010, the rail industry generated a turnover of approximately RM 1.7 billion and employed a workforce of approximately 9500.

Besides the intercity railway network, there is also high speed rail, light rail transit (LRT), monorail and a funicular railway line in Malaysia. The current rail operators in Malaysia are:

- (a) Keretapi Tanah Melayu Berhad ("**KTMB**");
- (b) Express Rail Link Sdn Bhd ("**ERL**");
- (c) Prasarana Malaysia Berhad (formerly known as Syarikat Prasarana Negara Berhad ("**Prasarana**");
- (d) Penang Hill Corporation ("**PHC**"); and
- (e) Sabah State Railway ("**SSR**").

(i) KTMB

KTMB is the main and oldest rail operator in Peninsular Malaysia. The 1,000mm gauge railway network consists of two main lines and several branch lines. The total length of the network was initially 1,699KM, however due to the partial dismantling work that occurred between Tanjong Pagar and Kranji in Singapore since 17 July 2011, the new total length of the network is 1,677KM.

KTMB offers intercity passenger railway (KTM Intercity) which is intended to carry patrons between stops serving cities, town and village (depending on regions). All the lines in the KTMB rail network are initially single-track but KTMB has embarked on the double-tracking and electrification project to introduce frequent intercity service at 140KM/hour. The Electric Train Service (ETS) was introduced as a result of the double tracking and is operated by ETS Sdn. Bhd., a fully owned subsidiary of KTMB.

(ii) ERL

The ERL is currently the fastest train having the speed of 160KM/hour. The ERL rail service consists of Kuala Lumpur International Airport Express ("**KLIA Express**") and KLIA Transit. The KLIA Express is a direct airport rail service from KL Sentral to KLIA while the KLIA Transit is a commuter rail service with three additional stops between the KLIA and KL Sentral. The ERL is operated by ERL Sdn. Bhd., a joint venture company between YTL Corporation Bhd, Lembaga Tabung Haji and Trisilco Equity Sdn. Bhd. with each partner holding 50%, 40% and 10% interest in the company respectively.

On the 25th of August 1997, the Malaysian government presented the company with a 30 year concession to finance, build, maintain and control the operations of the railway. The KLIA Express has also extended its line to the new KLIA2 airport when it officially opened on 2 May 2014. It was reported that the Malaysian government is looking into extending the ERL service from KLIA to the state of Malacca and is pending a feasibility study to be undertaken by the Land Public Transport Commission.

(iii) Prasarana

Prasarana is a 100% government owned company which was set up to own the assets of multi-modal public transport operator in Malaysia. It operates bus and LRT

services where its LRT service is operated by a wholly owned subsidiary, Rapid Rail Sdn. Bhd. ("**Rapid Rail**"). Rapid Rail operates 3 LRT Lines (i.e. Ampang Line, Kelana Jaya Line and Monorail Line). The Ampang Line consists of elevated or at-grade stations while the Kelana Jaya Line comprises of underground and elevated stations. The two aforementioned lines operate within Kuala Lumpur and the state of Selangor whereas the Monorail Line only operates within Kuala Lumpur.

(iv) PHC

PHC owns the funicular railway which climbs the state of Penang's hill. The first railway was constructed in 1901 and completed in 1905 but was rendered useless, due to technical faults. On 1st January 1924, the 2,007m long funicular railway was officially opened. The last upgrade was in 1977, before a complete overhaul of the system in 2010.

(v) SSR

The SSR is under the arm of the Sabah's state administration. SSR operates the only rail transport in East Malaysia. It was formerly known as North Borneo Railway and only serves 13 stations with a distance of 134KM from Tanjung Aru to Tenom.

(2) Applicable laws and regulations for rail transportation

Peninsular Malaysia

The current applicable law and regulations for rail transportation in Peninsular Malaysia is the Land Public Transport Act 2010 ("**LPTA**"). The Railways Act 1991 was repealed when the LPTA came into force on 31 January 2011. However, all subsidiary legislation made or having effect under the Railways Act 1991 continues to be in force until amended or revoked by any subsidiary legislation made under the LPTA. The LPTA does not apply to the Penang Hill railway and the Sabah railway.

The passing of the LPTA was aimed at improving the entire transportation sector by streamlining all regulatory operations under a single body i.e. the Land Public Transport Commission ("**LPTC**"). The LPTC is a statutory body under the Suruhanjaya Pengangkutan Awam Darat Act 2010 and is established to plan, regulate and enforce all matters relating to land public transport. The LPTC has jurisdiction over Peninsular Malaysia. In respect of rail transportation, the LPTC is the regulator that reviews railway schemes and licence applications before making recommendations to the Transport Ministry. The LPTA provides that any person who is intending to construct a railway would need to make an application and deposit a railway scheme which must contain (a) the type and system of the proposed railway, (b) the general routes, (c) the safety aspects and (d) the proposed fare of the proposed railway system. Under the LPTA, constructing railways without ministerial approval or a licence is an offence, with penalties of up to RM500,000 and/or three years' imprisonment. Vocational licences for train drivers, and publishing timetables and fares are also mandatory under the LPTA.

East Malaysia

The applicable legislation for rail in East Malaysia is the Railway Ordinance 1914 and the Railway (Tariff Book) Rules 1979. The Railway Ordinance only specifies the rules relating to the operation of railway but does not specify any licensing requirement for constructing a railway. The Railways Act 1991 unfortunately specifically excludes Sabah railway while the LPTA only applies in Peninsular Malaysia.

(3) Recent, On-going and Potential rail projects

(a) LRT Line Extension Project

The LRT Line Extension Project is one of the government's nation-building initiatives to enhance and integrate the urban public transportation services. The LRT Line Extension Project involves the extension of two (2) LRT Lines namely the Kelana Jaya Line and the Ampang Line and commenced operations on 30 June 2016. The Kelana Jaya line extends from Kelana Jaya station and pass through 13 new stations before ending at Putra Heights, covering a distance of 17.4KM. The extension project

which costs about RM7 billion is undertaken by Prasarana who is also the project owner.

The LRT line including the extensions sees 50 new six-car LRT supplied by CSR Zhuzhou Electric Locomotive Co. Ltd, a company which operates as a subsidiary of China Railway Rolling Stock Corporation (CRRC) Corporation Limited. 30 trains replaces the existing trains on the Kelana Jaya line while the remaining 20 runs on the Ampang line.

(b) LRT3 project

A feasibility study that was done by Prasarana on a third LRT line (LRT 3) connecting Kelana Jaya to Klang through Shah Alam revealed that the project is expected to cost RM9 billion, excluding land acquisition costs. The 37KM-long LRT 3 line, which will run from Bandar Utama to Klang has 26 stations (which includes one underground station). The LRT 3 project is expected to be completed by 2020. The LRT 3 project will be on a Project Delivery Partner ("**PDP**") concept which is similar to the one used by KVMRT. The tender documents for the PDP role have been issued and Prasarana has awarded the role of PDP to a joint venture between Malaysian Resources Corporation Berhad (MRCB) and George Kent (M) Berhad.

(c) Klang Valley Mass Rapid Transit Project ("**KVMRT**")

The KVMRT project is a proposed 3-line mass rapid transit ("**MRT**") system in the Klang Valley region. It envisages a "wheel and spoke" concept comprising two northeast-southwest radial lines and one circle line looping around. The proposal was announced in June 2010 and was approved by the Malaysian government in December 2010. Construction of the first line (also known as SBK Line or MRT Line 1) commenced in July 2011. The KVMRT Project is expected to be the largest-ever construction project in Malaysia and had earlier been estimated to cost between RM36 billion and RM53 billion.

The current MRT Line 1 which costs about RM23 billion will link Sungai Buloh and Kajang. Mass Rapid Transit Corporation Sdn Bhd ("**MRT Corp**") has been appointed by the Malaysian government as the official and asset owner of the project. Prior to the founding of the corporation, the project was managed by Prasarana. A joint venture between Gamuda Bhd. and MMC Corp Bhd. has been appointed as the project delivery partner. The Phase one of the MRT Line 1 from Sungai Buloh to Semantan is expected to become operational by the end of 2016 and Phase Two from Semantan to Kajang is expected to be operational in July 2017.

The Malaysian government has approved the budget for the MRT Line 2 (SSP Line) in its revised Budget 2015 which will serve a longer line than MRT Line 1. The MRT Line 2 is expected to cost RM40 billion and will span from Sungai Buloh to Serdang to Putrajaya with 36 stations, depending on the final structure of the alignment. The tender for the MRT Line 2 closed in February. Phase One will run from Kwasa Damansara to Kg Batu and comprises 12 stations. It is targeted for completion by July 2021. Phase Two will have 11 underground stations and 26 elevated stations and is targeted to be completed in the second quarter of 2022.

(d) High speed rail from Kuala Lumpur to Singapore project

The Prime Minister of Malaysia and Singapore jointly announced the decision to proceed with the High Speed Rail ("**HSR**") on 19 February 2013 and described it as a 'game changer'. Under the Greater Kuala Lumpur/Klang Valley National Key Economic Area, the Malaysian government is looking to expedite the planned HSR system between Singapore and Kuala Lumpur and plans to complete Phase 2A of the feasibility study this year.

The Singapore's Land Transport Authority and Malaysia's Land Public Transport Commission jointly launched a request for information ("**RFI**") exercise in late November 2015 to assess industry opinion and to gauge market interest in the HSR project.

There have been indications that Malaysia and Singapore are exploring the possibility of a plan for the HSC to have two services, one a non-stop express service between Malaysia and Singapore which would take approximately 90 minutes. The other would offer transit services which calls at several stations in Malaysia indicatively Bandar Malaysia, Seremban, Malacca, Muar, Batu Pahat and Nusajaya taking approximately two hours. The Prime Minister of Singapore reportedly said that the terminus of the HSR in Singapore will be in Jurong East, a western part of Singapore.

MyHSR Corporation was incorporated in 2015 to be the project delivery vehicle accountable for the definition of the technical and commercial aspects of the HSR in Malaysia and is a company wholly owned by the Ministry of Finance of Malaysia. A memorandum of understanding on the HSR project was signed by Malaysia and Singapore in July 2016 which will reportedly be the precursor to a legally-binding bilateral agreement at year-end. An international tender for the HSR is said to be likely to be called in August to appoint a joint development partner. Both the government of Malaysia and Singapore have agreed to work towards commencing HSR operations around 2026.

The China Railway Rolling Stock Corporation (CRRC) Ltd announced that it would set up its regional headquarters in Bandar Malaysia, where the main terminal for the planner HSR line will be. Prior to this, CRRC opened Zhuzhou Electric Locomotive's new facility and its first rolling stock facility outside of China in Batu Gajah, Perak on 9 July 2015. The facility reportedly assembled the metro trains for the Ampang line.

(e) Penang Transport Master Plan ("**PTMP**")

The PTMP is introduced by the state government of Penang as its solution to the state's traffic woes. The PTMP is a massive effort which would significantly upgrade the public transport system in Penang by introducing, amongst other, new transport options including trams and a mass rapid transit system. The component projects of the PTMP are public transport project, highways project, road projects, interchange project, missing links and road upgrading project, bus rapid transit project, penang undersea tunnel and sky cab project. The public transport project involves LRT Lines, a Rapid Bus Transit system, Monorail Lines and a tram system that would run only within the George Town UNESCO Heritage Site. SRS Consortium which comprises of Gamuda Bhd (60%), Ideal property Development Sdn Bhd (20%) and Loh Phoy Yen Holdings Sdn Bhd (20%) have received the letter of award from the Penang state government to carry out various components of the alternative transport master plan including the public transport project and to provide new reclamation sites on 12 August 2015. The PTMP is an ambitious RM 27 billion project though it has recently been reported that this could balloon to RM46 billion after additional components were added by the Seberang Perai Municipal Council and the cost of the reclamation of land off Bayan Lepas.

(i) The Bayan Lepas LRT Line

The Bayan Lepas LRT Line is the first rail network proposed under the PTMP and will be the very first LRT line in Penang. The proposed Bayan Lepas LRT Line will be about 30KM in length with 27 stations running from KOMTAR to the future reclaimed islands in the south of Penang. The proposed alignment of the Bayan Lepas LRT will serve the heavier travel demand corridor in the eastern or Bayan Lepas belt (i.e. from KOMTAR all the way to the Penang International Airport). The Bayan Lepas LRT Line will integrate with the Sky Cab line across the Malacca Straits at the Sky Cab Station, as well as with the George Town-Butterworth LRT Line.

(ii) George Town – Butterworth LRT Line

The second rail network proposed under the PTMP is the George Town-Butterworth LRT Line. The George Town – Butterworth LRT Line will begin at The Light Station (which will be on the Bayan Lepas LRT Line) and terminates at the Sungai Nyiur Station for interchange transfer with the proposed Raja Uda-Bukit Mertajam Monorail Line, thus serving as a vital connector and interchange with other rail networks in the state of Penang.

(iii) Monorail Line

There are 3 Monorail Lines proposed under the PTMP which are the Ayer Itam Monorail Line, Tanjung Tokong Monorail Line and the Raja Uda-Bukit Mertajam Monorail Line. Ayer Itam Monorail Line will be about 12.8KM with 13 stations will improve transit reach to predominantly low-to-medium income residents in the high-density neighbourhoods in Ayer Itam and Paya Terubong areas, while the Tanjung Tokong Monorail Line will be about 7KM with 8 stations serving a mix of commercial and residential developments. The proposed Raja Uda-Bukit Mertajam Monorail Line is proposed to be about 28KM with 21 stations. The proposed Raja Uda-Bukit Mertajam Monorail Line will provide much-needed connectivity between Raja Uda in the north-western region and Bukit Mertajam in the south-eastern region of Seberang Perai, and serve the Penang state administration offices at Seberang Jaya and Bandar Baru Perda.

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C. Roads

(1) OVERVIEW

It is widely recognised that a good road infrastructure is a pre-requisite to the continuing development of a nation. Roads are essential to the nation's economic and social development. For most sectors of the economy, they form vital links between production centres and markets. Their multiple function of providing access to employment, social and health services and education makes them key elements in stimulating economic and social development. There are 2 types of roads in Malaysia, namely the Federal Roads and State Roads.

(2) FEDERAL AND STATE ROADS, TOLLS AND AUTHORITY FOR CONSTRUCTION AND MAINTENANCE OF ROADS IN MALAYSIA

The Malaysian government has entrusted the Ministry of Works ("**MOW**") to build and maintain the Federal Roads. The implementing agency under the MOW is the Public Works Department ("**PWD**").

The function of the MOW includes planning the development of the Federal Roads network nationwide; coordinating and monitoring the implementation of the Federal Road projects; regulating the privatised maintenance work of Federal Roads; and monitoring the construction, operation, toll handling and maintenance of the tolled expressways.¹⁵ The construction and maintenance of State Roads, on the other hand, fall under the purview of the respective State Government and the PWD of each state. One of the most important functions of PWD is to ensure that the road network system is always safe, efficient and comfortable to the road users.

(a) Federal Roads

Federal Roads are all roads declared to be Federal Roads under the *Federal Roads Act 1959* ("**Act 376**"). This category of roads includes the National Expressways and Highways under the administration of the Malaysian Highway Authority (see subsection (c) below for further information). Toll Expressway like the North-South Expressway and other toll highways are all classified under the category by an order published in the form of *Gazette*. Also included are the highways and other roads under the administration of the PWD like the major interurban roads joining the state capitals and roads leading to points of entry to and exit from Malaysia. Other roads classified under this category are the Regional Development Scheme Roads, such as those within the Federal Land Development Authority ("**FELDA**") schemes. Federal Land Consolidation Authority ("**FELCRA**") schemes and other Regional Development Authority Scheme such as Pahang Tenggara Development Authority Scheme etc. Minor roads leading to and within Federal Government Institutions are also classified under this category.

(b) State Roads

State Road generally comprises of the primary roads providing intra-state travel between the district administrative centres. Other roads included in this category are the Urban Collector Roads and other minor roads within the villages and rural inhabited areas. Roads within the Federal Territory of Kuala Lumpur and the island of Labuan which are not designated as Federal Roads are classified under this category.

(c) Malaysian Highway Authority

Lembaga Lebuhraya Malaysia or the Malaysian Highway Authority ("**MHA**") is a government agency under the MOW. MHA was established on 24 October 1980 in accordance with the *Highway Authority Malaysia (Incorporation) Act 1980* ("**Act 231**") to supervise and execute the design, construction, regulation, operation and maintenance of inter-urban highways in Malaysia.¹⁶ Act 231 also provides that the functions of MHA are to supervise and execute the design, construction and

¹⁵ <http://www.kkr.gov.my/en/organization/function>

¹⁶ http://www.llm.gov.my/background_EN.aspx

maintenance of highways and maintenance of rest and service areas and other facilities that may be deemed necessary along highways, to collect toll from users of highway and other dues from facilities along highways to plan and carry out research to ensure efficient utilisation of highways and other facilities along highways; and generally, to do everything for the betterment and proper use of highways and other facilities along highways.¹⁷

(d) Tolls

The Malaysian government began the implementation of its privatisation policy, sometime in the 1980s, and this included the award of concessions and construction contracts to private developers for the construction, maintenance and operation of infrastructure facilities. In the road transportation sector, the *Federal Roads (Private Management) Act 1984* ("**Act 306**") was enacted to allow the Malaysian government to grant private developers the right to collect tolls in respect of a Federal Road, bridge or ferry. Act 306 allows the Malaysian government to authorise any person who has agreed to construct, re-construct, upgrade, repair or maintain any road, bridge or ferry which has been declared or is to be declared a Federal road, bridge or ferry under Act 376 or which is in any Federal Territory, to demand, collect and retain tolls for such period as may be specified for the use of such road, bridge or ferry by any person or class of vehicles.¹⁸ In short, Act 306 enabled private developers to construct, operate and maintain new road systems and thereafter recover the costs of doing so through the collection of tolls.

(e) Other relevant laws governing roads in Malaysia

Tolls (Roads and Bridges) Act 1965 ("**Act 416**")

Act 416 provides that the MOW may impose tolls to be paid for the use by vehicles if such roads or any part thereof or such bridges as may be specified. Here, "roads" and "bridges" refers to Federal Roads and Federal Bridges, respectively.

Road Transport Act 1987 ("**Act 333**")

Act 333 provides for the regulation of motor vehicles and of traffic on roads and other matters with respect to roads and vehicles thereon; the protection of third parties against risks arising out of the use of motor vehicles; the co-ordination and control of means of and facilities for transport and means of and facilities for construction and adaptation of motor vehicles; and connected purposes. Part III of Act 333¹⁹, provides for highway codes, speed limits, restriction of use on specified roads, restriction of vehicles, pedestrian crossings, erection of traffic signs, construction of access and drains and laying of public utility installations to existing roads, restriction of vehicles on bridges and etc.

(3) PRIVATE SECTOR CONSTRUCTION AND MAINTENANCE OF ROADS

Traditionally, road development in Malaysia was undertaken and financed by the public sector. The increasing affluence and higher standards of living together with the increase of trading and commercial activities has resulted in immense growth of private vehicles in all major urban centres. This situation has called for an efficient and effective road system, the need to increase road capacities, and the improvement of traffic flow. Due to limited public sector resources, the Malaysian government has adopted a new approach through privatisation by encouraging the private sector to be actively involved in the development of road and highway projects.²⁰

Whilst the construction of roads is under the responsibilities of the MOW and hence remains in the public sector domain, tolled highways in Malaysia are mostly privatised and are usually effected by means of a concession, typically awarded on a build, operate and transfer ("**BOT**") basis. Using this method, the private sector would construct the highways using its

17 Section 11, Highway Authority Malaysia (Incorporation) Act 1980, Act 231

18 Section 2, Federal Roads (Private Management) Act 1984, Act 306

19 Sections 67 to 88, Road Transport Act 1987, Act 333.

20 Risk Management In Build-Operate-Transfer (Bot) For Roads And Highway Projects In Malaysia - Built Environment Journal Vol. 6, No. 1, 1-11, 2009.

own funds, operate and maintain the highways for a period of time and eventually, transfer the highways to the Malaysian government at the end of the period. During the concession period, the private concession companies are granted the right to collect toll from the users of the highways.²¹ The term or period of the concession is usually set out and governed by a concession agreement. The concession agreement is a confidential document between the Malaysian government and the private concession companies. In the event the Malaysian government imposes toll for any class of vehicle, during any concession year, which is lower than the agreed toll rates for that class of vehicle under such concession agreement, the Malaysian government may be required to compensate such private concession companies for such shortfall.

Under the 9th Malaysia Plan, the Malaysian government announced the implementation of public projects using the Public Private Partnership ("**PPP**") or Private Finance Initiative ("**PFI**") scheme.²² In 2009, a new unit under the Prime Minister's Department known as Privatisation and Private Finance Initiative Unit (currently known as Public Private Partnership ("**3PU**")) was established.²³ 3PU is the core agency with the responsibility to coordinate privatisation and PPP projects which have made an impact to the country's economy.

