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GUIDE TO DOING BUSINESS IN MALAYSIA

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Ministries, Regulatory Bodies and Agencies

Acronym	Name	Website
AIAC	Asian International Arbitration Centre	https://www.aiac.world/
APAD/SPAD	Land Public Transport Agency/Agensi Pengangkutan Awam Darat	https://www.spad.gov.my/
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
DCA	Drug Control Authority	https://www.npra.gov.my/index.php/en/about/drug-control-authority-dca/about-the-
DOSH	Department of Occupational Safety and Health	http://www.dosh.gov.my/index.php/en/
ECM	Energy Commission of Malaysia	https://www.st.gov.my/
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/
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	http://www.kkmm.gov.my/
MaGIC	Malaysian Global Innovation & Creativity Centre	https://mymagic.my/
MCMC	Malaysian Communications and Multimedia Commission	http://www.skmm.gov.my/
MDeC	Multimedia Development Corporation	http://www.mdec.my/
MDTCA	Ministry of Domestic Trade and Consumer Affairs	https://www.kpdnhep.gov.my/

Acronym	Name	Website
MESTECC	Ministry of Energy, Science, Technology, Environment and Climate Change	https://www.mestecc.gov.my/web/
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
MOH	Ministry of Health	http://www.moh.gov.my/english.php
MOHA	Ministry of Home Affairs	http://www.moha.gov.my/index.php/en/
MOE	Ministry of Education	https://www.moe.gov.my/index.php/en/
MOT	Ministry of Transport	http://www.mot.gov.my/en
MOW	Ministry of Works/Kementerian Kerja Raya	http://www.kkr.gov.my/
MyCC	Malaysia Competition Commission	http://www.mycc.gov.my/
MQA	Malaysian Qualifications Agency	http://www.mqa.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
TNB	Tenaga Nasional Berhad	https://www.tnb.com.my/
UKAS	Public Private Partnership Unit/Unit Kerjasama Awam Swasta	http://www.ukas.gov.my/

Contents

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 and Labuan are the Federal Territories of Malaysia whereas Putrajaya is the administrative capital where the seat of government is situated.

Geography

With its land area totalling 330,621 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 (the world's third largest island) 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 32.6 million consisting of different ethnic groups with the dominant racial group being the Malays, Chinese and Indian. Ethnic Malays comprise some 69.3% of the population; Chinese constitute around 22.8%; Indians constitute approximately 6.9%; while Eurasians and indigenous peoples make up the rest of the population. In terms of geographical distribution, 26 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 practicing the religion, but other religions such as Buddhism, Christianity, Hinduism and others are freely practiced.

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 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 its GDP per capita at the national level rising from RM42,834 to RM44,682 in 2018. Six states surpassed the national level, led by W.P. Kuala Lumpur (RM121,293), followed by W.P. Labuan (RM74,337), Pulau Pinang (RM52,937), Sarawak (RM52,301), Selangor (RM51,528) and Melaka (RM47,960). The growth in these states was primarily driven by the services, manufacturing and construction sectors. Malaysia is an economy that has progressed from an economy dependent on agriculture and primary commodities to a manufacturing-based economy, and now is transforming into a service and knowledge driven economy.

Shared Prosperity Vision 2030

Tabled on 11 October 2019, Budget 2020 is themed "Driving Growth and Equitable Outcomes Towards Shared Prosperity". It aims to bring stability to the Government's finances and achieving the goal of Vision 2020 with a new growth trajectory under the foundation of Shared Prosperity Vision 2030.

We saw a historical change in the Federal Government in 2018, and now we welcome the era of the Twelfth Plan, 2021-2025. This is the first of two plans to operationalise the efforts of achieving the goals of the Shared Prosperity Vision 2030.

In a keynote address by the then Prime Minister YAB Tun Dr Mahathir bin Mohamad on the Pakatan Harapan's first year anniversary, he described the Shared Prosperity Vision as an effort to make Malaysia a country that could be continuously developed sustainably in line with equitable growth at all levels of the supply chain, class, race and geography to create a sense of harmony and stability among the people, by 2030.

The four thrusts anchoring Budget 2020 are (i) driving economic growth in the new economy and digital era; (ii) levelling-up human capital; (iii) creating a united, inclusive and economic society; and (iv) revitalising public institutions and finances. It recognises and leverages on new waves of opportunities for businesses, such as the US-China trade wars, seeking to encourage economic development by focusing on foreign direct investments into Malaysia.

The Twelfth Plan, 2021 – 2025

The Government through the MEA is in the process of preparing the 12MP which is set to be tabled in Parliament in August 2020. The 12MP seeks to develop 3 components, namely economic empowerment, environmental sustainability and social re-engineering.

Economic empowerment will entail new sources of growth through the means of an industrial revolution, digital economy, aerospace industry, integrated regional development and growth enablers such as sustainable energy sources and infrastructural connectivity.

The environmental sustainability component will be an effort to mitigate climate change, introduce green technology, integrate water resource management and enable disaster risk management.

The social re-engineering limb will be a focus on community development, B40 income elevation, encourage social enterprises, affordable housing, health and education.

While the 12MP plans and policies are still being mapped out, we note that the Government is formulating a way forward for our national development agenda, especially in light of the economic impact of the Covid-19 pandemic.

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

Malaysia's GDP Growth by Sector

	2019 at Constant 2015 Prices (%)	2019	2020 (forecast)	2020 (Q1)
		Change (%)		
Services	57.7	6.1	6.2	3.1
Manufacturing	22.3	3.8	4.1	1.5
Mining	7.1	(2.0)	0.3	(2.0)
Agriculture	7.1	2.0	3.4	(8.7)
Construction	4.7	0.1	3.7	(7.9)
GDP	100.0	4.3	4.8	0.7

Source: Department of Statistics and Ministry of Finance, Malaysia.

The services sector grew 6.1% (year-on-year) during the third quarter of 2019 led by wholesale and retail trade and information and communication subsectors.

The manufacturing sector increased 4.0% (year-on-year) during the third quarter of 2019 and is expected to grow 4.1% over 2020, largely driven by export-oriented industries, coupled with sustained expansion in the domestic-oriented industries. However, based on our economic performance over the first quarter of 2020, this is unlikely.

Malaysia's GDP grew at 0.7% from 4.6% in the fourth quarter of 2019, making it the lowest growth recorded since the third quarter of 2009. This growth was supported by the Services and Manufacturing sectors, while the Mining, Agriculture and Construction sectors each saw a decline respectively. As Malaysia's GDP growth for the first quarter of 2020 is expected to be between 3.9% - 4.2%, it is estimated that the country's economic output will be less than that of the previous quarter by RM22.8 billion.

International Trade

Free Trade Agreements

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**").

ASEAN Free Trade Area

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.

Trans-Pacific Partnership Agreement / Comprehensive and Progressive Agreement for Trans-Pacific Partnership

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 ("**TPPA**") 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.

Following the exit of the United States of America from the TPPA negotiations, the remaining nations, including Malaysia, proceeded with and have concluded negotiations and now rebranded the TPPA as the Comprehensive and Progressive Agreement for Trans-Pacific Partnership ("**CPTPP**"). Malaysia and the remaining nations have since signed the CPTPP on 8 March 2018. The CPTPP essentially incorporates the original provisions of the TPPA. The CPTPP is however yet to be ratified by Malaysia.

Regional Comprehensive Economic Partnership (RCEP)

Malaysia is also party to the Regional Comprehensive Economic Partnership (RCEP) negotiations.

The RCEP negotiating members are: Australia, Brunei, Cambodia, China, India, Indonesia, Japan, Laos, Malaysia, Myanmar, New Zealand, the Philippines, Singapore, South Korea, Thailand, and Vietnam.

RCEP aims to foster inclusive development, promote innovation, drive sustainable growth and support job generation among the RCEP Members.

RCEP will cover various aspects of the economy such as trade in goods, trade in services, investment, economic and technical cooperation, intellectual property, competition, dispute settlement, e-commerce and SMEs. Recognising the importance of being inclusive, RCEP will lower trade barriers and has the potential to enhance trade and investments among RCEP Members. By broadening and deepening ASEAN's economic engagements with its FTA partners, RCEP will provide free and fair policies that mutually benefit the RCEP Members. While the RCEP was expected to be concluded in 2019, the respective leaders are still in negotiations.

The liberalisation of the investment regime among RCEP Members will no doubt support Malaysia's economic growth and promote trading relationships.

One Belt One Road

In addition, as the recipient of more than USD$ 200 billion worth of Chinese infrastructure and real estate investments, Malaysia is fast becoming the principal ASEAN partner in China's One Belt One Road ("**OBOR**") initiative. OBOR allows transportation and movement of goods to be cheaper and more efficient. This enables local entrepreneurs and investors to penetrate a larger market. Furthermore, this also allows Malaysia to boost its development of various sectors and industries, hence generating bigger growth via better infrastructure as the catalyst. In 2017, Malaysia launched the world's first digital free trade zone, to facilitate seamless cross border trade and enable local businesses to export their goods with a priority for eCommerce.

Digital Free Trade Zone

On 22 March 2017, Malaysia launched the world's first Digital Free Trade Zone ("**DFTZ**") which allows for the facilitation of SMEs to capitalise on the convergence of exponential growth of the digital economy and cross-border e-commerce activities via physical and virtual zones.

The Government, through the Budget 2020 tabling, has made clear its intended focus on ecommerce development. DFTZ participants enjoy incentives such as a 10-year corporate income tax holiday under pioneer status, and a 5-year investment tax allowance.

The DFTZ supports companies which trade goods, provide services, and drive innovation in the digital economy and the e-commerce industry by facilitating end-to-end support, networking and knowledge sharing. For example, the introduction of the DFTZ eServices platform simplifies and accelerates cargo clearance process for businesses involved in cross-border trade.

With the launch of the DFTZ, Malaysia aims to become a regional eFulfilment centre and serve as the regional hub for SMEs, marketplaces and monobrands. This is reflected in the joint efforts behind the Kuala Lumpur International Airport Aeropolis Digital Free Trade Zone Park project, which is expected to commence its

operations in the third quarter of 2020. The project anticipates a cumulative GDP increment of USD10.1 billion by 2029.

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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:

a) **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.

b) **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.

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

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

d) **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 enacted 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 provides 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 from decisions of 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. The appeal 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 on both 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 in civil cases. Therefore, save and except for hearing and deciding on appeals of the decisions of the High Court 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. 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. The sessions court is governed under the Subordinate Courts Act 1948 ("**SCA**").

Magistrates Court

Magistrate courts have jurisdiction to try civil cases where the claim does not exceed RM100,000. 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. The magistrates court is also governed under the SCA.

Children's Court

The Children's Court is governed under the Child Act 2001 and deals specifically with the trial and sentencing of offenders who are under the age of majority, namely minors below the age of eighteen (18). This court has the jurisdiction to try all offences except those punishable by death.

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.

Industrial Court

The Industrial Court system exists as a separate system from the mainstream judicial institutions. It is a quasi-judicial tribunal created by the Industrial Relations Act 1967 ("**IRA**") and deals with employment and industrial disputes in the private sector. Section 30(5) of the IRA mandates that such Court shall act according to equity, good conscience and the substantial merits of the case. Section 33B of the IRA, prohibits Industrial Court decisions from being appealed to the High Court. A decision of the Industrial Court, however may be challenged or reviewed by way of judicial review.

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 and maritime industry. Reasons for resorting to arbitration include, *inter alia*, the contractual parties' ability to choose their own arbitrator or panel of arbitrators, 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**"). This was 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 AIAC, an international dispute resolution centre which is recognised as a neutral, efficient, and reliable provider of dispute resolution services.

Asian International Arbitration Centre ("AIAC")

The AIAC 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 AIAC 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 AIAC i-Arbitration Rules, the AIAC Fast Track Rules as well as the AIAC Mediation Rules. Beyond the provision of dispute resolution services within the region, the AIAC 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 assists in enforcement of arbitral awards.

Arbitration Clause

Arbitration under the AIAC begins with the agreement of 2 or more parties for the reference to an arbitration proceeding under the AIAC Arbitration Rules ("**Arbitration Rules**"). The Arbitration 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 AIAC'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 RM50,000, the arbitrator's fees would be estimated at RM11,200 (exclusive of administrative fees and taxes).

Panel of Arbitrators

As at June 2020, the AIAC has a panel of over 1200 experienced domestic and international arbitrators. The Legal Profession Act 1976, does not apply to restrict foreign lawyers appearing in arbitral proceedings or to prevent foreign lawyers acting as arbitrators in Malaysia.

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 AIAC 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. In certain circumstances, arbitration may cost less than court litigation, as hearings may be brief 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 161 signatories to the New York Convention.

3. Adjudication

Adjudication is also a form of alternative dispute resolution resorted to for disputes in the construction industry in relation to payment for work done and services rendered under the express terms of a construction contract. Similar to arbitration, the adjudicator deciding on the dispute has experience in the construction industry. The administration of adjudication cases is dealt with by the AIAC.

Legislation

The Construction Industry Payment & Adjudication Act 2012 ("**CIPAA**") came into force on 15th April 2014. To complement the CIPAA, 2 legislations were also implemented - The Construction Industry Payment and Adjudication Regulations 2014 ("**CIPAR**") and the Construction Industry Payment and Adjudication (Exemption) Order 2014 ("**CIPAEO**").

CIPAA applies equally to the Government of Malaysia as well as the private sector. However, the CIPAEO recognises an exemption to Government construction contracts for any construction works that involve emergency, unforeseen circumstances and that relate to national security or security related facilities.

The exemption is in relation to a contract for any construction works that is carried out urgently and without delay due to natural disaster, flood, landslide, ground subsidence, fire and other emergency and unforeseen circumstances, or a contract for any construction works that relates to national security or security related facilities which includes the construction of military and police facilities, military bases and camps, prison and detention camps, power plant and water treatment plant.

Recently, the Federal Court of Malaysia ruled that the CIPAA only applies prospectively to construction contracts entered into subsequent to the CIPAA coming into force on 15 April 2014.[1]

Costs and Fees

The costs and fees for adjudication proceedings are set out in the Schedule of CIPAR and can be found on the AIAC website. Similarly, with arbitration, the higher the amount in dispute, the higher the fees for the services of the adjudicator.

Advantages of Adjudication

CIPAA proceedings are intended to increase cash flow in relation to work done and services rendered by providing for the recovery of payment at the conclusion of the adjudication proceedings. Other remedies available to the unpaid party may include the right to suspend work or the right to reduce the rate of work progress or securing direct payment from the principal. The adjudicator may be appointed by agreement of the parties or by the Director of AIAC.

Enforcement of Adjudication Award

The enforcement of an adjudication decision is governed under Part IV of the CIPAA. Essentially, a party can apply to the High Court for an order to enforce the adjudication decision as if it is a judgment or order of the High Court. Upon such application, the High Court may make an order in respect of the adjudication decision and make an order in respect of interest on the adjudicated amount.

[1] Please see Chapter 15 Part (H) of this Guide, under the heading "5. Adjudication under Construction Industry Payment and Adjudication Act"

However, in the event one party or both parties do not agree with the adjudication award, the matter can be referred to arbitration or litigation at the conclusion or termination of the construction contract.

4. Mediation

Another means of alternative dispute resolution is mediation. This is a voluntary out of court dispute resolution. Unlike the adversarial nature of a court case or arbitration, this method sees the parties in disagreement cooperating and attempting to reach a mutually beneficial solution. A party may initiate mediation by sending the other party a written invitation to mediate, specifying the matter in dispute. Once agreed to by both parties, the parties must enter into a written mediation agreement which shall contain an agreement to mediate and other miscellaneous matters such as the appointment of the mediator, and costs.

Malaysian Mediation Centre ("MMC")

The governing body for mediation in Malaysia is the MMC, which was founded in 1999. The MMC was created with the objectives of promoting mediation as a means of alternative dispute resolution, as well as to provide a platform for successful dispute resolutions. The MMC's objectives and the continuation of its proper function is overseen by the Alternative Dispute Resolution Committee of the Bar Council. The MMC is a member of the Asian Mediation Association, along with other similar centres located in other Asian countries such as Singapore, Indonesia and Hong Kong. The MMC deals with all disputes except constitutional disputes and criminal matters.

Legislation

Mediation in Malaysia is governed by the Mediation Act 2012 ("**Mediation Act**"). The Mediation Act was introduced with the aim to promote and encourage mediation as a method of alternative dispute resolution and to facilitate settlements of dispute in a just, efficient and cost-effective manner. However, it should be noted that the Mediation Act does not apply to (1) mediation conducted by courts; (2) mediation conducted by the Legal Aid Department; and (3) matters expressly excluded in its schedule (such as proceedings on the Federal Constitution, the remedy of temporary or permanent injunctions, and any criminal matter).

Moreover, the Mediation Act does not require the parties to attempt mediation prior to litigation or arbitration. Nevertheless, the parties may choose to mediate simultaneously with any civil court action or arbitration.

The role of the mediator

The Mediation Act stipulates that a mediator must be appointed by the parties after the parties have agreed to mediation. All mediators must possess the relevant qualifications, knowledge or experience in mediation via training or formal tertiary education or meet the requirements of an organisation which provides mediation services.

A mediator must act independently and impartially with the objective to assist the parties in reaching a satisfactory solution to the dispute and to make suggestions for the settlement of the dispute.

The mediator may use joint or separate private sessions in achieving this objective.

Costs and Fees

The basic administration fee for mediation, as set out in the MMC website, is RM100 (non-refundable). A mediator, if requested by the party, will also charge a fee for his services which may be mutually agreed by both parties. There are also other miscellaneous costs, such as hiring a venue. All costs, besides the hiring of personal representation, are shared equally between the parties.

Advantages of Mediation

Unlike arbitration, mediation allows for a collaborative method of settling the disputes between parties. The goal of mediation is to reach a solution which benefits both parties, as far as possible. This stands in great contrast to that of litigation and arbitration, where proceedings are conducted in an adversarial manner. As

such, it is more likely that parties in mediation are able to maintain and continue their business relationships even after a resolution has been achieved. This is especially crucial in situations where there exists a strong possibility of future dealings between the parties.

In addition, mediation allows parties to settle their disputes in a confidential environment. A party may not wish to disclose matters to the public for a variety of reasons, from preventing competing businesses from gaining an advantage to keeping sensitive family topics out of public scrutiny. The Mediation Act makes it clear that all matters related to the mediation remain confidential and subject to some exceptions, prohibits the disclosure of any oral or written statements made during or in relation to the mediation.

Settlement Agreement

Upon the conclusion of the mediation and an agreement being reached, a settlement agreement will be drawn up and subsequently executed by both parties. The settlement agreement is binding and may be recorded before the court as a consent judgment or judgment of the court.

5. Conciliation

Conciliation is a process of alternative dispute resolution whereby parties appoint a conciliator to resolve their dispute. This method of dispute resolution is a lesser known form of alternative dispute resolution in Malaysia. Notwithstanding its lack of popularity, certain laws such as the Industrial Relations Act 1967 and the Law Reform (Marriage and Divorce) Act 1976 both refer to the use of conciliation as a means of dispute resolution.

Legislation

Unlike arbitration and mediation, there is no defining law which sets out the legal mechanisms of conciliation. As such, it could be said that it is an informal method of alternative dispute resolution. This means that the process has no legal standing and no authority to require the presentation of evidence or the calling of witnesses.

The Role of the Conciliator

The role of the conciliator is very different from its counterparts in the realm of alternative dispute resolution. The primary goal of a conciliator is to conciliate by seeking concessions from both parties. This is slightly different as compared to a mediator, who tries to guide the discussion in a way that optimizes parties' needs, or an arbitrator, who aims to deliver a judgment on the matter.

Process

There will usually be one conciliator, chosen by both parties. The conciliator will often be a person who has expertise in the specific area of dispute and is trusted by both parties.

The process of conciliation could be conducted in a number of ways, provided that the conciliator remains impartial at all times. A method called "shuttle diplomacy" is commonly employed. This process would minimise the time that parties would spend face-to-face and instead, the parties will be situated in different room and the conciliator would go from one room to the other to seek common ground to resolve the dispute.

At the end of the day, the conciliator would not pass a decision or award. Instead, he attempts to negotiate with and understand the disputing parties. If successful, such terms of the understanding will be translated into a form of a legally binding settlement agreement (with the assistance of the parties' respective legal advisors).

Advantages of Conciliation

Parties could benefit from conciliation as it is a flexible and informal method of dispute resolution. This means that parties could elect for a form of conciliation which would put them at ease and create a more facilitative environment for negotiations. This also means that elements of hostility which is present in the other forms of dispute resolution is largely removed.

In addition to the above, parties and the conciliator could also agree on total confidentiality during or after the course of discussions, which allows parties to speak

freely without the fear of prejudice.

As there are no hard and fast rules, this allows parties to expedite the process and could end up being cheaper and more time efficient than the other methods of dispute resolution

3. ESTABLISHING A PRESENCE

In Malaysia, persons who wish to carry on business may register as a sole proprietor or partnership with the Registrar of Businesses ("**ROB**"), incorporate as a company or register as a branch office with the Registrar of Companies ("**ROC**") or establish a limited liability partnership with the Registrar of Limited Liability Partnerships.

Registration of Businesses Act 1956 ("**ROBA 1956**")

The registration requirements for businesses of partnerships and sole proprietorships are prescribed by the ROBA 1956. The ROBA 1956 requires the registration of a new business to be done within 30 days from the date of commencement of the business. Partnerships and sole proprietorships are not required to lodge accounts with the ROB.

Companies Act 2016 ("**CA 2016**")

The CA 2016 governs the registration, administration and dissolution of companies and provides for matters relating to companies in Malaysia. The CA 2016 came into effect on 31 January 2017 (save for Division 8 of Part III of the CA 2016 on the introduction of new corporate rescue mechanisms, which came into effect on 1 March 2018; and Section 241 of the CA 2016 on the requirement for company secretaries to register with the ROC, which came into effect on 15 March 2019) and replaces its predecessor, the Companies Act 1965.

The CA 2016 introduced substantive and administrative changes such as the abolition of par value shares, changes to capital maintenance rules and introduction of a solvency test (which is applicable to redemption of redeemable preference shares, reduction of share capital, financial assistance and share buybacks as well as in the distribution of dividends), simplification of incorporation and administrative processes, increases in directors' sanctions and new corporate rescue mechanisms.

Companies limited by shares, companies limited by guarantee, unlimited companies and branches of foreign companies are governed by the CA 2016. A company may 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.

The CA 2016 abolished the concept of par value shares and provides that all shares issued before or after the coming into force of the CA 2016 have no par value. In

tandem with this change, there is no longer a concept of authorised share capital and companies are no longer required to maintain a share premium account and a capital redemption reserve account. With the abolition of the concept of par value for shares, there is no prohibition on a company to issue shares at a discount (to par).

Consequentially, there is now no minimum price at which shares of a company may be issued although directors of a company continue to have an overriding fiduciary duty to ensure that the subscription price determined for the issue of shares in a company is made in good faith and in the best interest of the company.

The Companies (Amendment) Act 2019 ("**CAA 2019**") came into effect on 15 January 2020. The CAA 2019 represents the first time that amendments had been made to the CA 2016 since it came into operation on 31 January 2017 and is generally aimed at removing ambiguities surrounding certain provisions in the CA 2016.

Note: This chapter does not cover the Labuan Companies Act 1990 which governs the incorporation, registration and administration of Labuan companies. Please see Chapter 18 for further information.

A. Forms of Business Organisations

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

a) Limited Liability Partnership

b) Partnership

c) Sole Proprietorship

d) Company Limited by Shares

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 to carry on business in Malaysia. An LLP combines the characteristics of a private company and a conventional partnership and is regulated under the Limited Liability Partnerships Act 2012.

An LLP is a body corporate and has a legal personality separate from its partners (i.e. separate legal entity). Two or more individuals or bodies corporate may form an LLP for any lawful business in accordance with the terms of the LLP agreement executed amongst them. The Limited Liability Partnerships Act 2012 does not impose a maximum number of partners of an LLP. The liabilities of the partners of an LLP are limited. An LLP is also capable of suing and being sued and has unlimited capacity to conduct business and hold property.

An LLP 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 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 private company into an LLP is RM500.

An LLP has 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 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. Partnerships are regulated by the Partnership Act 1961.

In a partnership, all partners are personally jointly liable, without limit, for the debts and obligations of the partnership. Any number of persons up to a maximum of 20 may form a partnership. If more than 20 persons

intend to carry on business, the business must be registered as a company under the CA 2016 or must be formed under some other written law in Malaysia (for example, under the Legal Profession Act 1976).

3. Sole Proprietorship

A sole proprietorship is the simplest form of business ownership. It is formed essentially for businesses comprised of one person (being 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". In a company limited by shares, the personal liability of its members is limited to the amount if any, unpaid on their shares.

The CA 2016 restricts the right of members of private companies to transfer their shares, restricts the number of members to a maximum of 50 and prohibits members from soliciting the public to subscribe for its shares. A private company is also prohibited from accepting deposits of money from the public whether with interest or not. A public company is not subject to the foregoing restrictions. A private company may convert to a public company and vice versa.

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. A company limited by guarantee is typically used for non-profit purposes. A company limited by guarantee is required to have a constitution. It may not hold land unless a license has been obtained from the relevant Minister and it is not permitted to distribute dividends to its members.

6. Unlimited Company

An unlimited company is a company where the members' liability for its debts is 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.

On the winding up of an unlimited company, every past and present member shall be liable to contribute to the assets of the company for payment of its debts and liabilities and costs incurred in the winding up. However, a past member shall not be liable to contribute to the debts of the company if he ceased to be a member of the company for one year or more before the commencement of the winding up and he is not liable to contribute in respect of any debt or liability of the company incurred or contracted after he has ceased to be a member.

7. Branch of a Foreign Company

Under the CA 2016, a foreign company shall not carry on business in Malaysia unless it is registered with the ROC as a foreign company. The CA 2016 does not have an exhaustive definition of “carrying on business” as it defines “carrying on business”, to include “establishing or using a share transfer or share registration office or administering, managing or otherwise dealing with property situated in Malaysia as an agent, legal personal representative, or trustee, whether by servants or agents or otherwise”.

The CA 2016 does however provide some negative guidance on the meaning of carrying on business. It provides that a foreign company will not be regarded as carrying on business in Malaysia for the reasons only that it carries on any of the following activities in Malaysia (“**Permitted Activities**”):

a) is or becomes a party to any action or suit or any administrative or arbitration proceeding or effects settlement of an action, suit or proceeding or of any claim or dispute;

b) holds meetings of its directors or shareholders or carries on other activities concerning its internal affairs;

c) maintains any bank account;

d) effects any sale through an independent contractor;

e) solicits or procures any order which becomes a binding contract only if the order is accepted outside Malaysia;

f) creates evidence of any debt, or creates a charge on movable or immovable property;

g) secures or collects any of its debts or enforces its rights in regard to any securities relating to those debts;

h) conducts an isolated transaction that is completed within a period of thirty-one days, but not being one of a number of similar transactions repeated from time to time;

i) invests any of its funds or holds any property; or

j) imports goods temporarily under the Customs Act 1967 for the purpose of display, exhibition, demonstration or as trade samples with a view to subsequent re-exportation within a period of three months or within such further period as the Director General of Customs and Excise may in his discretion allow.

Foreign companies intending to carry on business in Malaysia may either incorporate a subsidiary or register a branch under the CA 2016. The branch of a foreign company does not have separate legal personality and is considered an extension of the foreign company. The foreign company will be liable for all debts and liabilities of the branch.

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 permitted for a foreign company. Any foreign involvement in wholesale and retail trade would require the incorporation of the business locally 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. Requirements of a Locally Incorporated Company

By the CA 2016, every company shall have at least one director who is ordinarily resident in Malaysia, although with respect to public listed companies, the Main Market Listing Requirements issued by Bursa Malaysia requires a minimum of 2 directors. A director of the company does not also need to be a shareholder of that company.

A company incorporated in Malaysia must maintain a registered office in Malaysia where all books and documents required under the provisions of the CA 2016 are kept. Apart from company secretarial documents and statutory registers, a company is required to keep accounting records, financial statements and instruments of charges at its registered office. A notice must be made to the ROC if such documents are kept at a different place.

All business letters, notices and official publications (including in electronic form), websites, cheques and order invoices must contain the company name and registration number.

Generally, each equity share of a company carries one vote at a poll at any meeting of members of the company. A company may, however, provide for varying voting rights for its shareholders.

By the CA 2016, a company has 30 days from its incorporation date to appoint a company secretary. The secretary of a company must be a natural person of full age who is a citizen or permanent resident of Malaysia

and has his principal or only place of residence in Malaysia. He must be a member of a professional body prescribed under the CA 2016 or hold an individual licence issued by SSM. Section 241 of the CA 2016 (which came into force on 15 March 2019) requires all persons to register with the ROC before they can act as a company secretary. The company must also appoint an approved company auditor for each financial year, although the CA 2016 gives discretion to the ROC to exempt certain private companies from the requirement to appoint an auditor.

Companies are not required to have a constitution, although companies may choose to adopt a constitution. For companies incorporated under the Companies Act 1965, unless otherwise revoked, its Memorandum and Articles of Association will be deemed to be its constitution. Where companies do not adopt a constitution, the default provisions on the rights, powers, duties and obligations of the directors and members under the CA 2016 apply.

C. Procedure for Incorporation (Locally Incorporated Company)

The CA 2016 has simplified the requirements for incorporating a company by requiring only one member 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.

1. Application to Confirm Availability and Reservation of Name

An application must be made to the ROC to confirm the availability of a proposed name of the company. The applicant may also apply for the reservation of the proposed name. The steps involved for the reservation of the proposed name are:

a) Completion and submission of an application under Sections 27(1) and 27(4) of the CA 2016 to the ROC; and

b) Payment of an RM50 fee for each name applied.

The application and payment to the ROC must be made electronically using the MyCoID 2016 Portal on SSM's website.

Thereafter, provided the ROC is satisfied that the name is not one which is undesirable, unacceptable or identical to another name, it will be reserved for 30 days from the date of the application or such longer period as the ROC may allow.

2. Application for Incorporation of Local Company

An application must be made to the ROC for incorporation of a local company. The information to be provided to the ROC for the purposes of incorporation of a company include: -

a) the name, status (whether the company is private or public) and proposed address of the registered office of the proposed company;

b) the nature of business of the proposed company;

c) details of each proposed member of the company including name, identification, nationality, place of residence / incorporation (as applicable);

d) details of each proposed director;

e) in the case of a company limited by shares, the details of class and number of shares to be taken by a member; and

f) in the case of a company limited by guarantee, the amount up to which the member undertakes to contribute to the assets of the company in the event of its being wound up.

The application for incorporation must include a statement by each promoter or director confirming his consent to act as promoter or director and that he is not disqualified to act as a promoter or director under the CA 2016.

Once the ROC is satisfied that the requirements for incorporation under the CA 2016 are complied with and upon payment of the relevant fee, the ROC will issue an

electronic notice of registration. The company is incorporated on the date of incorporation specified in the notice of registration.

3. Fees for Incorporation

A flat fee for the incorporation of a company is payable depending on the type of company incorporated, as follows:

TYPE OF COMPANY	FEES (RM)
Company Limited by Shares	1,000
Company Limited by Guarantee	3,000
Unlimited Company	1,000

4. Post-Incorporation Obligations

Upon incorporation, the company and/or officers of the company are responsible for ensuring compliance with the CA 2016. Any change in the company's name must be filed with SSM within 30 days from the date a special resolution is passed to change the company's name, together with the appropriate fees.

The company's annual return must be lodged with the ROC once in every calendar year, no later than 30 days from the anniversary of the company's incorporation date (save for the calendar year in which the company was incorporated).

The company, directors and managers must keep such accounting and other records which will explain the financial position of the company and its transactions to enable true and fair profit and loss accounts and balance sheet (together with relevant reports) to be prepared and cause those records to be kept in such manner to enable them to be properly audited. The financial statements and records must be circulated to the members of the company within 6 months of its financial year end (in the case of a private company) or at least 21 days before its annual general meeting (in the case of a public company). The company must lodge the financial statements and reports for each financial year with the ROC within 30 days from the date such financial statements and records are circulated (in the case of a private company) or within 30 days from the date of its annual general meeting (in the case of a public company).

Every company must maintain statutory records and registers in compliance with the CA 2016 including register of option holders, register of members, register of mortgages/charges, register of debenture holders, register of directors, managers and secretaries, register of directors' shareholdings and minute books containing minutes of all proceedings of general meetings and of meetings of directors.

Companies are required to notify the ROC of changes to its particulars within the prescribed time. The key requirements are as follows:

Item	Prescribed time to notify ROC
Change in registered office	Within 14 days of change
Change in directors	Within 14 days of change
Filing of Annual Return	Within 30 days of anniversary of incorporation
Return of Allotment of shares	Within 14 days
Change in Register of Members	Within 14 days of change
Change in substantial shareholding	Notify company and ROC within 3 days (public listed companies) / 5 days (non-listed public companies)
Change in nature of business	Within 14 days of change
Change in business address	Within 14 days of change

In addition, the ITA provides that a company is required to retain sufficient records or documents for at least 7 years from the end of the year to which the income of the business relates for the purposes of tax assessments. Such records or documents includes 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.

D. Requirements of a Foreign Company

A foreign company shall not carry on business in Malaysia unless it is registered as a foreign company under the CA 2016. A foreign company registered under the CA 2016 must comply with the CA 2016. Foreign companies must appoint an agent in Malaysia who shall be answerable for all such acts, matters and things that are required to be done by the foreign company under the CA 2016 and be personally liable to all penalties imposed on the foreign company for any contravention of the CA 2016. The foreign company must have a registered office within Malaysia at all times.

E. Procedure for Registration (Branch of a Foreign Company)

The application process for registration of a foreign company under the CA 2016 are as follows:

1. *Application to Confirm Availability of Name*

An application must be made to the ROC to confirm the availability of a proposed name of the company. The name to be used to register the foreign company should be the same as that registered in its country of origin. Similarly, with a locally incorporated company, to confirm the availability of a proposed name of the company, an application and payment of the prescribed fee must be made electronically to the ROC using the MyCoID 2016 Portal on SSM's website.

Thereafter, provided the ROC is satisfied that the name is not one which is undesirable unacceptable or identical to another name and that the requirements for registration below are met, the company shall be registered under that name by the ROC.

2. *Application for Registration of Foreign Company*

An application must be made to the ROC for registration of a foreign company under the CA 2016. The information to be provided to the ROC for the purposes of registration of a foreign company include:

a) details of every shareholder in Malaysia, including name, identification, nationality, place of residence / incorporation (as applicable);

b) details of each director in Malaysia;

c) a list of its shareholders and details of the class and number of shares at its place of origin;

d) for a foreign company limited without share capital, the amount up to which the member undertakes to contribute to the assets of the foreign company at its place of origin in the event of its being wound up; and

e) details of the agent of the foreign company appointed under a memorandum of appointment or power of attorney.

The application for registration must include a statement by the appointed agent confirming his consent to the appointment.

Once the ROC is satisfied that the requirements for registration under the CA 2016 are complied with and upon payment of the relevant fee, the ROC will issue an electronic notice of registration. The notification is conclusive evidence that the requirements as to registration have been complied with.

3. *Fees for Registration*

The fee payable for the registration of a foreign company depends on its share capital, as follows:

Share Capital (RM EQUIVALENT)	FEES (RM)
Not more than 1 million	5,000
1 million – 10 million	20,000

10 million – 50 million	40,000
50 million – 100 million	60,000
100,000,001 and above	70,000

To determine the fees payable for registration of a foreign company, the share capital of the foreign company should be converted to the Malaysian currency (Ringgit Malaysia) at the prevailing exchange rate. In the event a foreign company does not prescribe any share capital, a flat rate of RM70,000 must be paid to SSM.

4. *Post-Registration Obligations*

Any change in the particulars of the company including the company's name, constitution, particulars of directors and particulars of its agent must be lodged with the ROC within 14 days from the date of change together with the appropriate fees. Any change in the share capital or authorised capital must be lodged with the ROC within 30 days from the date of change together with the appropriate fees.

Every foreign company is required to keep proper accounting records in Malaysia which will sufficiently explain the transaction and financial position of the foreign company arising out of its operations in Malaysia. The foreign company's annual return must be lodged with the ROC once in every calendar year. Every foreign company is required to lodge with the ROC a copy of its audited financial statements within 2 months of its annual general meeting, and audited financial statements showing the assets used and liabilities arising out of its operations in Malaysia.

Similar to a locally incorporated company, a foreign company is required to comply with the applicable requirements under the ITA and the IRB's Public Ruling No. 4/2000.

F. Representative/Regional Office

Foreign investors can consider setting up a representative or a regional office in Malaysia to establish a presence for a minimum of 2 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 is not governed by the ROBA 1956 or the CA 2016. Instead they are within the authority of the responsible statutory body such as MITI or BNM. MITI is responsible for the registration of regional and representative office in 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, typically in the manufacturing and services sector. A representative office may also be established to enhance bilateral trade relations, promote the export of Malaysian goods and services or to carry out research and development. A representative office may be used to perform permissible activities for its head office/principal and it must be completely 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 Asia Pacific. The regional office is also responsible for the designated activities of the company/organisation within the region it operates in.

There are certain activities that are not permitted to be undertaken by a representative office or regional office, for example trading activities (including import and export) or 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.

G. 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 and signage 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.

3. Wholesale Retail Trade Licence (for foreign involvement)

All proposals for foreign involvement in distributive trade requires the approval of the Ministry of Domestic Trade and Consumer Affairs (“**MDTCA**”). The MDTCA would issue a Wholesale Retail Trade Licence ("**WRT**"), typically with a validity of 2 years. Please see Chapter 4 for further information on the WRT licence requirements under the Guidelines on Foreign Participation in the Distributive Trade Services issued by MDTCA.

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 of 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 Malaysia. 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 former 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 former 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 two (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 Distributive Trade Committee (established under the MDTCA) (the "**DTC**"). The DTC seeks to achieve Bumiputera participation through non-legal (or administrative) controls.

Ministry of Domestic Trade and Consumer Affairs ("MDTCA")

"Distributive trade" is given a broad definition in the Guidelines on Foreign Participation in the Distributive Trade Services ("**DTG**") published by the MDTCA 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) companies with manufacturing licences which only distribute products under the same production line; and (ii) companies granted the status of regional establishments by the Malaysian Industrial Development Authority, which includes International Procurement Centres (IPC), Regional Distribution Centres (RDC), Operational Headquarters (OHQ) and Principal Hub (PH).

The MDTCA encourages all foreign business operators engaged in distributive trade services in Malaysia to obtain approval from the MDTCA prior to commencing operation. A party who wishes to apply for foreign involvement in distributive trade is also recommended to consult with the DTC prior to submission of its application. The approval of the MDTCA is valid for a maximum of 3 years and may be renewed. "Foreign participation" or "foreign business operator" 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.

The DTG sets out a list of activities that are considered to be foreign involvement in the distributive trade, thus requiring prior approval from the MDTCA. It includes: (i) acquisition of interest in the distributive trade company; (ii) mergers and/or takeovers by foreign participation; (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 local (Malaysian) personnel at all levels particularly for management positions and above; (iii) have only 15% of the total workforce of low skilled foreign workers; (iv) develop and provide transparent standard operating procedures for local suppliers to market their goods; (v) encourage Bumiputera participation in the distributive trade sector; (vi) hire at least 1% of the total workforce from persons with disabilities in large formats (e.g. hypermarkets or superstores, etc.); (vii) increase the utilisation of local airports and ports in the export and import of the goods; (viii) encourage the utilisation of local professional services which are available in Malaysia; (ix) submit audited annual financial reports to the MDTCA; (x) support the initiatives and agenda for sustainable development as provided under the Sustainable Development Goals by the Malaysian Government; and (xi) comply with all by-laws and regulations of the local authorities.

The DTG further provides specific incorporation, capital and equity structure conditions for: (i) hypermarkets; (ii) departmental stores; (iii) superstores; (iv) specialty stores; (v) convenience stores; (vi) distribution centres; and (vii) various other distribution formats (i.e. other types of distributive trade businesses and unregulated sectors, including e-commerce, which are not specified in items (i) to (vi) but which will be considered on the merits of each case with particular reference to their contribution to the socio-economic development of Malaysia). All seven (7) types of distributive trades are required to be carried out by companies incorporated locally under the CA 2016.

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 a store is to be operational in a standalone building or if the business floor area is more 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 30% equity participation by Bumiputeras. A grace period of 3 years for compliance may be given by the MDTCA 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.

While franchise businesses are distributive trades and therefore subject to the conditions set out in the DTG, any foreign involvement in franchise businesses is also subject to the conditions prescribed under the Franchise Act 1998. A specialty store that intends to operate through a franchise system is required to obtain the MDTCA’s approval prior to applying for a licence under the Franchise Act 1998.

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 or rejection by certain local governments of application for business premises licence.

It should be noted that the MDTCA has provided for a prohibition of foreign involvement or foreign business operators in certain distributive trades listed in the DTG. These include but not limited to: (i) supermarket / mini market; (ii) provision shop / general vendor; (iii) news agent and miscellaneous goods store; (iv) medical hall (inclined towards traditional and alternative medicines plus general dry foodstuff); (v) fuel station; (vi) permanent wet market store; (vii) permanent pavement

store; (viii) national strategic interest; and (ix) non-exclusive textile, food and beverage, jewellery shops.
A key point that has been clarified by the MDTCA 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 MDTCA'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 MDTCA. The revised DTG in 2020 expressly provides that Unregulated Services would fall under the heading of 'Various Other Distribution Formats' and accordingly, a foreign business operator carrying on such services would be subject to the conditions as set out in the DTG.

The MDTCA has published a list of sub-sectors under the scope of Unregulated Services which would require the approval of the MDTCA. 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 and regulations such as petroleum products, pharmaceutical, medicinal and orthopaedic products, toxic substances and explosives, arms, ammunitions, agricultural raw materials as well as live animals need also to comply with such other acts and regulations. 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 SC 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 MCMC 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.

Petroleum – Upstream Activities

Petroliam 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 Malaysian Government's direction is towards liberalisation of local equity requirements and encouragement of foreign investment into Malaysia. This can be seen in the Malaysian 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 expatriates 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.

Please see Chapter 11 for further information on the immigration requirements and Chapter 7 for applicable taxes in relation to employment of expatriates in Malaysia.

D. Free Trade Agreements

At present, Malaysia has 7 bilateral Free Trade Agreements ("**FTA**") with the following countries: Australia, Chile, India, Japan, New Zealand, Pakistan and Turkey. 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. Malaysia has regional FTAs with Australia-New Zealand, China, India,

Japan and Korea, and also participates in ASEAN Trade in Goods Agreement. The latest regional FTA with Hong Kong was implemented on 13 October 2019.

On 4 February 2016, Malaysia signed the 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. However, on 23 January 2017, United States President Donald Trump signed a Presidential Memorandum to withdraw the United States from the TPPA.

In light of the withdrawal by the United States, Malaysia and the remaining member countries went on to affirm the economic and strategic importance of the TPPA. On 9-10 November 2017, Malaysia and the remaining 10 TPPA parties have reached an agreement on the new way forward to implement the TPPA, renamed as the CPTPP. The CPTPP will incorporate the original TPPA, with suspension of a limited number of provisions, while maintaining the high standard and comprehensive nature of the TPPA. However, any schedules and annexes specific to the United States and any references to the United States appearing in the original TPPA will have no application given the withdrawal by the United States.

On 8 March 2018, the CPTPP was signed by all 11 participating countries - Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore and Vietnam. The next course of action would be for the participating countries to ratify the CPTPP, where changes to legislation may be needed. In contrast to the original TPPA, the mechanism for the entry into force of CPTPP is simpler. On 31 October 2018, the CPTPP achieved the target of 50% ratification by its signatories. As such, the CPTPP came into force on 30 December 2018. However, the CPTPP is pending ratification by Malaysia, and as such, Malaysia is yet to be able to benefit from the preferential tariff treatment under the CPTPP. At present, the Malaysian Government continues to evaluate the impact on the current laws, policies and regulations of Malaysia which may result from the implementation of the CPTPP.

Another significant regional cooperation is the Regional Comprehensive Economic Partnership ("**RCEP**"), involving 16 countries namely the 10 ASEAN member countries, China, Japan, Korea, India, Australia and New Zealand. The RCEP is aimed at broader and deeper engagement with significant improvements over existing free trade agreements and comprehensive economic partnership agreements between ASEAN and the other 6 countries. However, participating countries were unable to finalise the negotiations during the meeting at the 35th ASEAN Summit in November 2019, and the negotiations are expected to continue into 2020.

E. Bilateral Investment Treaties

As of 2019, Malaysia has entered into 71 bilateral investment treaties ("**BIT**"), out of which 54 are in force, 12 are signed but not in force, and the remaining 5 have been terminated.

In a number of the earlier BITs ranging from 1960s to 1990s, foreign investments are required to be admitted or registered by Malaysia by being an 'approved project' by the relevant government ministry in Malaysia in order to qualify for the benefits under the relevant BITs. However, the idea of imposing such requirement is slowly meeting its end in the newer BITs that Malaysia seeks to enter into.

In terms of enforcement of the BITs, there are currently no publicly available information regarding treaty awards made against Malaysia. However, it is possible for such awards, if any, to be binding on Malaysia by virtue of section 3 of the Convention on the Settlement of Investment Disputes Act 1966 which provides that an award made by an arbitrator under the Convention on the Settlement of Investment Disputes between States and Nationals of other States to be enforceable as if it is a decree, judgment or order of the High Court of Malaysia.

F. Investment Incentives and Opportunities

In Budget 2020, the Malaysian Government set sights on attracting Fortune 500 companies and global unicorn companies involved in the high technology, manufacturing, creative and new economic sectors. By 1 January 2021, it is expected that a new framework on incentive will be rolled out encompassing the revamped version of the Promotion of Investments Act 1986, Special Incentive Packages worth up to RM1 billion for companies investing at least RM5 billion each, and incentives under the Income Tax Act 1967.

The Malaysian Government had set up the National Committee on Investment as a fast-track panel in approving foreign and domestic investments. Up until August 2019, three investments worth RM2.2 billion had been approved.

5. FRANCHISE LAWS

Starting a franchise business has become a viable business model compared to the traditional business models. Since the Franchise Act 1998 ("**FA 1998**") was introduced to regulate such businesses, they have maintained a slow but steady growth. However, becoming a successful franchisor requires the franchisor to know and comply with the requirements of the Act and guidelines issued by the Ministry of Domestic Trade and Consumer Affairs ("**MDTCA**") that heavily regulates the franchise industry in Malaysia.

A. The Law and its Scope

The franchise industry in Malaysia is mainly governed by the FA 1998 which provides for the registration of, as well as regulation of, any franchise related matters. It is also pertinent to note that the Franchise (Amendment) Act 2020 has been gazetted on 6 March 2020. However, the said amendment act has yet to come into force, As such, any changes promulgated by the Franchise (Amendment) Act 2020 in this Chapter shall be subjected to the effective date to be announced.

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 a franchise system) along with the right to use the trade mark, trade secret or any confidential information of 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 FA 1998, a franchise term must be for a period of 5 years and above ("**Minimum Term**").

B. Registration Requirements

Preliminary requirements

The FA 1998 requires a franchisor (be it local or foreign) to register its franchise with the Franchise Development Division of MDTCA ("**Franchise Division**") before a franchise business commences operation / a franchise business is offered for sale. Pursuant to the Franchise (Amendment) Act 2020, any franchisee who fails to register its franchise within 14 days from the signing of the franchise agreement commits an offence.

An application can be submitted online by anyone through the Malaysian Franchise Express portal at http://myfex.kpdnhep.gov.my/ ("**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 are not required, the master franchisee should consider whether such an application will impact any proposed commercial arrangements for the commencement / operation of the franchise business due to the length of time required by the Franchise Division to approve these applications.

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

According to the FA 1998, 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 ("**RoF**") if a franchisor is found by the RoF to have failed to register as required by the Act as follows:

a) a fine not exceeding RM250,000 for a body corporate; or

b) a fine not exceeding RM100,000 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. The parties should note that the franchise agreement that is to be signed is the franchise agreement that has been duly approved by the Franchise Division.

It should also be highlighted that pursuant to the Franchise (Amendment) Act 2020, the validity of a registration of a franchise is no longer in perpetuity and must be renewed within 30 days from the expiration date of such registration.

4. Registration of franchise broker or franchise consultant

It is common for a franchisor or a franchisee to engage a franchise broker or a franchise consultant when setting up a franchise business in Malaysia. A franchise broker or a franchise consultant must first register himself with the RoF.

All the requirements as prescribed on the qualifications of a franchise broker or franchise consultant in the FA 1998 must be met before he can be registered.

A "**franchise broker**" is defined as a person doing business as an agent or representative of a franchisor to sell a franchise to any person for a certain consideration but does not include any director, officer or employee of the franchisor or franchisee. A "f**ranchise consultant**", on the other hand, means a person who provides advice and consultancy services to another person on the registration of a franchise business and compliance of the related laws.

The RoF may impose conditions on the registration of the franchise broker or franchise consultant which include the following: -

a) conditions governing the sale of a franchise by a franchise broker or franchise consultant; and

b) conditions on the conduct, suspension, termination, prohibition or denial of registration of a franchise broker or franchise consultant.

5. 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.

6. Approval or refusal of application for registration

Upon the receipt of an application for registration together with the documents required for registration under the FA 1998, the RoF has the discretion to approve or refuse the application and the RoF must give reasons for the refusal.

An application for registration which is approved may be subject to conditions imposed by the RoF and may require the applicant to pay such amount of fees as may be prescribed.

7. Cancellation from register

A franchisor may, at any time after the franchise term, apply to the RoF for cancellation of registration of the franchise from the register.

The RoF shall cancel the registration of the franchise from the register if he is satisfied that:

a) the franchisor has failed to submit his annual report to the RoF for the duration of five (5) years continuously;
b) the franchisor is insolvent; or

c) the franchisor is no longer granting rights under the franchise.

C. The Franchise Agreement and the Disclosure Documents

As part of the registration requirements, the FA 1998 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 FA 1998 requires the franchisor to provide a set of documents / information (i.e. all the documents / information submitted by the franchisor in support of the Application, including disclosure documents, sample of franchise agreement, the operation manual and training manual of the franchise) to the franchisee at least 10 days before the franchise agreement is signed by the franchisee.

Supporting Documents / Information

a) Annual report

The franchisor must submit an annual report to the RoF in the prescribed form within 6 months from the end of each financial year of the franchise business. The FA 1998 allows the RoF to suspend, terminate or cancel the registration of the franchise in the public interest or for the purpose of protecting prospective franchisees until any deficiencies specified by the Registrar has been corrected..

b) Registration of trade mark or service mark

A franchisor is required to register his trade mark or service mark relevant to his franchise in accordance with the Trademarks Act 2019 (if they are registrable under the FA 1998) before applying for the registration of the franchise.

Franchise Agreement

Additionally, the FA 1998 also provides for certain mandatory provisions to be included in the agreement. Under the current FA 1998, failure to include such provisions will render a franchise agreement null and void. However, it should be highlighted that pursuant to the Franchise (Amendment) Act 2020, non-compliance with the requirements of franchise agreement set out in

the Act will amount to an offence instead. Some of the mandatory 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 after the franchise agreement has been signed 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 FA 1998 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 FA 1998, 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 a period no lesser than 14 days for 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.

D. Conduct and obligations of a franchisor and a franchisee

1. Conduct of parties

The FA 1998 provides for the conduct of the parties as follows: -

a) 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;

b) the franchisor and the franchisee in their dealings with one another shall avoid substantial and unreasonable overvaluation of fees and prices;

c) 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

d) 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.

e) The franchisee must also operate the business separately from the franchisor, and the relationship of the franchisee with the franchisor must not at any time 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 provided in the franchise agreement to the franchisor. It is vital that a franchisor and a franchisee protects the consumer's interests at all times.

c) Pursuant to the Franchise (Amendment) Act 2020, franchisors and franchisees must at all times display the registration of franchise in a conspicuous position at the place of business of the franchise.

E. Requirements Imposed by the Franchise Division

It is pertinent to note that the Franchise Division also requires the parties to include in the franchise agreement certain terms and conditions, even if the same are not specifically required by the FA 1998.

We understand that the Franchise Division has recently imposed a requirement for franchise agreements to include the following terms and conditions:

a) management of intellectual property rights upon the expiry or termination of the franchise agreement; and

b) alternative dispute resolutions in respect of any dispute arising from the franchise agreement to be held in Malaysia.

F. Offences and Penalties

The FA 1998 provides for various offences and penalties, amongst others, are as follows: -

1. Holding out a franchise business

A person who assumes / uses in relation to its business the term "franchise" / any of its derivatives/ any words indicating the carrying of a franchise business, including the use of the word "franchise" or any abbreviation thereof as part of the name or title in documents, agreements, books, advertisements or publications, without the required approval from the Franchise Division commits an offence and shall, on conviction, be liable for:

a) if such person is a body corporate, a fine not exceeding RM250,000, and for a second or subsequent offence, a fine up to RM500,000; or

b) if such person is not a body corporate, a fine up to RM100,000 and/or to imprisonment for a term up to 1 year, and for a second or subsequent offence, a fine up to RM250,000 or imprisonment for a term not exceeding 3 years or to both.

2. Offence by body corporate

If an offence against any provision under the FA 1998 has been committed by a body corporate, any person who at the time of the commission of the offence was a director, manager, secretary or other similar officer of the

body corporate or was purporting to act in any such capacity, or was in any manner or to any extent responsible for the management of any of the affairs of such body corporate, or was assisting in such management, shall be deemed to have committed the offence unless, having regard to the nature of his functions in that capacity and to all circumstances, he proves:-

a) that the offence was committed without his knowledge, consent or connivance; and

b) that he had taken all reasonable precautions and had exercised due diligence to prevent the commission of the offence.

3. General penalty for any other offence not specifically provided under the FA 1998

A person who commits an offence under the FA 1998 for which no penalty is expressly provided shall, on conviction, be liable to the following: -

a) if such person is a body corporate, a fine of not less than RM10,000 and not more than RM50,000, and for a second or subsequent offence, a fine of not less than RM20,000 and not more than RM100,000; or

b) if such person is not a body corporate, a fine of not less than RM5,000 and not more than RM25,000 or imprisonment for a term not exceeding 6 months, and for a second or subsequent offence, a fine of not less RM10,000 and not more than RM50,000 or imprisonment for a term not exceeding 1 year.

The aim of the legal framework of franchising in Malaysia brings greater protection for Malaysian businesses. Through proper implementation, the FA 1998 will encourage innovation and economic growth. However, franchisors should also be aware of the laws in place to establish franchises that are acceptable by all the parties, including the Franchise Division.

6. 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 in selected industries, including traditional manufacturing and agricultural sectors, as well as those involved in ICT, tourism, healthcare, education and research and development.

Overview of Major Incentives

Some of the major incentives available in Malaysia include Pioneer Status ("**PS**"), Investment Tax Allowance ("**ITA**") and Reinvestment Allowance ("**RA**"). MIDA is the body appointed to receive applications for PS and ITA, whilst claims for RA are processed by the IRB.

PS Incentive: The PS incentive is available to companies participating in a promoted activity or producing a promoted product. Companies with PS typically enjoy total or partial income tax exemption of up to 70% of their statutory income for 5 years, commencing from its production date as determined by MITI. 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 companies until a prescribed period.

PS and ITA are mutually exclusive and as such, a company may opt for ITA as an alternative to the PS incentive.

ITA Incentive: The ITA incentive is an allowance granted based on capital expenditure incurred on plant and machinery and industrial buildings used for the purposes of promoted activities or production of promoted products. Generally, 60% of qualifying capital expenditure incurred during the tax relief period of 5 years is claimed as an ITA and the ITA can be offset up to 70% of the company's statutory income. Unutilised ITA can be carried forward until fully utilised.

RA Incentive: 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 the condition that such company has been in operation for at least 36 months. The rate of RA is 60% on qualifying capital expenditure and can be offset against 70% of the company's statutory income for the year of assessment ("**YA**"). The claim of RA is limited to 15 YAs and with effect from YA 2019, unutilised allowance can be carried forward up to maximum period of 7 consecutive YAs.

A brief summary of some of the investment incentives for specific industry sectors are set out below.

A. Manufacturing Sector

In addition to PS, ITA and RA incentives, other incentives available for the manufacturing sector include the following:

1. Accelerated Capital Allowance ("ACA")

(a) Reinvestment for promoted activities or products

After the 15-year period of eligibility for RA, companies that reinvest in the manufacture of promoted products are eligible to apply for the ACA. The ACA provides a special allowance, where the capital expenditure is written off within 3 years, i.e. an initial allowance ("**IA**") of 40% and an annual allowance ("**AA**") of 20%. Applications should be submitted to the IRB accompanied by a letter from MIDA certifying that the company is manufacturing promoted activities or products.