An example of a completed PPP project using the BOT model would be the North-South Expressway, operated by PLUS Malaysia Berhad, which was completed 15 months ahead of schedule. The completion of this highway was a significant milestone in the privatisation of road projects in Malaysia. The project has also exposed Malaysia to new skills and expertise in the construction of highways. In addition, collaboration of local construction companies with international specialists/consultants in construction technology has also benefited local companies. Other successful road projects constructed through the privatisation concept using the BOT method includes the New Klang Valley Expressway, the Malaysia-Singapore Second Crossing Expressway, the New Pantai Expressway, the Cheras-Kajang Expressway, and the Ampang Elevated Highway.²⁴

Commencing from 15 October 2015, 18 highway concessionaires in Malaysia imposed new toll rates, with increases between 10 cent and RM3. Major highways which introduced include amongst others Damansara-Puchong Highway (LDP), New Pantai Expressway (NPE), Highway Maju Expressway (MEX), Duta-Ulu Kelang Expressway (DUKE), Sungai Besi Expressway (BESRAYA), etc. The Prime Minister, Datuk Seri Najib Razak announced that if toll rates were not raised, the government would have to compensate the highway concessionaires, which sequentially, would affect funds meant for other policies such as the 1Malaysia People's Aid (BR1M) cash handouts.

(4) NOTABLE DEVELOPMENTS

It was reported on June 2016 that a 1,400km highway was being constructed to link Mae Sot district, in Thailand to Moreh, in India. It is expected that such highway will be completed by the end of 2017. Noting that the distance from Bukit Kayu Hitam to Mae Sot is approximately 1,500km, if the said highway is completed, it would be viable for Malaysian to drive all the way from Malaysia to India.²⁵

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21 In the Pursuits of Highways: the Issues in Malaysian Public-Private Partnership (PPP) Tolled Highway Projects

22 <http://www.pwc.com/my/en/assets/services/ppp-projects-in-malaysia.pdf>

23 <http://www.ukas.gov.my/en/latar-belakang;jsessionid=8ECE871E82956B2C70C5F9D9486EE833>

24 Risk Management In Build-Operate-Transfer (Bot) For Roads And Highway Projects In Malaysia - Built Environment Journal Vol. 6, No. 1, 1-11, 2009.

25 <http://www.nst.com.my/news/2016/06/150659/new-highway-may-make-road-trips-india-week-possible>

D. Renewable Energy

(1) **Feed in Tariffs ("FiT") System**

The FiT system is a system which allows approved electricity producers to sell electricity produced from renewable energy resources, namely biomass (inclusive of municipal solid waste), biogas (inclusive of landfill/sewage), small hydro and solar photovoltaic, to power utilities at a prevailing FiT rate for a specific duration.

The following table indicates, as at 28 July 2016, the total approved capacity (in MW) of renewable energy facilities granted FiT approvals under the FiT system.

| Installed Capacity (MW) of Commissioned RE Installations | | | | | | | |
|---|---------------|---|----------------|------------------------------|--------------------|-----------------|--------------|
| Year | Biogas | Biogas (Landfill/ Agriculture Waste) | Biomass | Biomass (Solid Waste) | Small Hydro | Solar PV | Total |
| 2012 | 2.00 | 3.16 | 36.90 | 8.90 | 11.70 | 31.59 | 94.20 |
| 2013 | 3.38 | 3.20 | 0.00 | 0.00 | 0.00 | 106.95 | 113.53 |
| 2014 | 1.10 | 0.00 | 12.50 | 0.00 | 0.00 | 64.84 | 78.46 |
| 2015 | 0.00 | 7.40 | 12.00 | 7.00 | 6.60 | 52.60 | 85.60 |
| 2016 | 0.00 | 1.13 | 0.00 | 0.00 | 0.00 | 3.19 | 4.32 |
| Cumulative | 6.48 | 14.89 | 61.40 | 15.90 | 18.30 | 259.14 | 376.11 |

The FiT system, including the FiT rates, is administered and implemented by the authority known as 'Sustainable Energy Development Authority' ("**SEDA**").

In order to participate in the FiT system, an interested party must first make an application to be a Feed-in Approval Holder ("**FiAH**") by submitting a written application to SEDA together with such fees as may be determined by SEDA. The application Feed-in Approval can only be submitted, processed and granted through a quota system (known as the "**E-FiT System**") during a specified period, as may be determined and announced by SEDA. Upon announcement, interested parties may apply to register with SEDA through the E-FiT System. A registered E-FiT System user must comply with the instructions contained therein, and will also be expected to upload all the documents/information, required by SEDA from time to time, for the purpose of obtaining the Feed-in Approval.

Once approved, a Distribution Licensee (utility companies such as Tenaga Nasional Berhad and Sabah Electricity Sdn Bhd) ("**DL**") is required to enter into a Renewable Power Purchase Agreement ("**REPPA**") with the FiAH.

The FiT System is established under the Renewable Energy Act 2011 ("**REA**"). The REA governs the FiT System in the following matters:

- (a) all matters relating to the connection of supply line connection points for the distribution of renewable energy generated by renewable energy installations owned by the FiAHs;
- (b) all matters relating to the purchase and distribution by DL for renewable energy generated and sold by the FiAHs; and
- (c) all FiT payment related matters by DL to FiAHs for such renewable energy.

SEDA, being the authority administering and implementing the FiT System has various functions vested in it under the REA and Sustainable Energy Development Authority Act 2011 including to issue any guidelines on renewable energy matters. The REA and its subsidiary legislation constitute the legal framework for most matters in relation to renewable energy in

Malaysia but the Minister of Energy, Green Technology and Water has final say on certain matters such as on any appeals made to the Minister to appeal against certain decisions made by SEDA, and decisions on feed-in tariff degression rates. In carrying out its functions and obligations, SEDA is also required to give due consideration to, amongst other, the renewable energy policies of the Malaysian government from time to time.

(2) Eligibility for participation in FiT System

A person/company will be eligible to apply for feed-in-approval and participate in the FiT system as a FiAH if:

- (a) it proposes to generate renewable energy from a renewable energy installation having an installed capacity \leq 30MW (or such higher capacity as may be prescribed by SEDA); and
- (b) it meets such other criteria as may be prescribed by the SEDA, in particular the rules under the Renewable Energy (Feed-in Approval and Feed-in Tariff Rate) Rules 2011 ("**RE Rules**").

Essentially, the RE Rules states that an eligible producer shall be, amongst others, as follows:

- (i) a Malaysian citizen of not less than 21 years of age;
- (ii) a company incorporated in Malaysia which does not include:
- (iii) a company in which a foreign person holds, directly or indirectly, more than 49% of the voting power or issued share capital;
- (iv) a DL, where the application for a feed-in approval relates to a renewable energy installation proposed to be connected to that DL's electricity distribution network; or
- (v) an associate of a DL stated in sub-paragraph (b) above.
- (vi) a local authority in Malaysia;
- (vii) a body corporate constituted or established under any written law, excluding SEDA.
- (viii) a registered society; or
- (ix) a firm specified as a partnership under the laws of Malaysia.

Based on the eligibility criteria above, a foreign investor can participate in the FiT system by incorporating a company in Malaysia but hold no more than 49% of voting power or the issued share capital of such company. A foreign investor will need accordingly a local partner to participate in the FiT system.

As stated above, a DL is required to enter into a REPPA with the FiAH, once such FiAH has received its Feed-in Approval from SEDA. Upon such REPPA being concluded, the FiAH will generally apply to such DL for connection of its renewable energy installation to a supply line connection point. The REPPA is in standard form prescribed in rules under the REA according to the renewable energy installation capacity.

The technical and operational requirements as stated under the Renewable Energy (Technical and Operational Requirements) Rules 2011 in respect of the FiT System and the renewable energy installation must be complied with by both the DL and FiAH at all times.

(3) Degression of FiT

The REA provides for the FiT rate in future to be reduced progressively, commencing on 1 January each year, based on the applicable degression rate. The annual degression rates will be subject to review by SEDA, taking into consideration various factors such as:

- (a) the renewable energy policies of the Malaysian government;
- (b) the amount of funds allocated for the purpose of the FiT System;
- (c) the need for sustainability and diversity in renewable energy resources;

- (d) the ability of the FiAHs to recover their initial investment on their renewable energy installations;
- (e) the prevailing costs of equipping, constructing, operating and maintaining renewable energy installation utilising the relevant particular renewable resource;
- (f) the efficiency of renewable energy installation utilising the relevant particular renewable resource based on prevailing technologies; and
- (g) other factors as may be determined by SEDA from time to time.

Such degression means that future projects could have lower FiT rates awarded to them. The degression does not apply to projects which have had their FiT rates approved already.

The latest degression rates are as follows:

| Renewable Resource | Annual Degression Rate |
|--------------------|--|
| Biogas | 0% |
| Biomass | 0% |
| Small Hydropower | 0% |
| Solar Photovoltaic | 10% (≤ 24 kilowatts) 15% ($24 \text{ kilowatts} \geq 1$ megawatt) 15% ($1 \text{ megawatt} \geq 30$ megawatts) |

Whilst the rates have increases for solar photovoltaic, the rates are of 0% for biomass and biogas remain the same to incentivise the take-up rate of both biomass and biogas which has been quite low and the new rates are effective from 1 January 2016.

(4) Grid Parity

Over the years, it is intended by the Malaysian government that fossil fuel subsidies will gradually be reduced and the cost incurred in generating electricity through renewable energy gradually becomes more competitive with the retail rate of conventional grid power.

There will be a point of time when the renewable energy installation may achieve grid parity. Grid parity occurs when the FiT rate applicable to the renewable energy installation is equal to or cheaper than the displaced cost. The displaced cost means the average cost of generating and supplying 1 kilowatt hour of electricity from resources other than the renewable resources through the supply line up to the point of interconnection with the renewable energy installation.

Once a particular renewable energy installation has achieved grid parity, the FiAH will not be entitled to be paid the FiT and will instead be paid by the DL a tariff that is based on the prevailing displaced cost for the remaining duration under the REPPA.

The following is the prevailing displaced cost introduced on 1 May 2014:

| RE Connection Point | Prevailing Displaced Cost (RM/kWh) | |
|--|------------------------------------|----------------|
| | Peninsular Malaysia | Sabah & Labuan |
| High Voltage (from 50 kV to 230 kV) | Nil | 0.2100 |
| Medium Voltage (from 1 kV to 50 kV) | 0.2380 | 0.2200 |

| | | |
|---------------------------------|--------|--------|
| Low Voltage (less than 1 kV) | 0.3100 | 0.3000 |
|---------------------------------|--------|--------|

(5) Renewable Energy Fund

In terms of funding, the Malaysian government has stipulated that all electricity consumers are to contribute 1% of each of their total electricity bill towards the financing of the cost to implement the Renewable Energy Program in Malaysia. However, excluded consumers, those who consume less than 300kWh per month, will not be required to make such contribution. The funds collected nationally will be deposited into a Renewable Energy Fund ("**RE Fund**") managed and controlled by SEDA. The RE Fund is further supported by annual national budget contributions as and when required, should the RE Fund fall short of its financial commitments to finance the feed-in tariff costs.

Other than the RE Fund, the Malaysian government has also launched the National Green Technology Policy where various programs have been implemented to promote the application and development of green technology in Malaysia. Amongst others, a Green Technology Financing Scheme ("**GTFS**") was established in 2010 to accelerate the expansion of green investments by providing easier access to financing from private and commercial financial institutions. The GTFS offers a 60% guarantee of the financing amount and a rebate of 2% on the interest or profit rate charged by the financial institutions. Under the GTFS, funding will be provided for any project that satisfies the requirements for private finance initiatives and meets the green technology project criteria under the GTFS. It is to be noted that the GTFS is only available until 31 December 2017 or upon reaching a total financing approval amount of RM2.6billion (whichever is earlier).

(6) Renewable Power Purchase Agreement

In Malaysia, the Malaysian Renewable Energy (Renewable Energy Power Purchase Agreement) Rules 2011 sets out the different types of renewable energy power purchase agreements ("**REPPA**") to be adopted based on the type of renewable resource and the capacity of the proposed renewable energy installation. Any deviation from the standardised REPPA format shall require the prior written approval of SEDA. The standard form of the various REPPAs are made available by SEDA at its offices and on its official website.

Under the terms of the REPPA, the FiAH sells and delivers the renewable energy generated to the distribution licensee at the applicable tariff for a fixed number of years (unless otherwise terminated earlier), the duration of which is dictated by the type of renewable energy used for power generation under which the feed-in approval is granted. The incentive provides a fixed payment from the electricity supplier for every kWh of electricity generated and a guaranteed minimum payment for every kWh exported to the grid.

(7) Development in respect of Waste-to-Energy Facility

The Government of Malaysia has, on August 2014, sought to secure (by way of issuing invitation to tender to the public) suitably qualified and experienced private sector support for the building and operation of a Waste-to-Energy Facility ("**WtE Facility**") to process and treat 1,000 tonnes per day (tpd) of residual municipal waste in Kuala Lumpur ("**WtE Proposal**"). The Government has mandated the foregoing task to UKAS - to lead the procurement of the WtE Proposal.

It was later reported that on June 2015, UKAS has announced to abort the WtE Proposal. Subsequently, on September 2015, UKAS has issued a new request for proposal to recommence the WtE Facility Proposal.

The proposed site being offered for the development of the WtE Facility is located at Kepong Waste Transfer Station, Taman Beringin, Jinjang Utara, Kuala Lumpur. Under the WtE Proposal, the Government plans to deliver 1,000 tpd of residual municipal waste to the WtE Facility, which the WtE Facility then in turn convert the delivered waste into energy. For the foregoing purposes, it is expected that the owner (successful bidder) will enter into a REPPA with Tenaga Nasional Berhad.

A detailed environmental impact assessment studies will be carried out either by the successful bidder of the WtE Proposal or the Government of Malaysia. It should be noted that

the proposed site location for the WtE Facility is surrounded by residential houses/ highly populated.

As at July 2016, 3 bidders have been shortlisted to undertake the WtE Proposal. The expected operation date of the WtE Facility has been forecasted to be on or about 2019 or 2020.

E. Non-Renewable Energy

Coal, natural gas, oil, hydro and other natural resources are primary sources to generate electrical energy. In 2013, coal, gas, oil and hydro contributed 38.5%, 45.3%, 5.4% and 10.6%, respectively to the generation of electricity in Malaysia.

In Peninsular Malaysia, Tenaga Nasional Berhad ("**TNB**") is responsible for generation, transmission and distribution of electricity. Additionally, there are also a few independent power producers ("**IPP**") generating and supplying electricity to TNB. Electricity generated by the IPP is first sent to the transmission system owned by TNB before the consumers receive their electricity via a distribution network. In Sabah, the main electric supply utility is Sabah Electricity Sdn. Bhd. and as for Sarawak, it is Sarawak Energy Berhad.

(1) The Energy Commission of Malaysia

The Energy Commission of Malaysia ("**EC**") is a statutory body that is established by under the Energy Commission Act 2001 and administered by the Minister of Energy, Green Technology and Water. The EC is responsible to regulate the energy sector under the following laws:

- (a) Electricity Supply Act 1990;
- (b) Electricity Regulations 1994;
- (c) License Supply Regulations 1990;
- (d) Gas Supply Regulations 1997;
- (e) Gas Supply Act 1993; and
- (f) Efficient Management of Electrical Energy Regulations 2008.

The EC is tasked with the responsibility of issuing licences for the operation of the power producers' installations, without which, no person is allowed to operate or supply electricity from any installation. In evaluating the application for such licences, such application must comply with the following provisions in the Electricity Supply Act 1990 and Energy Commission Act 2001:

- (i) Promote competition in generation and supply of electricity to ensure it is offered at reasonable prices;
- (ii) Promote and encourage the generation of energy for the economic development of Malaysia;
- (iii) Ensure all reasonable claims for electricity supply are met;
- (iv) Ensure consumer needs in terms of affordable prices, security, reliability of supply and quality of services are met;
- (v) Ensure the licensee can finance the activities as set out in the licence; and
- (vi) Encourage efficient use and supply of electricity.

(2) Competitive Bidding

As part of the transformation of the Malaysian Electricity Supply Industry, competitive bidding to install new generation capacity was introduced in 2009 to ensure independence, credibility and transparency in procuring all new capacity requirements, and falls under the purview of the EC. The competitive bidding process is a price discovery mechanism where qualified parties will be identified and tasked to ensure Malaysia's electricity requirements are met. The process will also determine the construction of all future power plants through execution of the power purchase agreements ("**PPA**") upon identification of the successful bidders and extension of the existing power plants by renegotiating the executed PPA and awarding it to

the successful bidder in order to ensure an arm's length relationship in the power purchase agreements ("**PPA**"). The typical contract duration for a PPA is as follows:

- (a) 21 years for a gas-based power plant; and
- (b) 25 years for a coal-fired power plant.

Any qualified players, new or established, are allowed to participate in the competitive bidding process by putting in their bids when the EC issues a request-for-proposal ("**RFP**") for any new plant. Bidders who submit the RFP will be shortlisted by the EC and eventually, winners of the competitive bidding will be published on the EC website (<http://www.st.gov.my/>).

(3) Recent Developments

In November 2015, 1Malaysia Development Berhad ("**1MDB**"), Edra Global Energy Berhad and its subsidiaries ("**Edra**") executed a Share Sale and Purchase Agreement with China General Nuclear Power Corporation and its subsidiaries ("**CGN Group**") for the 100% sale of 1MDB's ultimate ownership in all its energy assets. CGN Group will pay an equity value of RM9.83 billion in cash and will assume all the debt and cash of those power assets. The transaction is expected to be completed in February 2016 and upon completion, the transaction would be the first in Malaysia to see foreign shareholders owning a 100% stake in Malaysian power plants and the sale will be the largest announced transaction in Malaysia and one of the largest in the Asian power sector, year to date.

Prior to the sale of 1MDB's entire energy assets to CGN Group, it is worthy to note that 1MDB's interests in Project 3B was sold to Tenaga Nasional Berhad (see below).

(4) Project 3B Development

Project 3B is a project related to the development, construction and completion of 2 x 1,000 MW coal-fired power station located in Jimah, Negeri Sembilan, Malaysia. The project was originally scheduled for commissioning in stages commencing from October 2018, when it was first awarded to a consortium called Jimah East Power Sdn Bhd ("**JEP**") led by 1MDB (which owns 70% of the shareholding interests in JEP) and Mitsui Corp Ltd (which owns 30% of the shareholding interests in JEP). It was later confirmed, circa July 2015, that Tenaga Nasional Berhad ("**TNB**") has entered into a share sale agreement with 1MDB to acquire 70% of 1MDB's shares in JEP. Mitsui Corp Ltd interests in JEP remains unchanged.

Due to 1MDB's divestment in Project 3B to TNB, the scheduled commercial operations date for the first and second units of Project 3B has been postponed to June 2019 and December 2019 respectively.

It should be noted that 1MDB's divestment in Project 3B to TNB occurs prior to 1MDB's divestment in all its energy assets to CGN Group. As such, Project 3B does not form as part of CGN Group's acquisition in 1MDB's energy assets disposal transaction as stated in paragraph (3) above.

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F. Oil & Gas

Malaysia is the second largest oil and natural gas producer in Southeast Asia, the second largest exporter of liquefied natural gas globally, and is strategically located amid important routes for seaborne energy trade. The oil and gas industry is generally divided into upstream, midstream and downstream activities. Upstream activities consist of exploration, development and production of oil and gas resources. Midstream and downstream activities range from the transportation of oil and gas, to refining and processing through to marketing and trading of end products.

The principal legislation which forms the foundation of the development of the oil and gas industry in Malaysia are the Petroleum Development Act 1974 ("**PDA**") and the Gas Supply Act 1993 ("**GSA**"). The PDA applies to all activities in the value chain of the oil and gas industry in Malaysia, except for the supply of gas through the pipelines to consumers, which is regulated by the GSA.

The GSA was implemented for the purpose of safeguarding the interest of consumers who receive the supply of gas through pipelines. These consumers include residential, commercial and industrial outlets. The GSA provides for the licensing of the supply of gas to consumers through pipelines and related matters, the supply of gas at reasonable prices, the control of gas supply pipelines, installations and appliances with respect to matters relating to safety of persons and for purposes connected therewith.

Under the realm of the PDA, the Malaysian government proposed the creation of a national oil company to safeguard the country's oil and gas resources. Following this, Petronas was formed on 6 September 1974. Petronas became responsible to manage the petroleum resources in the country and to develop according to commercial needs while taking into consideration the socio-economic needs of the country. To optimise the value and maximise the synergy of the natural gas resources, the law had divided the upstream and downstream activities to different entities.

In addition to being vested with the absolute rights to petroleum, pursuant to the Petroleum Regulations 1974 (amended in 1975, 1981 and 1991) ("**Petroleum Regulations**"), Petronas is also the responsible authority for licensing any third party contractors ("**Contractors**") wishing to participate in upstream petroleum activities, including exploration and exploitation. Petronas is also responsible for licensing goods and service providers operating in the upstream sector including providers of rigs and drilling services and supply of general goods and services related to upstream operations.

Petronas' wholly owned subsidiary, Petronas Carigali Sdn. Bhd. ("**Carigali**") is its exploration and production arm. Although not required by law, we understand that it is the policy of Petronas that Carigali is one of the contracting parties to each Production Sharing Contract ("**PSC**").