(b) Incentive for Industrial Building System ("**IBS**")

Companies which incur capital expenditure on the purchase of moulds used in the production of IBS components in the business of a manufacturing company or a construction company are eligible for ACA with effect from YA 2006 at rate of 40% for IA and 20% for AA. Applications should be submitted to the IRB.

2. Group Relief

Group relief is provided under the Income Tax Act 1967 ("**ITA 1967**") to all locally incorporated resident companies. Effective from YA 2019, a company that qualifies for group relief may surrender a maximum of 70% of its adjusted losses to be offset against the income of another company within the same group for 3 consecutive YAs. The following conditions must be fulfilled by both claimant and surrendering companies:

(a) must be resident & incorporated in Malaysia;

(b) the claimant and the surrendering companies each have a paid-up capital of ordinary shares exceeding RM2.5 million at the beginning of the basis period;

(c) the claimant and the surrendering companies must have the same accounting period;

(d) the shareholding, whether direct or indirect, of the claimant and the surrendering companies in the group must not be less than 70% on a continuous basis during the preceding year and the relevant year;

(e) losses resulting from the acquisition of proprietary rights or foreign-owned companies should be disregarded for the purpose of group relief; and

(f) companies currently enjoying the following incentives are not eligible for group relief:

(i) PS or ITA;
(ii) RA;
(iii) exemption of shipping profits;
(iv) income tax exemption under section 127 of the ITA 1967; and
(v) other prescribed deductions under section 44A(10) of the ITA 1967.

Claims for group relief should be submitted to the IRB.

3. Automation Capital Allowance ("Automation CA")

Manufacturing companies (labour and non-labour intensive industry) operating for at least 36 months in Malaysia are eligible for:

(a) **Category 1: Labour intensive industries (rubber products, plastics, wood, furniture and textiles)**

Automation CA of 200% will be provided on the first RM4 million expenditure incurred for YA 2015 to YA 2023; and

(b) **Category 2: Other industries**

Automation CA of 200% will be provided on the first RM2 million expenditure incurred for YA 2015 to YA 2023.

The eligible company is required to fulfil a list of criteria, including the following:

(a) incorporated under the Companies Act 2016 ("**CA 2016**") and a resident in Malaysia;
(b) possess a valid business license from local authority and manufacturing license from MITI (if applicable);
(c) the automation equipment is used directly in the manufacturing activities and is able to:
  (i) enhance the productivity such as reducing man hours, reducing workers and increasing volume of output;
  (ii) adopts technology that is more advanced than the technology currently used by the company; and
  (iii) be verified by SIRIM.

Applications for an Automation CA should be submitted to MIDA.

4. Industry4WRD Intervention Fund

The Malaysian Government introduced the National Policy on Industry 4.0, known as Industry4WRD on 31 October 2018. Industry4WRD policy focuses on manufacturing and manufacturing related services sectors which aim to create a comprehensive ecosystem for Industry 4.0, ultimately transforming the manufacturing sector holistically.

The Industry4WRD Readiness Assessment Intervention Programme ("**Industry4WRD RA Intervention Fund**") is a financial support facility for Malaysian SMEs in the manufacturing and related services sectors to embrace Industry 4.0.

SMEs which have completed the government-funded Industry4WRD Readiness Assessment programme are eligible to apply for the fund.

The fund will be provided on matching basis (70:30) based on eligible expenditures, up to a maximum grant of RM500,000 only. A maximum of 30% of the matching amount (70% of total grant) will be provided upfront to the companies subject to the approval by Intervention Fund Approval Committee at MITI, whereby the balance of the remaining grant will be on reimbursable basis which will be deliberated by MIDA.

5. Industry4WRD Domestic Investment Strategic Fund ("DISF")

The Industry4WRD Domestic Investment Strategic Fund ("**DISF**") was established to accelerate the shift of Malaysian-owned companies in targeted industries to high value-added, high technology, knowledge-intensive and innovation-based industries. Under DISF, a matching grant in the form of 60:40 ratio based on a reimbursable basis is provided to Malaysian companies which have undertaken the Industry4WRD Readiness Assessment programme.

The eligibility criteria for DISF are as follows:

(a) incorporation under the CA 2016 and resident in Malaysia;

(b) effective equity of the company must be at least 60% owned by Malaysians;

(c) company has been assessed through the Industry*4WRD* Readiness Assessment program; and

(d) company adopts at least one of the following enabling technologies:

  (i) Big Data Analytics;

  (ii) Cloud Computing;

  (iii) Augmented Reality;

  (iv) Cybersecurity;

  (v) Artificial Intelligence;

(vi) Additive Manufacturing;

(vii) System Integration;

(viii) Simulation;

(ix) Internet of Things (IoT);

(x) Autonomous Robots; and

(xi) Advanced Materials.

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 for either PS or ITA.

Under PS, a high technology company would enjoy tax exemption of 100% of the statutory income for a period of 5 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.

With regard to ITA, as much as 60% of ITA is granted on the qualifying capital expenditure incurred within 5 years from the date the same is incurred. In addition, the allowance can be offset against 100% of the statutory income for each YA. Any utilised allowances can be carried forward to subsequent years until fully utilised.

The high technology company must fulfil the following requirements:

(a) the percentage of local research and development expenditure to gross sales of the company should be at least 1% on an annual basis. The company has 3 years from its date of operation or commencement of business for the company to comply with this requirement;

(b) scientific and technical staff having degrees or diplomas with a minimum of 5 years' experience in related fields should comprise at least 15% of the company's total workforce; and

(c) value-added must be at least 40%.

Applications should be submitted to MIDA.

C. Approved Service Projects ("ASP")

ASP which is of national and strategic importance include those in relation to transportation, communications, utilities or any sub sectors of the service sector as approved by the Minister of Finance. The service sector is granted tax incentives either on income tax exemption or investment allowance for ASPs. Some of the criteria considered in approval of tax incentives for ASPs include, large capital investments and long gestation periods, utilisation and transfer of advanced technology and contribution towards efficiency in other sectors of the economy.

Applications should be submitted to MOF.

D. Incentives for Small and Medium-Scale Enterprises ("SMEs") and Small-Scale Companies

Small-scale companies incorporated under the CA 2016 with shareholders' funds not exceeding RM500,000 and having at least 60% Malaysian equity, or with shareholders' funds of above RM500,000 and not exceeding RM2.5 million with 100% Malaysian equity, are eligible for either PS or ITA.

Companies with PS are given income tax exemption of 100% of the statutory income for a period of 5 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 PS, the companies may opt for the ITA incentive of 60% on the qualifying capital expenditure incurred within 5 years. The incentive further allows for the allowance to be offset against 100% of the statutory income for each YA. Any unutilised allowances can be carried forward to subsequent years until fully utilised.

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 include 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%.

Applications should be submitted to MIDA.

E. Incentives for the Machinery and Equipment Industry

1. Production of Machinery and Equipment

Locally owned companies that reinvest in the production of machinery and equipment, including specialised machinery and equipment and machine tools qualify for the following incentives:

(a) PS, which provides income tax exemption of 70% on the increased statutory income arising from the reinvestment for a period of 5 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% on its qualifying capital expenditure incurred within a period of 5 years. The allowance can be offset against 70% of the statutory income for each YA. Any unutilised allowances can be carried forward to subsequent years until fully utilised.

Applications should be submitted to MIDA.

2. Production of Specialised Machinery and Equipment

Companies that undertake to produce specialised machinery and equipment, namely, machine tools, material handling equipment, robotic and factory automation equipment and modules and components for machine tools, material handling equipment and robotic and factory automation equipment and such are eligible for income tax exemption of 100% of the statutory income for a period of 10 years under PS. 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, the company may opt for an ITA of 100% on the qualifying capital expenditure incurred within 5 years from the date the first qualifying capital expenditure is incurred. This allowance can be offset against 100% of the statutory income for each YA. Any unutilised allowances can be carried forward to subsequent years until fully utilised.

To qualify for the above incentive, the company must comply with the following requirements:

(a) value add must be at least 40%; and

(b) percentage of MTS Index to total workforce must be at least 25%.

Applications should be submitted to MIDA.

F. Incentives 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 that will lead to substantial creation of employment and rural development.

This incentive allows for an income tax exemption of 100% up to 15 years of assessment (5+5+5) commencing from first year the company derives statutory income or an ITA equivalent to 100% of qualifying capital expenditure incurred within a period of 10 years. The allowance can be offset against 100% of statutory income for each assessment year. Unutilised allowances can be carried forward until fully absorbed. Additional 5 years will be given in the event the company achieves the KPIs set by MITI.

Applications should be submitted to MIDA.

G. Incentive for the Establishment of Principal Hub

A principal hub ("**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 ITA

1967 and entails annual submissions of reports to MIDA for performance evaluation.

The eligible company shall fulfil the prescribed criteria including:

(a) a paid-up capital of more than RM2.5 million;
(b) minimum annual sales of RM500 million (additional requirement for companies applying for tax exemption on trading income);
(c) serving and controlling a minimum number of network companies (i.e. related companies or an entity within a same group including subsidiary, branches and joint venture; or non-related companies have contractual agreement with applicant or applicant's ultimate company with regard to applicant's business and supply chain for at least 3 years) as specified by MIDA;
(d) core income generating activities of a Principal Hub includes providing the compulsory services activities, regional P&L / business unit management and strategic business planning and corporate development and carrying out a minimum number of other qualifying services under strategic services, business services or shared services as specified by MIDA. The qualifying services are strategic services, business services and shared services;
(e) complying with employment requirement and annual operating expenditure imposed or set by MIDA;
(f) the applicant company must be the planning, control and reporting centre for the qualifying services; and
(g) significant use of Malaysia's banking and financial services and other ancillary services and facilities.

The incentive for new companies is in the form of a two-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. The corporate taxation rate for both approved operational headquarters (OHQ)/ international procurement centre (IPC) / regional distribution centre (RDC) with or without incentive and existing manufacturing/services companies is 10% concessionary rate on the total statutory income derived from qualifying Principal Hub activities for a period of 5 years of assessment.

An approved Principal Hub company will enjoy certain facilities such as the ability to bring in raw materials, components or finished products with customs duty exemption into free industrial zones, licensed manufacturing warehouse, 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. Tourism Industry Incentives

Tourism projects, including eco-tourism and agro-tourism projects, are eligible for tax incentives. These include hotel businesses, tourist projects and recreational projects.

1. PS

A company with a pioneer status has the privilege of a 5-year partial exemption of 70% on the income tax.

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.

2. ITA

A company with an ITA is entitled to allowance of 60% on qualifying expenditure for a period of 5 years from the date of when the qualifying expenditure was first incurred. Companies can offset this allowance against 70% of statutory income in the YA. Any unutilised allowances can be carried forward to subsequent years until fully utilised.

3. ***Enhanced Incentives for undertaking new investment in hotel***

Companies undertaking new investments in 4 to 5 stars hotel in Sabah and Sarawak are provided with bigger incentives whereby those with pioneer status will enjoy 100% tax exemption on statutory income for the period of 5 years. Alternatively, companies granted with ITA can enjoy allowance of 100% on the qualifying expenditure for a period of 5 years from the date of when the qualifying expenditure was first incurred. The allowance can be offset against 100% of the statutory income in each YA. Any unutilised allowances can be carried forward to subsequent years until fully utilised.

4. ***Incentives for Reinvestment in Hotels***

Companies that reinvest in the expansion and modernisation in 1 to 5-star hotels are eligible for additional rounds of ITA as follows:

(a) 60% (100% for 4 and 5 stars in Sabah and Sarawak) on the qualifying capital expenditure incurred within a period of 5 years;
(b) the allowance can be offset against 70% (100% for 4 and 5 stars in Sabah and Sarawak) of the statutory income in each YA; and
(c) any unutilised allowances can be carried forward to subsequent years until fully utilised.

Companies are eligible to apply for ITA for 3 rounds of reinvestments. For group of companies, only 3 companies in a group are eligible for tax incentives.

Applications should be submitted to MIDA before the first qualifying capital expenditure is incurred.

5. ***Incentives for Reinvestment in Tourism Projects***

Companies that reinvest in the expansion and modernisation in tourism projects are eligible for additional rounds of PS or ITA as follows:

(a) PS, with income tax exemption of 70% of the statutory income for a period of 5 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% on the qualifying capital expenditure incurred within a period of 5 years. The allowance can be offset against 70% of the statutory income in each YA. Any unutilised allowances can be carried forward to subsequent years until fully utilised.

Companies are eligible to apply for PS or ITA for the two rounds of reinvestments (expansion, modernisation and renovation).

Applications should be submitted to MIDA before the first qualifying capital expenditure is incurred.

I. 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 ITA 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 ITA of 100% of qualifying capital expenditure incurred on a green technology project from the YA 2013 commencing from 25 October 2013 until the YA 2020. The allowance can be offset against 70% of statutory income in the YA. Unutilised allowances can be carried forward until they are fully absorbed.

The above incentive is extended for another three years from 2021 to 2023 (for applications received by MIDA until 31 December 2023) pursuant to Budget 2020.

This form of ITA 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 YA 2013 until the YA 2020.

The company must set up a green policy and commit to carry out in relation to environment management and sustainability and must employ at least one qualified personnel holding a certificate of competency as a service provider in the related field of green technology.

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

3. *Tax Incentive for Purchase of Green Technology Assets*

ITA of 100% is offered for qualifying capital expenditure incurred on green technology asset from the YA from 25 October 2013 until the YA 2020. Similar to the tax incentives benefit afforded for green technology projects, the allowance can be offset against 70% of statutory income in the YA. Unutilised allowances can be carried forward until they are fully absorbed.

Green technology assets must be verified by the Malaysian Green Technology Corporation (MGTC) and listed in the MyHijau Directory (www.greendirectory.my). A "green technology asset" means a green technology product, equipment or system used to conserve natural environment and resources which minimizes and reduces the negative impact of human activities, and approved by Minister of Finance (MOF).

Only applications received by 31 December 2020 are eligible for this incentive.

J. Other Incentives

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

1. Industrial Building Allowance ("**IBA**")

   An 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%.

   Claims should be submitted to IRB.

2. IBA for Buildings in MSC Malaysia

   To encourage the construction of more buildings in Cyberjaya for use by MSC Malaysia status companies, IBA at the rate of 10% annual allowance on qualifying expenditure (for a period of 10 years) is given to owners of new buildings occupied by MSC Malaysia status companies in Cyberjaya. Such buildings are treated as industrial buildings.

   Claims should be submitted to IRB.

3. Tax Incentives for Venture Capital Industry

   Generally, venture capital companies ("**VCC**") are eligible for income tax exemption for 10 years subject to the investment condition as follows:

   (a) at least 50% of funds invested in venture companies must be in seed capital; or

   (b) at least 70% of funds invested in venture companies must be in start-up or early stage financing.

   Further, 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 5 years.

   Claims should be submitted to the IRB.

4. 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 5 years.

Claims should be submitted to IRB.

5. Incentive for Waste Recycling Activities

In addition to being eligible for PS and ITA incentives, companies which undertake waste recycling activities may claim ACA for expenses incurred in purchasing plant and machineries which are used for:

(i) the recycling of waste; or
(ii) further processing of the waste into finished products.

Applications should be submitted to the IRB.

6. Incentives for Employees' Child Care Facilities

Expenditure incurred for the construction or purchase of buildings for the purpose of providing childcare facilities is eligible for a special IBA of 10% of the qualifying building expenditure for 10 years.

Claims should be submitted to IRB.

7. Tax Incentives to promote high-value added activities in the Electrical and Electronics ("**E&E**") industry.

According to the Budget 2020, the Malaysia government will provide tax incentives to further promote high-value added activities in the E&E industry to transition into 5G digital economy and Industry 4.0, these incentives include:

(a) income tax exemption up to 10 years to E&E companies investing in qualifying knowledge-based services; and

(b) special ITA to encourage companies in E&E sector that have exhausted the RA to further reinvest in Malaysia.

To date, the Malaysia government is still in the midst of finalising the details and requirements of the tax incentives in the E&E industry.

7. TAXATION

Malaysia's taxation system is assessed on a current year basis, and all income accrued in, derived from or remitted to Malaysia are liable to tax. The IRB, an agency of the MOF, is the responsible regulatory body for the administration of direct taxes, whilst the Customs administers customs and excise duties and sales and services tax. This Chapter summarizes the various taxes which are relevant to doing business in Malaysia.

A. Corporate Tax

Section 8(1)(b) and (c) of the ITA provide that a company is considered to be a resident company in Malaysia for tax purposes if the control and management of its business or affairs are exercised within Malaysia. Some factors which are indicative of the place of management and control are the place at which the directors' meetings are held or where the superior's direction and control is exercised.

1.Taxable income

Income is taxed in Malaysia if the income is sourced in Malaysia (i.e., accrued in or derived from Malaysia) or received in Malaysia from outside Malaysia (subject to certain exemptions). Foreign sourced income received in Malaysia by a resident company is exempted from tax (save for a company carrying on the business of banking, insurance, shipping or air transport).

Presently, the rate of income tax for resident and non-resident companies (save for small and medium enterprises ("**SMEs**") in Malaysia) is 24% (i.e., the maximum rate for residents and flat rate for non-residents).

Effective from YA 2020, resident companies with paid-up capital or Limited Liability Partnerships (LLP) with capital contribution not exceeding or equal to RM2.5 million and having a gross income of not more than RM50 million (SMEs) are taxed at a rate of 17% on the initial RM600,000 of its chargeable income while the remaining chargeable income is taxed at 24%.

2. 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 is realised. Aside from RPGT, Malaysia currently has no existing capital gains tax in place.

3. Withholding tax

Withholding tax represents the portion of payment to a non-resident payee which is withheld by a payer in Malaysia as tax to be paid directly to the IRB. It is not applicable to resident payees. 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	10% of the contract payment on account of tax payable by the non-resident contractor;

No.	Relevant sections in the ITA	Withholding tax rates
		and 3% of the contract payment on account of tax payable by non-resident employees of that non-resident contractor
2.	109 – interest derived from Malaysia	15%
3.	109 – royalty derived from Malaysia	10%
.	109B – special classes of income (i.e., technical or management service fees etc.)	10% (N.B. from 17 January 2017 to 5 September 2017, services rendered by non-residents are subject to tax regardless of whether such services are rendered within or outside Malaysia (save for prescribed circumstances**))
6.	109D – distribution of income from a real estate investment trust or property trust fund	Tax rate varies according to the following unit holder: other than a resident company – 10%; non-resident company – 24%; and foreign institutional investor – 10%.
7.	109E – distribution of profits out of family fund, family re-takaful fund or general fund	Non-resident company - 25% Participants other than non-resident company - 8%
8.	109F – income under section 4(f)	10%

**Based on Practice Note No. 1/2017 issued by the IRB on 23 June 2017:

a) where contracts for services which are **signed before** 17 January 2017 and:

   (i) the services are performed outside of Malaysia before 1 January 2017, payments to non-residents for these services are not subject to withholding tax;

   (ii) the services are performed outside of Malaysia after 17 January 2017, payments to non-residents for these services are subject to withholding tax;

b) where contracts are **signed and services performed outside of Malaysia before** 17 January 2017, but the **payments made after** 17 January 2017, payments to non-residents are not subject to withholding tax; and

c) where contracts are **signed and payment made before** 17 January 2017 but **services performed outside of Malaysia after** 17 January 2017, the payments to non-residents are not subject to withholding tax.

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

With effect from 6 September 2017, non-resident shall be exempted from paying income tax in relation to sections 4A(i) and 4A(ii) payments (i.e., services for use of property or rights and technical service, etc.), where the services are performed outside of Malaysia.

4. Earning Stripping Rules

Previously, the concept of thin capitalisation was introduced in Malaysia via Section 140A(4) of the ITA and such provision has since been repealed under the Finance (No. 2) Act 2017.

The Earning Stripping Rules ("**ESR**"), i.e., similar rules to those proposed by the Organisation for Economic Cooperation and Development (OECD) in Base Erosion and Profit Shifting project (BEPS) Action 4, has replaced the existing thin capitalisation legislation.

The ESR is introduced via Section 140C of the ITA, which provides that no deduction will be allowed in

respect of any interest expense in connection with or any financial assistance in a controlled transaction which is in excess of the maximum amount of interest as determined under the Income Tax (Restriction on Deductibility of Interest) Rules 2019 which came into force on 1 July 2019 ("**ESR Rules**"). The interest expense subject to ESR includes interest on all forms of debt or payments economically equivalent to interest (excluding expenses incurred in connection with the raising of finance).

Under the ESR Rules, the maximum amount of interest shall be 20% of the tax-EBITDA, of which amount is ascertained by way of a prescribed formula. EBITDA means earnings before interest, taxes, depreciation and amortisation. The ESR Rules apply to a person whose total interest expense for any financial assistance [2] granted in a controlled transaction[3] exceeds RM500,000 in the basis period for a YA beginning on or after 1 July 2019.

5. Transfer Pricing

Section 140A of the ITA provides for transfer pricing requirement in Malaysia. Under the ITA, where a person enters into a transaction with an associated person for the acquisition or supply of property or services, then that person shall determine and apply the arm's length price for such acquisition or supply.

The Income Tax (Transfer Pricing) Rules 2012 and Transfer Pricing Guidelines 2012 provide guidance on the application of arm's length principle under section 140A of the ITA. A recent development also saw the introduction of country-by-country reporting into Malaysia through the enactment of the Income Tax (Country-by-Country Reporting) Rules 2016.

In light of the increasing development of transfer pricing law and audits conducted by the IRB into companies with related party transactions ("**RPTs**"), businesses with RPTs are strongly encouraged to ensure that their RPTs are conducted at arm's length price and the required transfer pricing documentation is complied with in order to justify the arm's length nature of their RPTs.

B. Real Property Gains Tax ("RPGT")

RPGT is a tax that is imposed on capital gains arising from the disposal of real property or shares in a real property company. The key elements in determining chargeability for RPGT would be the date of acquisition (**"DoA**") and the date of disposal.

In respect of disposal of real properties made from 12 October 2019, the market value as at 1 January 2013 is deemed to be the acquisition price in computing the RPGT for disposal of real properties acquired prior to the year 2013 by Malaysian citizens and permanent residents.

With effect from 1 January 2019, the RPGT rates for the disposal of real property and shares in real property companies (**"RPC"**)* are as follows:	**RPGT Rates**		
Category of Disposal	**Companies (incorporated in Malaysia) / Trustee**	**Individual (Citizen & PR)**	**Individual (Non-citizen), Executor of estate and Companies (not incorporated in Malaysia)**
Disposal within 3 years after DoA	30%	30%	30%

[2] "Financial assistance" includes loan, interest bearing trade credit, advances, debt or the provision of any security or guarantee.

[3] "Controlled transaction" is construed as a financial assistance: (a) between persons one of whom has control over the other; or (b) between persons both of whom are controlled by some other person.

With effect from 1 January 2019, the RPGT rates for the disposal of real property and shares in real property companies (**"RPC"**)* are as follows:	**RPGT Rates**		
Category of Disposal	**Companies (incorporated in Malaysia) / Trustee**	**Individual (Citizen & PR)**	**Individual (Non-citizen), Executor of estate and Companies (not incorporated in Malaysia)**
Disposal in the 4th year after DoA	20%	20%	30%
Disposal in the 5th year after DoA	15%	15%	30%
Disposal in the 6th year after DoA or thereafter	10%	5%	10%

* An RPC is a controlled company which owns real property or shares or both with a defined value of not less than 75% of its total tangible assets. A controlled company is a company owned by not more than 50 members and controlled by not more than 5 persons.

The RPGT rates have been designed to curb speculation in real property and not expected to burden genuine property owners. Exemptions are available in some cases, such as RPGT exemption on chargeable 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.

C. Income Tax on Expatriates in Malaysia

Expatriates are non-Malaysian citizens 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.

1. Taxable Income

A. Tax rate

a) Tax rate for an expatriate in Malaysia is dependent on his or her tax resident 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. During YA 2016, the maximum income tax for a resident was at 28% (after claims of reliefs) while income tax for non-resident was at a flat rate of 28% (without any reliefs or rebates accorded). With effect from YA 2020, the maximum income tax for a resident has been increased to 30% and income tax for non-resident is at a flat rate of 30%.

b) A non-resident employee who has exercised employment in Malaysia is exempted from income tax if, amongst other factors, he / she has exercised his / her employment in Malaysia for a period not exceeding 60 days in a calendar year; is employed on board of a Malaysian ship; is 55 years old and a pensioner from Malaysian employment; is receiving tax–exempted dividends or receiving interest from banks etc.

B. Types of Taxable Income

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

a) gains or profits from a business;

b) gains or profits from an employment;

c) dividends, interests or discounts;

d) rents, royalties or premiums;

e) pensions, annuities or other periodical payments not falling under any of the foregoing paragraphs; and

f) gains or profits not falling under any of the foregoing paragraphs.

The expatriate employee will be subject to monthly tax deduction scheme where employers are required to deduct and remit tax deducted from the employee's monthly remuneration to the IRB.

Employment income under the ITA is inclusive of the following:

a) salary and wages;

b) remuneration;

c) leave pay;

d) fees and commission;

e) bonus and gratuities;

f) perquisite; and

g) allowance (whether in money or otherwise) in respect of having or exercising the employment.

2. Concession

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

There are specific concessions which are applicable only for expatriates who are employed in Labuan. A non-Malaysian citizen 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 YA 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 a non-Malaysian citizen from payment of income tax in respect of fees received by that individual in his capacity as a director of a Labuan entity from the YA 2011 until the YA 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-citizens 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 and any income derived from their employment exercised outside of Malaysia is tax-exempted.

D. Indirect Taxes

1. Sales and Service Tax ("SST")

The Goods and Services Tax Act 2014 (which was effective from 1 April 2015) was repealed and replaced by the Sales Tax Act 2018 and the Service Tax Act 2018 (SST regime) on 1 September 2018.

A. <u>Sales Tax</u>

Sales tax is a single stage consumption tax imposed on goods manufactured in or imported into Malaysia for local consumption. This means that the tax is only imposed at one level. All goods manufactured in Malaysia or imported into Malaysia are taxable unless they are specifically exempted by order of the Minister of Finance.

Sales tax on importation of taxable goods into Malaysia shall be levied and payable as if it were a customs duty or an excise duty. Sales tax is levied on the sales value of imported taxable goods, which is computed based on the value of such taxable goods plus any customs duty or excise duty paid or to be paid on such taxable goods.

Goods that are exported will not be subject to sales tax. Sales tax is also not applicable on taxable goods which are imported into or transported between **designated areas** (i.e. Labuan, Langkawi and Tioman) and/or **special areas** (i.e. free zones[4] (such as the Port Klang Free Zone), licensed warehouses or licensed manufacturing warehouses[5] and the Joint Development Area[6]).

The Minister of Finance may by order fix, amend or vary the rate of sales tax from time to time. Presently, the sales tax rate is fixed at 5% or 10% generally, depending on the category of goods specified under the Sales Tax (Rates of Tax) Order 2018 ("**STO**"). Petroleum products on the other hand are subject to different rates under the STO.

Goods which are exempted from sales tax include vegetables, live animals, daily necessities such as rice, cooking oil, newspapers, and certain chemicals and medicines.

B. <u>Service Tax</u>

Service tax is another form of consumption tax levied and charged on any taxable service. A service which is taxable may be prescribed by the Minister of Finance to be a taxable service under the Service Tax Act 2018. The taxable services, as prescribed under the Service Tax Regulations 2018, presently include the provision of accommodation services, insurance and takaful, services of food and beverage preparation, provision of electricity, clubs and gaming facilities, information technology as well as telecommunication services. Any person who provides any taxable service which is of the prescribed value must be registered.

Similar to sales tax, the Minister of Finance may by order fix, amend or vary the rate of service tax from time to time. The rate of service tax is presently set at 6% of the price, value, premium or takaful contribution of the taxable service, save for credit card or charge card services which are imposed with a fixed amount of RM25 for each card.

Service tax is applicable to (amongst others) professional and consultancy services provided by accountants, advocates and solicitors, engineers, architect, surveyors (including valuers, assessors and real estate agents), advertising agencies, consultancy firms, management service provider, insurance companies, motor vehicle service and repair centres, telecommunication services companies, security and guard services agencies, recreational clubs, estate agents, parking space services operators and courier service firms.

Professional services provided by a company to companies within the same group will be exempted from the current service tax of 6%. Courier services provided from a point within Malaysia to a destination outside Malaysia are also exempted from the service tax of 6%.

Similar to sales tax, taxable services provided within or between designated areas and special areas are not subjected to service tax, save for certain taxable services (within or between designated areas or special areas or both) such as provision of passenger air transport, telecommunication services, accommodation premises, food and beverages and services for clearing of goods from customs control.