History of Production Sharing Contracts

Exploration rights are granted to oil and gas exploration companies through the PSC. The successful company explores for hydrocarbons on behalf of Petronas and if oil and/or gas is discovered during the duration of the PSC, it can subsequently proceed to develop and produce the hydrocarbons resources.

In general, the PSC sets out the arrangement for the sharing of petroleum production and the terms of cooperation between Petronas and the PSC Contractors. As of December 2013, a total of 151 PSCs have been awarded by Petronas to oil and gas upstream companies, and Petronas had 27 PSC Contractors participating in the country's upstream industry on a variety of fiscal arrangements.

The PSC requires the PSC Contractor to provide all the financing and bear all the risk of exploration, development and production activities in exchange for a share of the total production. The PSC Contractors are also required to, amongst others, submit the work programme and budget annually, seek authorisation prior to incurring any expenditure beyond a certain threshold, and seek various approvals from Petronas throughout all stages of operations. Failure to comply with these requirements may result in automatic relinquishment of the rights to carry out the operations back to Petronas.

The PSC contracting parties can be one or more companies but there must always be at least one company which "operates" on behalf of all contracting parties. Essentially the reasons why most PSC's are shared among several oil and gas companies is due to risk and uncertainty as the oil and gas business involves substantial expenditure whereas there is uncertainty whether the oil and gas can be successfully discovered.

For upstream exploration and production activities, there are no special requirements or limitations at law on the participation by foreign companies. In order to participate in exploration and production activities, foreign companies must enter into a PSC with Petronas and comply with requirements set by Petronas in the PSC.

However, foreign companies wishing to supply goods and services to the upstream oil industry in Malaysia must either do so through an agency agreement with local companies licensed by Petronas or set up a local subsidiary to be licensed by Petronas pursuant to the PDA. The foreign company's subsidiary must be incorporated under the CA 1965 with SSM as a private company and it must comply with the minimum local equity and/or paid-up share capital requirements, and the technical and registration requirements as stipulated under Petronas' Licensing Guidelines.

Following this business structure, whenever any international oil and gas companies enter into any PSC with Petronas to become PSC Contractors, Carigali also enters into the same PSCs as one of the PSC Contractors along with the international PSC Contractors

Among the PSC Contractors operating in Malaysia are Petronas Carigali, ExxonMobil Exploration and Production (Malaysia) Inc., Nippon Oil, Sarawak Shell, Murphey Oil and Amarada Hess. These companies are involved in upstream operations.

Malaysia Oil & Gas Regulatory Framework

(1) Exploration and Production

A Contractor wishing to participate in exploration and production activities must apply for and receive a licence from Petronas. The PDA and the Petroleum Regulations are silent on what form such licence should take. However, in practice the licence will normally take the form of a PSC.

Further, a Malaysian PSC, like many other PSCs, sets out provisions which govern payment of a royalty, caps on cost recovery, and sharing in profits from the production of petroleum. The PSC will also typically include phases of exploration, development and production, time periods for each phase and required work programs and budgets. As these obligations are imposed contractually in the PSC, rather than as a matter of law, it is possible that the obligations may vary, depending on the outcome of the PSC negotiations.

In addition to PSCs, Petronas has also executed Risk Service Contracts ("**RSC**") in 2011 for the development and production of discovered marginal fields. Petronas retains ownership of the oil. Exploration costs borne by RSC contractors will be reimbursed upon discovery of commercial fields. RSC contractors are also entitled to a share of the profit.

(2) Transportation and Storage Infrastructure

The principal law governing petroleum transportation and storage infrastructure is the Petroleum (Safety Measures) Act 1984 ("**PSMA**") which governs the transportation of Petroleum by road, railway, vessels and pipelines (transportation by aircraft is prohibited, except with the prior authorisation of the responsible Minister). It also regulates the storage and handling of petroleum. The Ministry of Domestic Trade, Co-Operatives and Consumerism ("**MDTCC**") is responsible for administrating the PSMA. Licences for transportation and storage of petroleum are issued by the MDTCC.

The Ministry of Transport's ("**MOT**") is responsible for the planning and development of policies with regards to rail, maritime, aviation transportation and port which involves the implementation of physical development projects involving infrastructure. In this regard, MOT's approval may be required for the construction and development of petroleum transportation and storage infrastructure projects.

(3) Transportation – Pipelines

The PSMA and the Petroleum (Safety Measures) (Transportation of Petroleum by Pipelines) Regulations 1985 (PSMR-Pipelines) govern transportation of petroleum in pipelines to places including production facilities, tank farms, natural gas processing plants and terminals (Covered Pipelines). Certain pipelines are excluded from the application of the PSMA, including pipelines within refineries, industrial plants and gas distribution networks.

(4) Transportation – Vessels

The Petroleum (Safety Measures) (Transportation of Petroleum by Water) Regulations 1985 (PSMR –Water) provides, in some detail, the requirements for vessels carrying petroleum. Vessels carrying Petroleum are required to be licensed by the Surveyor of Ships. There are different licences depending on the nature of the Petroleum being transported.

(5) Storage and Handling

Under the PSMA, separate licences are required in order to store petroleum and handle petroleum. Each licence may be issued with specific conditions as determined by the issuing authority. The issuing authority varies, depending on the location of the storage and handling facilities. It will either be a local authority, as defined in the PSMA, or such other person as the relevant Minister may authorise as the authority.

(6) Goods and Service Providers

Pursuant to the PDA, Petroleum Regulations and Petronas' Licensing Guidelines, providers of goods and services, including exploration, engineering, technical and consultancy services and the supply of goods connected to upstream operations must be licensed by Petronas – this includes the provision of such goods and services by an affiliate of a Contractor.

Based on the Petronas Licensing Guidelines, any company intending to participate in the oil and gas sector whether upstream or downstream has to make an application to Petronas for either a licence or to be registered. Among others, it sets out the following;

- (a) pursuant to the PDA and the Petroleum Regulations, a licence is required for any company who wishes to supply goods and services for the upstream sector;
- (b) a company is required to register with Petronas before participating in tender and activities in the downstream sector in order to monitor the development activities in this sector and with a valid registration, an entity is allowed to supply goods and services to the downstream sector of the Petronas group companies, including maritime activities;
- (c) the general requirements for application of Petronas licence or registration are:
 - (i) the company must be registered with the Registrar of Companies as a private incorporated or public incorporated company;
 - (ii) the company has a paid-up capital in the form of ordinary shares of not less than RM100,000 (for licence application) and RM10,000 (for registration application); and
 - (iii) meet the Bumiputera participation requirement for equity, Board of Directors, management and employee based on the Standardised Work and Equipment Categories ("**SWEC**") applied (i.e. SWEC with a minimum Bumiputera requirement either 30%, 51% or 100%).

Based on an applicant's offering of services, it will need to apply for the relevant category of licences as detailed in the SWEC. The SWEC stipulates the registration requirements, the minimum mode of operation of the applicant, as well as the minimum Bumiputera participation requirement.

If the SWEC require 100% Bumiputera participation, the 100% requirement is only for equity, while the minimum Bumiputera requirement for the other levels are as follows:

- 75% minimum Bumiputera participation for board of directors;
- 75% minimum Bumiputera participation for management; and
- 51% minimum Bumiputera participation for the applicant's employees.

If any category that an applicant wishes to apply is not listed in the SWEC, the applicant is advised to have a discussion with the Petronas' Licensing and Registration Section's officer prior to selecting the SWEC closest to the scope that the applicant intends to apply for.

(7) Processing & Refining and Marketing & Distribution

Pursuant to the Petroleum Regulations, downstream activities are regulated by two ministries: MDTCC is responsible for licences to market and distribute petroleum products while MITI is responsible for all licences relating to refining, processing and petrochemicals sectors.

Petroleum products are dutiable goods which are subject to excise duty under the Excise Act 1976. Export or import of petroleum and petrochemical products are regulated through the Customs Act 1967. Both acts are enforced by the Customs Department.

Petroleum products such as petrol, diesel, kerosene and liquefied petroleum gas ("**LPG**") are listed as controlled goods which require licensing from MDTCC for their sale under the Petroleum and Electricity (Control of Supplies) Act 1974. This Act provides for the control and rationing of the supply, distribution and use of petroleum products.

Latest Developments

In Malaysia, energy policy for the upstream sector is determined by the Economic Planning Unit ("**EPU**") and the Implementation and Coordination Unit, both of which reports directly to the Prime Minister. Malaysia's dynamic oil and gas industry has been facilitated by the close cooperation and support of the Malaysian government through progressive policies such as the Economic Transformation Programme ("**ETP**").

The ETP has developed targets in oil, gas and energy in order to rejuvenate Malaysia's upstream sector, expanding the country's domestic downstream sector and venturing into alternative energy sources. The ETP projects include reviving existing fields through enhanced oil recovery, developing marginal fields and intensifying exploration activities. Among the initiatives undertaken were testing of new play types in deepwater and complex fields, introduction of enhanced oil recovery and awarding of more RSC to develop marginal fields.

New tax and investment incentives incorporated in the Petroleum Income Tax Act were introduced in 2010 to promote development of new oil and gas resources, incentivise development of technically challenging resources and further stimulate domestic exploration activity.

Malaysia Petroleum Resources Corporation ("**MPRC**") was formed in April 2011 and started its operation in July 2011. As an agency reporting to Prime Minister's Department, MPRC's role is to promote, catalyse and transform the oil and gas services sector to become stronger entities in the industry. The objective is to position Malaysia to be the number one oil and gas hub in the Asia Pacific region by 2017.

To achieve that goal, MPRC has a broad mandate. One is to recommend appropriate policies relating to the oil and gas sector by reviewing existing business regulations and tax incentives. This would ensure that the facilities are competitive and attractive to international oil and gas companies to set up their regional or operation headquarters in Malaysia. MPRC also collaborates and promotes partnerships and joint ventures between local companies with global Multi-National Corporations, research institutions and academia.

The recent decline in global fuel prices have resulted in the Malaysian government scrapping fuel subsidies for petrol and diesel from 1 December 2014. With the economic reasons behind the collapse of global fuel prices unlikely to go away anytime soon, industry players will have to brace for a prolonged period of tough business environment. To remain in the game, many will likely seek consolidation or other merger and acquisition exercises. According to MPRC,

the industry is expected to move towards further consolidation, driven by the current weak oil price environment, as companies need to grow in size and capability to stay competitive.²⁶

Pengerang Integrated Petroleum Complex

To implement and realise the focus on oil and gas projects arising from the ETP, in 2011, the Malaysian government launched the Pengerang Integrated Petroleum Complex ("**PIPC**") project development in Pengerang, Southern Johor, Malaysia. The 22,000-acre PIPC mega project is one big step in creating value to the downstream oil and gas value chain in Johor and will house oil refineries, naphtha crackers, petrochemical plants as well as a LNG import terminal and a regasification plant. With a planned storage capacity of five million cubic metres, the complex will house oil refining facilities to make high value and high demand petrochemical products such as polymers, pharmaceutical products and plastics. The PIPC's advantage is that it can be a regional centre for oil and gas services and is able to complement Singapore's oil and gas facilities, including storage.

The development of PIPC will also benefit the local community by creating more access to economic opportunities in terms of job and business prospects. A new dedicated Federal Government agency known as Johor Petroleum Development Corporation Berhad ("**JPDC**"), a subsidiary of MPRC was established to coordinate the development of PIPC as well as a one-stop information centre to assist investors, oil and gas players and local community. One of the crucial roles for the government is to put in infrastructure and utilities in Pengerang to cater for the future expansion needs once PIPC is in place. These include construction of new roads, installing a comprehensive network of power, telecommunications and water supplies, upgrading roads to highways to facilitate movements of goods and services and a centralised management of industrial waste products from the complex. Two major catalytic projects have been committed within the PIPC area. The RM5 billion Pengerang Independent Deepwater Petroleum Terminal ("**PIDPT**") is a joint-venture between DIALOG Group of Malaysia, Royal Vopak of Netherlands and Johor State Secretary Incorporated. The second mega-project within PIPC is Petronas' RM60 billion Refinery and Petrochemical Integrated Development ("**RAPID**") Project and other associated facilities in Pengerang, through a project called Pengerang Integrated Complex ("**PIPC**"). The RAPID project site preparation is in progress and is expected to be commissioned by 2016. RAPID will have a 300,000 bbl. per day refining capacity while additional petrochemical plants will generate value to petroleum products produced in RAPID.²⁷

Phase 1 of the PIDPT has been completed and on March 2015, received its first Very Large Crude Carrier, the Liberian-registered MT Mesdar arriving from the Middle East to discharge its crude oil cargo at Phase 1 of the PIDPT. Phase 1 of the PIDPT has a storage capacity of approximately 1.3 million cubic metres together with six deepwater berths at a cost of RM2 billion with the capability to handle storage, blending and distribution of crude oil, petroleum, chemical and petrochemical feedstock, products and by-products. Dialog is currently investing in the Pengerang Terminal Phase 2 Project, which involves the construction of the storage capacity of approximately 2.1 mcm and a deepwater jetty with twelve berths at an approximate total project cost of RM6.3 billion and the Pengerang LNG Project for the development of LNG regasification facilities comprising of a regasification unit and two units of 200,000 cubic metres LNG storage tanks with an initial send out capacity of 3.5 million tonnes per annum at a total estimated project cost of approximately RM2.7 billion.²⁸

The RAPID project will create some 54,000 job opportunities, including 4,000 permanent jobs, upon its completion scheduled in 2019.²⁹ The timeline for PIPC masterplan which runs until 2035 may be revised due to the slump in oil price, as the drop in oil price has resulted in difficulty in attracting new investors, as investors are holding back or slowing down investments.

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²⁶ <http://www.thestar.com.my/Business/Business-News/2015/06/13/More-consolidation-seen-in-OG-industry-SapuraKencana-tops-ranking/?style=biz>

²⁷ <http://www.mprc.gov.my/our-businesses/pengerang-integrated-petroleum-complex-pipc>

²⁸ <http://worldmaritimeneeds.com/archives/154878/pengerang-deepwater-terminal-welcomes-first-vlcc/>

²⁹ <http://www.thestar.com.my/news/nation/2016/03/21/rapid-project-creates-54000-job-opportunities-in-johor/>

G. Infrastructure on Water

(1) Introduction to the Water Supply Industry in Malaysia

Water utilities in Malaysia were once predominantly state owned. However, continuous dependence on federal assistance were delaying the development of water infrastructure, which eventually lead to problems with the supply and quality of water. In 2006, there were two main legal outputs of the water sector reform which were the Water Supply Industry Act 2006 ("WSIA") and the Suruhanjaya Perkhidmatan Air Negara Act 2006.

The Suruhanjaya Perkhidmatan Air Negara Act 2006 ("**SPAN Act**") established a National Water Services Commission known as Suruhanjaya Perkhidmatan Air Negara ("**SPAN**"). The SPAN Act outlines the functions of SPAN, amongst which include:

- (a) to implement and enforce the laws in relation to water supply and sewerage services;
- (b) to monitor the compliance by operators of the stipulated standards, contractual obligations and relevant laws and guidelines;
- (c) to ensure long-term sustainability of the quality of water and sewerage services through continued capital works development;
- (d) to ensure the national development goals pertaining to coverage, supply and access to water supply and sewerage services are achieved; and
- (e) to regulate the water services industry through fair, effective and transparent implementation of the WSIA.

The WSIA regulates the water supply and sewerage services in Peninsula Malaysia. Apart from providing the licensing requirements needed to supply water or provide sewerage services, the WSIA also implements the rates, charges and deposits that may be collected.

The Ministry of Energy, Green Technology and Water oversees water supply and sanitation policies. It is assisted by the 'Jabatan Bekalan Air' (or Water Supply Department). Currently, all water supply assets in peninsular Malaysia are owned by Pengurusan Aset Air Berhad ("PAAB") in Malaysia. They are then leased back to both public and private operators. All operators have to be licensed by SPAN and have to achieve certain performance indicators specified in the licences.

The World Bank's Private Participation in Infrastructure database shows that there have been 16 private water contracts that reached financial close in Malaysia as of 2015.

(2) Licensing Requirements Under the WSIA

Individual Licence

A licence is required to own a public water supply system or public sewerage system; or to undertake, provide or make available any water supply services or sewerage services or part of the services by means of operating a public water supply system or public sewerage system. Only a company incorporated in Malaysia is eligible to apply for an individual licence. An application is made by submitting a written application to SPAN. The prescribed application form may be found in their website here:

<http://www.span.gov.my/index.php/en/guidelines/license/download>.

Class licence

A class licence is required to own a private water supply system or private sewerage system or any part of the system. A class licence is also required for those who wish to operate a private water supply system, or a private sewerage system for the purpose of providing treated water or sewerage services to the owner or the occupier of a premise for their private use. A company incorporated in Malaysia will be eligible to apply for an individual licence. Additionally, individuals who are citizens or permanent residents of Malaysia may also apply, as well as statutory bodies established under the Laws of Malaysia.

Types of Licences

Under each type of licence, there are three categories of licences that may be issued:

- (a) Facilities Licence - for those who own a water supply system, or sewerage system,

and/or any part of the system;

- (b) Service Licence - for those who own a water supply system or sewerage system and/or any part of the systems; and
- (c) Service Licence - for those who undertake, provide and/or make available any water supply services or sewerage services.

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16 TELECOMMUNICATIONS, MEDIA AND TECHNOLOGY

In light of significant developments and advancements within the Technology, Media and Telecommunications ("TMT") sectors across the globe, Malaysia has throughout the years been experiencing the ripple effect of the converging advancements across the three areas within the TMT sector. The aforementioned, coupled with incremental efforts by the government in according opportunities and incentives to individuals and businesses alike has made TMT as amongst the primary sectors in Malaysia.

In November 1998, the government adopted the convergence regulation model for purposes of administering the TMT sector. Such initiative saw the enactment of two legislations, which are the Malaysian Communications and Multimedia Commission Act, 1998 ("**MCMC Act**") and the Communications and Multimedia Act, 1998 ("**CMA**").

A. Regulators

The TMT sector is primarily administered by the Ministry of Communications and Multimedia, also known as "Kementerian Komunikasi dan Multimedia Malaysia" ("**KKMM**"); and the Malaysian Communications and Multimedia Commission ("**MCMC**"). The MCMC was established under the Malaysian Communications and Multimedia Commission Act 1998 ("**MCMC Act**"). KKMM is responsible for legislating, issuing directions and subsidiary instruments whereas the MCMC will enforce, implement and supervise the policies involved.

On its establishment, the MCMC had set out ten (10) national policy objectives, which are to:

- (a) establish Malaysia as a major global centre and hub for communications and multimedia information and content services;
- (b) promote a civil society where information-based services will provide the basis of continuing enhancements to quality of work and life;
- (c) grow and nurture local information resources and cultural representation that facilitate the national identity and global diversity;
- (d) regulate the industry for the benefit of the end user;
- (e) promote a high level of consumer confidence in service delivery from the industry;
- (f) ensure an equitable provision of affordable services over ubiquitous national infrastructure;
- (g) create a robust applications environment for end users;
- (h) facilitate the efficient allocation of resources such as skilled labour, capital, knowledge and national assets;
- (i) promote the development of capabilities and skills within Malaysia's convergence industries; and
- (j) ensure information security and network reliability and integrity.

These national policy objectives form the regulatory basis of the MCMC's regulatory framework which include, amongst others, economic regulation, technical regulation, consumer protection and social regulation.

B. Regulations for the TMT sector

The main legislation governing this sector is the Communications and Multimedia Act 1998 ("**CMA**") which sets out the regulatory licensing regime within the TMT sector. CMA has been in force since 1 April 1999 and serves to repeal the Telecommunications Act 1950 and Broadcasting Act 1988.

The licensing regime propounded within the CMA mainly functions to control the entry of market players within the industry. However, CMA worded rather broadly and specificities which aids in the regulation of the TMT sector in itself is more clearly spelt within the numerous guidelines, regulations and plans issued by MCMC and which are to be read together with the Acts, including but not limited to the CMA and MCMC Act.

One of such example is MCMC's publication of the Number and Electronic Addressing Plan ("**NEAP**") which governs matters pertaining to numbering and electronic addressing. To elaborate, the NEAP serves to ensure the proper and efficacious allocation, distribution and use of land line numbers, mobile numbers, IP telephony numbers, domain names, amongst others which are considered as national resources that are scarce and finite in amount. Requirements for the approval of the four categories of licences issued by MCMC, which shall be elaborated in further detail below are also addressed within the NEAP.

The MCMC has also issued the Malaysian Communications and Multimedia Content Code ("**Content Code**") which encourages self-regulation by members of the industry in its implementation. The general principle behind the Content Code is to ensure that content shall not be indecent, obscene, false, menacing or offensive. Although compliance with the Content Code is not mandatory, compliance with the Content Code shall be a defence against any prosecution, action or proceeding of any nature, whether in court or otherwise, taken against any person who is subject to the Content Code regarding a matter dealt with in that code. Further, the MCMC may direct a person or class of persons to comply with the Content Code.

C. Licensing Regime

The CMA provides the general terms of the licensing regime required. The specific provisions relating to licensing are contained in the Communications and Multimedia (Licensing) Regulations 2000 ("**Licensing Regulations**") which need to be read together with the Communications and Multimedia (Licensing) (Exemption) Order 2000 ("**Exemption Order**"). The Licensing Regulations set out in detail, the requirements and procedures to be complied with in order to obtain specific licences. The Exemption Order exempts certain specified activities and services from the requirement to obtain a licence under the CMA.

The four categories of licensable activities are described below.

(a) Network Facilities Provider ("**NFP**")

These are the owners of facilities such as earth stations, broadband fibre optic cables, telecommunications lines and exchanges, radio-communications transmission equipment, mobile communications base stations and broadcasting transmission towers and equipment. They are the fundamental building block of the convergence model upon which network applications and content services are provided.

(b) Network Services Providers ("**NSP**")

Parties who provide the basic connectivity and bandwidth to support a variety of applications are required to obtain an NSP licence. Network service enables connectivity or transport between different networks. A network service provider is typically also the owner of the network facilities. However, these services may also be provided by a person using network facilities owned by another.

(c) Applications Service Providers ("**ASP**")

ASPs are parties who provide particular functions such as voice services, data services, content-based services, electronic commerce and other transmission services. Application services are essentially the functions or capabilities, which are delivered to end-users.

(d) Content Applications Services Providers ("**CASP**").

The CASP licence is for a special subset of application service providers, including traditional broadcast services and online publishing and information services. "Content applications services" are defined as applications which provide sound, text, still picture, moving picture or other audio-visual representation, tactile representation or any combination of the proceeding which is capable of being created, manipulated, stored, retrieved or communicated electronically.

Across these four categories, the CMA provides for the issuance of two different types of licences, i.e. individual licences and class licences. Generally, an individual licence is granted to providers of services or owners of facilities who are subject to a high degree of regulatory control. For example, the services rendered or the facilities owned by the applicant has national and/or social significance; or there is a need to control market entry, to establish the

conditions of operation, or to limit the scope of the licensed activities (i.e. whether there are existing exclusivities, guarantees or other arrangements which must be preserved). All ASP individual licences have ceased to be valid and new ASP individual licences are no longer issued. Licensees previously holding a valid ASP individual licence and providing licensable applications services must register for an ASP class licence. A class licence, on the other hand, is relevant to services and facilities which are comparatively minor in nature. It is therefore subject to light-handed regulation and requires only the endorsement of the MCMC on registration notices submitted by the applicants.

The licence application procedure is quite simple. Applications for individual licences are made by completing and submitting a prescribed application form together with any documents that may be requested for by the MCMC and the prescribed licence fee. Individual licences are issued for ten years. In contrast, class licences are valid for only one year and needs to be applied for through submitting a prescribed registration notice together with the licence registration fee.

D. Spectrum

Under the CMA, the Minister of Communications and Multimedia ("**Minister**") is given power to make regulations in relation to technical regulation, and this includes the assignment of rights to the spectrum and mechanisms for rate-based assignments. In the same vein, the MCMC may develop a spectrum plan for any part of the spectrum. Within the spectrum plan, it shall specify, among other things, the division of frequency bands for specific uses, procedures for the assignment of spectrum (e.g. by auction, by tender, or at fixed prices) and a conversion plan.

For spectrum assignments, the Minister may determine that a certain spectrum is to be reallocated after taking into account recommendations of the MCMC, whereas the MCMC would then be able to confer rights on a person to use the specified frequency bands. The current ministerial determination would be Determination No. 4 of 2016 Ministerial Determination on the Issuance of Specified Spectrum Assignment to Particular Persons for the 900MHz Spectrum and Determination No. 7 of 2016 Ministerial Determination on the Issuance of Specified Spectrum Assignment to Particular Persons for the 1800MHz Spectrum.

As prescribed under the CMA, assignments shall be valid for a period of up to 20 years or less as may be specified in the spectrum assignment.

E. Access Obligations

In promoting an "any-to-any" connectivity network and to create a level playing field for the benefit of end consumers, regulatory intervention is required to allow competitors to access to each other's network, facilities or services. To this end, the MCMC has put in place three categories of determinations to regulate access obligations among CMA licensees: the Determination on the Access List; the Mandatory Standards on Access; and the Mandatory Standards on Access Pricing.

The Access List lists out the type of services and/or facilities that are regulated by the MCMC which places an obligation on certain licensees ("**Access Provider**") to provide access or interconnection to other licensees ("**Access Seeker**") and these licensees would be subject to the Mandatory Standards on Access. The Mandatory Standards on Access sets out the minimum standards that is expected in an Access Agreement which governs the relationship between an Access Provider and an Access Seeker to a facility or service. It also sets out certain obligations in relation to non-discriminatory practices, negotiation processes, operational standards and also a dispute resolution process. Further, Access Providers would also be subject to Access Pricing which specifies the wholesale prices that can be offered to an Access Seeker.

F. Incentives in the TMT sector

The Malaysian government recognises the importance of the TMT sector and has introduced several incentives for industry players. One of the most notable incentive would be the "MSC status" for companies that are in the information, communication and technology ("**ICT**") business or an ICT-facilitated business that develops or uses multimedia technologies to produce and enhance their products and services.

17 MULTIMEDIA SUPER CORRIDOR

A. Overview

Multimedia Super Corridor ("**MSC**") is a special economic zone designated by the Malaysian government ("**Government**") to house companies that embrace information and communications technology ("**ICT**").

This initiative was officially inaugurated on 12 February 1996 and the aim is to propel Malaysia into a knowledge based society. The Government set up an agency, Malaysia Digital Economy Corporation (formerly known as Multimedia Development Corporation) ("**MDeC**"), to manage and facilitate the development of the MSC and the award of MSC status to qualifying ICT companies.

The eligibility criteria for both local and foreign owned companies intending to apply for a MSC status and the corresponding benefits of having a MSC status are set out below.

B. Eligibility

MDeC awards MSC status to the following 3 types of business entities, each with a different set of qualifying criteria:

- (a) Private limited companies (a.k.a. sendirian berhad);
- (b) Institutions of higher learning ("**IHL**"); and
- (c) Incubators.

Once an applicant falls into either one of the 3 categories set out above, the applicant (save for Tier 3 and MSC4Startups applications, IHL and incubators) must:

- (a) undertake qualifying activities which involve technology and/or knowledge transfer and/or contribute towards the development of MSC or support Malaysia's knowledge-economy initiatives;
- (b) establish a separate legal entity for MSC qualifying activities if the existing business entity has a separate business activity; and
- (c) be located in a designated premise within MSC Malaysia Cyber City / Cybercentre*, to be considered for MSC status.

This is not a requirement for a startup. Please refer to **Section E for more details on this.*

C. Qualifying activities

Generally, qualifying activities are categorised into either Infotech, Global Business Services or Creative Content and Technology. Each category comes with different additional criteria for both local and foreign owned entities.

Please note however, that manufacturing and trading activities even involving off the shelf hardware and software are expressly categorised as non-qualifying activities.

(1) **Infotech**

- (a) Software Development

Companies undertaking design, development, maintenance and marketing of software products which includes but not limited to the following:

- (i) general business software applications such as CRM/ERP/Accounting on any platform; and
- (ii) specialised software applications for the vertical industries such as manufacturing/security solutions/wireless and fixed telecommunications embedded software.

(b) Hardware Technology products & application

Companies undertaking design, development, maintenance and marketing of hardware technology products and applications including but not limited to the following:

- (i) intelligent Controller/RFID/security solutions/Wireless and fixed telecommunications/SoC designs/IC design; and
- (ii) specialist design companies focused on electronic hardware components or finished products (RFID/Smart Cards).

(c) E-Business

Utilise the World Wide Web as its main platform of operation such as marketing, web hosting and e-commerce transactions, including:

- (i) application service providers, e-commerce service providers; web-based trading platforms; and
- (ii) E-Government based service providers.

(2) Global Business Services ("GBS")

The GBS activities are further broken down into 3 categories:

(a) Business Process Outsourcing (BPO)

Transactional-type internal (back-office) business functions such as human resources or finance & accounting and front-office functions which include customer-related services such as marketing and contact centre services.

(b) Information Technology Outsourcing (ITO)

Transactional-type IT and IT-related functions such as programming, technical support, desktop and server support, network and security systems etc.

(c) Knowledge Process Outsourcing (KPO)

Value-added processes which are highly complex and require the talent of professionals with widespread educational backing. The profile essentially requires specific and advanced knowledge of a particular domain or specialty. In the KPO context, the emphasis will be far more on talent than on physical infrastructure. Therefore, it will be more knowledge centric rather than capital centric.

A company under these activities will be subject to the following additional criteria:

| Criteria | MSC Malaysia (Foreign) | MSC Malaysia (Local) |
|------------|---|--|
| Headcount | 50 knowledge workers in 5 years or 20 knowledge workers with average salary > / = RM10k (subject to MDeC's evaluation) | 30 knowledge workers in 5 years or 20 knowledge workers with average salary > / = RM8k (subject to MDeC's evaluation) |
| Exports | 70% exports by 5 th year of MSC status | 20% or RM 0.5 million exports by 5 th year of MSC status |
| Location | 70% of investment located within designated areas | 30% of investment located within designated areas |
| Investment | RM10 million capital expenditure in 5 years | RM5 million capital expenditure in 5 years |

(3) Creative Content and Technology

Companies whose core business activity revolves around multimedia content creation, including:

- (a) production of multimedia & new media content IP;
- (b) production process (including interactive content);
- (c) post production digital audio and visual EFX / computer graphics based (CGI);
- (d) animation: 2D/3D, virtual reality, simulation;
- (e) aggregation/packaging of content; or
- (f) delivery of content.

A foreign applicant under this category must invest a minimum of RM5 million, have IP development activities in their business model, create a minimum of 20 high value jobs and generate at least 60% of its revenue from exports.

D. Benefits of MSC status

(1) Bill of Guarantees ("BoGs")

The grant of MSC status entitles qualified entities to a set of incentives, rights and privileges from the Government, set out in the BoGs. The incentives, rights and privileges granted pursuant to the BoGs are subject to requirements under relevant laws and policies. In addition, entitlement to the BoGs are conditional upon compliance with such terms and conditions as may be imposed by the Government and/or MDeC.

The BoGs comprises the following guarantees:

- (a) the guarantee of world-class physical and information infrastructure ("**BoG 1**");
- (b) the guarantee of unrestricted employment of local and foreign knowledge workers ("**BoG 2**");
- (c) the guarantee of exemption from local ownership requirements ("**BoG 3**");
- (d) the guarantee of freedom to source capital globally for MSC infrastructure and borrow funds globally ("**BoG 4**");
- (e) the guarantee of competitive financial incentives, including pioneer status which gives 100% tax exemption for up to 10 years or an investment tax allowance for up to 5 years and the guarantee of no duties on importation of multimedia equipment ("**BoG 5**");
- (f) the guarantee of the MSC entities becoming a regional leader in intellectual property protection and cyber laws ("**BoG 6**");
- (g) to ensure no censorship of the internet ("**BoG 7**");
- (h) the guarantee of grant of competitive telecommunication tariffs ("**BoG 8**");
- (i) the guarantee of major MSC infrastructure contracts will be tendered to the MSC entities ("**BoG 9**"); and
- (j) the guarantee of the support of MDeC as an effective one-stop agency ("**BoG 10**").

(2) Grants and Funding for MSC Malaysia Status Companies

Technology Innovation for Globalisation Fund (TIG)

TIG is a funding based on a competitive bidding model and the best bidder is awarded funding.

TIG supports all technology areas but funding preference is given to proposed projects related to these technology areas such as Big Data Analytics, IoT, Cloud, e-Commerce, Security, Games, 3D Printing, Mobile Technology/Computing or combinations of two or more of the said technology areas.

There is a long list of eligibility criteria for an applicant to meet before qualifying to participate in this competitive bidding model. The applicant must:

- (a) be a company incorporated in Malaysia;
- (b) not be the subject of a winding up order;
- (c) have a paid up capital of at least RM100,000;
- (d) have no going concern issue and/or not dormant;
- (e) have more than 50% of its ultimate legal and beneficial ownership vested in Malaysian(s). This include both direct and indirect ownership;
- (f) not be a recipient of, or has previously received any funding for the same product development and commercialisation deliverables under the Proposed Project from MDeC and/or any other Government Ministries or agencies;
- (g) not previously be in receipt of any such funding for a different product development and commercialisation project(s) such project(s) has been completed successfully;
- (h) not be a recipient of, or has previously received any funding under TIG (formerly known as PCF) from MDeC;
- (i) hold the MSC Malaysia status for at least 6 months as at the date of application and comply with all conditions thereunder;
- (j) not be listed on local and/or international bourses and is not a company in which more than 50% of its ultimate legal and beneficial ownership (direct or indirect) is vested in a listed company; and
- (k) work on the Project (which is the subject of the grant application) has not been completed as at the date of application.

MAC3 Fund

MAC3 fund is a funding support designed to help innovative local companies to develop, produce and co-produce content in the areas of Animation, Game, Digital Film with VFX components, Beyond Entertainment (Education, Simulation and Training content), High-end Technology Deployment (Film Technology, Editing and Colouring, Digitisation) and Digital Music that will contribute to the overall development of Creative Multimedia Industry and MSC Malaysia.

Application for this funding is closed until further notice from MDeC at the time of writing this guide.

E. MSC Malaysia for Startups

On 12 May 2015, MDeC launched the MSC Malaysia for Startups Programme ("**Programme**"). This Programme is an alternative for companies to attain MSC status without being required to locate to any of the MSC designated Cybercities/ Cybercentres. Prior to the Programme, MSC status companies must be located in designated premises within MSC Cybercities/Cybercentres ("**Tier-1 Companies**") or commercial premises within MSC Cybercities/Cybercentres ("**Tier-2 Companies**") for them to enjoy the various incentives offered under the MSC status. This Programme now creates a third category for MSC status companies that are located outside of MSC Cybercities/Cybercentres ("**Tier-3 Companies**").

For a company to enjoy the incentives under the Programme, it must first apply for a MSC status from MDeC. Whilst the Programme was launched on 12 May 2015, companies with MSC status approved from 1 January 2015 onwards are eligible to apply for a Tier-3 Company status.

MSC status companies approved after 1 January 2015 and have not activated their pioneer status incentive are eligible to apply for Tier-3 Company status. A Tier-3 Company can apply to move up to Tier-1 or Tier-2 Company status after 5 years of pioneer status incentive or it can choose to remain as a Tier-3 Company as long as the company is still active. However, such company will be liable to the applicable taxation laws after 5 years of pioneer status incentive. In other words, the company will have to upgrade to Tier-1 or Tier-2 Company status in order for it to enjoy another 5 years of pioneer status incentive.

MSC status companies approved prior to 1 January 2015 will still need to adhere to the location requirements as stated in their conditions of grant. If they move outside the designated location, it will be considered a breach of the conditions of grant. These companies are not eligible to move down to Tier-3 Company status and participate in the Programme but will continue to enjoy the full suite of incentives offered under MSC status.

Some of the main incentives offered to Tier-3 Companies under the Programme are as follows:

- (a) Enjoy 6 BoG privileges, i.e. BoGs 3, 4, 6, 7, 9 and 10
BoG1 & 8 are not applicable to Tier-3 Status Companies due to the company's location that is outside of a Cybercity/Cybercentre;
- (b) Enjoy partial BoG2
Companies can employ foreign knowledge workers for key positions only (maximum 20 workers); and
- (c) Enjoy partial BoG5
Instead of enjoying 100% tax exemption, Tier-3 Status Companies will only enjoy 70% tax exemption of statutory income for 5 years only, and no duties on the import of multimedia equipment.

F. Green Lane Policy

In addition to the MSC status, the Government also introduced a green lane policy targeted at assisting competitive and innovative local SMEs to secure a competitive edge over other business entities in securing government projects and tenders. The incentives under this policy are:

- (a) Loans with subsidised interest rates
Subsidised interest rate at 2% per annum subject to the maximum sum amount of RM200,000 annually or cumulative amount of RM1,000,000 for five years for each company, from the Development Institutes Development Financial Institutions / banks approved by Ministry of Finance ("MoF").
- (b) Tax exemption
Exemption of stamp duty under the Section 80 (1) Stamp Act 1949 for the legal documentations under the loans with subsidised interest rates incentives as mentioned above.
- (c) Government Procurement
 - (i) Registration of company for manufacturer status with the Ministry of Finance may be approved without the requirement of site-visits
 - (ii) Additional bonus points on technical assessment
 - (iii) Priority to join the Government Offset Programmes
 - (iv) Consideration to be included in the Central Contract / Panel System Contract
- (d) Privileges in the Ministry of Finance Incorporated Companies' Procurement

Companies intending to be listed in the green lane policy, a list of which MDeC will review on a quarterly basis must fulfil the following qualifying criteria:

- (a) MSC Malaysia Status Companies for minimum of 2 years;
- (b) maximum of 50 employees OR revenue of below RM5 million;
- (c) majority locally owned (51%);
- (d) achieve MSC Malaysia SME Competitiveness Rating for Enhancement (SCORE+) Financial Rating of minimum 2.5 or two (2) consecutive years of profitability after tax;
- (e) carry out MSC Malaysia Qualifying Activities as specified in the MSC Malaysia Conditions of Grant (CoGs);

- (f) meet the location requirements as specified in the CoGs;
- (g) participated and responded to surveys conducted by MDEC including MSC Malaysia Industry Reporting (AQIR) and SCORE+; and
- (h) fulfil either one of the additional qualifying criteria as below:
 - (i) overall SCORE+ Rating of minimum 2.5;
 - (ii) winner of MSC Malaysia APICTA; or
 - (iii) attained products certification from MSC Malaysia Certified Solutions.

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18 LABUAN – INTERNATIONAL BUSINESS AND FINANCIAL CENTRE

Labuan is one of the three federal territories of Malaysia since 1984. It comprises seven islands of which the main Labuan Island is the largest with the size of 75 km², the total area of the federal territory being 92 km². Its name, which is derived from the Malay word 'labuhan' meaning 'anchorage', is probably the most obvious evidence that Labuan has historically been treated as a port.³⁰ This is largely due to its strategic location being in between the giant economies of India and China. It is also in the same time zone as Singapore and Hong Kong which is very convenient for international trade. Essentially, Labuan is located on the major shipping and air routes of the Association of Southeast Asian Nations (ASEAN) region, off the north-west coast of Sabah, Malaysia. Therefore, it should not be much of a surprise when Labuan was declared as Labuan International Offshore Financial Centre ("**Labuan IOFC**") in October 1990. At that time, the island only had 6 banks, 5 legal firms and 8 accounting firms established. By offering flexible tax treatment and liberal exchange controls as well as low start-up and operational cost, Labuan has managed to draw in over 6500 offshore companies and 300 financial institutions, including some of the world's biggest banks. Hence, in order to reflect its flourishing international status, a rebranding and repositioning exercise was carried out in 2008. Labuan IOFC has since been renamed as Labuan International Business and Financial Centre ("**Labuan IBFC**").

Labuan IBFC

The reasons for establishing Labuan IBFC are clear - for growth and development of Labuan itself, Kuala Lumpur's domestic financial market and Malaysia as a whole. Given the success of Labuan in attracting foreign investment, it would seem that Labuan IBFC is operating well in line with its objective. Indeed, it would not be an exaggeration to say that Labuan IBFC has managed to go beyond expectation and brought pride to Malaysia due to the transactions that were carried out within the jurisdiction. For instance, at the prestigious Wealth Briefing Asia Awards 2014, Labuan IBFC was the winner for the Editor's Award – Islamic Finance Offering thanks to its range of Islamic wealth management specialists who are very helpful to the clients and readily available to advise on new trends and developments. Recognition was also given to Labuan's effort in encouraging collaboration with other like-minded Islamic financial institutions.

The change from Labuan IOFC to Labuan IBFC means much more than simply a word change. By describing a jurisdiction as 'offshore', it usually means a small, low tax jurisdiction specialising in providing corporate and commercial services to non-resident offshore companies and for the investment of offshore funds.³¹ Such jurisdiction has the advantage of tax saving, simpler business administration, assets protection, confidentiality (sometimes even anonymity) and ability to facilitate global investment. As a result, international companies regardless of size are frequently based offshore. In fact, even self-employed consultants own offshore companies so that they can invoice their clients without having to pay tax. Even if they pay tax, it will usually be low compared to onshore companies. Thus, it is apparent that being 'offshore' can accommodate the special needs of international transactions and wealth management demands very well. In Labuan, this is still being done as can demonstrated by the efforts in amending existing legislation along with adding new ones to incorporate new model like Protected Cell Companies (as described further below) as well as other investment and business vehicles. This includes trust, companies, insurance, fund management or capital markets, leasing, Labuan International Financial Exchange and many more.