In order to widen the scope of taxable services to include services rendered from foreign service providers,

[4] Declared under the Free Zones Act 1990
[5] Licensed under the Customs Act 1967
[6] Pursuant to the Malaysia-Thailand Joint Authority Act 1990

services imported by businesses (B2B) are effectively from 1 January 2019, subject to service tax and in this regard, the Malaysian recipient would need to account for 6% tax via reverse charge mechanism.

Digital Service Tax

Effective from 1 January 2020, foreign online service providers are required to register and service tax of 6% shall be imposed on any digital service provided by a foreign registered person (i.e., foreign service provider ("**FSP**") who is required to register under the Service Tax Act 2018) to any consumer in Malaysia.

a) Scope of "Digital Service"

"Digital service" is defined as any service that is delivered or subscribed over the internet or other electronic network and which cannot be obtained without the use of information technology and where the delivery of the service is essentially automated. This encompasses services such as subscription to online newspapers, advertisement and online platform, online licensing of software, website hosting, internet based telecommunication, provision of music and livestreaming services, search engines and social networks.

b) Definition of "FSP"

Under the STA, FSP is defined as any person who is outside Malaysia providing any digital service to a consumer and includes:

(i) a person who sells digital products directly to consumers;

(ii) a person who sells digital products indirectly through intermediaries such as online platform and issues the invoice for such a sale; and

(iii) an online platform who makes transactions on behalf of an oversea service provider and issues invoice or any other document under their name.

c) Definition of "Consumer"

"Consumer" is defined as any person who fulfils any two of the following:
(i) makes payment for digital services using credit or debit facility provided by any financial institution or company in Malaysia;

(ii) acquires digital services using an internet protocol address registered in Malaysia or an international mobile phone country code assigned to Malaysia;

(iii) resides in Malaysia.

In determining whether a consumer resides in Malaysia, the FSP may consider information or a declaration from the consumer as follows:
(i) the billing address of the consumer in Malaysia;
(ii) the home address of the consumer is in Malaysia; or
(iii) the recipient's country selection.

d) Exemption from applying reverse charge on imported taxable digital services

To ensure that there is no double taxation, the Service Tax (Persons Exempted from Payment of Tax) (Amendment) Order 2019 provides, amongst other things, that any person who in carrying on his business, acquires digital services from a foreign registered person, is exempted from payment of service tax.

e) Extension of inter-group relief facility to digital services provided by FRPs

Effective from 14 May 2020, FRPs who provide any digital service to any company in Malaysia within the same group of companies with the FRP are exempted from charging service tax on such digital service,

C. Registration for SST

a) Mandatory

In respect of sales tax, a manufacturer of taxable goods and the total sales value of his taxable goods for a 12-month period exceeds or is expected to exceed RM500,000, is required to be registered under the Sales Tax Act 2018.

Manufacturers of certain taxable goods are exempted by order of the MOF from the registration requirement under

the Sales Tax Act 2018. These manufacturing activities include developing and printing photographs and production of film slides, manufacture of ready mixed concrete, preparation of meals, repair of second hand or used goods and the installation of air conditioners in motor vehicles.

As for service tax, a person is liable to be registered under the Service Tax Act 2018 if he is a taxable person providing taxable services and the total value of his taxable services for a 12-month period exceeds or is expected to exceed the prescribed threshold under the Service Tax Regulations 2018. The prescribed total value of taxable service which is liable for registration varies from one taxable person to another, for example, the registration threshold for FSPs, operators of hotels, inns, lodging house is RM500,000; whilst the registration threshold for operators of restaurants, bars, snack bars and canteen is RM1,500,000.

b) Voluntary

Any person who is not liable to be registered for sales or service tax may apply to the Director General ("**DG**") of Customs for registration as a registered person. The DG of Customs may approve the registration to be effective from a date he determines and subject to conditions he thinks fit.

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.

Generally, the value of goods for the purpose of computing import duties is determined largely in accordance with the World Trade Organisation principles of customs valuation. Notwithstanding that, Malaysia being a member state of ASEAN is committed to the ASEAN Common Effective Preferential Tariffs scheme. As such, all industrial goods traded within ASEAN are imposed with import duties of 0% to 5%.

Malaysia is also a party to a number of free trade arrangements in the areas of trade in goods, rules of origin, and investments. To date, Malaysia has concluded 7 bilateral FTAs with Turkey, Japan, Pakistan, New Zealand, India, Chile and Australia and 6 regional FTAs 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 RM 1.50 per litre and 15% for certain types of 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.

8. BANKING & 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 June 2020, there are some 26 commercial banks, 16 Islamic banks, 1 international Islamic bank and 11 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.

Based on BNM's announcement on 27 December 2019, BNM plans to issue up to five licences to qualified applicants to establish digital banks to conduct either conventional or Islamic banking business in Malaysia in 2020.

1. Commercial Banks

The list of licenced commercial banks in Malaysia as published on BNM's website[7] is as follows:

No.	Commercial Bank
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.	CIMB Bank Berhad
9.	China Construction Bank (Malaysia) 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.	MUFG Bank (Malaysia) Berhad
18.	Malayan Banking Berhad
19.	Mizuho Bank (Malaysia) Berhad
20.	OCBC Bank (Malaysia) Berhad

[7] http://www.bnm.gov.my/index.php?ch=li&cat=banking&type=CB&fund=0&cu=0

21.	Public Bank Berhad
22.	RHB Bank Berhad
23.	Standard Chartered Bank Malaysia Berhad
24.	Sumitomo Mitsui Banking Corporation Malaysia Berhad
25.	The Bank of Nova Scotia Berhad
26.	United Overseas Bank (Malaysia) Bhd

2. Islamic Banks

The list of licensed Islamic banking institutions in Malaysia as published on BNM's website[8] is as follows:

No.	Islamic Banks
1.	Affin Islamic Bank Berhad
2.	Al Rajhi Banking & Investment Corporation (Malaysia) Berhad
3.	Alliance Islamic Bank Berhad
4.	AmBank Islamic Berhad
5.	Bank Islam Malaysia Berhad
6.	Bank Muamalat Malaysia Berhad
7.	CIMB Islamic Bank Berhad
8.	HSBC Amanah Malaysia Berhad
9.	Hong Leong Islamic Bank Berhad
10.	Kuwait Finance House (Malaysia) Berhad
11.	MBSB Bank 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. Foreign International Islamic Banks

In addition to the abovementioned Islamic banking institutions, there is foreign international Islamic bank which is licenced to conduct Islamic banking business in international currencies other than Ringgit with residents and non-residents. The list of licenced international Islamic bank in Malaysia as published on BNM's website[9] is as follows:

No.	International Islamic Bank
1.	PT. Bank Muamalat Indonesia, Tbk

4. Development Financial Institutions

Other financial institutions licenced by BNM providing banking services would be 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 website[10] 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 [11]**
1.	Malaysian Industrial Development Finance Berhad
2.	Credit Guarantee Corporation Berhad
3.	Perbadanan Nasional Berhad
4.	Sabah Development Bank Berhad
5.	Sabah Credit Corporation

[8] http://www.bnm.gov.my/index.php?ch=li&cat=islamic&type=IB&fund=0&cu=0

[9] http://www.bnm.gov.my/index.php?ch=li&cat=iib&type=IIB&fund=0&cu=0

[10] http://www.bnm.gov.my/index.php?ch=fs&pg=fs_mfs_dfi&ac=162

[11] http://www.adfim.com.my/members/

6.	Borneo Development Corporation (Sabah) Sdn. Bhd.
7.	Borneo Development Corporation (Sarawak) Sdn. Bhd.
8.	Development Bank of Sarawak
9.	Johor Corporation Berhad
10.	Majlis Amanah Rakyat
11.	Malaysian Technology Development Berhad
12.	Perbadanan Usahawan Nasional Berhad

5. Digital Banks

BNM will be issuing up to 5 licences to qualified applicants to establish digital banks that will offer banking products and services through digital or electronic means to address market gaps in the underserved and unserved segments in Malaysia. On 27 December 2019, BNM had issued the Exposure Draft on Licensing Framework for Digital Banks ("**Exposure Draft**") which outlines the proposed framework for the licensing of digital banks.

The Exposure Draft provides requirements on applications for the establishment of a digital bank, including the eligibility requirement and application procedures that must be complied with by an applicant intending to carry on digital banking business or Islamic digital banking business, the business limitations and regulatory framework applicable to a licensed digital bank during the foundation phase and the business activities that must be undertaken and the physical access points that may be established by the licensed digital bank.
The Exposure Draft is issued together with the Application Procedures for New Licences under the Financial Services Act 2013 ("**FSA**") and the Islamic Financial Services Act 2013 ("**IFSA**"), and Application Procedures for Acquisition of Interest in Shares and to be a Financial Holding Company to provide clarity on the procedures and criteria involved in the application process to be a licensed persons under the FSA and IFSA.

In order to enable admission of digital banks with strong value propositions, while safeguarding the integrity and stability of the financial system, BNM set an asset threshold of RM2 billion in the initial three to five years of operations. This functions as a 'foundational phase' for the licensees to demonstrate their viability and sound operations, and for BNM to observe performance and attendant risks. Digital banks will also be required to maintain minimum capital funds unimpaired by losses of RM100 million during the foundational phase, and RM300 million thereafter.

Subsequent to the foundational phase, digital banks are required to observe all equivalent requirements that are applicable to incumbent banks. The key features of the framework include:

a) Capital adequacy requirement: the risk categories to calculate the credit and market risk components for risk weighted assets under the Basel II capital framework have been rationalised into simpler categories; and

b) Liquidity requirement: 25% of the digital bank's on-balance sheet liabilities must be held in high quality liquid assets.

BNM aims to extend the consultation period for the Exposure Draft and finalise the policy document by June 2020. Applications for licences will open upon issuance of the policy document.

6. 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 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:

c) act as financial adviser, banker and financial agent of the Malaysian government;

d) regulate the banking and financial services industry and ensure stability of the country's financial system;

e) ensure prudent conduct of monetary policy; and

f) 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

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

The LFSA was established in 1996 under the Labuan Financial Services Authority Act 1996. The 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. Please refer to chapter 18 for more information on Labuan IBFC.

7. Legislation

1. Financial Services Act 2013

The principal legislation governing the banking and financial services industry in Malaysia is the 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) and financial reporting. The guidelines, standards, and notices 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. There are currently 15 financial holding companies in Malaysia[12].

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. Islamic Financial Services Act 2013

The IFSA is the principal legislation in Islamic banking, finance and investment in Malaysia, which 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 issued by 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 on *Shariah* requirements to facilitate institutions in complying with *Shariah*. The Islamic financial institutions are required to comply with the rulings of the Shariah Advisory Council established under the CBMA.

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. 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 issuances 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.

8. Services

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

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 issuances (bond and sukuk) in Malaysia are required to be made in accordance with the relevant guidelines and practice notes issued by the SC.

[12]https://www.bnm.gov.my/index.php?ch=fs&pg=fs_mfs_hold&ac=422&lang=en

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. The 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.

A. Other governing bodies

1. 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 the 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.

2. Malaysia International Islamic Financial Centre

The Malaysia International Islamic Financial Centre ("**MIFC**") was launched 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.

3. 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.

B. 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.

C. Types of financing

The types of financing provided by Islamic financial institutions in Malaysia are substantially similar to those provided by commercial banks, and 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, Ijarah, Wakalah or Musharakah; 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 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.

D. 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 or Offering of Sustainable and Responsible Investment Sukuk) Rules 2017

A Company shall receive a revenue deduction on an amount equal to the expenditure incurred on the issuance or offering of a Sustainable and Responsible Investment Sukuk approved or authorised by or lodged with the SC under the CMSA. This deduction shall apply where 90% of the proceeds raised from the issuance or offering of the Sustainable and Responsible Investment Sukuk are used solely for the purpose of funding the Sustainable and Responsible Investment Project specified in the guidelines relating to sukuk issued by the SC. This applies from assessment year 2016 until 2020.

According to the MOF's 2019 Budget speech, the current tax deduction period is expected to be extended until 2023.

Stamp Duty (Exemption) (No. 3) Order 2016

Instruments relating to Islamic banking, takaful activities and Islamic capital markets under a scheme to promote Malaysia International Islamic Financial Centre, such as:- (i) instruments on transactions in currencies other than ringgit relating to Islamic banking or takaful activities executed on or after 1 January 2017 but not later than 31 December 2020 and (ii) instruments relating to issuance of Islamic bonds in ringgit or foreign currencies approved by the SC on or after 1 January 2017 but not later than 31 December 2020, are exempted from stamp duty.

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 order.

Income Tax (Deduction for Expenditure on Issuance of Sukuk) Rules 2019

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 LFSA. This applies for the assessment years 2019 and 2020.

According to the MOF's 2019 Budget speech, the current tax deductions on the cost of issuance and additional deductions on *Sukuk* issuance costs under the principle

of *Wakalah* is expected to be extended until the assessment year 2025.

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.

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 until the assessment year 2020. The fund managed shall be in accordance with *Shariah* principle certified by the SC.

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 (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 (whether Islamic or otherwise) and the transfer of such debentures, are exempted from stamp duty.

E. 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 AIAC 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 i-Arbitration Rules of the AIAC, 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 AIAC and the Malaysian Mediation Centre established by the Bar Council of Malaysia. The AIAC has come up with its Mediation Rules, which cover all procedural aspects of the mediation process.

3. Financial ombudsman scheme

The financial ombudsman scheme introduced by the IFSA provides an avenue for financial consumers to resolve complaints/disputes against financial service providers, as part of BNM's efforts to strengthen financial consumer protection and to create awareness of matters relating to the Islamic finance industry. It is described in the IFSA as a scheme for ensuring effective and fair handling of complaints and for the resolution of disputes between an eligible complainant and a financial service provider (who is required to be a member of the approved financial ombudsman scheme) in respect of financial services or products. Once a complaint/dispute has been formally referred to the scheme, the eligible complainant is not entitled to lodge a claim on such dispute with the Tribunal Consumer Claims. On 1 October 2016, the Ombudsman for Financial Services ("**OFS**") has commenced operations as the operator for the financial ombudsman scheme pursuant to the Islamic Financial Services (Financial Ombudsman Scheme) Regulations 2015. Financial consumers can now refer eligible disputes involving members such as licensed Islamic banks, takaful operators, prescribed development financial institutions, designated Islamic payment instrument issuers, takaful brokers, and Islamic financial advisers, to the OFS for resolution, where the scope and jurisdiction will be subject to its terms of reference. The services of the OFS are offered free of charge to eligible complainants, without having to engage the service of a lawyer for a complaint/dispute to be filed with the OFS. Complaints/disputes filed with the OFS must not exceed RM250,000. Lower limits will apply to disputes on motor third party property damage, insurance claims and unauthorised transactions involving Islamic payment instruments and payment channels. The complaint/dispute must be lodged with OFS within six (6) months from the date of the final decision of the relevant member, or after sixty (60) calendar days from the date the complaint/dispute was first referred to the member concerned in respect of which no response has been received from that member. The decision of OFS is final and is only binding on the member if the complainant accept the decision.

TAKING SECURITY IN MALAYSIA

Security can be taken over various types of assets in Malaysia and guarantees may be granted by individuals and corporate entities. Security or guarantee granted in favour of non-residents may be required to be registered with, or may require the prior written approval of, BNM (see Chapter 9 – Foreign Exchange Administration).

A. Forms of security over assets

The forms of security defer from one asset to another. The types of assets and the common forms of security over these assets are set out below.

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); all vegetation and other natural products, whether or not requiring the periodical application of labour to their production (whether on or below the surface); standing timber, trees, crops and other vegetation growing on land; and land covered by water.

The laws governing real estate in Malaysia (Real Estate Legislation) are the:

(a) National Land Code 1965, which covers Peninsular Malaysia;

(b) Sarawak Land Code in the State of Sarawak; and

(c) Sabah Land Ordinance in the State of Sabah.

The types of land in Malaysia are:

(a) freehold, which means the land is granted by the state authority in perpetuity;

(b) leasehold, which means the land is granted by the state authority for a term of years (not exceeding 99 years) and when that period expires the state authority can take back the land, or grant a renewal of lease;

(c) malay reserved land and customary land, which are reserved only for the Malay race and can be transacted only between members of the Malay race; and

(d) native land, which applies to land in Sabah and Sarawak and can only be transacted between natives.

There are two types of land titles: final title and qualified title. Both titles can be registered at the Land Registry of the State ("**Registry**") or the Land Office. A Registry title is evidenced by a grant or state lease, or by any document of title registered in a Registry. A Land Office

title is evidenced by a "mukim" grant or "mukim" lease, or by any document of title registered in a Land Office.

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. The assignment must be perfected by serving a notice on the counterparty to the sale and purchase agreement, usually a developer if the property is part of a new development, or the vendor of the property, if it is a sub-sale. A deed of power of attorney, giving the power to the assignee to sell, assign, lease, deal with and take possession of the property must then be registered at the High Court.

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 2016 and the Merchant Shipping Ordinance 1952 (as amended by Merchant Shipping Ordinance (Amendment) Act 2016). An application to enter an aircraft mortgage in the Aircraft Register must be made in the prescribed form and accompanied by a certified true copy of the mortgage. A security interest in an aircraft and aircraft engine falling within the scope of the Convention on International Interests in Mobile Equipment and the Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment, implemented by the International Interests In Mobile Equipment (Aircraft) Act 2006, may be registered on the International Registry. A ship mortgage must be made in the prescribed form and presented for registration at the ship's port of registry whereby the mortgage is recorded in the register book.

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.

The formalities for creating security over financial instruments are as follows:

(a) **Certificated and non-certificated shares, and debt securities**. A fixed charge over shares or debt securities and assignment of the rights and interests in and to such shares and debt securities (for example, dividends, interest or coupon) is the most common way of creating security. It is in writing and created by both security provider and security holder entering into a document evidencing the charge cum assignment;

(b) **Certificated shares**. Under the Companies Act 2016, a company is not required to issue a share certificate unless the company receives an application from its shareholder for such certificate or as otherwise provided for in its constitution. In the absence of evidence to the contrary, the entry of the name of a person into the register of members as a shareholder is prima facie evidence that legal title to the share is vested in that person (section 101, Companies Act 2016). A security holder can request for custody of the original share certificates and an executed but undated share transfer form (in prescribed form) from the security provider with the transferee details left blank. When the security is enforced, the security holder can transfer the title of the shares to itself or a nominee by exercising powers of attorney granted by virtue of the charge instrument;

(c) **Non-certificated (listed) shares**. The shares are transferred from the securities account of the security provider to the securities account of the security holder. This account is established to receive the charged shares and is designated a "pledged securities account" in accordance with the Securities Industry (Central Depositories) Act 1991; and

(d) **Debt securities**. For listed/non-certificated debt securities, security is created in the same way as non-certificated shares.

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.

Assignments of rights and benefits in and to claims and receivables are affected in writing and created when the security provider enters into the assignment. The assignment must be stamped. A power of attorney in

favour of the security holder is usually included in the security document. The power must also be stamped and registered with the Registrar of the High Court and particulars of the security must be registered with the Companies Commission.

The following conditions must be fulfilled for the perfection of a legal assignment:

(a) the assignment must be for a debt or other legal chose in action;

(b) the assignment must be in writing and signed/executed by the security provider;

(c) express notice in writing of the assignment must be given to the debtor, trustee or other person from whom the security provider would have been entitled to claim the debt or chose in action; and

(d) the assignment must be absolute and not purporting to be by way of charge only.

By law, a legal assignment by way of security must be perfected by the security provider serving a notice of assignment on the debtor, trustee or other relevant counterparty.

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). An assignment of a registered industrial design is not effective unless it is in writing and signed by or on behalf of the assignor and the assignee. The assignee must then apply to the Registrar of Industrial Designs (i.e. the Intellectual Property Corporation of Malaysia, known as MyIPO) to record his interest in the register.

In respect of registered trademarks, the Trademarks Act 2019 came into force on 27 December 2019. Under the new Act, a registered trademark is afforded due legal recognition to be treated as a personal or moveable property and thus, may be the subject of a security charge in the same way as a personal or moveable property. An assignment of a registered trademark or an assent relating to a registered trademark, cannot be effective unless it is in writing and is signed on behalf of the assignor and the assignee, or a personal representative, as the case may be. The assignee must then apply to the Registrar of Trademarks (i.e. MyIPO) to record his/her title over the mark.

In respect of copyright and patents, the Copyright Act 1987 and the Patents Act 1983, respectively, do not expressly provide for copyright or patent application or patent to be assigned or to be subject to a charge as security interest.

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.

B. 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 or registration with the Central Bank of Malaysia (Bank

Negara Malaysia) may be required under the relevant Notices.

C. Registration of Charges

All charges created by a company over its assets (whether for the benefit of itself or a third party) must be lodged with the Companies Commission for registration within 30 days from the creation of the charge (section 353, CA 2016).

D. 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 CA 2016.

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.

9. 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. The 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 instruments regulating exchange control more concise and easier to reference.

BNM previously indicated that foreign exchange rules will be progressively liberalised. On 30 April 2020, BNM issued new foreign exchange notices that replaced the previously issued notices in its entirety. The new foreign exchange notices introduced changes and further liberalised its foreign exchange rules to provide greater flexibility, ease and efficiency to businesses.

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 website[13]. Currently, there are 7 notices in the following categories:

a) Notice 1: Dealings in Currency, Gold and Other Precious Metals

b) Notice 2: Borrowing, Lending and Guarantee

c) Notice 3: Investment in Foreign Currency Asset

d) Notice 4: Payment and Receipt

e) Notice 5: Security and Financial Instrument

f) Notice 6: Import and Export of Currency

g) Notice 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:

"**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;

[13] https://www.bnm.gov.my/index.php?lang=en&ch=fea&pg=en_fea_overview&ac=100

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.

"**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.

Foreign Exchange Notices ("FE Notices")

The following sets out a brief overview of certain key provisions within of the FE Notices. The following summaries are divided into those applicable to Residents and Non-Residents. We have used the same defined terms as those contained in the FE Notices. As such, readers are recommended to read this chapter together with the Interpretation chapter of the FE Notices.

Pursuant to the Declaration on Entities Created, Incorporated, etc. in Labuan, BNM has declared 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 FE Notices.

A. Rules Applicable to Residents

Investment

Residents **without** domestic ringgit borrowing are free to undertake any amount of investment in foreign currency assets onshore and abroad.

If a Resident **with** domestic ringgit borrowing wishes to invest in foreign currency assets, the following limits will apply:

Type of Resident	Limits	Source of Funds / Use of Funds
Individual	Any amount	(a) foreign currency funds sourced from outside Malaysia except from proceeds of Export of Goods; or (b) an approved Borrowing in Foreign Currency in accordance with Part A of Notice 2.
Individual	Any amount	Provided that the investment is in real estate for own accommodation or family member's accommodation outside of Malaysia for the purpose of education, employment or migration.
Individual	RM1 million equivalent in aggregate per calendar year	(a) conversion of Ringgit; (b) Trade Foreign Currency Account ("**Trade FCA**"); and (c) swapping of a Ringgit denominated financial asset in Malaysia for a financial asset outside of Malaysia.
Entity	Any amount	(a) foreign currency funds sourced from outside Malaysia except from proceeds of Export of Goods; or (b) an approved Borrowing in Foreign Currency in accordance with Part B of Notice 2.
Entity	Any amount	Foreign currency funds sourced from a borrowing in foreign currency from a licensed onshore bank

Type of Resident	Limits	Source of Funds / Use of Funds
		("**LOB**") for the purpose of a Direct Investment Abroad.
Entity	RM50 million equivalent per calendar year in aggregate	(a) conversion of Ringgit; (b) Trade FCA; (c) a borrowing in foreign currency from a LOB for any purpose other than Direct Investment Abroad; and (d) swapping of a Ringgit denominated financial asset in Malaysia for a financial asset outside of Malaysia.
LOB, licensed insurer or licensed takaful operator	Any amount	For its own account
A resident licensed unit trust companies, entity offering collective investment schemes including closed-end funds, fund managers or licensed insurer	[See next column)	• Up to 100% of Net Asset Value (NAV) or total funds belonging to resident client without domestic ringgit borrowing and non-resident clients in conventional and Shariah compliant assets; or • Up to 50% of NAV or total funds belonging to a resident client with domestic ringgit borrowing in conventional assets.

"**domestic ringgit borrowing**" means (a) any borrowing in ringgit obtained by a Resident from another Resident; or (b) any obligation considered or deemed as domestic ringgit borrowing under any of the FE Notices.

Borrowing

The following table sets out a summary of the limits on borrowing as applicable to Resident entities.

Type of Borrowing	Limits	Source of Funds / Use of Funds
Ringgit Borrowing from Non-Resident	Any amount	To finance a Real Sector Activity in Malaysia only. Borrowing may be obtained from a Non-Resident within the Resident Entity's Group, including a Non-Resident Direct Shareholder, excluding: (a) a non-resident financial institution ("**NRFI**"); or (b) an approved Borrowing in Foreign Currency in accordance with Part A of Notice 2.
Ringgit Borrowing from Non-Resident	Any amount	Through the issuance of: (a) redeemable preference shares or Islamic redeemable preference shares in Ringgit for use in Malaysia; (b) Ringgit sovereign bond or sukuk (issued by the Federal Government); or (c) Ringgit Corporate Bond or sukuk in accordance with the relevant guidelines issued by the SC (but excludes non-tradable Ringgit Corporate bond or Sukuk issued to a Non-Resident Entity outside of the Resident Entity's Group or to an NRFI.
Foreign Currency Borrowing	Any Amount	(a) from a LOB; (b) from an Entity within its group of companies or from its direct shareholder (except the entities below) (c) through the issuance of Foreign Currency corporate bond or sukuk to another resident.
Foreign Currency Borrowing	RM100 million equivalent in aggregate	(a) from a non-resident outside of the resident entity's group of companies;

Type of Borrowing	Limits	Source of Funds / Use of Funds
		(b) a NRFI (even if within the group of companies); or (c) a non-resident special purpose vehicle which is used to obtain borrowing from persons outside the resident entity's group.

The following table sets out a summary of the limits on borrowing as applicable to Resident individuals, sole proprietors or general partnerships.

Type of Borrowing	Limits	Source of Funds / Use of Funds
Ringgit Borrowing from Non-Resident	Any amount	(a) non-resident family member; or (b) non-resident employer in Malaysia for use in Malaysia *Note: for resident individuals only.
Ringgit Borrowing from Non-Resident	RM1 million	For use in Malaysia from any non-resident other than an NRFI.
Foreign Currency Borrowing	Any Amount	Non-resident immediate family member *Note: for resident individuals only.
Foreign Currency Borrowing	RM10 million equivalent in aggregate	From a LOB or a non-resident.

Guarantees

Obtained by Resident from Non-Resident

Resident lenders are now free to **obtain** financial guarantee **in any amount** in foreign currency or ringgit from Non-Resident guarantors to secure borrowings obtained by Residents or Non-Resident borrowers and this enables foreign investors to better support their entities operating in Malaysia.

Given by Resident Guarantor to Resident

A Resident Guarantor is free to **give** financial guarantee **in any amount** in ringgit or foreign currency to secure borrowing obtained by a Resident in ringgit or foreign currency (as approved under the FE Notices).

Given by Resident Guarantor to Non-Resident

A non-bank Resident Guarantor is now free to **give** financial guarantee **in any amount** in ringgit or foreign currency to secure borrowing obtained by a Non-Resident in ringgit or foreign currency (as approved under the FE Notices) with the exceptions as follows:

(a) the Non-Resident borrower is a special purpose vehicle (SPV). The financial guarantee shall be deemed as a borrowing by the Resident and therefore, the Resident shall be subjected to the foreign exchange control rules on borrowing; or

(b) the underlying borrowing will be repaid by the Resident in foreign currency, other than when financial guarantee is called upon. In such cases, the repayment shall be deemed as an investment in foreign currency asset and the Resident shall be subjected to the foreign exchange control rules on investing in foreign currency asset.

Payment and Receipt

Payment in Foreign Currencies between Resident and Non-Resident

A Resident is free to make and receive payments in foreign currency to and from a Non-Resident except for:

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 subparagraph (b) 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 bank 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 Capital Markets and Services Act 2007 ("**CMSA**") undertaken through a Resident futures broker by a Resident; or

d) a derivative denominated in foreign currency, except for exchange rate derivatives, purchased by a Resident individual from a Non-Resident, subject to Notice 3 of the foreign exchange control rules if the foreign currency denominated derivative is undertaken without a firm commitment.