Given that the type of business opportunities available at Labuan IBFC is not decreased, what exactly does the name change signify then that is so important? The answer lies in the degree of regulation in place at Labuan. As shown by the press statement by Labuan IBFC in 17 September 2013, it can be seen that the jurisdiction has repositioned itself as a Mid-shore Business and Financial Centre. This is achieved by striking a balance between a robust regulatory framework and maintaining the competitiveness of an international business and financial centre. The challenge of this all is in preserving the flexibility and confidentiality an offshore financial centre could offer while ensuring

30 'Labuan – The Garden Island of Borneo' <http://go2travelmalaysia.com/tour_malaysia/labuan.htm> (accessed 19th July 2014)

31 Moran Harari, Markus Meinzer and Richard Murphy, 'Key Data Report: Financial Secrecy, Banks and the Big 4 Firms of Accountants' (Tax Justice Network, October 2012) <http://www.taxjustice.net/cms/upload/pdf/FSI2012_BanksBig4.pdf> accessed 20th July 2014

compliance with internationally agreed standards and best practices which often requires disclosure. If successful, Labuan IBFC can make some very good counter-arguments against the accusation made by the Organisation for the Economic Cooperation and Development that the confidentiality or anonymity and flexibility provided by offshore jurisdictions like Labuan results in money laundering and unfair competition. To put it simply, what Labuan IBFC has to do as a mid-shore jurisdiction is to make sure that the regulation in place can sufficiently complement its expanded legal framework, ideally no more and no less.

Labuan Protected Cell Companies

Labuan IBFC is the first in ASEAN region to introduce the concept of Labuan Protected Cell Companies ("**PCC**"). The insertion of new provisions introducing PCC is one of the key amendments to the Labuan Companies Act 1990 in February 2010. With this, it is hoped that Labuan will become the PCC Centre for Asia Pacific region. PCC is basically a single company consisting of two distinct elements --- a core and any number of cells, each having separate assets attributed to it and each will be identified independently and distinctly from the others. This separation of assets brings the advantage of flexibility. If one cell becomes insolvent, the creditors will only be entitled to assets attributed to that particular cell. Besides, due to the minimal administrative work and cost required in the addition of cell as and when required, PCC also has the benefit of having low start up and operational cost. This ultimately increases profit of the company as well as improving cash flow. In short, the ability to incorporate such companies shows how Labuan IBFC is very innovative in its development and not merely a trend follower. Indeed, the jurisdiction is the first in ASEAN region to realise the potential of PCC as a useful tool for assets and privacy protection. Hence, it can be safely concluded that Labuan IBFC is taking constructive steps towards the goal of becoming leader of the market.

Labuan Financial Services Authority

Under the Labuan Financial Services Authority Act 1996, the sole statutory body responsible for the regulation, supervision and development of the Labuan IBFC is the Labuan Financial Services Authority ("**Labuan FSA**"). It acts as a one-stop body for those functions through its investment holding company established in December 1999 named Labuanfsa Incorporated Sdn. Bhd. In turn, the company owns two subsidiaries, Pristine Era Sdn. Bhd. and Labuan IBFC Inc. Sdn. Bhd. The former manages the Labuan International School whereas the latter is responsible for marketing and promoting Labuan IBFC. Labuan FSA ensures that the IBFC subscribes to international standards and best practices in financial services and prudential regulation. Not only that, Labuan FSA was provided the scope and authority to further develop the range of financial intermediation available in 2010 through a comprehensive review of the entire legal structure supporting Labuan IBFC. This was done with the objective of conserving Labuan's competitiveness. Consequently, significant changes were made to the existing Labuan law as well as causing the enactment of four new Acts. One of the key changes that is worth highlighting is the enactment of Labuan Islamic Financial Services and Securities Act 2010 which is a specific legislation governing the provision of Islamic financial services in Labuan. This is a first for a common law international business and financial centre.

With the expanded legal framework mentioned, there is certainly a need to complement it with strengthened prudential regulations to live up to its reputation as a leading mid-shore jurisdiction. There are three underlying principles in the creation of the prudential regulations. Firstly, the intensity of the policy requirements needs to be proportionate to the risk, materiality and significance posed by the financial institutions involved. Therefore, there is a need to distinguish between the primary market players and intermediaries to ensure the policy requirements are fitting to the role assumed by the institutions concerned. Secondly, it is strident that the prudential policies incorporate the international standards as base line requirements while being benchmarked to the onshore comparable regulations. The onshore regulations measured against should be modified and moderated accordingly so as to be able to appropriately cater to the international business setting based on the practices of the other fellow offshore financial centres. The third principle calls for a step-by-step implementation approach for new requirements as opposed to sudden 'big-bang' imposition to the industry. This is to allow time for adequate preparation by the financial institutions to internalise the prudential requirements as part of the business set up rather than simply fulfilling their regulatory obligations. Ultimately, these principles ensure that due consideration is taken in developing and effecting the appropriate prudential policy. The word 'appropriate' in this sense means adapted to the demands and situations specific to Labuan IBFC.

Keeping those three-pronged principles in mind, Labuan FSA had launched a programme of regulatory up-scaling plans in 2013 with four focus areas as the thematic cornerstones from which specific prudential policy initiatives are being or will be developed throughout the year of 2014 till 2016. The four broad focus areas are identified from the national recommendation package committed under the Financial Sector Blueprint 2011-2020. The first focus area is in strengthening capital and financial foundations. This is to be done by initiatives like harmonising the financial reporting standards to achieve valuation consistency and evolving towards a risk-based capital standards for insurers. Other than that, it is hoped that corporate governance as well as practices of key financial institutions could be enhanced, possibly through promotion of effective self-regulation whilst still allowing room for supervisory reliance by the Labuan FSA. The third broad area to be focused on is in improving market conduct so that higher professionalism and sound business practices could be cultivated and maintained. Moreover, initiatives to foster close ties between Labuan FSA and key regulatory authorities and agencies in the domestic and international markets would be carried out under the fourth focus area – regulatory partnership. It is believed that the combination of the prudential regulatory measures and compliance with the three underlying principles of proportionate regulations, strategic benchmarking and phased implementation approach will further improve Labuan IBFC's international status as a mid-shore jurisdiction.

Overview of Financial Services in Labuan

The financial services industry in Labuan is regulated under the Labuan Financial Services and Securities Act 2010 ("**LFSSA**"). The LFSSA governs, amongst others, Labuan banking business, Labuan investment banking business, Labuan financial business and Labuan insurance. It is important to note that these financial services industries are not subject to the jurisdiction of the Central Bank of Malaysia ("**BNM**"), but instead are regulated by the Labuan FSA.

Labuan Banking Business

The LFSSA defines Labuan banking business as (a) the business of receiving deposits on current account, deposit account, savings account or any other account as may be specified by the Labuan FSA; (b) Labuan investment banking business; (c) Labuan financial business; (d) Labuan Islamic banking business; or (e) such other business as the Labuan FSA, with the approval of the Minister, may specify, in any currency (including in Malaysian Ringgit where permitted under the Financial Services Act 2013 or such other relevant law in force).

Any person wishing to carry on a Labuan banking business must be licensed with the Labuan FSA. The minimum eligibility criteria for applicants is that the applicant: (a) must be a bank or a financial institution; (b) possess a sound track record; (c) be accorded a good credit rating by acceptable credit rating agencies; (d) be supervised by a competent regulatory authority; and (e) conform to generally accepted standards of international banking practices or the Bank for International Settlements (BIS), as the case may be.

A Labuan bank may also set up an Islamic banking window pursuant to the LFSSA without the need to have a separate Labuan Islamic banking license. Pursuant to the initiatives led by the Malaysia International Islamic Financial Centre ("**MIFC**"), Islamic divisions in Labuan banks have been given some flexibility, including: (a) exemption from the requirement to maintain a physical presence in Labuan; the Islamic divisions of Labuan banks may open operations offices anywhere in Malaysia, subject to the consideration of the Labuan FSA; (b) there is no limitation on the staffing and number of operations offices to be opened outside of Labuan; (c) the operations offices are to conduct Islamic financial business in non-Ringgit currencies and deal mainly with non-residents as required under the relevant legislation; and (d) dealings with residents in non-Ringgit transactions are allowed as permitted under the current foreign exchange administration policies.

Labuan Investment Banking Business

The LFSSA defines Labuan investment banking business to mean: (a) the business of providing credit facilities; (b) the business of providing consultancy and advisory services relating to corporate and investment matters, including dealing in securities, or making and managing investments on behalf of any person; (c) the business of undertaking foreign exchange transactions, interest rate swaps, dealings in derivative instruments or derivative financial instruments or any other similar risk management activities; (d) Labuan Islamic investment banking business; (e) Labuan financial business; or (f) such other business as the Labuan FSA, with the approval of the Minister, may specify, in any currency (including in Malaysian Ringgit where permitted under the Financial Services

Act 2013 or such other relevant law in force). Note that Labuan investment banks are not allowed to accept deposits.

Similarly, any person wishing to carry on a Labuan investment banking business, must be licensed by the Labuan FSA. An applicant for a Labuan investment banking business licence may be from: (a) an investment bank or group engaging in investment banking activities licensed by the regulatory authority in its country of origin; (b) a licensed bank or an established financial institution or financial services provider supervised by a competent regulatory authority; (c) any institution licensed under the Financial Services Act 2013 with prior approval from BNM; or (d) corporations with the necessary expertise and experience in the financial industry with at least three years of good track record and is regulated by an authority in their home country.

Labuan Financial Business

Labuan financial business includes (a) building credit business; (b) credit token business; (c) development finance business; (d) leasing business; (e) factoring business; (f) money-broking business; (g) Labuan Islamic financial business; or (h) such other business as the Labuan FSA, with the approval of the Minister, may specify, in any currency (including in Malaysian Ringgit where permitted under the Financial Services Act 2013 or such other relevant law in force).

Each type of financial business will be subject to different application and operational requirements as prescribed by the Labuan FSA.

Labuan Insurance Business

Labuan insurance business is defined as insurance business which is not domestic insurance business and which is transacted in foreign currency, and includes takaful and retakaful business, Labuan captive insurance business and such other insurance business as may be approved by the Labuan FSA. Only a Labuan company, a foreign Labuan company or a branch of a Malaysian insurer that holds a valid insurance license may carry on or transact any Labuan insurance business. There are four main categories of Labuan insurances business: (a) Labuan captive insurance; (b) Labuan Reinsurance; (c) Labuan general insurance; and (d) Labuan life insurance.

Labuan insurance-related businesses include business as a Labuan insurance broker, Labuan insurance manager or Labuan underwriting manager. Again, only a person with a valid insurance license may carry on or transact these insurance-related activities. Each of these activities will have separate licensing and operational requirements as prescribed by the Labuan FSA.

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19 ECONOMIC CORRIDORS

In order to develop Malaysia's strategic investment regions, the Malaysian government has established five economic growth corridors. Each corridor consists of a well-defined space with sectorial and geographical advantages enabling businesses to benefit from common resources, facilitate labour market matching and contribute to knowledge sharing. Each corridor also highlights physical planning and its surrounding area to concentrate on infrastructure development to achieve the most positive benefits. The corridors have their own clear and concise visions and purpose, focusing and owning the authority to oversee the developments in their specific region. The five corridors are:

- (a) Iskandar Malaysia in Southern Johor (Iskandar);
- (b) Northern Corridor Economic Region (NCER);
- (c) East Coast Economic Region (ECER);
- (d) Sabah Development Corridor (SDC); and
- (e) Sarawak Corridor of Renewable Energy (SCORE).

The Malaysian government supports the economic corridors by making supportive government policies such as liberal equity requirements, tax incentives and the flexibility to recruit expatriates. These policies are mainly implemented through a statutory body set up specifically for each of these corridors.

In order to further develop investments in the 5 economic corridors, the Malaysian government has recently announced in the 11th Malaysia plan tabled in May 2015 that efforts will be undertaken to accelerate investments and improve infrastructure. One such effort is the upgrading of existing roads and highways such as the Pan Borneo Highway to ensure better connectivity from SCORE to SDC and the Kota Bahru – Kuala Krai highway to increase connectivity to the ECER.

The Malaysian government is hopeful that with the combination of supportive government policies such as tax incentives and with the improved connectivity to the economic corridors, private investors (both foreign and local) will flock to invest in the economic corridors. The Malaysian government aims to attract private investments of RM 236 billion and the creation of 470,000 new jobs by the year 2020.

A. Iskandar Malaysia ("Iskandar")

Iskandar is situated in southern Johor and is divided into five flagship zones, namely:

(1) Johor Bahru

The current key economic activities in this flagship zone are financial services, commerce and retail, arts and culture, hospitality, urban tourism, plastic manufacturing, electrical and electronics and food processing.

(2) Nusajaya

The current key economic activities in this flagship zone are mixed property development, state & federal administration and logistics. Going forward, this flagship zone would be the hub for creative arts and entertainment, medical facilities, educational institutions, tourism, biotechnology and hi-tech manufacturing.

(3) Western Gate Development

The key economic activities in this flagship zone are port and marine services, warehousing, logistics, engineering, hi-tech manufacturing, food production, petrochemical industry, entreport trade. The Western Gate Development boasts a logistic centre, regional distribution centres, regional procurement centres and utilities (power).

(4) Eastern Gate Development

Current key economic activities in this flagship zone are focused on heavy industries and logistics, including electrical and electronics, chemical, oleochemical, food and engineering-based industries as well as ports and logistics and warehousing

(5) Senai – Skudai

Current key economic activities in this flagship zone are airport services, engineering, electrical and electronics and education. Going forward, the Senai –Skudai flagship zone would also be the hub for agro and food processing, ICT and retail tourism.

Iskandar Regional Development Authority ("IRDA") is a Federal statutory body established under the Iskandar Regional Development Authority Act 2007 to oversee development within Iskandar. Accordingly, IRDA's main focus and roles are to establish policies, directions and strategies that have a direct impact on development activities within Iskandar and to act as a "one-stop centre" to deal with investors and responding to investors' needs in a timely and efficient manner.

Companies investing in Iskandar may apply to IRDA to enjoy an array of flexibilities and attractive incentives. Companies applying to be an IDR–status Company must be a company incorporated under the CA 1965 and approved by the MOF and is a resident in Malaysia which undertakes a qualifying activity in the approved zone within Iskandar. The qualifying activities are education, financial healthcare, ICT & creative, industries, logistics and tourism.

IDR-status companies will enjoy various incentives. One of the incentives enjoyed by IDR-status companies is the exemption from the Foreign Investment Committee rules. Besides that, they will enjoy flexibilities under the foreign exchange administration rules, in that they can make and receive payments in foreign currency with residents, retain export proceeds offshore, invest any amount in foreign currency assets onshore and offshore and borrow any amount of foreign currency from licensed onshore and non-residents. IDR-status companies will also enjoy unrestricted employment of foreign knowledge workers.

Tax incentives for IDR-status companies will depend on the sector that a company is in, however the general incentive is a five year corporate tax exemption or 100% investment tax allowance within a five year period to be offset with statutory income, along with import duty and sales tax exemption for equipment and components used directly in the company's qualifying activities.

B. Northern Corridor Economic Region ("NCER")

The Northern Corridor encompasses the northern states of Perlis, Pulau Pinang, Kedah and northern Perak, covering an area of 17,816 sq. km. This area leverages on existing economic achievements in electronics, tourism, agriculture as well as its strategic location bordering Thailand and facing the Straits of Malacca. The NCER focuses on accelerating economic growth and elevating income levels in northern Peninsular Malaysia with the objective of becoming a world-class economic region by the year 2025.

Unlike the other economic corridors, the NCER does not have key development areas for certain sectors, but rather it develops all key sectors as a whole. The key sectors are:

- (a) agriculture;
- (b) manufacturing;
- (c) tourism; and
- (d) logistics.

The Northern Corridor Implementation Authority ("**NCIA**") was established under the Northern Corridor Implementation Authority Act 2008 as the authority responsible for providing direction and for devising policies and strategies in relation to socio-economic development in the Northern Corridor Economic Region.

The development of the area will be cascaded into a number of programmes. The programmes are mainly divided into phases 1, 2 and 3. Phase 1 is from 2007 to 2012, which is the introductory phase to secure anchor investors and develop infrastructure. Phase 2 is from 2013 to 2020, which focuses on broadening private sector involvement in the area and the establishment of business networks. Phase 3 is from 2021 onwards and it focuses on achieving regional leadership via sustainable market growth.

Several iconic projects have been planned for the NCER, and these include the Kedah Rubber City, Kedah Science and Technology Park, Kulim International Airport, Kedah

Aerocity, Sungai Petani-Kedah Inner Expressway and Kedah Medical Science City. The Kedah Rubber City project has attracted some interest from Thailand and Indonesia who are keen on making the Kedah Rubber City part of a larger rubber corridor between the 3 nations. The Malaysian government has also shown its support for the Kedah Rubber City Project by allocating some RM320 million for the development of the rubber city.

All investors are welcome to invest in the area through the various routes of setting up a presence in Malaysia, highlighted in **Chapter 4** above. Investors can also enjoy several incentives by making an application to the NCIA. The NCIA usually grants the incentives on a sector-by-sector basis but it generally includes Investment Tax Allowances, Pioneer status exemption on import duty and others.

C. East Coast Economic Region ("ECER")

The ECER covers the states of Kelantan, Terengganu, Pahang and the district of Mersing in Johor. It occupies an area of 66,000 sq. km or 51% of the total area of Peninsular Malaysia. The East Coast Economic Region Development Council ("**ECERDC**") is the statutory body established to spearhead the development of the ECER, particularly in the five key economic sectors, namely manufacturing, oil, gas & petrochemicals, tourism, agriculture and human capital development.

There are six key development areas or nodes within the ECER, and they are:

- (a) The coastal belt from Besut in Terengganu to the Kelantan-Thai border at Tumpat. This node focuses cross border development, capitalizing on the synergy generated by the Indonesia-Malaysia-Thailand Growth Triangle. Key initiatives include Pasir Mas Halal Park; Pengkalan Kubor Collection; Processing, Packaging Centre; Tok Bali Fisheries Park, Kota Bharu City Centre and Jeli-Bukit Bunga Conurbation.
- (b) The heartland of Terengganu formed by Dungun, Kuala Terengganu and Kuala Berang. The focus of this node is on agriculture and eco-tourism. Key projects include Dungun Coastal Tourism Development, Pasir Raja Herbal Park, Kuala Berang Sheep Breeding Centre and Telaga Papan Goat Multiplier Farm.
- (c) The Special Economic Zone of Greater Kuantan, which extends over an area of 3,874 square kilometres along the coast from Kertih in Terengganu to Pekan in Pahang, is the only special economic zone in Malaysia. This Special Economic Zone acts as the main engine of growth in ECER through key projects such as the regional Kuantan Port, Kuantan Integrated Biopark, Kertih Biopolymer Park, Cherating Coastal Tourism Development, Pahang Technology Park and Pekan Automotive Park.
- (d) The Mersing-Rompin key development area stretches from Rompin in Pahang to Mersing in Johor. It plays an important role in agriculture and ecotourism. Some of the key projects in the Mersing-Rompin key development area are the Rompin Integrated Pineapple Plantation, Cattle Research and Innovation Centre in Muadzam Shah, Endau-Rompin State Park and Island Tourism off the Coast of Mersing, Johor.
- (e) The Dara-Jengka key development area consists projects aimed at promoting sustainable development, enhancing public transportation and developing a progressive community.
- (f) The Bentong – Raub key development area in Pahang is aimed at providing a satellite role to the Greater Kuala Lumpur Development. Gua Musang – Kuala Lipis key development area focuses on initiatives such as the eco-tourism and agropolitan projects.

Similar to the other economic corridors, all investors are welcome to invest in the area through the various routes of setting up a presence in Malaysia and in turn the investors in the ECER enjoys incentives such as income tax exemption up to ten years, investment tax allowance of 100% on qualifying expenditure, sales tax exemption, discount rate for land premium, quit rent and land assessment, guaranteed land lease periods for a specific time period, flexibility in the employment of expatriates and special flexibility in foreign exchange administration under BNM.

There are also several Schemes tailored for Malaysian citizens only, which are aimed at improving the livelihood of Malaysian citizens in the area. These Schemes are:

(i) Entrepreneur ECER

This programme targets existing entrepreneurs in the ECER who wish to grow their business. The programme aims to increase the participation of Bumiputera entrepreneurs as well as entrepreneurs from other communities, including Orang Asli. Entrepreneurs. The programme is implemented through collaboration with SIRIM and AGROBANK. The programme involves financial assistance and training workshops on business management skills, financial management, product development, product quality improvement, branding, product registration, research & development, Halal JAKIM certification, packaging & labelling and also market expansion.

(ii) CER Talent Enhancement Programme

The CER Talent Enhancement Programme is a human capital development programme designed to ensure that there are adequate skilled and multilingual workforce that matches the industry's requirements. The programme forges strategic partnerships between investors and training providers in training graduates from various disciplines for placement with employers to ensure high employability of the trainees.

D. Sabah Development Corridor ("SDC")

The SDC emphasises transformation and expansion of the agricultural, bio-technological avenues, tourism and logistics sectors in the region with the overall theme of "increasing value add from existing industries". The SDC initiative seeks to accelerate the key sectors to move towards higher value-add activities such as design and research & development. Also, key tourism assets such as the National Park Islands of Sipadan, Pulau Tiga, Mabul, and Kinabalu National Parks, will be enhanced to attract higher-yielding tourists, thereby increasing per capita tourist spending and the size of the tourism industry in the region. Besides that, SDC also aims to enhance the industrial potential of palm oil with a Palm Oil Industrial Cluster at Lahad Datu to get investors to open up more palm oil related industries within the area.