Payment in Foreign Currencies between Residents

As for making and receiving payments of foreign currency between Residents, a Resident is free to pay or receive foreign currency to or from another resident for the following:

a) any purpose between immediate family members;

b) education, employment or migration outside Malaysia;

c) a transaction between the Resident and a licensed onshore bank, a licensed international takaful operator or an international currency business unit of a licensed takaful operator, in the conduct of the latter's business involving foreign currency;

d) settlement of:

   i. a foreign currency denominated derivative, excluding exchange rate derivatives, transacted on a specified exchange under the CMSA between the Resident and a Resident futures broker;

   ii. a commodity Murabahah transaction between Residents undertaken through a Resident commodity trading service provider; or

   iii. a domestic trade in goods or services between a Resident entity with foreign currency export earnings and a Resident entity which is a SME and a net importer, subject to specified conditions.

Sale and Purchase of Foreign Currencies

Spot Basis

There are no restrictions save that with respect to purchase and sale of ringgit against foreign currencies, Residents must do so with a LOB or a person who is licensed under the Money Services Business Act 2011 ("**MSBA 2011**") on spot basis.

For hedging of foreign currency obligations, a Resident is allowed to buy or sell ringgit against foreign currency with a licensed onshore bank on spot basis up to the aggregate of its 6 months foreign currency obligations.

A Resident entity is also allowed to buy or sell ringgit against foreign currency on behalf of Residents and/or Non-Residents entity within its group of entities with LOBs provided that the entity is not a financial institution or NRFI, the entity shall comply with paragraphs 1 and 2 of Notice 1 of the FE Notices (where the entity is a Resident).

"**Foreign currency obligation**" refers foreign currency import payment to a Non-Resident, foreign currency borrowing repayment, other current account transactions in foreign currency with a Non-Resident; and domestic trade in goods and services between a Resident exporter and a Resident SME.

Forward Basis

A Resident may also buy or sell foreign currency against ringgit for its own account on forward basis with a licensed onshore bank subject to the transaction is undertaken on firm commitment or anticipatory basis, and shall be terminated when the firm commitment ceases to exist or the anticipated transaction does not materialise, and where the transaction involves:

a) underlying foreign currency denominated derivates (excluding exchange rate derivative) offered by a Resident, the value of the transaction shall not exceed the net open position ("**NOP**") of the foreign currency exposure arising from the derivatives contract;

b) buying foreign currency against ringgit, it shall not be for deposit into Foreign Currency Account except

for temporary placement arising from the delivery of foreign currency under the forward basis transaction due to extension of payment timeline of the foreign currency firm commitment or temporarily placed into the Foreign Currency Account for subsequent payment out on the same day; or

c) selling of foreign currency against ringgit, the foreign currency shall not be sourced from Foreign Currency Account except for foreign currency proceeds received earlier than the maturity date of the forward basis transaction.

Furthermore, Residents are free to unwind the forward basis transaction with any LOB except where a transaction where the firm commitment is a portfolio commitment.

Lastly, a Resident is also free to hedge non-FX derivative contracts offered by a Resident up to the NOP of the FX exposure with any licensed onshore bank. The Resident is required to unwind the forward position if it exceeds the NOP.

Import and Export of Physical Notes

Residents may only carry physical notes of a maximum of ringgit equivalent to USD 10,000 and any amount greater than that requires currency declaration when travelling in and out of Malaysia.

Export of Goods

A Resident exporter shall receive the proceeds of its export of goods in Malaysia:

a) in ringgit or foreign currency provided where the proceeds of its export of goods is received or retained in foreign currency, the Resident exporter shall place the proceeds of its export of goods in its Trade FCA maintained with a LOB;

b) in full value excluding any approved deductions related to the export of goods permitted in the notices; and

c) earlier than or in accordance with the payment date of the export contract which in any case shall not exceed: (i) 24 months form the date of shipment where the amount of export proceeds does not exceed RM200,000 equivalent per invoice and any circumstance permitted by the notices; or (ii) 6 months from the date of shipment in any other case.

A Resident exporter is allowed to retain in its Trade FCA held with a LOB, the full amount of the foreign currency proceeds from its export of goods of up to RM200,000 equivalent per transaction and the higher of the following foreign currency proceeds from its export of goods exceeding RM200,000 equivalent per transaction:

a) 25% of foreign currency export proceeds; or

b) the Resident exporter's six (6) months foreign currency obligations that exist on the date of receipt of the export proceeds provided that the aggregate amount of existing balance in the Resident exporter's Trade FCA and sources from the forward basis transactions undertaken by the Resident exporter for its foreign currency obligation is insufficient to meet the Resident exporter's six (6) months foreign currency obligations .

Accordingly, a Resident exporter is required to convert the balance of its foreign currency export proceeds into ringgit with a LOB.

A Resident with annual gross exports of goods exceeding RM50 million equivalent in the preceding year is required to submit a 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. The report shall be submitted to BNM whether or not there is any export of goods in that quarter.

B. Rules Applicable to Non-Residents

Investment

Non-Residents may invest in any form of ringgit assets or foreign currency assets in Malaysia either as direct or portfolio investments without any restriction.

Non-Residents may also 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	• Free to obtain any amount: • to finance Real Sector Activities in Malaysia; • of trade financing for settlement of trade in goods or services with a Resident • obtain up to RM10 million in aggregate via a repurchase agreement or sale buy back agreement.
	Resident stockbroking corporation Licensed onshore banks with stockbroking license	Free to obtain margin financing to purchase securities or financial instruments traded on Bursa Malaysia
	Resident companies and individuals	Free to obtain any amount to finance real sector activities in Malaysia
Non-Resident Individual	Individuals who are immediate family members	Any amount and purpose
	Licensed insurer or a licensed Takaful operator	Up to the attained cash surrender value of any life insurance policy or family takaful certificate purchased by the Non-Resident
	Employer in Malaysia	Any amount pursuant to the terms and conditions of service and for use in Malaysia
Non-Resident custodian bank or Non-Resident stock broking corporation	Licensed onshore banks (excluding licensed international Islamic banks)	Free to obtain overdraft facilities (not exceeding two (2) business days and with no roll over option) to avoid failure in settlement of shares or Ringgit instrument due to inadvertent delay of payment by the Non-Resident.

Payment and Receipt

The following table sets out a summary of the instances where a Non-Resident is allowed to make or receive payments in ringgit to or from a Resident or another Non-Resident.

Purpose of Use and Source of Funds	Between Resident and Non-Resident	Between Non-Residents
Any purpose between immediate family members	Allowed	Allowed
Income or expense incurred in Malaysia	Allowed	Allowed
Settlement of a trade in goods and services	Allowed	Allowed
Settlement of ringgit asset, including income and profit due form the ringgit asset	Allowed	Allowed
Settlement of a court judgment where the transaction under litigation is undertaken in compliance with the FE Notices	Allowed	N/A
Settlement of a commodity Murabahah transaction undertaken through a Resident commodity trading service provider	Allowed	Allowed
Settlement of a reinsurance for domestic insurance business or a retakaful for a domestic takaful business between a Resident and a person licensed to carry out Labuan insurance business	Allowed	N/A
Settlement of a financial guarantee denominated in Ringgit, to secure an underlying Borrowing in Ringgit	Allowed	Not Allowed

Purpose of Use and Source of Funds	Between Resident and Non-Resident	Between Non-Residents
Settlement of a non-financial guarantee denominated in Ringgit for use in Malaysia	Allowed	Allowed

Sale and Purchase of Currency

Non-Residents are free to buy or sell foreign currency against another foreign currency in Malaysia on: (a) spot basis with: (i) a licensed money changer under the MSBA 2011; or (ii) with a LOB; or (b) forward basis with a LOB only.

For the purchase and sale of ringgit against foreign currency, the rules applicable to Non-Residents acting on its own account are:

Basis	Counterparty	Purpose / Limitations
Spot	LOB	Any purpose
	Appointed Overseas Office ("**AOO**")	(a) for settlement of international trade in goods or services on Firm Commitment or Anticipatory basis; or (b) other purposes on Firm Commitment basis;
Forward	LOB	(a) Current Account transaction on Firm Commitment or Anticipatory basis; or (b) Financial Account Transaction on Firm Commitment basis. Where the Firm Commitment is a Ringgit-denominated derivative contract (excluding Exchange Rate Derivatives) offered by a Resident, the value of the transaction shall not exceed the NOP of the Ringgit exposure arising from the derivative contract. Provided that the Forward Basis transaction shall be terminated where the Firm Commitment ceases to exist, or the anticipated transaction does not materialise.
	AOO	(a) Settlement of international trade in goods or services with a Resident on Firm Commitment or Anticipatory basis; or (b) other purposes on Firm Commitment basis. Where the Firm Commitment is a Ringgit-denominated derivative contract (excluding Exchange Rate Derivatives) offered by a Resident, the value of the transaction shall not exceed the NOP of the Ringgit exposure arising from the derivative contract. Provided that the Forward Basis transaction shall be terminated where the Firm Commitment ceases to exist, or the anticipated transaction does not materialise.

A Non-Resident is allowed to unwind the Forward basis transaction with any LOB or AOO except for a transaction where the Firm Commitment is a Portfolio Investment.

A Non-Resident entity is allowed to buy or sell foreign currency against ringgit on behalf of:

a) a Resident entity (excluding a financial institution) within its group with:

   i. an LOB (provided the Resident entity within its group complies with paragraphs 1 and 2 of Notice 1 of the FE Notices); or

   ii. an AOO (provided that the transaction is undertaken for the settlement of international trade in goods and services on Firm Commitment or Anticipatory basis or for other purposes on Firm Commitment basis);

b) a Non-Resident entity within its group with a LOO or an AOO, provided that the Non-Resident within its group is not a financial institution or a NRFI, and the Non-Resident within its group complies

with paragraphs 6 and 7 of Notice 1 of the FE Notices.

Import and Export of Physical Notes

Non-Residents may only carry physical notes of a maximum of ringgit equivalent to USD 10,000 and any amount greater than that requires currency declaration when travelling in and out of Malaysia.

Ringgit and 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.

10. CAPITAL MARKETS

Bursa Malaysia is an exchange holding company approved under section 15 of the Capital Markets and Services Act 2007 ("**CMSA**"). 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 14 April 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**"). 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.

On 15 June 2017, Bursa Securities announced the issuance of new listing requirements for the Leading Entrepreneur Accelerator Program ("**LEAP**") Market. The LEAP Market aims to provide small and medium-

sized enterprises ("**SMEs**") with a new platform to raise funds from sophisticated investors. It addresses the funding gap faced by SMEs and the over-dependency of SMEs on financial institutions.

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 2019 by Bursa Malaysia Berhad, securities market capitalisation remains at RM1.7 trillion, with over 900 entities listed on Bursa Securities, consisting of 772 companies on the Main Market, 129 companies on the ACE Market and 28 companies on the LEAP Market.

Primary Listing for Local Companies

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

Bursa Stock markets	Main Market	ACE Market	LEAP Market
Mode of Listing	The Issuer must satisfy the profit test or market capitalisation test if its core business is not that of infrastructure project or the infrastructure project corporation test if its core business is that of infrastructure project, for listing: **a. Profit test** (i) *Profit requirements* Aggregate profit after tax of at least RM20 million for the latest 3 to 5 financial years prior to listing; and A minimum of after-tax profit of RM6 million for the most recent financial year; Contributions from associated companies must not exceed those of subsidiary companies; and (ii) *Operating history* The Issuer or the corporation within its group which is the single largest contributor to the after-tax profits must have been operating in the same core business over at least the profit track record period prior to listing. **b. Market capitalisation test** (i) *Market capitalisation requirement* 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; and (ii) *Operating history* Issuer or the corporation within the group representing the core business must have been incorporated and	No minimum operating track record or profit requirement	No minimum operating track record or profit requirement.

Bursa Stock markets	Main Market	ACE Market	LEAP Market
	generated operating revenue for at least a full financial year prior to listing. **C. Infrastructure project corporation test** Have the right to build and operate an infrastructure project within or outside Malaysia, with project costs of not less than RM500 million and the concession or licence for the infrastructure project has been awarded by the relevant government or state agency, in or outside of Malaysia, with remaining concession or licence period of at least 15 years from the date of submission to the SC.		
Public Shareholding Spread	At least 25% of its post-listing share capital has to be in the hands of a minimum of 1,000 public shareholders holding not less than 100 shares each.	At least 25% of the total number of shares for which listing is sought in the hands of a minimum of 200 public shareholders holding not less than 100 shares each	At least 10% of the total number of ordinary shares for which listing is sought are in the hands of public shareholders at admission. No requirement to maintain the public shareholding spread of 10% post-listing.

Bursa Stock markets	Main Market	ACE Market	LEAP Market
Approval	Must obtain approval(s) from the SC and other relevant authorities (where applicable) before listing and quotation of any security will be considered by Bursa Securities	Only the approval of Bursa Securities is necessary	Only the approval of Bursa Securities is necessary.
Native Equity Requirement	Allocation of 50% of the public shareholding spread to Malaysian native investors at point of listing.	No such requirement upon listing. Allocation 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 earlier.	No such requirement upon listing.

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, ACE Market and LEAP 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 2016

The Foreign Applicant must be registered with the Registrar of Companies ("**ROC**") as a registered branch under the CA 2016.

d) Accounting and auditing standards

The accounting standards of the Foreign Applicant shall be in accordance with the Financial Reporting Act 1997, while the auditing standards adopted by the Foreign Applicant shall be that applied in Malaysia or International Standards on Auditing and an external auditor from an international accounting firm or an accounting firm with international affiliation must be appointed.

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 two directors whose principal or only place of residence is in Malaysia. At least one of these directors must be a member of the applicant's audit committee.

2. Secondary listing of foreign corporations on Main Market

In addition to compliance with 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) it must already have a primary listing on the main market of a foreign stock exchange which is specified by the SC 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 at least equivalent to those of 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 V Division 1 as a foreign company under CA 2016 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 on a consolidated basis and in accordance with the approved accounting standards as defined in the Financial Reporting Act 1997, and ensure that the auditing standards applied are in accordance with approved auditing standards applied in Malaysia or International Standards on Auditing..

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 the approval of the Controller of Foreign Exchange.

3. Special Purpose Acquisition Company ("SPAC")

A SPAC is a company without existing business operations or income generating business at the point of listing and has yet to complete a qualifying acquisition with the proceeds of such listing, 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 seeking listing on Bursa Securities must be incorporated in Malaysia under the CA 2016.

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 are required collectively to have sufficient and relevant technical and commercial experience and expertise in corporations within the same industry and business activity.

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 36-month 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, the management team are allowed to sell, transfer or assign up to a maximum of 50% per annum, on a straight-line basis, of their respective holdings in the securities under moratorium.

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 the 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. Further, 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")

A 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 of 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.

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 shareholders[14].

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 highlights concerns and issues relevant to retail and minority shareholders.

7. Capital Markets Promotion Council[15]

The Capital Markets Promotion Council was established in 2012 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.

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-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.

8. Recent Developments

The SC continues to review the primary market regulations. To strengthen the positioning of key market segments, the SC has undertaken the following in 2019/2020:

[14] Minority Shareholder Watchdog Group, Who we Are <http://www.mswg.org.my/objective-vision-mission>

[15] Capital Markets Malaysia (CM2) Official Website <http://www.capitalmarketsmalaysia.com>

a) digital assets were recognised as securities under the Capital Markets and Services (Prescription of Securities) (Digital Currency and Digital Token) Order 2019 which came into effect on 15 January 2019 ("**Digital Currency and Digital Token Order**"). The SC has further published the Guidelines on Digital Assets on 15 January 2020 (to take effect in the second half of 2020) which introduces a framework to raise funds via digital token offerings in Malaysia;

b) the Guidelines on Advertising for Capital Market Products and Related Services ("**Guidelines on Advertising**") were issued by the SC on 4 May 2020 which supersedes the Guidelines on Unit Trust Advertisements and Promotional Materials. The new guidelines allow advertisers to use a wider range of platforms such as social media, messaging applications and video streaming to advertise their products and services;

c) the Guidelines on Recognised Markets were revised on 31 January 2019 to introduce a framework to facilitate the trading of digital assets in Malaysia and also property crowdfunding (PCF) under a new property crowdfunding framework. The Guidelines on Recognised Markets were further revised on 5 May 2020 to introduce the "e-services platform" which facilitates the distribution of capital market products via e-services platforms such as e-wallet or e-payment service providers;

d) the establishment of the Co-Investment Fund (MyCIF) which enables the government to co-invest with private investors in financing the development of new businesses; and

e) the issuance of a Guidance Note on the Conduct of General Meetings for Listed Issuers by the SC on 18 April 2020 which states that listed issuers shall only conduct fully virtual general meetings during the Movement Control Order (MCO) period.

Below are brief details of each development listed above:

Digital assets

Digital assets comprise of digital currency and digital token. Under the Digital Currency and Digital Token Order, a digital currency is defined as "a digital representation of value which is recorded on a distributed digital ledger whether cryptographically-secured or otherwise, that functions as a medium of exchange and is interchangeable with any money, including through the crediting or debiting of an account", and a digital token is defined as "a digital representation which is recorded on a distributed digital ledger whether cryptographically-secured or otherwise". The significance of prescribing both digital currency and digital token as securities is that securities laws such as the CMSA will apply to both. However, the Digital Currency and Digital Token Order makes clear that for the purpose of securities laws, a digital currency and digital token are not considered a share in or a debenture of a body corporate/ unincorporated body, or a unit in a unit trust scheme/ prescribed investments scheme.

The Guidelines on Digital Assets set out the requirements for all offerings of digital tokens to be carried out through an initial exchange offering (IEO) platform operator that is registered with the SC. The IEO platform operator must carry out the necessary assessment and due diligence to, amongst others, verify the business of the issuer as well as understand the features of digital tokens.

The initiative supports Malaysia's Shared Prosperity Vision 2030 (SPV2030) by supporting the growth of SMEs and micro businesses as digital token offerings provide an alternative fundraising avenue for early stage entrepreneurs.

Guidelines on Advertising

The new Guidelines on Advertising are meant to encourage greater use of digital channels for advertisements. The Guidelines on Advertising came

into effect on 4 May 2020 for advertisers who were previously subject to the Guidelines on Unit Trust Advertisements and Promotional Materials and certain clauses under the Guidelines on Private Retirement Schemes, Prospectus Guidelines and Guidelines on Compliance Function for Fund Management Companies. For all other advertisers, the Guidelines on Advertising will come into effect on 4 August 2020. Product issuers, recognised market operators, persons undertaking regulated activities and capital market service providers who were previously required to submit their advertisement materials to the SC for approval are no longer required to do so as long as they comply with the Guidelines on Advertising.

Revised Guidelines on Recognised Markets

Provisions were introduced in the Guidelines on Recognised Markets in order to facilitate the registration of operators of digital asset exchanges in Malaysia. An operator of a digital asset exchange must be registered as a Recognised Market Operator ("**RMO**") under Section 34 of the CMSA. A digital asset exchange operator is someone who operates an electronic platform which facilitates the trading of digital assets. Based on the SC's list of registered RMOs on its website (updated as of 1 June 2019), there are three RMOs registered with the SC to establish and operate digital asset exchanges in Malaysia.

Apart from the framework to facilitate the trading of digital assets, the SC has also introduced a new property crowdfunding framework. The property crowdfunding scheme provides an alternative route of financing for first-time homebuyers. Homebuyers will have to satisfy certain criteria in order to participate, such as being Malaysian, at least 21 years old and a first time homebuyer. Those who had previously inherited a house from a family member are not eligible to participate. The property crowdfunding operator must be registered with the SC as an RMO. The first property crowdfunding operator was registered with the SC in September 2019.

The SC has also introduced an "e-Services platform" whereby operators of e-wallets or e-payment applications would be able to partner with Capital Market Services Licence holders to distribute capital market products to investors. The Guidelines on Recognised Markets were revised to provide the registration requirements and ongoing obligations for e-Service providers. During a virtual press conference held on 16 April 2020, the SC has stated that it has observed an increase in the number of online trading accounts being registered and that there has been a shift amongst licence holders towards using digital channels to distribute capital market products and services.

MyCIF

The Co-Investment Fund, administered by SC, allows the government of Malaysia to co-invest alongside the public in either an Equity Crowdfunding (ECF) or Peer-to-Peer Funding (P2P) campaign. The government has pledged RM50 million to the fund in 2019, with an additional RM50 million pledged for 2020 as announced in Budget 2020.

Pursuant to the Covid-19 pandemic, the SC has announced the following measures effective from 3rd April 2020 to 30th September 2020:

a) MyCIF will invest in ECF and P2P campaigns based on a 1:2 ratio (previously 1:4 ratio) whereby MyCIF will invest RM1 for every RM2 successfully raised from private investors on the MyCIF participants' platforms; and

b) MyCIF's maximum investment in each ECF and P2P campaign is raised from RM500,000 to RM1 million,

as part of the SC's efforts to provide additional liquidity into the alternative fundraising space.

Guidance Note on the Conduct of General Meetings for Listed Issuers ("**Guidance Note**")

Beginning 18 March 2020, Malaysia was placed under a Movement Control Order ("**MCO**") pursuant to the Covid-19 pandemic. As such, the Guidance Note was issued by the SC to ensure that companies can continue to

meet their obligations under the law and to shareholders even during the MCO period. The number of individuals physically present at a broadcast venue for fully virtual general meetings is restricted to eight essential individuals and social distancing guidelines must be observed at all times. The Guidance Note was revised on 11 June 2020 as Malaysia entered into a Recovery Movement Control Order ("**RMCO**") on 10 June 2020. During the RMCO, a listed issuer will be able to choose between conducting a fully virtual, hybrid (where the meeting is held at a physical venue and also broadcasted online for shareholders to participate remotely) or physical general meeting (where there is no online participation). However, listed issuers are still strongly advised to facilitate online participation for shareholders to attend remotely and the Guidance Note will continue to be applicable beyond the RMCO period until appropriate to be removed.

11. 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;

Section	Subject	Provision
		(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 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.
60E	Annual Leave	An employee shall be entitled to paid annual leave of: 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, 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.
60F	Sick Leave	An employee shall be entitled to paid sick leave where no hospitalisation is necessary: 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 If hospitalisation is necessary, entitlement is to 60 days each calendar year.
37	Maternity Leave / Allowance*	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

Section	Subject	Provision
		immediately before her confinement.
19 & 24	Wages	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.
61 & 60K	Registration	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.

** The government had previously announced that private sector employees should be granted a 90-day maternity leave instead of the current 60-day maternity leave as provided by Section 37 of the EA 55. However, as at the date of this article, the EA 55 has yet to be amended to reflect the foregoing changes.*

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.

K. 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.

L. 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.

M. Trade Unions Act 1959

While the Industrial Relations Act 67 governs the relationship between trade unions and employers, the Trade Unions Act 1959 ("**TUA 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 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.

N. Immigration Requirements

For employers who are desirous of hiring expatriates, an employment pass would have to be applied from the Immigration Department. Depending on their basic monthly salary and duration of their employment contracts, an expatriate would be eligible to the following categories of employment pass:-

a) Category I (Expatriate)

A basic monthly salary of RM10,000 together with an employment contract for a period of up to 5 years;

b) Category II (Expatriate)

Applicant must have a salary range of RM5,000 to RM9,999 together with an employment contract for a period of up to 2 years; or

c) Category III (Knowledge/Skilled)

Applicant must have a salary range of RM3,000 to RM4,999 together with an employment contract for a period not exceeding 12 months.

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

Companies regulated by any of the following approving agencies must first obtain an approval letter for the relevant employment pass:

a) MOHA;

b) MIDA for manufacturing and its related services sectors;

c) MDeC for information technology sector, specifically companies awarded with the Multimedia Super Corridor ("**MSC**") Status;

d) BNM for the financial, insurance and banking sectors;

e) SC for securities and futures market;

f) PSD for government contractual positions;

g) Iskandar Regional Development Authority for specific companies operating within Iskandar Malaysia;

h) ECERDC for specific companies operating within East Coast Economic Region;

i) Talent Corporation Malaysia Berhad for specific key employers under ICAEQ/ACCA/NKEA sectors;

j) MaGIC for approved programs under its purview; or

k) Expatriate Committee ("**EC**") for expatriate posts in sectors other than those mentioned above.

In addition to that, companies in the sector which are under the purview of the following Regulatory Body must obtain a supporting letter from the relevant Regulatory Body, as listed in the table below.

No.	Regulatory Bodies	Sector
1.	Ministry of Education	Education
2.	Ministry of Health (Traditional & Complementary Medicine)	Healthcare
3.	Ministry of Tourism and Culture	Tourism
4.	- National Sports Institute, Ministry of Youth and Sports - National Sports Council, Ministry of Youth and Sports - Related Associations	Sports
5.	Ministry of Agriculture and Agro-based Industries	Agriculture
6.	Malaysian Bioeconomy Development Corporation Sdn Bhd (Bioeconomy)	Biotechnology
7.	Department of Civil Aviation, Ministry of Transport	Aviation
8.	Department of Mineral and Geoscience, Ministry of Natural Resources and Environment	Mining
9.	Unit PUSPAL (Central Agency for Application of Filming and Performance by Foreign Artistes), Ministry of Communications and Multimedia	Entertainment & Performance
10.	Construction Industry Development Board (CIDB)	Construction
11.	Equestrian Association of Malaysia	Equestrian

The approval and/or supporting letters as stated above are to be submitted for each Employment Pass application.

Companies which intend to bring in foreign talents for short term engagements ranging from 1 to 365 day(s) would be required to apply for a professional visit pass. This will allow those with acceptable professional qualifications or skills to provide services to or undergo practical training with a Malaysian company on behalf of an overseas company.

The professional visit pass would cover engagements by Malaysian companies of foreign entertainers which provide commercial services by way of entertainment services / performances as well as foreign talents who provide commercial services by way of their involvement in events / conferences.

Where an employee does not possess a valid employment pass and/or does not comply with a specific term of the employment pass, the following offences may be made out under the Immigration Act 1959/63:-

i) an offence by the employee on the grounds that he/she does not possess a valid employment pass;

ii) an offence by an employer who employs an employee who is not in possession of a valid employment pass; and/or

iii) an offence by any company who harbours any person within their premises where there are

reasonable grounds for believing that he/or she does not possess a valid employment pass.

O. 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, 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.

P. 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 per month to the foreigner's fund regardless of how much the foreigner earns unless the contract of employment provides otherwise.

Malaysians who are employed abroad may also opt to contribute to this fund.

Q. Employment Insurance System Act 2017

Every employer and employee are required to contribute to this employment insurance scheme ("**Scheme**") which is administered by the Social Security Organisation. The Scheme seeks to provide short term financial assistance as well as reskilling and upskilling for employees who face imminent retrenchment by their employers. The contribution rate is set out in the Second Schedule of the Employment Insurance Act 2017 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 the Scheme

R. 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.

As for poor performance, an employer may only terminate an employee if the employer is able to show that the employee had been performing poorly over a period of time, even after sufficient opportunities to improve were afforded to the employee. There must be records of the poor performance (i.e. performance appraisal / records) and the opportunities given by the company for the employee to improve (i.e. warning letters). The implementation of a performance improvement plan is also necessary.

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.

Termination by way of a Mutual Separation Agreement

An employer and an employee may mutually agree to terminate the employment contract by way of a mutual separation agreement whereby the employee would offer his/her voluntary resignation in consideration for an ex-gratia payment by the employer, the sum of which would be agreed upon by the parties.

To ensure that the terms of the Mutual Separation Agreement would be given effect by the Industrial Courts in the event that there is a dispute, the employer must ensure that there were no vitiating factors such as undue influence, coercion, etc. against the employee during the material time in which the employee was asked to execute the mutual separation agreement.
Should such vitiating factors exist, the Industrial Courts have the discretion to hold that notwithstanding the execution of the mutual separation agreement by the

parties, the termination of the employee's employment was without just cause or excuse.

S. 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 2020 (the "**Order**") came into force on 1 February 2020 replacing its preceding Minimum Wages Order 2018. 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 EA 55 (for example: maids, gardeners, private chefs and drivers). With this Order coming into effect, there are now 2 different sets of minimum wage rates which applies in Malaysia, according to the different localities as prescribed under the Schedule of the Order. The relevant provisions can be found in Section 4 and 6 of the 2020 Order. For an employee who is employed in any of the 16 City Council areas or the 40 Municipal Council areas, their minimum monthly wage rate would be RM 1,200.00. As for those who are employed outside the abovesaid areas, their minimum monthly wage rate would be RM 1,100.00. Additionally, the Order has also increased the minimum daily and hourly wage rates for employees. .

T. 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.

U. Self- Employment Social Security Act 2017

The Self-Employment Social Security Act 2017 ("**SESSA 2017**") came into force on 13 June 2017. The SESSA 2017 is aimed at safeguarding the welfare of self-employed individuals via social security benefits from the Social Security Organisation.

The SESSA 2017 applies to self- employed drivers of e-haling service providers such Uber and Grab, though its application may be widened in the future. Under the SESSA 2017, contributions at the rate of 1.25% of the self- employed driver's monthly income is required by both the self-employed individual as well as the e-hailing service provider.

12. FOREIGN INVESTMENT IN REAL PROPERTY

Foreigners are allowed and encouraged to acquire and own properties in Malaysia. In fact, the property market in Malaysia remains attractive to foreigners due to its potential growth and reasonable return. In the recent years, new policies in relation to foreign acquisition of property has been proposed by the Government of Malaysia with the aim to stimulate more investment or acquisition of property by foreigners in Malaysia.

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 EPU 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 FIC ("**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. The EPU Guideline was subsequently amended on 1 March 2014.

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. For direct acquisition of property, the equity and paid-up capital conditions imposed by the EPU must be complied with before the transfer of the property's

ownership, whereas for indirect acquisition of property, the equity and paid-up capital conditions must be complied with within one (1) year after the issuance of written approval.

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 allowed to acquire property from the Developer and secondary market (sub-sale).

If the foreign interest would like to acquire property owned by Malaysians, it will be considered on a case-to-case basis.

The minimum threshold for the acquisition of property direct from the Developer by foreign interest is RM1 million and above. The categories of land allowed to be acquired by foreign interests are as follows: -

i. Residential building;

ii. Business Building/ Commercial; and

iii. Enterprise/ Industry.

The minimum threshold for the acquisition of property for secondary market (sub-sale) by foreign interest is RM1 million and above. The categories of land allowed to be acquired by the foreign interests are as follows: -

i. Residential building;

ii. Enterprise building/ Commercial;

iii. Enterprise (foreign interest is allowed to acquire real estate enterprise category without permission of the State Authority);

iv. Industry; and

v. Agriculture land (foreign interest is not allowed to acquire agriculture land except for lease only).

In addition, the acquisition of property by foreign interest through gift/ love and affection is subject to the consent and approval by the State Authority regardless of the types of property and valuation and it is subject to the approval fees of a minimum of RM20,000 for each title issued.

The foreign interest is also allowed to acquire property through Estate Order/ Court Order for all types of property inherited under the Inheritance Distribution Order or Court Order, except where it is the Malay Reserved Land under the Malay Reservation Enactment 1936.

The approval fee of RM10,000 is exempted for such an acquisition.

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.

iii. The Straits of Johor Development Corridor 2025 Master Plan showed that Tanjung Bin, Tanjung Pelepas, Nusajaya (now known as Iskandar Puteri), Johor Bahru city centre, Pasir Gudang, Tanjung Piai, Sungai Sekudai and Sungai Tebrau are international zones. The minimum threshold for acquisition of property by foreign interest within the international zones is RM2 million per unit for landed properties with individual titles and RM1 million per unit for properties with strata titles. For properties outside the international zones, the minimum threshold is RM1 million for properties with individual titles and strata titles.

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.

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		

ii. 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.

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 interests and permanent residents must be more than RM1 million per unit for landed properties with individual titles and RM500,000 per unit for properties with strata titles.

Foreign interests and permanent residents are required to pay an approval fee upon issuance of the Notice of Approval by the State Authority. The approval fees for each categories of land are as follows:-

i. For residential and commercial properties, 2% of the sale price or RM20,000 (whichever is higher);

ii. For industrial land, 2.5% of the sale price; and

iii. RM5,000 for transfer of ownership by love and affection, gift or any dealings not involving the sale price (except for industrial category of land, RM10,000 for transfer not involving sale price).

Under the guideline, foreign interests and permanent residents are only allowed to acquire the following properties based on the conditions set out below: -

i. For bungalow house, not exceeding 8,000 square feet;

ii For semi-detached house, not exceeding 5,000 square feet;

iii. For condominium and apartment, the foreign ownerships are limited to only 50% of the project (within the town area) and 30% (suburb) through *Mesyuarat Jawatankuasa Belah Bahagi Tanah Negeri Melaka* (JKBB);

iv. For commercial buildings, foreign interests and permanent residents shall only acquire three storeys and above and they are not allowed to acquire the commercial buildings in separate storeys;

v. For vacant land, provided that the project plan layout has been approved, the area of the bungalow land does not exceed 8,000 square feet and the foreign ownerships shall not exceed 10% of the same project;

iv. For properties under master title, an application may be made to the State Authority and it will be considered on a case-to-case basis; and

vii. For properties acquire through *Hukum Faraid* (Muslim Inheritance Law) or Small Estate (Distribution) Act 1955, it will be considered on a case-to-case basis.

Foreign interests and permenant residents are not allowed to acquire the following:-

i. low cost/ low medium cost residential unit and shop lot;

ii. single storey/ one and a half storey residential unit;

iii. single/ double storey shop/ shop house/ office;

iv. properties allocated for Malays in a property development project;

v. land under an order for sale by the court or public auction;

vi. Malacca Customary Land;

vii. Malacca heritage site; and

vii. Agriculture land (except where the land is acquired for the purpose of privatisation)

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.

iii. The approval fee for property acquired by foreign interest is based on the category of land set out below: -

Category of land	Fee
a) residential/ business premises/ agriculture	5% of the valuation from the Valuation and Property Services Department
b) industry	RM5,000 per title for acquisition by foreign individual RM10,000 per title for acquisition by foreign company

f) **Penang**

i. Since 1 July 2012, the "Guidelines of Acquisition of Property by Foreign Interests in Penang" allows foreign interests and permenant residents to acquire land in Penang based on the minimum threshold set out below: -

Stratified properties

Effective 28 April 2017, the minimum purchase price for stratified properties in Seberang Perai has been reduced from RM1million to RM500,000 per unit. For Penang Island, the minimum purchase price for stratified properties remained at RM1million per unit

Landed properties

Effective 1 April 2017, the minimum purchase price of landed properties (including landed strata) in Penang Island has increased from RM2million to RM3million per unit. For Seberang Perai, the minimum purchase price of landed properties (including landed strata) remained at RM1million per unit.

All purchases of properties by foreign interest in Seberang Perai will be subjected to 3% levy on the transacted price. The 3% levy on foreign buyers is targeted to significantly deter foreign speculators on bulk buying.

Nevertheless, effective from 1 July 2017, for purchases of stratified properties (priced between RM1million and RM1.5millon) by foreign interest and permenant resident in Penang Island, the previous 3% levy rate has been reduced to 1.5% on the transacted price.

ii. Permanent resident in Penang is allowed to acquire properties in Penang subject to a minimum price of RM250,000.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;

d) property built on a Malay Reserve Land.

e) property for sale by way of bank's auction; and

f) property under an Order for Sale by Court or Land Administrator (as per National Land Code (Penang Malacca) Section 256 and 260)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 allowed to purchase a residential unit, commercial unit, industrial land or agricultural land if the minimum price of the property is valued at RM500,000 or above.

h) **Pahang**

In Pahang, foreign interests and permanent residents are allowed to purchase residential, agriculture, industry and commercial units if the property is valued at RM1million and above.

The rates of levy for the purchase of each categories of land by foreign interest are as follows: -

i. For residential, RM50,000 plus RM5,000 for every further RM100,000 in the value of land acquisition

ii. For agriculture, 2% from the value of acquisition or RM100,000 whichever is higher

iii. For industry, 2% from the value of acquisition or RM100,000 whichever is higher; and

iv. For commercial, 2% from the value of acquisition or RM100,000 whichever is higher.

i) **Perak**

In Perak, foreign interests and permanent residents are allowed to acquire stratified and landed properties. The areas of Perak have been divided into 3 zones and each zone has different minimum threshold.

Zone	Area	Landed	Stratified
Zone 1	Ipoh	RM1million	RM900,000
Zone 2	Manjung, Taiping and Teluk Intan	RM900,00	RM800,000
Zone 3	Areas other than Zone 1 and 2	RM800,000	RM500,000

The levy rates imposed on the acquisition of land by foreign interest or permenant resident for every zone is the same. For acquisition of first residential unit, the levy rate is 1% or RM10,000 (whichever is higher). For acquisition of second residential unit, the levy rate is 1.5% or RM15,000 (whichever is higher).

Approval from the State Authority under section 433B 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.

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 2019, the RPGT rates imposed on non-citizens and foreign companies are as follows:

Disposal Period	Non-citizen	Foreign Company
< 3 years	30%	30%
< 4 years	30%	20%
< 5 years	30%	15%
> 5 years	10%	10%

As amended and effective from 1 January 2018, the amount to be retained by an acquirer for the purposes of RPGT has been increased from 3% to 7% of the

purchase price where the disposer is neither a Malaysian citizen nor a permanent resident.

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 effective from 1 January 2019:

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	
On the next	500,000	RM3 per RM100 of part thereof	9,000	
In excess of	1,000,000	RM4 per RM100 of part thereof		

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.

Notwithstanding the above, the Finance Minister had announced in the latest 2020 Budget that the price threshold for high-rise property in urban areas for foreign ownership will be reduced from RM1 million to RM600,000* taking effect for a period of one year from the 1st of January, 2020. This lower threshold could encourage and attract more foreign property purchasers in the near future.

** While the Federal Government has proposed to lower the threshold, the implementation may not be adopted by each state government.*

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 Energy, Science, Technology, Environment and Climate Change ("**MESTECC**").

In Malaysia, the legal framework for environmental protection, preservation and conservation is established by the Environmental Quality Act 1974 ("**EQA**") and the environmental orders, rules and regulations issued by MESTECC in accordance with the powers conferred on the Minister under the EQA.

Activities falling within the scope of the EQA will require various approvals, permissions and/or licences from the Director General of Environmental Quality prior to the implementation of the activities which includes, but are not limited to, the following:

a) approval of environmental impact assessment ("**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 and prescribed conveyances); and

d) licence to use and occupy prescribed premises and prescribed conveyances – under Section 18 of the EQA.

1. Environmental Impact Assessment for Prescribed Activities

Section 34A of the EQA provides that an EIA is required for activities prescribed under the Environmental Quality (Prescribed Activities) (Environmental Impact Assessment) Order 2015 ("**Prescribed Activities Order 2015**"). Activities which are not subject to mandatory EIA requirements are nevertheless subject to other various regulations under the 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.

Prescribed Activities

Investors intending to carry out any prescribed activities must necessarily conduct an EIA study and submit an EIA report to the Director General of Environmental Quality for approval prior to attaining the approval of the relevant Federal or State Government authority for the implementation of the prescribed activity.

The list of prescribed activities can be found under the First and Second Schedules of the Prescribed Activities Order 2015.

Depending on the type of prescribed activity, the EIA report will also be required for public display and public comment at a place and within the time determined by the Director General of Environmental Quality for the purpose of obtaining public comment in relation to such EIA report.

EIA Study and Report

An EIA study has to be conducted by competent individuals who are registered with the 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 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; and

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 Environmental Quality has the prerogative to request a detailed assessment of a project which has significant impacts to the environment or projects which are located in or adjacent to environmentally sensitive areas.

The DOE may from time to time issue EIA guidelines for specific activities. As at June 2020, the DOE has issued guidelines on EIA in connection with, among others, the following:

a) radioactive materials and radioactive wastes;

b) petrochemical industries;

c) petroleum industries;

d) national and state parks;

e) logging and forest clearance activities;

f) river, sand and stone mining;

g) oil palm plantation development;

h) slope and hill areas; and

i) coastal areas and marine parks.

2. Site Suitability Evaluation for Non-Prescribed Activities

Where potential sites for the establishment of new activities are not subject to the Prescribed Activities Order 2015, investors are advised to refer to the DOE for consideration and advice on site suitability for the proposed project.

In considering the site suitability, the DOE will take into account the gazetted structure/local plans, surrounding land use, provision of setbacks or buffer zones, the

capacity of the area to receive additional pollution load, and waste disposal requirements.

For potentially hazardous type of activities, 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.

3. Written Permission

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

a) construction on any land or any building; or carrying out works that would cause the land or building to become prescribed premises; or

b) carrying 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.

4. Licence to Occupy Prescribed Premises and Prescribed Conveyances

A licence is required to occupy and operate prescribed premises as below:

a) crude palm oil mills;

b) raw natural rubber processing mills; and

c) treatment and disposal facilities of scheduled wastes.

An application for a licence shall only be made after obtaining written permission under Section 19 of the EQA. Licensing fees are 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.

Similarly, a licence is also required to use prescribed conveyances. Prescribed conveyances are prescribed by the Environmental Quality (Prescribed Conveyance) (Scheduled Wastes) Order 2005 as any vehicle or ship of any description which are:

a) propelled by a mechanism contained within itself;

b) constructed or adapted to be used on land or water; and

c) used for the movement, transfer, placement or deposit of scheduled wastes.

5. Environmental Requirements on Scheduled Wastes

Section 34B 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.

The list of scheduled wastes can be found in the First Schedule of the Environmental Quality (Schedules Wastes) Regulations 2005.

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.

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.

6. 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.

7. Incentives for Environmental Management

With a view to encouraging investments into the environmental sector in Malaysia, various tax incentives have been allocated pursuant to the Promotion of Investments Act 1986 and the Investment Tax Allowance ("**ITA**") for companies actively engaging in environmental management services.

Depending on the activity and subject to the terms and conditions imposed by the relevant authorities, 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) ITA –

i. 100% of the qualifying capital expenditure incurred on a green technology project from the year of assessment 2013 (where the date on which the first qualifying capital expenditure incurred is not earlier than 25 October 2013) until the year of assessment 2020. The allowance can be offset against 70% of statutory income in the year of assessment. Any unutilised allowances can be carried forward until they are fully redeemed.

ii. 100% of qualifying capital expenditure incurred on purchasing green technology asset from the year of assessment 2013 (where the date on which the first qualifying capital expenditure incurred is not earlier than 25 October 2013) until the year of assessment 2020. The allowance can be offset against 70% of statutory income in the year of assessment. Any unutilised allowances can be carried forward until they are fully redeemed.

Projects relating to renewable energy, energy efficiency, green building, green data centre, and waste management can qualify for this tax incentive.

iii. 100% of qualifying capital expenditure incurred within a period of 5 years by a company operating in a waste eco park and undertaking certain waste management activities. The allowance can be offset against 70% of statutory income in the year of assessment.

iv. 60% of capital expenditure incurred for companies carrying out waste recycling activities within a period of 5 years to be set off against 70% of the statutory income in the assessment year. Any underutilised allowance can be carried forward to subsequent years until it is fully utilised.

c) Green Technology Services – income tax exemption of 100% of statutory income from the year of assessment 2013 until the year of assessment 2020.

d) Exemption from Import Duty – exemption from import duty can be considered for imported machinery and equipment that are used for the provision of waste management services, provided the machinery/equipment are not available locally.

e) Accelerated Capital Allowance – companies using environmental protection equipment are eligible for an initial allowance of 40% and an annual allowance of 20% on the qualifying capital expenditure.

8. Other Environmental Updates

A. Environmental Protection Act

In view of the emergence of complex global environmental issues, the Ministry of Natural Resources and Environment (now MESTECC) has stated that a new Environmental Protection Act ("**EPA**") will replace the current EQA. Under the new EPA, a total of 91 sections, of which 41 are new, will enhance the power of enforcers to prosecute and to impose heavier penalties on any person who is found to cause damage to the environment. The EPA is expected to be tabled in Parliament in the year 2020.

Among the salient changes in the law include:

a) the EIA will be revamped to be more comprehensive;

b) a disinterested third party will approve or nix projects that might have considerable impact on the environment;

c) MESTECC's special investigators will be empowered to conduct search and seizure on premises;

d) rights to force illegal factories to relocate or shut down;

e) compulsory obligations for certain industries and development sectors to self-regulate; and

f) expand regulation to the animal husbandry industry.

B. Energy Efficiency and Conservation Act

On 12 June 2019, Cabinet had given approval to MESTECC to draft an Energy Efficiency and Conservation Act ("**EECA**") in pursuit of achieving national aspirations for effective utilization of energy, electricity and thermal, across all key sectors. Currently, existing regulations on energy efficiency only regulate electricity use.

The EECA is in line with the government's National Energy Efficiency Action Plan 2016-2025. The EECA is intended to promote widespread of energy efficient practices in the county, reduce energy use and lower electricity bills of consumers.

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**").

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

A. Trademarks

The new Trademarks Act 2019 which recently came into force on 27 December 2019 marks Malaysia's accession to the Madrid Protocol. This accession allows multiple-class applications and brand owners to file one application across 122 member states of the Madrid System. The Trademarks Act 2019 also covers specific offences in relation to counterfeits, false application for registered trademarks to goods and/or services and would also cover things that were previously covered under the Trade Descriptions Act 2011.

A trademark is a 'sign' used in relation to a business and it includes "any letter, word, name, signature, numeral, device, brand, heading, label, ticket, shape of goods or their packaging, colour, sound, scent, hologram, positioning, sequence of motion or any combination thereof". Proprietors of trademarks may assert their rights to the trademarks either through the legal recourses made available to them for registration under the Trademarks Act 2019, or for non-registered trademarks, through the tort of passing off.

1. Unregistered Trademarks

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 trademark. It provides protection for both unregistered and registered trademarks but is the only recourse available for unregistered trademarks.

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 trademark.

2. Registered Trademarks

Registration of trademarks under the Trademarks Act 2019 and the previous Trade Marks Act 1976 grants a proprietor the exclusive right to use the trademark in Malaysia. A certificate of registration provides easy *prima facie* evidence of ownership of the trademark.

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 trademark agent to act on its behalf. Applications for registration of trademarks 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 trademark 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 gazetted period, the trademark will be successfully registered, whereupon the applicant will be granted a certificate of registration for the trademark.

A trademark 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:

a) where prior disclosure of the invention was made in confidence; or

b) 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.

Inventions that consist any of the following are not patentable:

a) discoveries, scientific theories and mathematical methods;

b) plant or animal varieties or essentially biological processes for the production of plants or animals, other than man-made living micro-organisms,

micro-biological processes and the products of such micro-organism processes;

c) schemes, rules or methods for doing business, performing purely mental acts or playing games;

d) methods for the treatment of human or animal body by surgery or therapy, and diagnostic methods practised on the human or animal body.

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. As there are no provisions to extend the patent term, the patent can be utilised by any person upon expiry of the term.

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; and

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; and

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.

F. Integrated Circuit Layout-Designs

A layout-design of an integrated circuit is the three-dimensional disposition of the elements of an integrated circuit and some or all of the interconnections of the integrated circuit or such three-dimensional disposition prepared for an integrated circuit intended for manufacture.

The protection of layout-designs of integrated circuits is governed by the Layout-Designs of Integrated Circuits Act 2000.

A layout-design is automatically eligible for protection upon the fulfilment of the following conditions:

a) it is original, i.e. the result of its creator's own intellectual effort and not commonplace among creators and manufacturers of integrated circuit;

b) it has been fixed in a material form or incorporated into an integrated circuit at the time of its creation;

c) the right holder was a qualifying person at the time the layout-design was created.

A layout-design shall be protected for a period of 10 years from the date the layout-design is first commercially exploited in Malaysia or elsewhere.

G. Plant Variety Protection

The Protection of New Plant Varieties Malaysia Act 2004 and the Protection of New Plant Varieties Regulations 2008 provides a filing system to protect plant breeder's rights over new plant varieties.

A plant variety is considered new if the propagating or harvested material of the plant variety has not been sold or commercialised either earlier than 1 year in Malaysia or 4 years for outside of Malaysia, prior to the filing date. In respect of trees and vines, the exemption is 6 years.

In order to be eligible for registration as a new plant variety and granted a breeder's right, a newly developed plant variety must fulfil four conditions, i.e. new, distinct, uniform and stable.

However, there is a lower standard for a plant variety which is bred, or discovered and developed by a farmer, local community or indigenous people, it is entitled for registration if it satisfies three conditions, i.e. new, distinct and identifiable.

Any application for registration of a new plant variety which may affect public order or morality or where there is reasonable ground to believe that the cultivation, reproduction or use of the plant variety may produce a negative impact on the environment will not be approved.

A registered plant variety will have a maximum term of 20 years calculated from the filing date of the application and a maximum term of 25 years from the filing date for varieties of tree and vines. Whilst, the maximum term of protection for registered plant varieties bred or discovered and developed by a farmer, local community or indigenous people is 15 years.

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 Prime Minister of Malaysia when addressing the Jeddah Economic Forum in 2016, where the theme was “Public-Private Partnerships: Catalysing Growth Through Smart Partnerships – The Malaysia Way”, said that as of December 2015, Malaysia has implemented 754 PPP projects. According to the Prime Minister of Malaysia, overall, the Government has saved a total capital expenditure of RM203.45billion, total operating expenditure of RM9.25billion and the total proceeds from sales of Government equity and assets stands at RM6.5billion.

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 otherwise known as UKAS (the "**UKAS Guidelines**"), 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 UKAS Guidelines sets out the key principles of Malaysia's PPP programmes as embodied in the 9MP. The UKAS Guidelines acknowledged that the terms "PPP" and "PFI" may be used interchangeably and that "PFI" is a subset of "PPP".

The UKAS Guidelines 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 UKAS Guidelines, 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; and

f) Projects awarded are based on lowest total cost over concession period, known as Whole Life Cycle Costing ("**WLCC**").

The UKAS 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		

Public Sector	Special Purpose Vehicle ("SPV")	Financiers	Construction Contractors
	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

PPP proposals can originate from either the private sector and Government agencies. PPP proposals initiated by Government and submitted by ministries/governmental agencies are known as Solicited Proposal where else PPP proposal initiated and submitted by private sector are known as Unsolicited Proposal.

The UKAS Guidelines states 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 UKAS Guidelines also states 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:

a) an executive summary of the submission;

b) evidence of financial stability and statement of financial capability, including access to capital (debt and equity) and Letters of Support from potential lenders;

c) evidence of performance capability and expertise;

d) a detailed business plan and financial plan;

e) PPP modality options and the preferred option, concession period, risk analysis and allocation and financing scheme; and

f) 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 UKAS 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 PPP Committee comprises of representatives from:

a) UKAS;

b) the Prime Minister Department;

c) the Ministry of Finance;

d) Attorney General's Chamber;

e) Economic Planning Unit;

f) Department of Director General of Lands and Mines;

g) Department of Valuation and Property Services; and

h) the respective ministries or agencies.

UKAS adopts a decentralised approach in project implementation and contract management of PPP projects where UKAS plays the lead role in coordinating and processing project proposals from inception to signing of concession agreement where else the relevant ministry/agency will monitor the implementation of the project and manage the concession agreement. Nonetheless, UKAS will continue to monitor large scale PPP projects through a project monitoring unit which receives regular reports from the ministries/agencies concerned.

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 (generally around 30 to 50 years) 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. To date, a total of 31 toll highways and toll bridges have been constructed using the BOT model.

c) 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).

d) 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.

e) 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.

The Official Portal of the PPP Unit summarises the forms of PPP adopted in Malaysia and the models generally adopted as follows:

Privatisation	PFI	Others
• Sale of Equity • Sale of Assets • Corporatisation • Land Development/Land Transfer • Build-Operate-Transfer • Build-Operate-Own • Management Contract • Leasing	• Build-Operate-Transfer • Build-Lease-Transfer • Build-Lease-Maintain-Transfer	• Facilitation Fund • Off-take • Joint Venture

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 RM20billion to support development projects implemented by the private sector. The Official Portal of the Economic Transformation Programme states that a total of RM100million from the Facilitation Fund has been allocated to each economic corridor in order to decentralise the fund, as well as to enable the economic corridors to identify projects that are qualified for the grant.

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 is to 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. Through 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) new investments that have high impact or contributes significantly to the economic growth of Malaysia 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 or projects with strategic value in line with the initiatives outlined under the Five Year Malaysia Plan where the physical progress does not exceed 10% of the total project development/new project;

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's fixed investment (not including the land cost) is as follows:

   i. not less than RM100 million; or

ii. RM 50 million and above for health services and logistics sectors; or

iii. in respect of Bumiputera investments, worth between RM 50 million to RM 200 million, such applications may be made through Unit Peneraju Agenda Bumiputera ("**TERAJU**") of the Prime Minister's Department; or

iv. for domestic investments involving the maintenance and conservation of the environment or green technology, worth at least RM 20 million; and

a) mixed development projects or development projects related to abandoned tourism that is free of any legal action. Such applicants will also need to prove that the investment to be implemented is a new investment.

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. green field real estate development projects and less developed residential areas that do not have any basic infrastructures;

iii. Program Perumahan Penjawat Awam 1Malaysia ("**PPA1M**") which have been approved or recommended by the Special Committee of PPA1M;

iv. property development by Malay or Bumiputera companies above Malay reserved lands;

v. projects in the incubator stage or research and development (R&D) stage;

vi. projects which involve the acquisition of assets from existing corporations where there is no new investment;

vii. projects that have received other government allocation and/or funded by other funds provided by the Government;

viii. government procurement projects;

ix. investment in foreign countries;

x. projects that are highly dependent on financial support from the Government;

xi. projects where the Government needs to bear a significant portion of the risks; and

xii. any application for additional funding for projects which were previously approved for to receive grants from the Facilitation Fund.

c) The Official Portal of the PPP Unit states that the corporations that qualify to apply for grants from the Facilitation Fund must:

i. be incorporated under the relevant companies' law of Malaysia with a paid-up capital of at least RM300,000.00 at the point of signing of the Facilitation Fund Agreement (as at the date of publication, the Official Portal of the PPP Unit states that the company must be incorporated under the Companies Act 1965 but the Companies Act 1965 has since been repealed by the CA 2016);

ii. for new projects, have equity in the project equivalent to at least 10% of the total grant requested;

iii. have ownership of the land on which the project is to be developed on or right to carry out development on the land (such as a joint venture agreement, power of attorney or lease over the land);

iv. have the capacity, ability and skill/expertise to carry out the proposed project; and

v. have strong financial position and the ability to procure commercial financing to carry out the project.

Application for grant must be submitted to UKAS. Some of the information which must be set out in the project proposals are as follows:

a) the profile of the company;

b) an executive summary;

c) a detailed business plan (which sets out the executive summary of the project, the objective of the project, the background and scope of the project, current statues of the project development, the project cost, information of the site/land involved, marketing strategy);

d) investment/implementation impact including information on:

   i. the impact on the economy and gross domestic product of Malaysia;
   ii. impact on the touch point rakyat. Touch point means components of projects that can provide direct benefits to the public;
   iii. employment opportunities that will be created;
   iv. increasing the economic competitiveness of Malaysia; and
   v. the risk management of the project;

e) details of the component of the Facilitation Fund requested (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.

Please see Appendix 2 of the Facilitation Fund Guidelines for the project proposal format.

Some examples of projects which have received grants from the Facilitation Fund are:

a) construction of solar energy farm in Kulim Hi-Tech Park, Kedah;

b) Amanjaya Integrated Bus Termination in Meru Raya, Ipoh, Perak;

c) project to overcome the instability of power supply and connectivity in Samalaju Industrial Park, Sarawak; and

d) Construction of the Plaza Merdeka shopping mall and hotel in Kuching, Sarawak.

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 Bursa Malaysia for equity funding is another option.

It is easier for infrastructure project corporation 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:

a) *with project costs of not less than RM500 million; and*
b) *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 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 ("**TM**") announced the signing of two PPP agreements with the Government 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. Another example of a successful PPP project that was regarded as a milestone in the privatisation of road projects is the privatisation of the North-South Highway that was finished approximately 15 months earlier than scheduled.

11. Notable Developments

The priority sectors aimed by UKAS in promoting PPP programs are mainly health, education, infrastructure and green technology.

In the recent tabling of Budget 2020, the Malaysian Finance Minister Lim Guan Eng announced the Malaysian Government's plans to construct a Digital Malaysia by implementing the National Fiberisation & Connectivity Plan ("NFCP"). It was announced that the NFCP will adopt a PPP approach involving a total investment of RM21.6 billion.

In addition to the above, in the Budget 2020, it has been announced that the Malaysia Government will be inviting proposals on a PPP basis to realise investments to upgrade the Sultan Azlan Shah Airport in Ipoh.

B. Infrastructure on Rail

1. Introduction to Rail Transport in Malaysia

Rail transport has been in existence in Malaysia since 1885 when the first railway track was built linking Taiping to Port Weld with the aim of speeding up the transportation of tin from mining areas to ports along the coast. From a mere 12.8km track, it has grown tremendously over the years to the current 1,677km linking inter cities of West Coast (between Johor 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.