In order to expedite the implementation of SDC, the Sabah State Legislative Assembly had approved the establishment of a statutory body known as the Sabah Economic Development and Investment Authority ("**SEDIA**"). SEDIA has been entrusted as the One-Stop Authority to drive the SDC, with the primary responsibility to plan, coordinate, promote and accelerate the development of the SDC.

The SDC is divided into specific project areas, with different functions or sectors for each project area:

- (a) Kinabalu Harbour Front and Gold Coast Enclave are developed for the consolidation of logistics and transportation infrastructure as well as reducing the cost of doing business.
- (b) The development of the Keningau Integrated Livestock Centre on the other hand, is for the production of commercial rice, fruits and livestock.
- (c) Marine Integrated Cluster is developed for the purposes of Permanent Food Production Parks, seafood and aquaculture.
- (d) Palm Oil Industrial Clusters in Lahad Datu and Sandakan are developed for the purposes of the production of palm oil.
- (e) Other specific projects include the development of Oil and Gas Industry Cluster in Sipatang, environmental rehabilitation and conservation, Brunei Bay Development Zone, agropolitan projects for the rural poor, promotion of new sources of growth via the application of pioneering technology in the SDC such as ICT, Biotechnology and Nanotechnology and to establish a one-stop service centre for SDC and Business Desk for SMEs, start-ups and Bumiputera Commercial and Industrial Community.

To encourage companies to participate in the initiative, incentives are given to companies carrying out specific qualifying activities, located in the designated SDA. Activities that qualify for the incentives are agriculture, green technology, human capital, infrastructure, manufacturing and tourism.

In order to enjoy the incentives, investors must make an application to SEDIA. Incentives granted are on a case by case basis but generally, companies investing in the SDC will enjoy incentives such as exemption on import duty and sales tax, full tax exemption on statutory income for ten years and investment tax allowance of 100% on qualifying capital expenditure for five years.

E. Sarawak Corridor of Renewable Energy ("SCORE")

In terms of land area, SCORE is the second largest of the corridors and covers an area of more than 70,000 square kilometres of the resource rich central region of the state of Sarawak with a population of more than 600,000. SCORE has a long coastline of more than 1,000 km, over eight million hectares of forests and almost five million hectares of arable and peat land suitable for agriculture. Besides that, SCORE has an abundance of natural resources, including clean and safe renewable resources, such as hydropower, that offers commercial users clean energy at competitive rates.

The Regional Corridor Development Authority ("**RECODA**") is the agency tasked with overseeing and managing SCORE. The Chairman of the RECODA board is the Chief Minister of Sarawak and RECODA has board representation from all of the relevant federal and state agencies to ensure swift decision making and traditional government procedural delays are avoided. RECODA has two primary tasks. The first is to promote SCORE effectively by creating and stimulating new and existing markets, and the second, to work towards achieving the ambitious investment goals set by the State.

The key sectors in SCORE are aluminium, glass, marine, engineering, metal-based, oil & gas, timber – based, tourism, aquaculture, livestock, palm oil and tourism. In order to ensure effective allocation of infrastructure and resources, SCORE is divided into five different areas to focus on different sectors. The five areas are:

(a) Samalaju

Samalaju is the ideal location for heavy industries with a deep sea port scheduled for completion in stages from 2013 to 2016 and the state's attractive energy rates. Covering an area of 450 hectares, the port will form the logistical hub for the import of raw materials and the export of finished products from the heavy industries located in the industrial park

(b) Tanjung Manis

Tanjung Manis is being developed into an industrial port city and Halal Hub. The port will have an annual capacity of 200,000 TEUs and 6 million tonnes of general cargo and will play a pivotal role in the future success of the Halal Hub and SCORE. Tanjung Manis Halal Hub will be the largest and most advanced integrated Halal Hub in the world. Tanjung Manis has a number of competitive advantages including a large land bank, extensive infrastructure and the deep water port and airport will be upgraded.

(c) Mukah

Mukah will be the administrative nerve centre of the corridor, with access to all key locations within SCORE and RECODA headquartered there. Mukah will also be the location for training and research with polytechnics, specialised training centres as well as research and development centres set up there.

(d) Baram

The Baram area will have at its core hydroelectric power generation, oil palm plantations, forest plantations that use renewable plantation timber to promote the preservation of rainforests with responsible forest management practices, and eco-tourism that allows visitors to experience the natural world of the rainforest.

(e) Tunoh

The Tunoh area focuses on oil palm and forest plantations, agriculture and eco-tourism.

Sarawak is focused in its resolve to develop its human capital to meet the needs of industries in SCORE, and one of the most significant initiatives to date has been the setting up of U-SCORE, which is a consortium of private and public institutions of higher learning in the State, with the main purpose of assisting the State Government in monitoring the demand and supply of the workforce required for SCORE. The Ministry of Higher Education Malaysia instructed UNIMAS to chair the U-SCORE project, which is implemented in collaboration with the State Government. U-SCORE gathers statistics on the number of graduates produced by institutions of higher learning and then presents this information to the Federal and State government. Apart from that, the new investors setting up their operations in SCORE are also preparing their future employees for the task ahead by offering courses related to their field of work. Their investment in local human capital has even included sending their employees overseas for training stints

All investors are welcome to invest in the area through the various routes of setting up a presence in Malaysia and similar to the other economic areas, incentives are granted by RECODA through application by the investors. The general incentives include tax incentives such as investment tax allowance and pioneer status, with the option to renew for a second term. Non tax incentives include infrastructure allowances, cheap industrial land, flexible payment terms for industrial land, double deduction on freight charges incurred for the export of rattan and wood-based products and full import duty exemption on raw materials which are not available in Sarawak.

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20 COMPETITION LAW

The Competition Act 2010 ("**Competition Act**") which came into force on 1 January 2012, has a significant impact on how businesses should carry out their daily activities so as not to infringe the various anti-competition prohibitions under the Competition Act.

The Competition Act applies to any commercial activity by any enterprise (including Government-linked companies) within and outside Malaysia which affects competition in any market in Malaysia; save for those commercial activities exempted by the Competition Act in Schedule 1 (namely the activities regulated under the Communications and Multimedia Act 1998, the Energy Commission Act 2001 and the Petroleum Development Act 1974 as well as the Petroleum Regulations 1974, upstream activities only).

The regulator of the Competition Act is the Malaysia Competition Commission ("**MyCC**"). There is no merger regime in Malaysia yet.

A. Anti-Competitive Agreements

Section 4 of the Competition Act prohibits horizontal agreements (*i.e. agreements between enterprises operating at the same level of the production or distribution chain, e.g. competitors in the same market*) and vertical agreements (*i.e. agreement between enterprises operating at different level of the production or distribution chain e.g. buyers and sellers, manufacturers and distributors*) between enterprises where an agreement has the object or effect of significantly preventing, restricting or distorting competition in any market for goods or services.

In general, "significant" means the agreements must have more than a trivial impact. It should be noted that impact would be assessed in relation to the identified relevant market. A good guide to the trivial impact of an anti-competitive agreement might be the combined market share of those participating in such an agreement. As a starting point and to provide greater certainty, MyCC may use the following basis in assessing whether an anti-competitive effect is "significant". This approach sets "safe harbours" for otherwise anti-competitive agreements or association decisions. In general, anti-competitive agreements will not be considered "significant" if:

- (a) the parties to the agreement are competitors who are in the same market and their combined market share of the relevant market does not exceed 20%;
- (b) the parties to the agreement are not competitors and all of the parties individually has less than 25% in any relevant market.

B. Types of Anti-Competitive Agreements

MyCC has in its guidelines (which are merely for illustration purposes and not a substitute for the law), set out a non-exhaustive list of the types of agreements that could potentially be anti-competitive. Horizontal agreements that facilitate information (price or non-price) sharing, that restrict advertising, that serve as a barrier to new entrants to the market and the standardisation of agreements to set new standards or to sell new products will be investigated and may potentially be found to be anti-competitive. It is important to note that the Competition Act treats certain "hard-core" cartel arrangements as anti-competitive. In these situations, the agreements are deemed to "have the object of significantly preventing, restricting or distorting competition in any market for goods or services". This means for these horizontal agreements, MyCC will not need to examine any anti-competitive effect at all. The agreements which are deemed to be anti-competitive include price fixing, fixing of trading conditions, market sharing or sharing of sources of supply, limiting or controlling production, market outlets or access, technical or technological development or investment or bid rigging.

Vertical agreements involving price restrictions such as setting minimum resale price, maximum price or even recommend retail price which serve as a focal point for downstream collusion, may be anti-competitive, and MyCC has made it clear that it will take a strong stance against these types of anti-competitive agreements. Other non-price vertical agreements such as tying and bundling agreements that require a buyer to buy all or most of its supplies from the seller, exclusive distribution agreements covering a geographic territory, exclusive customer allocation agreements as well as up-front access payments conditions may give rise to anti-competition concerns under Section 4 of the Competition Act.

C. Abuse of Dominant Position

Section 10 of the Competition Act addresses the conduct of dominant enterprises. An enterprise is in a dominant position if it has what is termed as "market power" or if it possesses "such significant power in a market to adjust prices or outputs or trading terms, without effective constraint from competitors or potential competitors".

In general, MyCC will consider a market share above 60% as indicative of dominance. The Competition Act does not penalise an enterprise because of its dominance. It only prohibits enterprises from engaging in any conduct which amounts to an abuse of a dominant position such as imposing an unfair purchase or selling price, limiting or controlling production, market outlets or market access, refusing to supply, applying discriminatory conditions that discourage new market entry, engaging in predatory behaviour towards competitors or buying up scarce supplies in excess of the dominant enterprise's own needs.

Market share shall not by itself be regarded as conclusive of dominance. Dominance shall be assessed in terms of the enterprise's ability to act without concern about competitors' responses or ability to dictate the terms of competition in a market in Malaysia. Other factors such as barriers to entry, countervailing buyer power, etc. may also be used in the assessment of dominance.

For instance, there may be a new product provided by an enterprise in the market and hence it holds a market share of more than 60%. If the enterprise can show however that there will be potential competitors entering this market soon and that the market share of 60% will be quickly eroded, then it is arguable that the enterprise has no dominance. Conversely, even with a market share of for example only 20%, if there are no existing or future competitors who could constrain the enterprise (for example, as the rest of the market is very fragmented and made up of many very small players) then, the enterprise could still have dominance. It is very much a question of fact and the "significant market power with no effective constraint" test is the best determinant.

There are 2 main types of abuse:

- (a) exploitative conduct – setting a high price to exploit consumers knowing that there are no new entrants or competitors, in which the resulting excessive profits are not a reward for innovation; and
- (b) exclusionary conduct – a conduct that prevents equally efficient competitors from competing. For example, predatory pricing, price discrimination, exclusive dealing, loyalty rebates and discounts, refusal to supply and sharing of essential facilities, buying up scarce intermediate goods or resources as well as bundling and tying.

D. Leniency Regime

MyCC has finalised and published the Guidelines on Leniency Regime which is based on the statutory framework of section 41 of the Competition Act. An enterprise that admits its involvement in a hard-core cartel arrangement and provides information or other form of co-operation to MyCC which significantly assists in the identification or investigation of any finding of an infringement of any prohibition by any other enterprises will enjoy a reduction of up to a maximum of 100% of any penalty which would otherwise have been imposed on it.

E. Consequences of Infringement

MyCC has also published its finalised Guidelines on Financial Penalties pursuant to section 17 and section 40(1) of the Competition Act. Enterprises which are found to have infringed the Competition Act may be ordered to stop the infringement immediately and to take steps to bring the infringement to an end. Additionally, it is liable to a fine of up to **10% of its worldwide turnover** for the period during which the infringement occurred. The enterprise may also be required to change its business practices in a manner materially adverse to its present business model. Directors, CEOs, COOs and managers may also be severally and jointly liable to pay hefty fines and subject to imprisonment for obstruction of investigations.

Any private individual who has suffered loss or damage as a result of the infringement may also bring a private action against the enterprise. A private action could potentially result in an award of damages that far exceeds the amount of the fines imposed by MyCC. It should also be noted that a private action can be taken even if MyCC does not investigate or prosecute

the enterprise, or if MyCC finds in favour of the enterprise after its investigations. Aside from these potential sanctions, a breach of the Competition Act will also result in additional consequences for the business as it will take up a huge amount of management and staff time in assisting with the investigation which could take years to complete. It will also attract negative publicity for the enterprise and damage the enterprise's image and brand.

F. Enforcement Action

Since the Competition Act has come into force, MyCC has adopted a gradual approach to the enforcement of competition law. It has started its presence with advocacy work and capacity building and is now moving towards a more stringent position on enforcement.

MyCC's decisions including but not limited to exemption applications and undertakings are as follows:

- (a) Enforcement action against Cameron Highlands Floriculturist Association ("**CHFA**")
- (b) Enforcement action against Megasteel Sdn Bhd ("**Megasteel**")
- (c) Grant of block exemption in favour of liner shipping services
- (d) Undertaking given by the Malaysian Indian Hairdressing Saloon Owners Association ("**MIHSA**")
- (e) Enforcement action against Ice Manufacturers
- (f) Enforcement action against Malaysian Airlines ("**MAS**") and AirAsia ("**AirAsia**")
- (g) Undertaking given by Pan-Malaysia Lorry Owners Association ("**PMLOA**")
- (h) Enforcement action against Sibü Confectionary and Bakery Association ("**SCBA**")
- (i) Undertaking given by Giga Shipping Sdn Bhd and Nexus Mega Carriers Sdn Bhd
- (j) Enforcement action against My E.G. Services Berhad ("**MyEG**")
- (k) Enforcement action against Containerchain (Malaysia) Sdn Bhd ("**Containerchain**") and container depot operators ("**CDOs**")
- (l) Enforcement action against Pangsapuri Perdana
- (m) Enforcement action against Sarawak Restaurants Association
- (n) Enforcement action against My Egg Consortium Sdn Bhd
- (o) Enforcement action against Federation of Stationers and Booksellers Association of Malaysia
- (p) Undertaking given by the Malaysia Heavy Construction Equipment Owners' Association ("**MHCEOA**")

(1) Section 4 of the Competition Act

- (a) MyCC's first cartel enforcement was in 2012. Non-financial remedies were imposed on the CHFA after discovering that members of the CHFA were engaging in an anti-competitive agreement to increase the prices of flowers by ten percent (10%). This was followed by MyCC's enforcement actions against MIHSA and PMLOA where both associations had given undertakings that they would stop any price-fixing activities of their members. As for the enforcement action against ice manufacturers, a penalty of RM252,250.00 was imposed by MyCC.
- (b) Another enforcement action against a cartel by MyCC which attracted significant media interest is its action against MAS and AirAsia. MAS, AirAsia and AirAsia X entered into a Comprehensive Collaboration Framework (i.e. Collaboration Agreement dated 9 August 2011 ("the Agreement")) with the purported goal of seeking cost savings and increase in revenues in relation to certain sectors and categories of aviation services. MyCC found both MAS and AirAsia to have infringed Section 4(2) of the Competition Act for market sharing and imposed a financial penalty of RM10 million each on MAS and AirAsia for the four (4) months from the date the Competition Act came into effect up to the time when the two airlines terminated the agreement. However, on 4 February 2016, the Malaysian Competition

Appeal Tribunal ("CAT") unanimously determined that MAS and AirAsia did not infringe Section 4(2) of the Competition Act. In its written judgment, CAT undertook a thorough review of the Agreement and upheld MAS' and AirAsia's appeal on three (3) grounds, namely that (i) the Agreement did not have an anti-competitive object; (ii) the Agreement was not implemented; and (iii) MyCC did not establish (and did not even attempt to establish) any link between the Agreement and MAS' withdrawal of routes. Additionally, MAS and AirAsia had also argued that there was procedural unfairness and that the financial penalties imposed by MyCC were disproportionate and discriminatory in nature. On the former, CAT found that procedural unfairness was not an issue as CAT has the jurisdiction to hear the case afresh. On the latter, CAT did not come to a decision as the appeal was upheld on the aforementioned three (3) grounds. Nevertheless, on 25 July 2016, MyCC obtained High Court leave to proceed with its legal bid to reinstate the RM10 million fines against MAS and AirAsia.

- (c) The subsequent enforcement action against cartel by MyCC was an action against SCBA. Enterprises who are members of SCBA were found infringing section 4(2) of the Competition Act after they were discovered agreeing to increase the prices of confectionery and bakery products by ten to fifteen percent (10% - 15%) in the Sibuluan area effective 1 December 2013. Final decision was issued by MyCC with a financial penalty as much as RM247,730 imposed. It is interesting to note from this decision that mere participation without objection to an anti-competitive decision suffices as evidence of participation in an infringing agreement.
- (d) More recently, in June 2016, MyCC released its final decision against Containerchain and container depot operators ("CDOs"). MyCC held that Containerchain has entered into vertical agreements with the CDOs in the area of Penang Port by way of concerted practices and their conduct has infringed Section 4(1) of the Competition Act. It is worth noting that this is the first MyCC's decision on an infringement on anti-competitive vertical agreement. MyCC further determined that the CDOs have infringed Section 4(2) of the Competition Act by entering into horizontal agreements to fix the depot gate charges.
- (e) Other enforcement actions against cartel by MyCC include (i) an action against two major providers of logistic and shipment services by sea for motor vehicles from ports in Peninsular Malaysia to ports in Sabah, Sarawak and Labuan – namely, Giga Shipping Sdn Bhd and Nexus Mega Carriers Sdn Bhd ("the said logistics service providers"); and (ii) an action against the MHCEOA for increasing machinery rental. MyCC has accepted undertakings from the said logistics service providers to stop any exclusive logistics activities and to remove any exclusivity clauses in their agreements and also an undertaking from MHCEOA to cease all anti-competitive activities.
- (f) Apart from findings of infringement of the Competition Act, MyCC also made findings of non-infringement. MyCC found that there was no infringement of the Competition Act by Sarawak Restaurants Association, My Egg Consortium Sdn Bhd and the Federation of Stationers and Booksellers Association of Malaysia.

(2) Section 10 of the Competition Act

- (a) One important case in the enforcement of the Competition Act is the abuse of dominant position by Megasteel. Megasteel was claimed to have used its vertically integrated structure to undertake predatory pricing in the downstream cold rolled coil market. A fine of RM4.5 million was proposed by MyCC on Megasteel. However, on 15 April 2016, MyCC found that there was no infringement of the Competition Act by Megasteel as MyCC came to the conclusion that Megasteel did not abuse its dominant position nor practice margin squeeze.
- (b) The second enforcement on abuse of dominance is MyCC's decision on MyEG. On 24 June 2016, MyCC issued a decision setting out a fine of RM2.272mil against MyEG and MyEG Commerce Sdn Bhd ("MyEG Commerce") for infringing Section 10 of the Competition Act, i.e. for abusing its dominant position in the market. MyCC has determined that by virtue of their shareholdings and directorships, MyEG and MyEG Commerce is a single economic unit as defined under Section 2 of the Competition

Act. This decision came after MyCC issued a proposed decision against MyEG on 6 October 2015 where it proposed to impose a fine of RM307,200.00. In 2015, MyCC probed MyEG after receiving several complaints from various parties. As a result of the investigations, it was discovered that MyEG had abused its dominant position in its market owing to its management of the online portal for Foreign Worker Permit ("PLKS") renewals. MyEG was found to have harmed the level of competition in the selling of mandatory insurance policies for online PLKS renewal applications as it was also competing against other insurance companies in the market. MyEG's wholly-owned unit, MyEG Commerce, was an agent of RHB Insurance Bhd which was selling the mandatory insurance policies. The insurance policies were foreign workers insurance guarantee, foreign workers hospitalisation and surgical scheme and foreign workers compensation scheme. On top of the financial penalty, MyCC also imposed remedial actions on MyEG which included to cease and desist immediately from imposing different conditions on equivalent transactions in the processing of mandatory insurance policies for online PLKS renewal applications. MyEG was also required to provide an efficient gateway for all its competitors in the market for sale of the mandatory insurance policies and allow other competitors to compete at the same level within 60 days from the date of the decision. MyCC also required MyEG to provide an undertaking in the form and manner acceptable to MyCC to be fully compliant with the rules and regulations of the General Insurance Association of Malaysia within 60 days from the date of the decision.

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21 PRIVATE HEALTHCARE

Healthcare in Malaysia is provided by both the private sector and the public sector. In 2012, as a measure to liberalise the services sector in Malaysia, the Prime Minister announced that 100% foreign shareholding would be allowed for private hospitals. All private facilities in Malaysia are required to be licensed under the Private Healthcare Facilities and Services Act 1998 ("**PHFS**") and Private Healthcare Facilities and Services (Private Hospitals and Other Private Healthcare Facilities) Regulations 2006 ("**PHFS Regulations**"). The two main institutions involved in regulating private facilities are the Ministry of Health ("**MOH**") and the local municipal authority of the location of the hospital.