The Malaysia Industry-Government Group for High Technology stated in the Malaysian Rail Supporting Industry Roadmap 2030 that, since the 1990s, the Malaysian government has invested more than RM50 billion on rail infrastructure, and in 2010, the rail industry has generated an estimated turnover of RM1.7 billion employing a total workforce of 9,500 people.

Besides the intercity railway network, there are also the light rail transit (LRT), mass rapid transit (MRT), monorail, airport rail link and funicular railway lines in Malaysia. The current rail operators in Malaysia are:

a) Keretapi Tanah Melayu Berhad ("**KTMB**");

b) Express Rail Link Sdn Bhd ("**ERL**");

c) Rapid Rail Sdn Bhd ("**Rapid Rail**");

d) Sabah State Railway ("**SSR**"); and

e) Penang Hill Corporation ("**PHC**").

a) KTMB

KTMB is the main and oldest rail operator in Peninsular Malaysia. The 1,000mm gauge railway network consists of two main lines (North South Line (West Coast Line) and East Coast Line) 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). The West Coast Line was initially single-track but KTMB has embarked on the double-tracking and electrification project to introduce frequent intercity service at 140km/hour between Gemas and Padang Besar on the Malaysia-Thai border. The Electric Train Service (ETS) was introduced in August 2010 by KTMB when electrification and double tracking works were completed. ETS is currently operated by the KTM Intercity Division (previously operated by ETS Sdn. Bhd., a fully owned subsidiary of KTMB). The remainder of the West Coast line from Gemas railway station to Woodlands Train Checkpoint in Singapore and the entire East Coast Line from Gemas railway station to Tumpat railway station remains single track and not electrified.

Since 2018, KTMB also operates the Skypark Link, an airport train service linking KL Sentral to Subang Airport. Skypark Link is the second airport rail link service in Malaysia after the ERL. The RM521 million project was initiated by the Government in 2013 with an initial completion date in 2016 but was later extended to 2018. The 26km Skypark Link commenced operations on 1 May 2018 and runs between KL Sentral and Subang Skypark with a stop in Subang Jaya. The journey time from KL Sentral to Subang Skypark is 30 minutes.

b) ERL

ERL was awarded the concession on 25 August 1997 to finance, design, construct, operate and maintain the Kuala Lumpur Airport Express ("**KLIA Express**") and KLIA Transit services, and other ancillary activities related to railway services for 30 years. ERL is a joint venture company between YTL

Corporation Berhad, Lembaga Tabung Haji, SIPP Rail Sdn Bhd and Trisilco Equity Sdn Bhd with 45%, 36%, 10% and 9% shareholding respectively. The KLIA Express which started operation on 14 April 2002 is a non-stop air-rail connection between Kuala Lumpur International Airport (KLIA) and KL Sentral. The KLIA Express has also extended its line to the new KLIA2 airport which was officially opened on 2 May 2014. The KLIA Transit service stops at three intermediate stations i.e. Bandar Tasik Selatan, Putrajaya & Cyberjaya and Salak Tinggi, with a total journey time between KL Sentral and KLIA2 of 39 minutes. It commenced operation on 1 June 2002. The train operation and maintenance are managed by ERL's wholly owned subsidiary, ERL Maintenance Support Sdn Bhd.

c) Rapid Rail

Rapid Rail is a wholly owned subsidiary of Prasarana Malaysia Berhad (formerly known as Syarikat Prasarana Negara Berhad) ("**Prasarana**"). Prasarana is a 100% Government owned company and it was established to facilitate, undertake and expedite public infrastructure projects approved by the Government. Rapid Rail currently operates three LRT Lines (i.e. Ampang Line, Sri Petaling Line and Kelana Jaya Line), KL Monorail Line and MRT Line 1.

The Ampang and Sri Petaling lines run on a common route between Sentul Timur station and Chan Sow Lin station. The lines diverge and run separately, with the Ampang line travelling to Ampang station, whereas the Sri Petaling line runs to Putra Heights station, where it meets the Kelana Jaya line. The Kelana Jaya line is the first fully automated and driverless rail system in the Klang Valley. The line runs from Putra Heights through Kelana Jaya to Gombak and has 37 stations.

The MRT Line 1 (also known as Sungai Buloh-Kajang ("**SBK**") Line), is the second fully automated and driverless rail system in Klang Valley. Phase one of the MRT Line 1 between Sungai Buloh and Semantan commenced service on 16 December 2016, while phase two between Muzium Negara and Kajang began operations on 17 July 2017.

The KL Monorail Line opened on 31 August 2003, with 11 stations running on two parallel elevated tracks connecting the KL Sentral transport hub in the south and Titiwangsa in the north. It is the only operational monorail system in Malaysia.

d) SSR

SSR is under the arm of the Sabah's state administration. SSR operates the only rail transport in East Malaysia. The railway began operations in 1896 and consists of a single 134km line from Tanjung Aru, to the town of Tenom. It was formerly known as the North Borneo Railway.

e) PHC

PHC operates the Penang Hill Funicular Railway which is located in Air Itam on Penang Island, Malaysia. The approximately 2km long funicular railway travels directly from the base station to the top of Penang Hill. It was officially opened on 1 January 1924. It was the second mode of transport established for access to the summit of the Penang Hill. The first railway was constructed in 1901 and completed in 1905 but was rendered useless due to technical faults. In February 2010, the funicular railway was closed for an upgrade to a new system and resumed its service in April 2011. The new system is able to carry 1,000 passengers per hour compared to 250 under the old system.

2. Applicable Laws and Regulations governing Rail Transport

a) Peninsular Malaysia

The principal act governing rail transport in Peninsular Malaysia is the Land Public Transport Act 2010 ("**LPTA**") which came into force on 31 January 2011. The Railways Act 1991 ("**RA**") ceased to apply

to Peninsular Malaysia on 15 September 2010. Notwithstanding the non-application of the RA to Peninsular Malaysia, all subsidiary legislation made or having effect under the RA , in so far as they are not inconsistent with the LPTA, continue to be in force and have effect in Peninsular Malaysia until they are amended or revoked by any subsidiary legislation made under the LPTA. The LPTA does not apply to the Penang Hill Funicular 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 (*Suruhanjaya Pengangkutan Awam Darat* or "**SPAD**"). SPAD was a statutory body created under the now repealed Suruhanjaya Pengangkutan Awam Darat Act 2010, which carried a wide range of powers to plan, regulate and enforce all matters relating to land public transport including railways. SPAD had jurisdiction over Peninsular Malaysia. In respect of rail transport, SPAD was the regulator that reviewed railway schemes and licence applications before making recommendations to the Prime Minister. On 1 January 2019, SPAD was abolished and replaced by the Land Public Transport Agency (*Agensi Pengangkutan Awam Darat* or "**APAD**"). APAD is under the purview of the Ministry of Transport and has absorbed most of the functions of SPAD.

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, amongst others: (a) the type and system of the proposed railway, (b) the proposed 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 imprisonment for a term not exceeding 3 years. Besides that, there are mandatory requirements under the LPTA for railway train drivers to hold vocational licence, and for licenced operators to keep a copy of timetables for the time being in force and a list of general fares chargeable for travelling from the railway stations.

b) East Malaysia

In Sabah, the principal legislation governing rail transport is the Railways Enactment 2017 ("**RE**") which came into operation on 2 January 2018. The RE was enacted to replace the over 100-year-old Railways Ordinance 1914 that had been in force since 1914. Under the RE, the director of railways has been given a wide range of powers such as, to issue licences, to advise the minister charged with the responsibility for railways in Sabah on policy and planning, and to regulate railway operations.

In Sarawak, the RA and Railways Ordinance 1914 remain as the applicable laws in respect of rail transport. The Railways Ordinance 1914 only specifies the rules relating to the operation of railway but does not specify any licensing requirement for constructing a railway.

3. Recent, on-going and potential rail projects

a) LRT3 project

The Light Rail Transit 3 (LRT3) is the third light rail line planned to be developed in Malaysia. Prasarana has been appointed to develop and operate the line upon completion. The 37km-long LRT 3 line was initially planned to run from Bandar Utama to Klang with 26 stations, including one underground station; and to be completed by 2020. The cost of the LRT3 project was estimated at RM9 billion. The LRT3 project was proposed to be on a Project Delivery Partner ("**PDP**") concept. The tender documents for the PDP role have been issued and Prasarana has awarded the role of PDP to MRCB George Kent Sdn Bhd, a joint venture between Malaysian Resources Corporation Berhad (MRCB) and George Kent (M) Berhad.

As a result of the 14th General Election which was held on 9 May 2018, Malaysia witnessed a change

of government since independence in 1957. Mega projects initiated by the previous administration were reviewed with a view to reduce government expenditure as well as debts. The newly formed Government revealed that the projected total cost for LRT3 line had increased drastically from RM9 billion to RM31.65 billion. The LRT3 line was subsequently restructured and the overall cost was reduced to RM16.63 billion. The key steps to reduce the cost of the LRT3 line included remodelling the PDP concept to a fixed price contract and cancelling a 2km tunnel and the underground station. The timeline to complete LRT3 line has also been extended from 2020 to 2024 to reduce construction cost.

b) Klang Valley Mass Rapid Transit Project ("KVMRT")

The proposal for the KVMRT project was announced in June 2010 and was approved by the Malaysian government in December 2010. It is a mass rapid transit system in the Klang Valley region comprising three lines namely MRT Line 1, MRT Line 2 and MRT Line 3. Mass Rapid Transit Corporation Sdn Bhd ("**MRT Corp**") has been appointed by the Malaysian government as the developer and asset owner of the project. MMC Gamuda KVMRT (T) Sdn Bhd ("**MMC-Gamuda**"), a joint-venture between Gamuda Bhd and MMC Corp Bhd, has been appointed as the project delivery partner.

MRT Line 1 begins from Sungai Buloh and runs through the city centre of Malaysia's capital city before ending in Kajang. The line has 31 stations, out of which seven are underground. The construction of the MRT Line 1 was carried out in two phases. The first phase Sungai Buloh to Semantan began operations on 16 December 2016 and the second phase from Semantan Station to Kajang Station commenced operations on 17 July 2017.

The MRT Line 2 (also known as Sungai Buloh-Serdang-Putrajaya ("**SSP**") Line) will run from Sungai Buloh to Putrajaya passing through Serdang. The line is now under construction and has reached more than 70% completion as at March 2020. The MRT Line 2 stands at 52.2km long and is targeted for full operation by 2023.

The MRT Line 3 (also known as MRT Circle Line), was once proposed to form the loop line of the Greater KL/Klang Valley Integrated Transit System, integrating MRT Line 1 and MRT Line 2. The MRT Circle Line was expected to cover the hotspots surrounding Bandar Malaysia, Ampang, KL Ecocity, Bukit Kiara and Sentul at an estimated cost of RM45 billion. However, the MRT Line 3 has been subsequently suspended amid a review of the project due to funding constraints.

c) High Speed Rail from Kuala Lumpur to Singapore Project ("HSR")

The Kuala Lumpur to Singapore high-speed rail was first announced in February 2013 jointly by Prime Minister of Singapore and former Prime Minister of Malaysia. Construction of the HSR was planned to begin in 2018, with operations scheduled to begin sometime in 2026. The length of the HSR line was expected to be 350km long with the purpose of reducing travel time between Kuala Lumpur and Singapore to 90 minutes. It was expected to run from Bandar Malaysia in Malaysia to Jurong East in Singapore.

The project structure was as stipulated in the table below:

Party	Role
Operating Company Domestic ("**OpCo Domestic**")	Responsible for provision of train services. The OpCo Domestic would be offering transit services which calls at several stations in Malaysia indicatively Bandar Malaysia, Seremban, Malacca, Muar, Batu Pahat and Nusajaya taking approximately two hours.
Operating Company	Responsible for provision of train services.

International ("**OpCo International**")	The OpCo International would offering a non-stop express service between Malaysia and Singapore which would take approximately 90 minutes.
Assets Company ("**AssetsCo**")	Responsible for designing, building, financing and maintaining all rolling stock, as well as designing, building, financing, operating and maintaining all rail assets (e.g. trackwork, power, signalling and telecommunications) for the HSR. The AssetsCo will also coordinate the system's network capacity for operations and maintenance needs.
MyHSR Corporation Sdn Bhd ("**MyHSR Corp**")	Responsible for provision of civil infrastructure, including stations and maintenance facilities infrastructure.
SG HSR Pte Ltd ("**SG HSR**")	

MyHSR Corp 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 Malaysia. A legally-binding bilateral agreement was executed in December 2017 where both the Malaysian government and the Singapore government agreed to work towards commencing HSR operations around 2026.

MyHSR had then appointed two consortia as its project delivery partner to assist with the civil works portion of the HSR. The consortium of MRCB and Gamuda Bhd was selected for the northern portion of the alignment, while the consortium of Syarikat Pembenaan Yeoh Tiong Lay Sdn Bhd (YTL) and TH Properties Sdn Bhd was selected for the southern portion.

MyHSR Corp and SG HSR had also launched the joint tender for the HSR for the AssetsCo on 20 December 2017 for the bidders to submit proposals to MyHSR Corp and SG HSR by 28 December 2018. Through the open, fair and transparent procurement process, MyHSR Corp and SG HSR targeted to jointly select a qualified bidder by the third quarter of 2019.

However, on 5 September 2018, an agreement was signed by Malaysia's Economic Affairs Minister Azmin Ali and Singapore's Transport Minister Khaw Boon Wan at the Prime Minister's Office in Putrajaya to postpone the construction of the HSR until end-May 2020, with Malaysia having to pay Singapore S$15 million for costs incurred in suspending the project. On 31 May 2020, the Malaysian government announced that the deferment of the project has been extended to 31 December 2020 with both the Malaysian government and Singapore government agreeing to resume discussions in the near future regarding the proposed changes to the commercial and technical aspects of the HSR project.

d) Penang Transport Master Plan ("PTMP")

The PTMP is the Penang state government's plan to build a series of transit lines and highways to alleviate the traffic congestion problem. The PTMP, among others, comprises of public transport project, highways and road project, and undersea tunnel project. SRS Consortium was appointed as the Project Delivery Partner (PDP) for the RM27 billion PTMP projects in August 2015. SRS Consortium is a joint venture of Gamuda Bhd (60%), Ideal Property Development Sdn Bhd (20%) and Loh Phoy Yen Holdings Sdn Bhd (20%).

SRS Consortium's public transport master plan outlines an integrated transit network with appropriate long term capacity to increase public transport adoption in Penang. For the Penang Island, four transit lines have been proposed:

i) Bayan Lepas LRT;
ii) Ayer Itam monorail;
iii) Tg Tokong monorail; and
iv) Tram (in George Town heritage area).

These three main transit corridors of Bayan Lepas, Ayer Itam and Tg Tokong Bungah are only 3km apart.

At the same time, three transit lines have been proposed in Seberang Perai to connect with the newly completed KTM Komuter line:

i) George Town - Butterworth LRT line integrating rail transit lines in Penang Island with those in Seberang Perai;
ii) Monorail from Raja Uda to Bkt Mertajam/Alma (with BRT extension to Kepala Batas and Kulim); and
iii) Bus Rapid Transit from Permatang Tinggi to Batu Kawan (with extension northwards to Seberang Jaya and southwards to Nibong Tebal).

SRS Consortium's proposed public transport network takes cognisance of the need to enable efficient multi-modal integration and flexibility in delivery phasing in order to maximise accessibility, future catchment and economic viability. With an integrated approach, the entire transit system will operate effectively as a single 'unified' network to provide a seamless and cohesive public transport strategy.

In recent years, Penang state government expanded the project scope of the PTMP to RM46 million. In view of the foregoing, Gamuda Berhad (the controlling shareholder in SRS Consortium Sdn Bhd) is expected to execute a new project delivery partner agreement with the Penang State Government to formalise the latest plans.

(i) Bayan Lepas LRT Line

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, passing through KOMTAR, Bayan Lepas FIZ and the Penang International Airport. In terms of integration, the 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 at The Light Station.

(ii) George Town – Butterworth LRT Line

The 18km George Town-Butterworth LRT Line will begin at The Light Station (on the Bayan Lepas LRT Line) and terminates at Sg Nyiur Station for interchange transfer with the Raja Uda-Bukit Mertajam Monorail Line. The line fuses the rail network on both sides for passenger transfer between transit lines. It will be a vital connector and interchange with other rail networks in the state, such as the Raja Uda-Bukit Mertajam Monorail Line and BRT Line from Permatang Tinggi to Batu Kawan. The proposed LRT Line will enable passengers to travel from the Prai Industrial Estate, Penang Sentral and established housing estates in Seberang Perai towards Gelugor on Penang Island in a single journey.

(iii) Monorail Lines

The three Monorail Lines proposed under the PTMP 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.

(iv) George Town Tram Line

The George Town Tram line will be almost 2km in distance with six designated stops which will begin at KOMTAR and end at the Swettenham Pier Cruise Terminal. In compliance with the heritage guideline, the tram line within World Heritage Site will be at-grade (on-ground) and feeds into the KOMTAR interchange station to integrate with the Bayan Lepas LRT and the two monorail lines i.e. Ayer Itam Monorail and Tanjung Tokong Monorail.

e) East Coast Rail Line Project ("ECRL")

The ECRL is aimed at eventually linking Port Klang on the west coast of Peninsular Malaysia to Kuantan Port and all the way to Tumpat in Kelantan on the east coast. On 1 November 2016, China's state-owned China Communications Construction Company ("**CCCC**") and Malaysia Rail Link Sdn Bhd (the project owner) entered into the Engineering, Procurement, Construction and Commissioning Agreement for the RM81 billion project with a total of 668km of rail link. The contract was awarded to CCCC without an open call for international bidders. The ECRL project was to be carried out in two phases. The proposed alignment for Phase one of the railway featured 22 stations running along a 600.3km route. It was projected to connect passengers from Kota Bharu in Kelantan to the Integrated Transport Terminal Gombak in Selangor in less than four hours. Phase two of the ECRL had an estimated length of 88km and covered the stretch from Gombak North to Port Klang and two more future stations located at Puncak Alam and Kapar. A further extension between Kota Bharu and Pengkalan Kubor was also proposed to be built.

Following a suspension of the construction of the ECRL, the ECRL project was relaunched in July 2019 after a reduction in project cost was negotiated and is targeted for completion by end of 2026. The length of alignment of the ECRL now stands at 640km and is divided into three sections, namely Section A (Kota Bharu – Dungun), Section B (Dungun – Mentakab) and Section C (Mentakab – Port Klang). The rail infrastructure will traverse the east coast states of Kelantan, Terengganu, and Pahang before linking with Negeri Sembilan, Selangor, and Putrajaya on the west coast.

f) Rapid Transit System ("RTS") Link

In January 2018, the Malaysian government and the Singapore government signed a bilateral agreement on the 4km RTS Link between Johor Bahru and Woodlands, Singapore. As reported by mainstream media, when completed in 2024, the RTS Link will be able to carry up to 10,000 passengers per hour in each direction which is much higher than the average 300 passengers per hour in each direction that the KTMB's Tebrau Shuttle currently ferries.

Channel NewsAsia reports that the RTS Link project structure is as below:

Party	Role
Infrastructure Company ("**InfraCo**")	**Prasarana Malaysia Berhad** Will be appointed by the Government to be the InfraCo to fund, build, own, maintain and renew the civil infrastructure and stations within Malaysia.
	Land Transport Authority Will be appointed by the Government of the Republic of Singapore to be the InfraCo to fund, build, own, maintain and renew the civil infrastructure and stations within Singapore.

Party	Role
Operating Company ("**OpCo**")	Will be jointly appointed by the Government and the Government of the Republic of Singapore to own, design, build, finance, operate, maintain and renew the RTS Link's operating assets such as trains, tracks and systems. The OpCo will pay a concession fee in exchange for the right to collect fare revenue from operating the RTS Link and it has been reported that the said fares will be set on a commercial basis by the OpCo and not regulated by the 2 governments.

For ease of commute, the RTS Link will also have co-located Custom, Immigration and Quarantine (CIQ) facilities in both the Bukit Chagar station in Johor Bahru and Woodlands North station in Singapore.

Following the acceptance of a Letter of Offer (LO) jointly issued by the Prime Minister's Department of Malaysia and LTA, Prasarana and SMRT Corporation Ltd ("**SMRT**") will proceed to form a joint venture company to operate the RTS Link. The LO confirms the commitment of Prasarana and SMRT to form a joint venture corporation to be the Opco for the RTS Link, and their acceptance of the terms and conditions as in the LO. Following the exchange of signed LO, Prasarana and SMRT were expected to work towards executing a joint venture agreement and incorporating a joint venture company before 30 June 2018. However, this did not happen and the RTS Link project was suspended after Malaysia's 14th General Election until 30 September 2019.

The suspension of the RTS Link project was subsequently extended to 30 April 2020, followed by a further extension to 31 July 2020. This is in light of discussions between the Malaysian government and the Singapore government regarding the proposed changes to the scope and structure of the RTS Link project, which include changing the infrastructure system from an MRT to an LRT.

C. Infrastructure on Roads

1. Overview

It is widely recognised that 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 functions of providing access to employment, social and health services, and education makes them key elements in stimulating economic and social development.

There are two types of roads in Malaysia, namely Federal Roads and State Roads.

2. Federal and State Roads, Tolls and Authority For Construction and Maintainence of Roads in Malaysia

The Ministry of Works ("**MOW**") is responsible for the building and maintenance of Federal Roads. The implementing agency under the MOW is the Public Works Department ("**PWD**").

The functions of the MOW include planning the development of the Federal Roads network nationwide; coordinating and monitoring the implementation of Federal Road projects; regulating the privatised maintenance work of Federal Roads; and monitoring the construction, operation, toll handling and maintenance of the tolled expressways.[16]

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 the PWD is to ensure that the road network system is always safe, efficient and comfortable to road users.

a) Federal Roads

Federal Roads are all roads declared to be Federal Roads under the *Federal Roads Act 1959 (Revised 1989)* ("**Act 376**"). This category of roads includes the national expressways and highways under the administration of the Malaysian Highway Authority (see sub-section (c) below for further information). Toll expressways like the North-South Expressway and other toll highways are all classified under this category by an order published by *Gazette*. Under this category, highways and other roads under the administration of the PWD such as major interurban roads joining 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 FELDA schemes, FELCRA schemes and other Regional Development Authority Schemes 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 Roads generally comprise of 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 ("MHA")

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.[17]

[16] http://www.kkr.gov.my/en/organization/function

[17] http://www.llm.gov.my/corporate_info

Act 231 also provides that the functions of MHA are to supervise and execute the design, construction and 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 highways 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.[18]

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.[19] 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 (Revised 1989) ("**Act 416**")

Act 416 provides that the MOW may impose tolls to be paid for the use by vehicles of 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 333[20], 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 Maintaenance 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 had adopted a new approach through privatisation by encouraging the private sector

[18] Section 11, Highway Authority Malaysia (Incorporation) Act 1980, Act 231

[19] Section 2, Federal Roads (Private Management) Act 1984, Act 306

[20] Sections 67 to 88, Road Transport Act 1987, Act 333

to be actively involved in the development of road and highway projects.[21]

Whilst the construction of roads is under the responsibility 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 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 concession period. During the concession period, the private concession companies are granted the right to collect toll from the users of the highways.[22] 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 the relevant concession agreement, the Malaysian government may be required to compensate the affected private concession company for any shortfall.

Under the 9th Malaysia Plan, the Malaysian government announced the implementation of public projects using the private finance initiative scheme.[23] The Public Private Partnership Unit, also known as *Unit Kerjasama Awam Swasta* ("**UKAS**") is the core agency, currently under the Ministry of Finance, with the responsibility of coordinating privatisation and Public-Private Partnership ("**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, the 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]

4. Notable Developments

SILK Highway

On 18 January 2017,[25] it was reported that SILK Holdings Bhd (now known as Marine & General Berhad) entered into a conditional share purchase agreement with Permodalan Nasional Bhd ("**PNB**"), for the disposal of 100% of the issued and paid-up share capital in Sistem Lingkaran-Lebuhraya Kajang Sdn Bhd ("**SILK**")[26]. This transaction has since been completed upon full payment of the balance consideration amount on 28 April 2017.

SILK is the concession holder of the 37km Kajang Traffic Dispersal Ring Road, commonly known as the SILK Highway. The concession period in respect of the SILK Highway expires on 31 July 2037.

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[21] Risk Management in Build-Operate-Transfer (Bot) For Roads and Highway Projects in Malaysia - Built Environment Journal Vol. 6, No. 1, 1-11, 2009

[22] Economic Planning Unit (2006). *Ninth Malaysia Plan, Chapter 10: Streamlining Privatization.* Kuala Lumpur: Economic Planning Unit

[23] *ibid*

[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.bursamalaysia.com/market/listed-companies/company-announcements/5318497

[26] Sistem Lingkaran-Lebuhraya Kajang Sdn Bhd is a wholly owned subsidiary company of SILK Holdings Bhd

The SILK Highway is a primary urban road serving the south eastern corridor of Klang Valley, linking Balakong, Sungai Long, Kajang, Bangi, Serdang and Putrajaya as well as these townships to the Sungai Besi Highway, North South Expressway, Cheras-Kajang Highway, Kajang-Seremban Highway, South Klang Valley Expressway, and in future, to the East Klang Valley Expressway once construction is completed.

Sarawak-Sabah Link Road

The Sarawak-Sabah Link Road project consists of a 425km route, for which construction was scheduled to begin on June 2020[27] at an estimated cost of RM5.2 billion. It is expected to be the first land link connecting the states of Sabah and Sarawak without passing through the nation of Brunei. With the Sarawak-Sabah Link Road, road users will benefit from being able to travel between the two states without having to go through border security checks at the Malaysia-Brunei immigration checkpoints.

The construction of the project is expected to be carried out in two phases, with phase one covering around 90km from Lawas to Kampung Pa' Berunut in Sarawak; and phase two covering around 160km from Kampung Pa' Berunut to Long Lama and spur roads measuring 175km.[28] Construction of this project is expected to be completed by 2030.[29]

Pan-Borneo Highway

The Pan Borneo Highway, spanning to a total of 2,083km, is a project intended to link together the most remote areas of Sabah and Sarawak. Once it is completed, the Pan Borneo Highway is expected to run from the southwestern tip of Sarawak to the northern edge of Sabah. This highway will also include the construction of the aforementioned Sarawak-Sabah Link Road.[30] The cost of this project was initially estimated to be RM29 billion. However, as a result of a cost rationalisation exercise, the overall development cost of the Sarawak portion of the project is now reported to be RM18 billion[31] following the change from the use of a project delivery partner model to the conventional method of construction. The completion date of the Sarawak portion of the Pan Borneo Highway is expected to be June 2022[32]; with the Sabah to complete in June 2023[33]

Sungai Besi – Ulu Kelang Elevated Expressway and Damansara – Shah Alam Elevated Expressway

There are currently two highway projects under construction in the Klang Valley, namely the Sungai Besi – Ulu Kelang Elevated Expressway (SUKE) and the Damansara – Shah Alam Elevated Expressway (DASH). Both projects are projects of Prolintas and as of May 2020, SUKE and DASH are reported to have achieved 76.97% completion [34] and 82.43% completion respectively[35].

Central Spine Road Project

The Central Spine Road project consists of a route spanning approximately 400km, connecting the states of Pahang and Kelantan. The project will comprise six phases:

a) Phase 1 - a 51km stretch from Kuala Krai to Jambatan Sungai Lakit;
b) Phase 2 -a 63km stretch from Jambatan Sungai Lakit to Gua Musang;

[27] https://www.thestar.com.my/news/nation/2020/01/17/sabah-swak-link-road-construction-to-begin-in-june
[28] https://www.miricitysharing.com/new-sarawak-sabah-link-road-sslr-project/
[29] https://www.theborneopost.com/2019/11/05/baru-sarawak-sabah-link-road-will-be-completed-by-2030/
[30] https://www.therakyatpost.com/2020/01/20/the-pan-borneo-highway-connecting-msias-forgotten-states/
[31] https://www.nst.com.my/news/nation/2020/02/567278/govt-saves-rm286bil-sarawak-pan-borneo-highway-project
[32] https://www.theborneopost.com/2020/02/20/baru-shifts-pan-borneo-highways-completion-date-to-june-2022-from-2021/
[33] https://www.freemalaysiatoday.com/category/nation/2020/01/06/pan-borneo-highway-in-sabah-22-complete-ministry-tells-najib/
[34] https://www.mysuke.com.my/project-overview/
[35] https://www.mydash.com.my/project-overview/

c) Phase 3 - a 107km stretch from Gua Musang to Kampung Relong;
d) Phase 4 - a 56km stretch from Kampung Relong to Raub;
e) Phase 5 - a 60km stretch from Raub to Bentong; and
f) Phase 6 -a 53km stretch connecting Bentong and Simpang Pelangai.[36] As at 4 September 2019, the construction of Package 5 of the Central Spine Road project involving the route from Raub to Bentong was reported to be 87% ready and is expected to be completed by September 2020.[37]

Budget 2020 Highlights

Below are some of the Government initiatives proposed in the Budget 2020 which was tabled in Parliament on 11 October 2019:

a) The Government will allocate RM50 million for the repair and maintenance of roads leading to Port Klang. The Ministry of Transport will commence feasibility studies on the Serendah-Port Klang Rail Bypass for cargo shipments and the Klang Logistics Corridor, a dedicated privatised highway connecting Northport and Westport for commercial vehicles, with both projects estimated to cost RM8.3 billion.

b) In 2020, a total of RM4.85 billion is also provided under the Malaysian Road Records Information System ("**MARRIS**") fund from the Federal to all state governments to maintain roads. The existing guidelines do not allow for MARRIS funds to be used for repair and upgrading works. To provide greater flexibility, state governments will be allowed to upgrade roads, slopes, bridges and drains utilising up to 15% or RM20 million from MARRIS funds allocated to each state, whichever is lower.

c) The Cabinet has approved the proposed offer to acquire 4 Klang Valley highways – Shah Alam Expressway (KESAS), Damansara-Puchong Expressway (LDP), Sprint Expressway (SPRINT) and SMART Tunnel (SMART) to be funded via Government guaranteed borrowings. Gamuda Berhad is a substantial shareholder in all four highways.