A. Regulation of Healthcare Professionals

Persons intending to set up private practices in medical and healthcare services are required to fulfil the necessary licensing conditions specified by the respective licensing authorities of the accredited professional services. This is important to ensure that only competent professionals with recognised qualifications get into the system. The licensing conditions briefly tabulated are as follows:

| Professions | Act & Regulations | Regulators | Licensing |
|--|--|---|--|
| Medical Practitioner (Doctors) & Specialists | Medical Act 1971 | Malaysian Medical Council | Registration & Annual Practicing Certificate |
| Nurses | Nurses Act Nurses Registration Regulations 1985 | Malaysia Nursing Board | Registration & Annual Practicing Certificate |
| Midwives | Midwifery Act 1966 | Malaysia Midwife Board | Registration & Annual Practicing Certificate |
| Pharmacists | Registration of Pharmacists Act 1951 Registration of Pharmacists Regulations 2004 | Malaysia Pharmacy Board | Certification of Registration & Annual Retention of Registration |
| Medical Assistants | Medical Assistants (Registration) Act 1977 | Medical Assistants (Registration) Board | Annual Certificate of Registration |
| Opticians & Optometrists | Optical Act | Malaysian Optical Council | Registration & Annual Practicing Certificate |

These healthcare professionals are required to be registered formally with the respective licensing authorities and apply for a practicing licence, which needs to be renewed annually.

Apart from the above, in the event that these professionals intend to set up a medical and health care practice, they are required to register with the Companies Commission of Malaysia ("**CCM**") under the Registration of Business Act 1956 or incorporate a company under the Companies Act 1965.

B. Establishing a Private Hospital

(1) **PHFS and PHFS Regulations 2006**

In order to establish and operate a private hospital in Malaysia, a person or company will need to obtain an approval ("**Approval**") and licence ("**Licence**") from the Director General of Health ("**Director General**"). These requirements are provided under Section 3 and 14 of the PHFS respectively. The approval and licence may only be issued to³²:

- (a) a sole proprietor who is a registered medical practitioner;
- (b) a partnership which consists of at least one partner who is a registered medical practitioner; or
- (c) a company whose board of directors consists of at least one person who is a registered medical practitioner.

In determining whether to grant the Approval or not, the Director General will take into consideration the following matters:³³

- (a) the nature of the healthcare facility or service to be provided;
- (b) the extent to which the healthcare facilities or services are already available in the area;
- (c) the need for the healthcare facility or service in the area;
- (d) the future need for the healthcare facility or service in an area; or
- (e) any other matter which in his opinion is relevant.

Once an Approval has been secured, an application for a Licence must be made within 3 years from the date of the issuance of the Approval, failing which the Approval will be deemed to have been revoked. In order to qualify for the Licence, the private hospital has to meet all the regulatory requirements prescribed in the PHFS and the PHFS Regulations 2006. These provide for the licensing of private hospitals and other private healthcare facilities to ensure that the minimum acceptable standards are complied with. Among other things that are provided in the PHFS Regulations 2006 are that all private hospitals need to have a plan of organisation outlining the staff and practitioners in the facility and the chain of command³⁴ and the Person-In-Charge is responsible for the employment of qualified healthcare professionals including foreigners registered under the law and recognised by the Director General³⁵.

(2) **Private Hospital Life-cycle**

There are four stages to the business life-cycle of a private hospital:

- (a) Establishment (start-up)
- (b) Operation and maintenance (licence renewal)
- (c) Expansion (growth and renewal)
- (d) Winding up

The table below provides an overview of the legal and regulatory regimes for the business life-cycle of a private hospital³⁶.

| Act & Regulations | Business-Life Cycle | Regulatory Regime |
|------------------------------|----------------------------|------------------------------------|
| Establishment | | |
| Companies Act 1965 | Starting a business | Business registration with the CCM |

32 Section 6 of PHFS

33 Section 9 of PHFS

34 Regulation 11 of PHFS Regulations

35 Regulation 13 of PHFS Regulations 2006

36 Report on Reducing Unnecessary Regulatory on Business: Private Hospital by Malaysian Productivity Corporation (August 2014)

| Act & Regulations | Business-Life Cycle | Regulatory Regime | | |
|---|--|---|------------------------|---|
| Registration of Business Act 1956 | | | | |
| National Land Code 1965 | Acquiring property | Land acquisition and registration | | |
| Strata Title Act 1985 | | | | |
| EPU Guideline on the acquisition of properties | | | | |
| Town and Planning Act 1976 | Establishment of private hospital Construction of building Land Conversion Utilities requirements | <u>Dealing with construction permits</u> <ul style="list-style-type: none"> • Development Order • Planning Approval • Land conversion and registration • Approval to establish private hospital (MOH) • Fire Safety (BOMBA) • Water and sewerage (SPAN) • Approval for electricity (Energy Commission/ TNB) • Certificate of completion & compliance | | |
| Federal Territory Planning Act 1982 | | | | |
| Uniform Building By-laws 1984 | | | | |
| Fire Services Act 1990 | | | | |
| Water Services Industry Act 2006 | | | | |
| Electricity Supply Act 1990 | | | | |
| PHFS 1998 | | | | |
| PHFS Regulations 2006 | | | | |
| Contracts Act 1950 | | | Establishing contracts | Registration of contracts Stamp duties |
| Stamp Act 1949 | | | | |
| Specific Relief Act 1963 | | | | |
| Operation and Maintenance | | | | |
| PHFS Act 1998 PHFS Regulations 2006 | Operation and maintenance of hospital & healthcare facilities | <ul style="list-style-type: none"> • Operation licensing (MOH-CKAP) • Licensing of medical devices (Medical Device Board) • Licensing of radioactive medical equipment (MOH) • Passenger lifts safety certificate (Department of Occupational Health and Safety ("DOSH")) • Autoclaves & other pressure | | |
| Medical Devices Act 2012 Medical Device Regulations 2012 | | | | |
| Atomic Energy Licensing Act 1984 | | | | |
| Environmental Quality Act 1974 | | | | |

| Act & Regulations | Business-Life Cycle | Regulatory Regime |
|---|--|---|
| Factory and Machinery Act 1967 | | vessels (DOSH) <ul style="list-style-type: none"> • Fire safety certificate (BOMBA) • Drugs and pharmaceuticals manufacturing licence (Malaysian Pharmacy Board) • Approvals for advertisement and advertising materials (Medicine Advertisements Board) |
| Fire Services Act 1988 | | |
| Control of Drugs and Cosmetics Regulations 1984 | | |
| Sale of Drugs Act 1952 | | |
| Medicine (Advertisement and Sale) Act 1956 | | |
| Local Government Act 1976 | Other business licensing | <ul style="list-style-type: none"> • Premise Licence • Advertising Licence • Vehicle Parking Licence • Food Premise Licence • Vehicle Type Approval (JPJ) |
| Land Public Transport Act 2010 | | |
| Expansion/Growth (include improvement) | | |
| Similar regulations are applicable as for establishing a new hospital | Renovation of building Upgrading facilities Extension of building Acquiring adjacent land for extension | <ul style="list-style-type: none"> • Similar as in establishment stage in requiring planning and construction permits • Establishment approval (MOH) • Re-licensing on completion by MOH to include the new facility |
| Winding Up | | |
| PHFS Act 1998 PHFS Regulations 2006 | Closing down Sales or ownership transfer Bankruptcy | <ul style="list-style-type: none"> • Surrender of operating licence (MOH) • Receivership processing • Registration of company (CCM) |
| Companies Act 1965 | | |
| Income Tax Act 1967 | | |
| Bankruptcy Act 1967 | | |

C. PHARMACEUTICAL INDUSTRY IN MALAYSIA

(1) **Overview of the Pharmaceutical Industry in Malaysia**

One of the important components of the healthcare sector in Malaysia is the pharmaceutical industry. The pharmaceutical industry in Malaysia has been identified by the Malaysian government as an industry to be developed and promoted. Besides that, Malaysia is a member of Pharmaceutical Inspection Co-operation Scheme ("**PIC/S**") since January 2002. What this means is that the manufacturers are required to be in compliance with the high standards of the Good Manufacturing Practices requirements. Since being admitted as a member of the PIC/S, our exports of pharmaceutical products have increased, especially among the member countries such as Canada, Australia and the EU. In 2014, income generated from pharmaceutical export grew 9%, surpassing the 5% growth target.

Generally, pharmaceutical products can be classified as:

- (a) Prescription Medicine;
- (b) Over the counter Medicine;

- (c) Herbal and Health Supplements; and
- (d) Traditional Medicine.

(2) Regulatory Requirements

In Malaysia, Drug Control Authority ("DCA") of the Ministry of Health is responsible to regulate the production, importation and sale of pharmaceutical products in Malaysia. All manufacturers, importers and wholesalers are required to be licensed by the DCA. The National Pharmaceutical Control Bureau ("NPCB") acts as the secretariat to DCA. NPCB's main roles and functions is to develop and implement regulations concerning the quality, safety and efficacy of drugs.

(3) Pharmacy Legislative: Existing Laws

Main legislations that currently govern the pharmaceutical industry in Malaysia are as follows:

- (a) **Registration of Pharmacists Act 1951.** This Act governs the establishment of a Pharmacy Board and the registration of pharmacists.
- (b) **Poisons Act 1952.** This Act regulates the importation, possession, manufacture, compounding, storage, transport, sale and use of poisons.
- (c) **Medicines (Advertisement and Sale) Act 1956.** This Act prohibits certain advertisements relating to medical matters and regulates the sale of substances recommended as medicine.
- (d) **Sale of Drugs Act 1952.** This Act regulates the sale of drugs.

D. Equity Policy

Following the 2012 Budget announcement, the Malaysian government decided to liberalise private hospital services, medical specialists services and dental specialists services, with no equity conditions attached.

E. Employment of Foreigners

(1) Employment of Foreign Medical Practitioners

Under section 16(1) of the Medical (Amendment) Act 2012, a temporary practicing certificate will be issued to foreign medical practitioners who intend to teach, do research, or pursue a post graduate course or clinical attachment in Malaysia. The temporary practicing certificate is not to be used for employment purposes.

Based on the Registration Procedures and Guidelines issued by the Malaysian Medical Council, the applicant may be required by the Evaluation Committee of the Malaysian Medical Council to work initially in an approved practice setting such as a health care facility which has systems for the effective management of practitioners, systems for identifying and acting upon concerns about practitioners' fitness to practice, systems to support the provision of relevant teaching or continuing professional development, and systems for providing regulatory assurance.

A temporary practicing certificate that is issued to practitioners for teaching purposes shall be limited to the duration applied for and shall not exceed six weeks. A temporary practicing certificate issued to practitioners who intend to pursue a post-graduate course shall not exceed three months. If the applicant intends to enrol in post-graduate courses at local universities for more than three months, the applicant must apply for full registration for the duration of the course. At all times, there has to be a registered medical practitioner with a valid annual practicing certificate that will be responsible for the applicant.

Under section 16(5) of the Medical (Amendment) Act 2012, any foreign medical practitioner that practices without a temporary practicing certificate under section 16(1) commits an offence and shall, on conviction be liable:

- (a) in respect of a first offence, to a fine not exceeding RM10,000.00; and
- (b) in respect of a second or subsequent offence, to a fine not exceeding RM20,000 or to imprisonment for a term not exceeding 6 months or to both.

In the case of a continuing offence, such person shall be liable to a further penalty of RM100 for each day during which the offence continues in addition to the penalty under section 16(5)(a) and (b).

(2) Employment of Foreign Pharmacist

Under section 11A of the Registration of Pharmacists Act 1951 ("RPA"), a temporary practicing certificate will be issued to foreign pharmacist intending to practise as a professional pharmacist in Malaysia.

The Pharmacy Board of Malaysia ("PBM") has set the following pre-requisites for registration:

- (a) the applicant must hold a bachelors' degree qualification from an approved institution as listed in Schedule 1 of the RPA;
- (b) the applicant must be a fully certified pharmacist in his or her country of origin; and
- (c) the applicant is required to pass a qualifying examination by PBM.

In granting a certificate, PBM will take into consideration the applicant's immigration documents. PBM will only grant temporary certificates in cases where the foreigner is:

- (a) the spouse of a Malaysian citizen;
- (b) the spouse of an expatriate holding an employment pass in Malaysia; or
- (c) holding a PhD in Pharmacology related field and has received an employment offer in Malaysia.

The validity period of the certificate will depend on the applicant's immigration document and will be subjected to annual renewals. It should also be noted that applicants will be exempted from the 1 year internship requirement under Section 6A of RPA and the compulsory public service required under Section 11C of the same Act.

F. Tax Incentive for Healthcare Industry

With the view of expanding Malaysia's potential to be a hub for medical tourism in the region and to further stimulate its growth, new companies and existing companies engaged in expansion, modernisation and refurbishment that provide private healthcare services to healthcare travellers constituting at least 5% of their total patient base will be given exemption on income equivalent to an Investment Tax Allowance of 100% of qualifying capital expenditure for a period of 5 years. This incentive was announced by the Finance Minister during the tabling of the 2015 budget and is applicable for all applications received by the Malaysian Investment Development Authority from 1 January 2015 to 31 December 2017.

At the moment, the manufacture of pharmaceuticals, biopharmaceuticals, nutraceuticals, microbials and probiotics are also eligible for Pioneer Status with income tax exemption of 70% or 100% on statutory income for a period of 5 years or Investment Tax Allowance incentives of 60% or 100% on qualifying capital expenditure incurred for a period of 5 years. The development, testing and production of pharmaceuticals promoted under biotechnology are eligible for High Technology Pioneer Status with full income tax exemption on statutory income for 5 years or Investment Tax Allowance incentives of 60% on qualifying capital expenditure for 5 years to be offset against 100% of statutory income.³⁷

22 PRIVATE HIGHER EDUCATION INSTITUTIONS

Private higher education institutions ("PHEI") in Malaysia are governed by the Private Higher Educational Institutions Act 1996 ("Act") under the jurisdiction of the Ministry of Higher Education ("MOHE"). The Act facilitates the establishment of private colleges, universities, university college and foreign branch campus universities in Malaysia. Under the Act, approval must be obtained from the MOHE before a PHEI can be set up or before any courses can be offered by the PHEI. In addition, the courses offered by the PHEI must be endorsed by the national quality assurance agency i.e. Malaysian Qualifications Agency ("MQA").

There are four stages in starting a PHEI business in Malaysia namely:

1. Company/PHEI establishment;
2. Pre-operational registration;
3. Operational approvals; and
4. Additional approvals.

A. Establishment of PHEI

Under section 6 of the Act, prior approval of the MOHE shall be obtained before a PHEI may be established and maintained. An application for approval shall be made to the Registrar General of PHEI ("**Registrar General**"). Section 21 of the Act further states that for the establishment of a PHEI with the status of a University or University College or a branch campus thereof or a branch campus of a foreign University or University College, prior approval of the MOHE shall be obtained. It is also important to note that only applications from companies registered with the Companies Commission of Malaysia ("**CCM**") are accepted. In the event the successful applicant is not a locally incorporated company, the applicant shall within one year from being notified of the approval, incorporate a company locally.

In addition, PHEI requires the recommendation from the MQA in order to receive approval to conduct courses. Approval from the MOHE would be given upon receipt of MQA's recommendation.

Therefore, at this stage, the following certificates and approvals are required.

| No. | Certificates/Approvals | Issuing Authority |
|-----|--|-------------------|
| 1. | Certificate of Incorporation | CCM |
| 2. | Approval for the establishment of the PHEI with the status of University or University College or branch campus thereof or a branch campus of a foreign University or University College | MOHE |
| | Approval for the establishment of the PHEI without the status of University or University College or branch campus thereof or a branch campus of a foreign University or University College | |
| 3. | Approval for Appointment of PHEI Chief Executive | MOHE |
| 4. | Approval for draft Institutional Constitution | MOHE |
| 5. | Approval for Company's Memorandum and Articles of Association | MOHE |
| 6. | Approval to Conduct Courses of Study | MOHE |
| 7. | Certificate of Provisional Accreditation | MQA |

(1) Issued and Paid-up Capital

The applicant, whether it be a locally incorporated or otherwise, must ensure that, amongst others, its issued and paid-up capital shall be of an amount as determined by the MOHE. Regulation 7 of Private Higher Education Institutions (Establishment) Regulations 1997 provides that the issued and paid-up capital of the company shall not be less than two hundred thousand. The prescribed issued and paid up capital for the different types of PHEI is as follows:

| Institution | Prescribed issued and paid-up capital |
|--------------------|---------------------------------------|
| College | RM1,000,000.00 |
| University College | RM15,000,000.00 |
| University | RM20,000,000.00 |

(2) Equity Conditions

For the establishment of a PHEI with College and University College status, the following prescribed equity conditions have to be fulfilled:

| Equity Conditions | Percentage (%) |
|--|----------------|
| Maximum foreign shareholding permitted | 51 |
| Minimum Bumiputera shareholding required | 30 |
| The remaining shareholding must be Malaysian | 19 |

For the establishment of a PHEI with University status, up to 100% foreign ownership is permitted pursuant to the 2012 Budget announcement themed "National Transformation Policy: Welfare for the Rakyat, Well-Being of the Nation".

(3) Other Requirements

An applicant must also comply with the prescribed requirements set out in Regulation 5 of the Private Higher Education Institutions (Establishment) Regulations 1997 as follows:

- (a) the applicant is capable of preparing the site, location and premises with communication facilities;
- (b) the applicant has the appropriate experience in education or an excellent performance record;
- (c) the applicant is capable of providing qualified and experienced teachers in the relevant fields;
- (d) the applicant has a strong financial position and is capable of providing good financial management; and
- (e) the applicant is capable of conducting courses of study or training programmes individually or in affiliation, association, or collaboration with any University or University Colleges, higher educational institutions, whether private or public, or professional bodies within or outside Malaysia.

B. Registration of PHEI

Once the MOHE has granted its approval for the establishment of a PHEI, the applicant is then required to register the PHEI. An application for registration shall be made to the Registrar General within three years from the date of approval for the establishment of the PHEI. This duration is provided to allow the applicant to prepare and equip themselves with the necessary resources including facilities to start operating the PHEI.

Generally, the applicant is required to secure the following specific approval, licences, certificates and permits:

| No. | Type of Licences/Approvals/ Certificates/Permits | Issuing Authority |
|-----|---|---|
| 1. | Certificate of Registration | MOHE |
| 2. | Registration of Chief Executive PHEI | MOHE |
| 3. | Premise Licence | Respective Local Authorities <i>Note: the PHEI provider is also required to comply with the requirements in relation to the PHEI premises set out in the Act and Regulations.</i> |
| 4. | Advertisement Licence | Respective Local Authorities <i>Note: the PHEI provider is also required to comply with the requirements in relation to advertisement as set out in the Act and Regulations</i> |
| 5. | Teaching Permit (for local teaching staff) | MOHE |
| 6. | Teaching Permit (for foreign teaching staff) | Immigration Department of Malaysia <i>Note: The application for an employment pass for a foreign teacher/lecturer shall be submitted to MOHE for its recommendation to the Immigration Department of Malaysia.</i> |

C. **Operational Approvals**

PHEI providers which have been given Provisional Accreditation are required to apply for Full Accreditation prior to the expiry of the validity period specified in the Certificate of Provisional Accreditation.

Private Higher Education Institutions (Conducting Courses of Study) Regulations 1997 requires any application to conduct courses shall be submitted to the Registrar General and a copy to the Chief Executive of the National Accreditation Board ("**LAN**"). The MQA is the successor agency to the LAN and is responsible for quality assurance of higher education for both the public and the private sectors.

In general, MQA assures the quality of programs through two distinct processes namely Provisional Accreditation and Full Accreditation.

(1) **Provisional Accreditation**

Provisional Accreditation is an exercise to determine whether a program has met the minimum quality requirements preliminary to Full Accreditation. The minimum quality requirements consist of nine areas of evaluation that have to be met by a PHEI provider. However, these nine areas will be adjusted accordingly to fit the PHEI provider distinct purposes. The minimum quality requirements cover the following areas:

- (a) Vision, mission, educational goals and learning outcomes;
- (b) Curriculum design and delivery;
- (c) Assessment of students;
- (d) Student selection and support services;
- (e) Academic staff;
- (f) Educational resources;

- (g) Program monitoring and review;
- (h) Leadership, governance and administration; and
- (i) Continual quality improvement.

Section 38 of the Malaysian Qualifications Agency ("**MQA**") Act 2007 provides that an application by a higher education provider for the provisional accreditation of its program or qualification shall be made to the MQA. The MQA may conduct an institutional audit for the purpose of considering such application. Certificate of Provisional Accreditation issued by the MQA shall specify the period within which the higher education provider shall apply for accreditation.

(2) Full Accreditation

Full Accreditation is an assessment exercise to ascertain that the teaching, learning and all other related activities of a program provided by a higher education provider has met the quality standards and in compliance with the Malaysia Qualifications Framework ("**MQF**"). Application for the accreditation of programme or qualification which complies with the MQF shall be made to the MQA. The MQA may also conduct an institutional audit for the purpose of considering such application.

The MQF has eight levels of qualifications, namely Certificate Level 1-3, Diploma, Advanced Diploma, Bachelors, Masters and Doctoral:

| Level 1 – 3 | Level 4 – 5 | Level 6 – 8 |
|--|---|---|
| Levels 1 to 3 are Skill Certificates. Vocational and Technical Certificates as well as Certificates awarded by the Higher Education Sector are at Level 3. | Levels 4 and 5 are Diplomas and Advanced Diplomas (General Degree) respectively, awarded by the Technical and Vocational Sector, the Skills Sector and the Higher Education Sector. | Level 6 is for Bachelor's Degree with Honours while Level 7 is for Master's Degrees and Level 8 for PhD / Doctoral Degrees. |

In the event the MQA grants the application, a certificate of accreditation will be issued to the higher education provider and the certificate of accreditation shall specify the program and state the premises in which the program shall be conducted or facilitated.

D. Additional Approvals

Any proposal to change or add to existing practice, operation or environment of a PHEI would require additional approvals from the MOHE in order to ensure that the standards and regulations are continuously complied with.

Generally, a PHEI provider may apply for the following approvals depending on the number of academic activities intended to be provided by the PHEI:

| No. | Type of Approvals | Issuing Authority |
|-----|--|-------------------|
| 1. | Approval to conduct additional courses | MOHE |
| 2. | Approval of amendment of courses requirement | MOHE |
| 3. | Approval for fees increase | MOHE |
| 4. | Approval of change of Institution's name | MOHE |
| 5. | Approval of change in Company's equity | MOHE |
| 6. | Approval of change of/addition to /renovation of premise | MOHE |
| 7. | Recommendation by MOHE for recruitment of international students | MOHE |
| 8. | Approval for recruitment of international students | Ministry of Home |

| No. | Type of Approvals | Issuing Authority |
|-----|---|----------------------------------|
| | | Affairs (Immigration Department) |
| 9. | Application for extension of period for teaching permit of local and foreign teaching staff | MOHE |
| 10. | Approval to sell/dispose/reconstruct the business of PHEI relating to education | MOHE |

E. Applications for Establishment of PHEI as at July 2016

On 1 February 2013, MOHE implemented a moratorium on the establishment of new PHEI with the status of universities, university colleges and colleges. Initially, the moratorium was effective for a period of 2 years from 1 February 2013 until 31 January 2015. Due to positive developments that supported the objectives of the moratorium, particularly on the quality and sustainability of PHEI, the Government decided that the moratorium would be extended for a further period of 2 years, with effect from 1 February 2015 to 31 January 2017. The objectives of the moratorium are as follows:

- (a) to prevent an excess supply of over demand in the PHEI sector;
- (b) to focus on the rationalisation of the private higher education sector by means of mergers and acquisitions, collaborations or restructuring of PHEI; and
- (c) to focus on the improvement of the quality of existing study programs and PHEI.

However, exemptions to the moratorium may be considered in the following circumstances:

- (i) applications for the upgrading of PHEI;
- (ii) the establishment of foreign branch campuses that rate top 100 in the international rankings;
- (iii) any issues decided by the Cabinet; and
- (iv) the establishment of a PHEI in the development area of Pagoh and Iskandar Malaysia, Johor.

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23 INSURANCE

In Malaysia (excluding Labuan), the insurance business is divided into conventional insurance and takaful (insurance based on Islamic principles). Conventional insurance is regulated under the Financial Services Act ("**FSA**"), which is a consolidation of the now repealed Banking and Financial Institutions Act 1989, Payment Systems Act 2003, Insurance Act 1996 and Exchange Control Act 1953. On the other hand, takaful is regulated by the Islamic Financial Services Act ("**IFSA**"), which consolidated the repealed Islamic Banking Act 1983 and the Takaful Act 1984. The IFSA applies to the takaful industry, which is the Islamic equivalent of conventional insurance.

A. Licensing requirements

BNM is the main regulatory authority for the insurance and takaful industry in Malaysia. BNM wields a wide range of powers in the insurance and takaful industry, including regulating insurance and takaful business, insurance broking business, adjusting business and financial advisory business. Insurers and takaful operators are required to hold a valid licence issued by the Ministry of Finance on the recommendation of BNM. The carrying on of an insurance broking business or financial advisory business requires the approval of BNM while an adjusting business is required to be registered with BNM.

The current policy is that BNM does not intend to issue any new licences for conventional insurance or a takaful operator. Nevertheless, interested persons may explore the option of partnership with the existing licence holders.

B. Classification of insurance business

In general, conventional insurance business is divided into two classes under the FSA:

- (a) life business — includes all insurance business concerned with life policies and any type of insurance business carried on as incidental only to the life insurer's business; and
- (b) general business — all insurance business which is not life business.

Under the IFSA, takaful is divided into family takaful business and general takaful business, which are the Islamic equivalents of life business and general business.

Carrying on insurance business includes the activity of: (i) effecting a contract of business; or (ii) carrying out a contract of insurance by way of business. A person is deemed to effect, or carry out, a contract of insurance by way of business if he: (a) engages in such activity in a manner which in itself constitutes the carrying on of a business; (b) holds himself out as willing and able to engage in such activity; or (c) regularly solicits other persons to engage with him in transactions constituting such activity.

A reference to carrying on insurance business includes carrying it on through an agent, or as an agent, but "insurer" does not include an insurance agent as such or, in the case of a person who is both insurer and insurance agent, any business done by that person as an insurance agent.

Licensed insurers (excluding reinsurers) are no longer allowed to carry on both life business and general business under a single entity under the FSA. Insurers currently doing so will be given a grace period up to 2018 to divest their insurance business into separate entities. Similar provisions with regard to single takaful business which applies to licensed takaful operators (excluding retakaful operators) can also be found in the IFSA.

C. Form of establishment and prudential requirements

The FSA and IFSA provide that only a public company can be licensed to carry on an insurance business or takaful. Only professional reinsurers and professional retakaful operators do not need to be a public company. Under the IFSA, a licensed takaful operator which is a private company must be converted into a public company within 12 months from the appointed date or such longer period as may be specified by the MOF, on the recommendation of BNM.

The FSA and IFSA empower BNM to specify standards on prudential matters to promote the sound financial position of an institution or to promote the integrity, professionalism and expertise in the conduct of the business, affairs and activities of an institution.

The standards that may be specified include standards relating to:

- (a) capital adequacy;
- (b) liquidity;
- (c) corporate governance;
- (d) risk management;
- (e) related party transactions;
- (f) maintenance of reserve funds;
- (g) insurance/ takaful funds; and
- (h) prevention of an institution from being used, intentionally or unintentionally for criminal activities.

Every institution must have a chief executive officer ("**CEO**") at all times. Further, the CEO must have his principal place of residence within Malaysia and devote the whole of his professional time to the service of the institution. The chairman, director, CEO or senior officer of the institution must be an individual, not disqualified under the FSA and complies with the fit and proper requirements as prescribed by BNM.

A licensed insurer must appoint an actuary in respect of a life or general business it carries. Further, a licensed insurer must establish and maintain one or more insurance funds for any class or description of its insurance business as may be specified by BNM. A licensed life insurer must also establish and maintain a separate insurance fund for its life insurance business relating to participating life policies. The same requirements also apply for licensed takaful operators.

D. Regulation of Shareholding

The FSA and IFSA stipulate the circumstances where the prior written approval of the MOF or BNM are required for the acquisition of interest in shares that exceed the prescribed limit or result in a change in control of a licensed insurer or takaful operator.

The FSA and IFSA require a person to obtain BNM's prior approval before entering into an agreement to acquire an interest in shares which would result him holding an aggregate interest of 5% or more of shares in a licensed insurer or takaful operator.

A person shall also obtain BNM's approval before entering into an agreement to acquire an interest in shares which would result him holding an aggregate interest in shares of more than 50% of the interest in shares of a licensed insurer or takaful operator.

Further, a person shall also obtain BNM's approval before entering into an agreement to acquire an interest in shares which would result him holding an aggregate interest in shares of a licensed insurer or takaful operator, exceeding any multiple of 5% or the percentage of holding that triggers a mandatory offer under the Malaysian Code on Take-overs and Mergers, i.e. 33%.

The FSA and IFSA also introduce the concept of a financial holding company where any company which holds an aggregate of interest in shares of more than 50% in a licensed insurance or takaful operator is required to submit an application to BNM to be approved as a financial holding company. Unless otherwise approved, a financial holding company of a licensed insurer or takaful operator shall not carry on any business, other than the business of holding investments in corporations which are primarily engaged in financial services.

Under the FSA and IFSA, the maximum permissible interest in shares that may be held by an individual in a licensed insurer or takaful operator is 10%. Such requirement in the IFSA may be waived by BNM if BNM is satisfied that this would not result in the individual having the power to exercise control over the takaful operator and such individual has given a written undertaking not to exercise control over the takaful operator. Such waiver is not provided for in the FSA.

"Interest in shares" is defined in the FSA and IFSA to include both direct and effective interests. For purposes of determining the interests held, the FSA and IFSA require a person's interest in shares to be aggregated. In other words, the interest held by the person's

spouse, children, family corporation and persons acting in concert with him shall be taken into account when computing the interests held.

E. Foreign Equity Limits

There is a maximum limit of 70% on foreign equity participation in insurance companies and takaful operators. However, a higher foreign equity limit may be considered by the BNM on a case by case basis for players who can facilitate consolidation and rationalisation of the insurance and takaful industry.

F. Business conduct and consumer protection

BNM may specify standards on business conduct to a licensed insurer for the purposes of ensuring that the licensed insurer is fair, responsible and professional when dealing with financial consumers. A financial consumer means any person who uses the insurance product for personal, domestic or household purposes or in connection with a small business, as specified by BNM. These standards may include standards relating to:

- (a) transparency and disclosure requirements, including the provision of information to financial consumers that is accurate, clear, timely and not misleading;
- (b) fairness of terms in a financial consumer contract for financial services or products;
- (c) promotion of financial services or products;
- (d) provision of recommendations or advice including assessments of suitability and affordability of financial services or products offered to financial consumers; and
- (e) complaints and dispute resolution mechanisms.

The FSA and IFSA provide a list of business conduct that is prohibited. This list includes among other things:

- (a) engaging in conduct that is misleading or deceptive in relation to the nature, features, terms or prices of any financial service or product;
- (b) inducing a financial consumer to do an act or omit to do an act in relation to the any financial service or product by:
 - (i) making or recklessly making a statement, illustration, promise, forecast or comparison that is false, misleading or deceptive; or
 - (ii) dishonestly concealing, omitting or providing material facts in a manner which is ambiguous; or
- (c) exerting due pressure, influence in relation to the provision of any financial service or product to a financial consumer;
- (d) demanding payments from a financial consumer in any manner for unsolicited financial services or products;
- (e) colluding with any other person to fix or control the features or terms of any financial service or product to the detriment of any financial consumer.

Both the FSA and IFSA contain several provisions on consumer protection, these provisions laid down the requirements in relation to pre-contractual duty of disclosure, representations, and remedies for misrepresentations for insurance and takaful contracts. The FSA and IFSA also set out the provisions relating to insurance policies and takaful certificates. BNM also prohibits a person from entering into a general insurance contract with an insurer other than a licensed general insurer licensed by the BNM, unless with the prior approval from the BNM.

Further, an insurer is required to have an express provision in its policies informing its customer of a cooling-off period. A cooling-off period allows the customer to terminate a life policy within a specified period and obtain a full refund of money paid.

The Guidelines on Product Transparency and Disclosure issued by the BNM provides that general insurance products can be cancelled by the customer at any time by giving a written notice to the insurer. Upon cancellation, the customer is entitled to a refund of the premium, based on short period rates. Any expense incurred by the insurance company could be deducted from the premium paid.

In addition, Para 2, Schedule 8 of the FSA gives a policy owner the right to return a life policy to the insurer within 15 days from the date of delivery of the life policy. Upon return of the life policy, the insurer must immediately refund the premium, subject only to the deduction of expenses incurred for the medical expenses of the policy owner.

G. Risk-Based Capital Framework

The BNM has issued Risk-Based Capital Framework for Insurers and Risk-Based Capital Framework for Takaful Operators (the "**RBC Framework**") to ensure that each insurer and takaful operator maintains a capital adequacy level that is commensurate with its risk profile. The RBC Framework applies to all insurers, takaful operators, including reinsurers and retakaful operators, licensed by the BNM, for business generated from within and outside Malaysia.

The RBC Framework sets out the requirements applicable to each insurer and takaful operator to determine the adequacy of the capital available in its insurance and shareholders' funds to support the Total Capital Required ("**TCR**"). The RBC Framework also sets out the formula for computation of Capital Adequacy Ratio ("**CAR**") which serves as key indicator of the insurer's financial resilience and its ability to support the insurance business and will be used as an input to determine the appropriate level of supervisory intervention by the BNM.

H. Outsourcing

Licensed insurers are allowed to outsource various business activities, functions and processes, however such arrangements can also potentially increase the risk profile of an insurer as a result of the increased dependence on third parties, particularly where the outsourced activities are critical to the insurer's ongoing viability and ability to meet its obligations to policy holders.

The BNM has issued the Guidelines on Outsourcing for Insurers ("**Outsourcing Guidelines**") which governs all outsourcing arrangements of a licensed insurer to a third party. The Outsourcing Guidelines set out the minimum expectations of BNM for insurers that outsources, or plan to outsource, any of its business activities, functions or processes.

"**Outsourcing**" is defined as an insurer's use of a third party to perform, usually on a continuing basis, activities that would normally be undertaken by the insurer itself and it does not extend to include purchasing contracts for the procurement of services which are not generally regarded as part of an insurer's business activities or the purchase of standardised goods, wares or commercially available software.

Under the Outsourcing Guidelines, activities outsourced are categorised as core activities, material activities and non-material activities. Core activities consist of activities constituting insurance business, board and senior management oversight, investment management, internal audit and compliance functions, risk management, financial analysis, strategic planning and decision making. Insurers should not outsource core activities, except to the extent permitted under the Outsourcing Guidelines. Prior approval of BNM is required for outsourcing of core activities such as premium collection, claim administration, settlement of claims outside Malaysia, claims subrogation recoveries, investment management and internal audit.

Material activities are activities regarded as material pursuant to the materiality assessment while non-material activities are activities other than core and material activities. In general, an outsourcing arrangement is considered material if its disruption has the potential to significantly impact an insurer's business operations, reputation or profitability. Insurers must assess the potential risks and degree of materiality attached to an outsourcing arrangement.

An insurer is required to notify BNM of any material outsourcing arrangements. Further, an insurer should notify BNM immediately upon aware of any event relating to a material outsourcing arrangement that may potentially increase its risk profile.

I. Winding up

A licensed insurer or takaful operator may not be wound up voluntarily without obtaining the prior approval of BNM. In the event of a winding up of a licensed insurer, the assets of an insurance fund must be applied to meet its liabilities to policy owners and claimants under policies of that fund and these liabilities shall have priority over unsecured liabilities of that

fund, to the extent that they are apportioned to the insurance fund. However, the preferential debts such as remuneration of liquidators, wages and salary of employees, worker's compensation and taxes (as provided in Section 292(1) of the Companies Act 1965), and debts due and owing to the Government still maintain priority over the assets of the insurance fund in such instance. Similar provisions can also found in the IFSA for winding up of a licensed takaful operator.

J. Recent changes

As of 26 January 2016, BNM undertakes surveillance on significant non-bank financial institutions that have important interlinkages with the financial system. This is supported by the establishment of the Financial Stability Executive Committee (FSEC) under the Central Bank of Malaysia Act 2009 which is chaired by the Governor and whose members include the Secretary General of the Treasury, the Chairman of the Malaysia Securities Commission, the Chief Executive Officer of the Malaysia Deposit Insurance Corporation and an independent external member.

Based on BNM's surveillance, BNM and the FSEC may, from time-to time, issue advice to significant non-bank institutions as a pre-emptive measure to promote the sound financial standing of such institutions and avoid any systemic risks to on the financial system.

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24 PERSONAL DATA PROTECTION

The Personal Data Protection Act 2010 ("PDPA") came into force on 15 November 2013. The objective of the PDPA is to regulate the processing of personal data in commercial transactions, and to safeguard the rights and interests of individuals. Under the PDPA, anyone who processes personal data of an individual in commercial transactions, be it online or offline, must comply with the PDPA.

(1) Definition of Personal Data

Personal Data is defined under the PDPA as any information in respect of commercial transactions that relates directly or indirectly to a data subject/individual, who is identified or identifiable from the information or from that and other information in the possession of a data user, including any sensitive personal data and expression of opinion about the data subject/individual.

(2) 7 Principles under the PDPA

A data user must comply with the seven personal data protection principles, which form the fundamental backbone of the PDPA, as well as other relevant provisions of the PDPA:

- (a) General principle – a data user must only process personal data with the consent of an individual, for a lawful purpose and the personal data collected must not be excessive or beyond what is required for the purpose it was collected;
- (b) Notice and choice principle – a data user must inform the individual that his personal data is being processed and provide a description of the personal data, purpose of collection and choice for him to decide whether he wants to provide his data;
- (c) Disclosure principle – a data user may only disclose personal data for purposes, or to other third parties to which the individual has, consented to;
- (d) Security principle – a data user must take practical steps to protect personal data from loss, misuse, modification, unauthorised or accidental access or disclosure;
- (e) Retention principle – a data user must not retain personal data longer than it is necessary to fulfil the purpose for which it was collected;
- (f) Data integrity principle – a data user must take reasonable steps to ensure that all personal data is accurate, complete, not misleading and kept-up-to-date; and
- (g) Access principle – a data user must allow an individual to have access to his own personal data and to correct it if it is inaccurate, incomplete, misleading or outdated.

(3) Minimum Personal Data Protection Standards

Standards in relation to the Security, Retention and Data Integrity principles were issued by the Personal Data Protection Commissioner on 30 December 2015. The Standards are the "minimum standards" to be observed by data users, and details specific measures which need to be taken by data users in respect of the Security, Retention and Data Integrity principles. The Standards apply to both physical and electronic personal data. A contravention of any of the Standards may attract a fine of up to RM250,000 or imprisonment for a term not exceeding 2 years or both.

(4) Rights of an Individual

The PDPA also confers a number of rights on an individual/data subject:

- (a) an individual is entitled to be informed by the data user whether his personal data is being processed by or on behalf of data user;
- (b) an individual is entitled to correct his personal data if it is inaccurate, incomplete, misleading or outdated;
- (c) an individual is entitled to withdraw his consent to the processing of personal data;
- (d) an individual is entitled to request the data user to cease or not begin the processing of his personal data based on the reason that the processing of personal data will cause or is likely to cause substantial damage or substantial distress to him or to another; and the damage or distress is or would be unwarranted; and

- (e) an individual is entitled to request the data user to cease or not begin processing his personal data for purposes of direct marketing.

(5) Transfer of Personal Data outside Malaysia

As a general rule, the data user should not transfer personal data to a place outside Malaysia unless to such place as specifically permitted by the Minister and in accordance with the requirements prescribed under the PDPA, unless such transfer of personal data falls within one of the exceptions under the PDPA (e.g. performance of contract, legal proceedings etc.).

(6) Working with Data Processor

Under the PDPA, a data processor is any person, other than an employee of the data user, who processes personal data solely on behalf of the data user and does not process the personal data for any of his own purposes.

Where a data processor (e.g. contractor of the data user) is given personal data by the data user and the data processor processes the personal data on behalf of the data user, the data user must obtain sufficient guarantees from the data processor in respect of the security measures governing the processing of such personal data and ensure that the data processor takes reasonable steps to comply with these security measures.

(7) Registration as Data User

Pursuant to the Personal Data Protection (Class of Data Users) Order 2013, there are classes of data users who must be registered under the PDPA.

The classes which have been specified in the aforementioned Order are as follows:

- (a) communications;
- (b) banking & financial institution;
- (c) insurance;
- (d) health;
- (e) tourism & hospitalities;
- (f) transportation;
- (g) education;
- (h) direct selling,
- (i) services (e.g. legal, audit, accountancy etc.);
- (j) real estate; and
- (k) utilities.

The Personal Data Protection Commissioner is empowered by the PDPA to designate a body as a data user forum for each of the specific classes of data users. These data user forums in turn may prepare codes of practice either on their own initiative or at the request of the Commissioner, to regulate the personal data processing activities carried out by the respective industries.

(8) Non-application

The PDPA will not apply to:

- (a) the Malaysian Federal and State Government;
- (b) information processed for the purpose of a credit reporting business carried on by a credit reporting agency under the Credit Reporting Agencies Act 2010; and
- (c) to any personal data processed outside Malaysia unless that personal data is intended to be further processed in Malaysia.

However, the PDPA does apply to person/entity not established in Malaysia, but uses equipment in Malaysia for processing the personal data otherwise than for the purposes of transit through Malaysia

(9) Non-compliance

Aside from the negative publicity, penalties for non-compliance of the PDPA can be very severe, with the Personal Data Protection Commissioner being empowered to impose financial penalties of up to RM500,000 and/or imprisonment of up to 3 years for non-compliance with the PDPA.

(10) Compoundable Offences

On 15 March 2016, the Personal Data Protection Commissioner issued the Personal Data Protection (Compounding of Offences) Regulations 2016. The Compounding Regulations provide a list of offences which are prescribed to be "compoundable offences", where the Commissioner may offer data users an opportunity to pay a monetary penalty (which penalty can be up to half of the maximum fine stipulated in the PDPA) within the time period stipulated in the offer. If no payment is received within the stipulated period, prosecution for the offence will be instituted against the data user.

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