[36] https://www.theedgemarkets.com/article/considerable-interest-central-spine-road-contracts

[37] https://www.malaymail.com/news/malaysia/2019/09/04/package-5-central-spine-road-from-raub-to-bentong-scheduled-for-completion/1787022

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 the total approved capacity (in MW) of renewable energy facilities granted FiT approvals under the FiT system, which have started generating renewable energy for commercial sale.

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	31.54	94.20
2013	3.38	3.20	0.00	0.00	0.00	106.94	113.52
2014	1.10	0.00	12.50	0.00	0.00	61.88	75.48
2015	0.00	5.40	13.80	7.00	6.60	60.33	93.13
2016	0.00	15.46	19.50	0.00	12.00	77.84	124.80
2017	0.00	22.54	0.00	0.00	0.00	38.65	61.19
2018	0.00	11.71	0.00	5.85	20.00	3.05	40.61
2019	0.00	1.50	0.00	0.00	0.00	0.01	1.51
Cumulative	6.48	62.97	82.70	21.75	50.30	380.24	604.44

(*source:* https://www.seda.gov.my/statistics-monitoring/re-installed-capacities/)

The FiT system, including the FiT rates, is administered and implemented by the authority known as 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 Feed-in Approval application can be made either by electronic transmission through the Feed-in Tariff Online portal (known as the "**E-FiT Online System**"), through manual submission in physical form to SEDA's office or any other submission method as may be determined by SEDA and notified on the website.

Once approved, a distribution licensee ("**DL**") (i.e. utility companies such as TNB and Sabah Electricity Sdn Bhd) 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 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 and Natural Resources ("**KeTSA**") 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 digression 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 ≤ 30MW (or such higher capacity if approval from KeTSA is obtained); 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 state that an eligible producer shall be, amongst others:

a) a Malaysian citizen of not less than 21 years of age;

b) a company incorporated in Malaysia which does not include:

   i) a company in which a foreign person holds, directly or indirectly, more than 49% of the voting power or issued share capital (excluding preference shares);

   ii) 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

   iii) an associate of a DL stated in sub-paragraph (ii) above.

c) a local authority in Malaysia;

d) a body corporate constituted or established under any written law, excluding SEDA.

e) a registered society; or

f) 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 can hold no more than 49% of voting power or the issued share capital of such company. As such, a foreign investor will need a local partner in order to participate in the FiT system.

As stated above, a DL is required to enter into a REPPA with the FiAH, once the 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 by SEDA according to the renewable resources and the energy installation capacity.

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

3. Digression of FiT

The REA provides for the FiT rate to be reduced progressively each year based on the applicable digression rate (as outlined in the Schedule of the REA) commencing on 1 January every year. The digression rate is determined by the applicable rate at the time of its FiT commencement date. The basis of the digression rate is that, as the cost of the renewable energy technology mature, the cost of implementation reduces. As such, the digression rate accounts for a reduction in cost of renewable energy technologies as they mature in time.

The annual digression 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 moneys available in the Renewable Energy Fund ("**RE Fund**") established under the REA from time to time;

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 installations utilising the relevant particular renewable resource;

f) the efficiency of renewable energy installations 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 digression means that future projects could have lower FiT rates awarded to them. The digression does not apply to projects which have had their FiT rates approved already.

4. Grid Parity

The FiT system is designed with the main objective of achieving grid parity. Grid parity occurs when the FiT rate applicable to the renewable energy installation is equal to or cheaper than the displaced cost. 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.

Therefore, there will be a point of time when the renewable energy installation may achieve grid parity. Once a particular renewable energy installation has achieved grid parity, the FiAH will not be paid based on the FiT rate but will instead be paid based on the prevailing displaced cost for the remaining duration of its REPPA.

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.

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

(*source:* https://www.seda.gov.my/feed-in-tarif-fit/grid-parity-displaced-cost/)

5. Renewable Energy Fund

The FiT system is not financed by the Malaysian government. 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, domestic consumers who consume less than 300kWh per month, will not be required to make such contribution. The funds collected nationally will be deposited into the 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.

6. Green Technology Financing Scheme

The Malaysian government launched the National Green Technology Policy in 2009 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% per annum on the interest or profit rate charged by the participating financial institutions ("**PFIs**"). The first edition of GTFS was available until 31 December 2017 or upon reaching a total financing approval amount of RM3.5 billion, whichever is earlier.

At the start of 2018, the Malaysia government had approved an extension of the GTFS known as GTFS 2.0 with a financing amount earmarked up to RM 5.0 billion. However, in May 2018, a change in Government administration resulted in the discontinuation GTFS 2.0. Later, in March 2019, the Malaysia government decided to reinstate GTFS 2.0 with the allocation of RM2 billion for the period of January 2019 until the end of 2020. GTFS 2.0 will continue to provide 60% government guarantee on the green component cost financed by PFIs as well as a rebate of 2% per annum on the interest or profit rate for the first seven (7) years.

GTFS 2.0 also supports companies under Energy Services Company (ESCOs), where RM1 billion has been exclusively allocated to finance investments or assets related to energy-efficient projects and Energy Performance Contract. ESCOs are eligible to obtain a maximum financing of RM25 million for a period of up to five (5) years.

7. Green Technology Tax Incentive

Further, the Government provides investment tax allowance ("**ITA**") for the purchase of green technology equipment or assets and income tax exemption for green technology service providers.

There are three categories under the Green Technology Tax Incentive:

a) Green Investment Tax Allowance (GITA) Assets which applies to companies that acquire qualifying green technology assets and listed under MyHIJAU Directory (www.myhijau.my);
b) Green Investment Tax Allowance (GITA) Project which applies to companies that undertake qualifying green technology projects for business or own consumption; and
c) Green Income Tax (Exemption) (GITE) Services which applies to green technology service provider companies that are listed under the MyHIJAU Directory.

The incentives provided under the Green Technology Tax Incentive are as follows:

Category	Rate of Incentive
GITA Assets	a) 100% of qualifying capital expenditure incurred on approved green technology assets from the year of assessment 2014 (date on which the first qualifying capital expenditure incurred is not earlier than 25 October 2013) until the year of assessment 2023 (which encompasses energy efficiency, building, transport, renewable energy, waste, water). b) The allowance can be offset against 70% of statutory income in the year of assessment. c) Unutilised allowances can be carried forward until they are fully absorbed.
GITA Project	a) 100% of qualifying capital expenditure incurred on green technology project from the date of application received by MIDA until the year of assessment 2023 (which encompasses renewable energy, energy efficiency, green building, green data centre and integrated waste management activity). b) The allowance can be offset against 70% of statutory income in the year of assessment. c) Unutilised allowances can be carried forward until they are fully absorbed.
GITE Services	a) 100% of statutory income from the date of application received by MIDA until the year of assessment 2023 (which comprises of renewable energy, energy efficiency, green building, green data centre, green township, certification/verification bodies and electric vehicles).

Category	Rate of Incentive
	b) A 70% income tax exemption of up to 10 years will be given to companies undertaking solar leasing activities

There are two main qualifying activities for tax incentives under SEDA:

Qualifying Activities	
Renewable Energy	Commercial and industrial business entities which undertake generation of energy in the form of electricity, steam, heat and chilled water using renewable energy resources such as solar power (including NEM), biomass, biogas, mini hydro and geothermal. *Note: Projects which have been approved with FiT for solar by SEDA are not eligible for the ITA.*
Energy Efficiency	Companies investing in energy efficient equipment or technologies and energy saving equipment.

(*source:* http://www.seda.gov.my/reportal/re-incentive/)

8. Renewable Power Purchase Agreement

In Malaysia, the Malaysian Renewable Energy (Renewable Energy Power Purchase Agreement) Rules 2011 sets out the different types of 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 DL 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. 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.

9. Development in respect of Waste-to-Energy Facility

Waste-to-Energy Facility ("**Wte Facility**") is a waste management facility that combusts wastes to produce electricity. 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 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 the MOF's Public Private Partnership Unit, i.e. UKAS - to lead the procurement of the WtE Proposal.

The first solid waste modular advanced recovery and treatment ("**SMART**") Wte Facility in Malaysia is situated in Ladang Tanah Merah, Port Dickson, Negeri Sembilan which is expected to be fully operational by 2020. The project, developed by Cypark Resources Bhd, has a 4ha built-up area and it would be able to undertake 600 tonnes of mechanically segregated and processed municipal solid waste a day. The RM300 million public-private partnership project was constructed in 2016 under the build-operate-manage-transfer concept for a lease period of twenty-five (25) years. The SMART Wte Facility would be able to produce between 20MW and 25MW of green energy.

Further, Worldwide Holdings Bhd, which is wholly owned by the Selangor state government, plans to develop a Wte Facility that is targeted for completion in year 2024. Worldwide Holdings Bhd is partnering with Western Power Clean Energy Sdn Bhd to work on the project with an estimated total cost of RM500 million in Jeram, Selangor. The project will be developed in two phases. The first phase is expected to be operational by 2022 and will produce between 20-25 megawatt of green energy, enough to power 25,000 household within the vicinity of the plant. The second phase of the project is set to be completed by 2024.

10. Net Energy Metering

The Government on Malaysia has implemented the Net Energy Metering (NEM) programme in Peninsular Malaysia. The NEM is a programme that specifically targets solar photovoltaic to complement the FiT system. The NEM is regulated by the ECM, with SEDA as the implementing agency.

What is NEM?

The NEM scheme is a billing mechanism that credits indirect solar photovoltaic ("**PV**") system users or owners for the electricity they add to the grid. The concept of NEM is that energy produced from the solar PV system installed will be consumed first, and any excess will be exported and sold to the DL on a "one-on-one offset basis" or equivalent to consumption minus generation times the tariff. There will be no differences in the sale and purchase prices of electricity as every 1kWh exported to the grid will be offset against 1 kWh consumed from the grid with gazetted tariff. This scheme is applicable to all domestic, commercial, industrial and agriculture sectors as long as they are the registered customers of TNB in Peninsular Malaysia.

Benefits

The energy generation by an NEM consumer will be consumed first which means there will be less energy import from the utility. The more energy generated from the solar PV system that is self-consumed; the more NEM consumers can save on their electricity bills as the electricity imported from the utility will be reduced. This is especially relevant for consumers who fall under the high electricity tariff block. In many countries, NEM is often used to hedge any future fluctuations or increase in electricity tariff.

Under the NEM, energy generated from the NEM consumer will be self-consumed first, and any excess energy generated will be exported to the DL on a "one-on-one" offset basis at the same consumption tariff, allowing the consumer to enjoy rebates in their utility bills. However, some premises, especially industry or manufacturing companies which may not be operating during the weekends may have excess energy to be exported to the grid. The credit will be allowed to roll over for a maximum of 24 months and net-off at the gazetted tariff.

The following is the (i) quota balance; and (ii) quota allocated in relation to NEM taken for the years 2019 to 2020:

Quota Balance	
Region	**Peninsular Malaysia**
Year	**2019-2020**
Domestic (MWac)	38.9173 out of 50
Commercial (MWac)	254.6906 out of 450
Total (MWac)	293.6079 out of 500

Quota Allocated		
Region	**Peninsular Malaysia**	
Year	**2019**	**2020**
Domestic (MWac)	2.9012	6.5742
Commercial (MWac)	7.6027	33.4503
Industrial (MWac)	21.6222	109.6918
Agriculture (MWac)	0.0000	2.9645
Total (MWac)	32.1261	152.6808

(*source:* http://www.seda.gov.my/reportal/nem/)

As at November 2019, KeTSA had announced a 50MW quota allocation for the NEM scheme in Sabah for the next ten (10) years.

The Guidelines for solar PV installation on NEM issued by the ECM sets out the registration procedures and requirements for any person seeking approval for installing a solar PV generating facility via to the DL network through NEM ("**NEM Guidelines**"). Amongst other requirements, the NEM assessment study to be conducted by the DL or its appointed consultant is a pre-requisite to obtain an approval in respect of a NEM application for installation above 72kW, which is used to determine the technical impact to the DL's electricity distribution network and establish technical and safety requirements that may necessary for the solar PV and meter installation.

Third Party Ownership and Financing

Under the improved NEM mechanism, NEM consumers will also be able to participate in NEM through third party ownership and financing options via the Supply Agreement for Renewable Energy ("**SARE**") programme or enter into solar power purchase agreements with third party investors/ owners, based on the concept of solar leasing. Under SARE, the parties will enter into a tripartite agreement and their respective roles will generally be as follows:

(a) NEM consumers;

(b) investors/ owners/ lessors of the assets of the PV panels ("**Lessors**"), who will conduct energy audit, finance, design, install and operate the solar PV system and will lease them to the Consumers. Depending on what is agreed between the Consumers and the Lessors, the Lessors will make a profit from the difference from the savings made of electricity bills by the Consumers; and

(c) TNB, who will provide the service of billing, collection and remittance of the payment by the Consumers to the Lessors and in return, TNB will impose a small service charge.

Further details of SARE and registration details are set out under the Guidelines for solar PV installation on NEM issued by the ECM.

Companies that wish to participate as Lessors in SARE must first be registered with SEDA. If the applicant is a Malaysian-incorporated company ("**Local Applicant'**), it is subject to a minimum paid-up capital of RM1,000,000 requirement, while if a company is incorporated outside Malaysia but intends to carry on business as a Lessor in Malaysia ("**Foreign Applicant**"), it is subject to a minimum paid-up capital of an amount equivalent to RM10,000,000. The Local Applicants are required to have 100% local engineering, procurement and construction capabilities by appointing SEDA-registered service providers, while not only are Foreign Applicants subject to that same condition, they can participate in projects with a capacity exceeding 250kWac and must ensure that at least 80% of the company's employees are local workers.

11. Self-Consumption

The Malaysian government introduced the self-consumption scheme pursuant to the issuance of the Guidelines on the Connection of Solar Photovoltaic Installation for Self-Consumption ("**SELCO Guidelines**"). Self-consumption or known as SELCO applies when electricity is being generated for own usage and any excess is not allowed to be exported to the grid. This mechanism encourages individuals, and commercial premise consumers to install solar PV system for their own consumptions, looking to hedge against the rising cost of electricity. As such, if the consumer of the solar PV system intends to export the excess energy generated from the installation to the DL's network, then the consumer should participate in the NEM scheme.

Only an individual or commercial premise consumer can install the solar PV system for self-consumption. Under the SELCO Guidelines, the consumer of the solar PV system is required to register the installation with the DL. For stand-alone systems (i.e. systems which are completely independent from any electricity utility grid), there is no capacity limit for solar PV system installation for self-consumption purposes. However, for non-stand-alone systems (i.e. systems which are connected to the electricity utility grid), the capacity limit for solar PV system installation must be lower than 75% of the maximum demand of the consumer's existing installation. Any person who uses, works or operates the installation above 24kW for single phase and 72kW for three phases, shall require a licence under the Electricity Supply Act 1990.

12. Large Scale Solar Photovoltaic Plant ("LSS Plant")

Apart from the NEM scheme, the ECM implements a competitive bidding programme to encourage development of grid-connected Large-Scale Solar ("**LSS**") projects, which will be connected to the either transmission network or distribution network (where relevant) of TNB or Sabah Electricity Sdn. Bhd. ("**SESB**") in Peninsular Malaysia, Sabah or Labuan pursuant to entering into a Solar Power Purchase Agreement

("**SPPA**") with the relevant DL. The government hopes that the implementation of LSS will increase Malaysia's Renewable Energy portion to 20% by 2025 and drive down the levelised cost of energy. Shortlisted bidders will be announced by the ECM in its website. The selection of the bidders is based on bids with the most competitive offer prices up to the total capacity to be procured and meeting all the Request for Proposal ("**RFP**") requirements.

In the second tender, the capacity of plants for which tenders are sought are from 1 to 30MW, with a target aggregate capacity of 360MW in Peninsular Malaysia and 100MW in Sabah/Labuan. Following the second bidding exercise, 41 bidders were selected to implement about 550MWac, which is expected to be commissioned in 2019 to 2020.

The third tender (intended for LSS projects to be launched in Peninsular Malaysia only), involving a total aggregate capacity of 500MW, garnered bid submissions during the submission period from February to August 2019, with a reference price at RM 0.3240/kWh. LSS projects for the third tender are expected to be commissioned in the year 2021.

The KeTSA has announced on 28 and 29 May 2020, calls for bids to participate in the fourth tender (known as LSS@MEnTARI), to develop up to 1,000MWac of large-scale solar power plants in Malaysia. There are 2 packages offered, which are: (a) an aggregate of 500MWac on offer, capacity of each plant to be between 10MWac – 20.99MWac; and (b) an aggregate of 500MWac on offer, capacity of each plant to be between 30MWac – 50MWac. The maximum capacity that a bidder may bid for is 30MWac. These LSS4 projects are expected to be commissioned in 31 December 2023. It is to be noted that under the previous LSS programmes, foreign shareholding in the bidders was expressly allowed. Instead, the LSS@MEnTARI is open only to locally incorporated companies that are 100% owned by Malaysians and companies listed in the local stock exchange (Bursa Malaysia) may also participate in the programme provided that at least 75% of its shares are held by Malaysians.

The Guidelines on LSS Plant for Connection to Electricity Networks issued by the ECM govern matters related to LSS in Malaysia, with the exception of Sarawak. Amongst the key principles of the LSS framework are:

a) The LSS Plant capacity range is as specified in the RFP. Under the previous LSS programs, the maximum export capacity is as follows:

Plant Location	Max. Export Capacity	
	2017-2018	2019-2020
Peninsular Malaysia	30MWac	100MWac
Sabah/Labuan	10MWac	N/A

b) The SPPA shall be based on take and pay energy only under a Build, Own and Operate (BOO) concession;

c) The LSS participant (i.e. the owner or developer of the LSS Plant) must be a locally- incorporated company of which the Malaysian equity interest in such company is at least 51% or a consortium of locally incorporated companies of which the Malaysian equity interest in each such locally incorporated company is at least 51% or a higher percentage to be determined by the ECM;

d) upon participation in the LSS program, there shall be no change to the shareholding structure of the LSS participant unless with prior written approval of the ECM;

e) The usage of land to be used for the LSS project may also be optimised for other economic activities (e.g. agricultural) and not restricted only to solar energy generation;

f) The LSS Plant may be a combination of several solar farms from different sites from one single shortlisted bidder and arising out of the same submission of the RFP and connected to one interconnection point, whereby a single SPPA with one energy rate shall be applied;

g) The connection to the electricity network, whether to the transmission network or distribution network, shall be based on technical criteria and evaluation through a comprehensive system study;

h) The PPA duration is 21 years with a fixed energy price throughout;

i) The offers by the bidders shall be based on the optimum output, final yield and specific yield of the proposed LSS power plant in accordance with its design and technology used;

j) The LSS developer shall declare the plant's energy production for twenty-one (21) years. In the SPPA, the developer is entitled to pay the energy rate up to the LSS Plant's Maximum Annual Allowable Quantity ("**MAAQ**"). Any energy beyond MAAQ, if accepted by TNB or SESB, shall be paid at the excess energy rate (which is the rate to be paid to the owner or developer of the LSS Plant in the event it sells net electrical output to TNB in a contract year in excess of the MAAQ of such contract year); and

k) The energy rate (as per the SPAA) shall include but is not limited to the EPCC costs, land costs, project development costs, financing costs, operation and maintenance costs and interconnection costs.

13. Peer-to-Peer (P2P) Energy Trading

The P2P Energy Trading programme was launched as part of SEDA's initiative under the Renewable Energy Transition Roadmap (RETR) 2035 to promote a more liberalised renewable energy market. How the P2P energy trading works is where the solar PV producer registered under the NEM scheme sells excess solar electricity generated through their solar panels ("**Prosumers**") on an energy trading platform, known as Power Ledger (on pilot run), to TNB consumers, at a rate competitive to the retailer's tariff, using TNB's grid.

Participating TNB consumers under this scheme may opt to purchase electricity from the Prosumer or from the retailer when available. In this instance, TNB plays the role of a grid operator and a retailer. As the grid operator, TNB will be compensated with a grid fee, while as a retailer, TNB will be compensated with a retailer's fee for operating the trading platform. Currently operating on an 8-month pilot run, the Alpha phase of the pilot run has commenced for two (2) months from November 2019, which will test the technical operability of the platform. Thereafter, the Beta phase of the pilot run will commence until June 2020 to enable commercial and financial settlements to be facilitated among Prosumers and TNB consumers vide TNB's electricity bills. At the end of the pilot run, SEDA will peruse the findings to suggest further improvements before official implementation of the P2P Energy Trading programme.

E. Non-Renewable Energy

Coal, natural gas, oil, hydro and other natural resources are primary sources to generate electrical energy. In 2017, coal, gas, oil and hydro contributed 44.3%, 37.4%, 0.5 % and 17.3 %, respectively to the generation of electricity in Malaysia.

In Peninsular Malaysia, 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 ("**ECM**") 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 ECM 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 ECM 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:

a) Promote competition in generation and supply of electricity to, *inter alia,* ensure the optimum supply of electricity at reasonable prices;

b) Promote and encourage the generation of energy for the economic development of Malaysia;

c) Ensure all reasonable claims for electricity supply are met;

d) Ensure consumer needs in terms of affordable prices, security, reliability of supply and quality of services are met;

e) Ensure the licensee can finance the activities as set out in the licence; and

f) 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 ECM. 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 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 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.

c) Any qualified players, new or established, are allowed to participate in the competitive bidding process by putting in their bids when the ECM issues a request-for-proposal ("**RFP**") for any new plant. Bidders who submit the RFP will be shortlisted by the ECM and eventually, winners of the competitive

bidding will be published on the ECM website (http://www.st.gov.my/).

Notwithstanding the introduction of competitive bidding, certain projects were awarded by the previous government without any competitive bidding. The new administration has reaffirmed its commitment to competitive bidding and cancelled some of those awards and is closely scrutinising some of the others to ensure they provide value for money.

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 was successfully completed in March 2016 as the first transaction in Malaysia where foreign shareholders owns a 100% stake in Malaysian power plants. The sale was the largest announced transaction in Malaysia and one of the largest in the Asian power sector.

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 TNB (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). As at December 2018, TNB owns a 70% stake in Project MB. The remaining 30% stake is currently owned by Japanese companies Mitsui & Co Ltd and Chugoku Electric Power Co Inc.

The first unit of the project started its commercial operation in August 2019, whilst the second unit started operation since 27 December 2019

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.

a) Project 4A Back on Track

Project 4A which involves a 1,440 megawatt (MW) combined cycle power plant to be located in Pasir Gudang, Johor was awarded to a consortium back in 2014 and never took off due to several reasons. Recently, TNB decided to buy the majority 51% stake in the operating company for the power plant, namely, Southern Power Generation Sdn Bhd. It appears that TNB had been invited to get involved as TNB only paid a nominal sum of RM50 to acquire that stake

It is to be noted that TNB had been part of the initial consortium awarded with Project 4A, along with YTL Power International Bhd and SIPP Energy Sdn Bhd, a company linked to the Johor royal family. TNB's re-entry into Project 4A is seen as a major development in the power sector.

b) Project 4B

Edra Power Holdings Sdn Bhd has signed the power purchase agreement ("**PPA**") between TNB and its subsidiary, Edra Energy Sdn Bhd ("**Edra**") and the development of Malaysia's largest combined cycle gas turbine ("**CCGT**") power plant in Alor Gajah, Melaka. Edra Energy would construct, finance, own, operate and maintain a 2,242 MW CCGT power plant, which, upon completion would be the largest CCGT plant. It will consist of three generating blocks, with each having a capacity of 747.4 MW. Under the PPA dated April 11, 2017, Edra Energy will sell the electrical energy generated from the new plant to TNB for a period of 21

years from the commercial date of the first generating block.

In January 2018, Edra issued a RM5.28 Billion Sukuk Wakalah to fund the construction of Project 4B.

5. MESI 2.0

In September 2019, the Malaysian Government approved a 10 year master plan known as Malaysia Electric Supply Industry 2.0 ("**MESI 2.0**") to reform the power industry. It aims to increase industry efficiency, develop the industry structure, regulations and key processes, empower consumers in the electricity supply industry as well as democratise and decentralise the electricity supply industry. which may create more opportunities in the market.

Under MESI 2.0, the role of government in fixing electricity tariffs will be reduced. The mechanism for this is being developed by a special purpose agency, Malaysia Programme Officer for Power Electricity Reform ("**MyPower**"). Via MESI 2.0, independent power producers will be allowed to source for cheaper fuel other than from TNB Fuel Services Sdn. Bhd. or from PETRONAS. MyPower is currently engaging with independent power producers to come up with these new rules and incentive mechanisms, to open up fuel sourcing in the value chain. These rules are expected to be published by the end of 2020, although there are now expected delays to this. As part of the liberalisation of the electricity market, the government has decided to migrate the existing Power Purchase Agreements ("**PPA**") framework towards a wholesale market in future. Renewable energy suppliers will also be able to compete directly in the retail market. The more transparent and competitive electricity market will ensure a lower cost of electricity for Malaysian consumers.

F. Infrastructure on Oil & Gas

Malaysia is the second largest oil producer in Southeast Asia, one of the largest liquified natural gas ("**LNG**") exporter 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:

(a) Petroleum Development Act 1974 ("**PDA**"); and
(b) 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.

As part of its gas market reforms, Malaysia has in 2017, implemented a third-party access system through the amendment of the GSA. The GSA now provides for, amongst others, the licensing of the import into regasification terminal, regasification, shipping, transportation, distribution, retail or use of gas in the supply of gas through pipelines, the supply of gas at reasonable prices, control of gas supply pipelines, installations and appliances with respect to matters relating to safety of persons in the distribution, retail or use of gas and for connected purposes.

Under the PDA, the Malaysian government entrusted the entire ownership and management of the country's oil and gas resources to the national oil company, Petroliam Nasional Berhad ("**Petronas**"). Under this framework, Petronas is responsible for the exploitation, management, and development of petroleum resources in the country, with a mandate to develop the industry in accordance to commercial needs, whilst balancing socio-economic concerns.

Pursuant to the Petroleum Regulations 1974 ("**Petroleum Regulations**"), Petronas is the responsible authority for licensing any third-party contractors ("**Contractors**") wishing to participate in upstream petroleum activities, including exploration and exploitation. Malaysian Petroleum Management ("**MPM**") is a division within Petronas, who exercises the functions and powers of Petronas as the regulatory authority under the legislation for upstream purposes. It is not however, a separate legal entity, and is considered part of Petronas. It is MPM therefore which more specifically assesses, manages, and awards petroleum arrangement contracts in the upstream sector. This role allows Petronas to manage its affairs under the dual function of being both a regulator, as well as an operator in the upstream business.

On the other hand, pursuant to the regulations, downstream operations require approval from the Secretary General of MITI and/or MDTCA, depending on the type of downstream activity being carried out. Petronas is the only company in Malaysia which is legally allowed to carry out business in the downstream sector without the need for further permission or approval.

In summary, for upstream activities, licensing with Petronas is required, whereas in downstream activities, MITI and/or MDTCA licensing is required. However, where a contractor wishes to participate in downstream activities tendered by Petronas, a registration with Petronas would be required, for both its contractors and often also, its sub-contractors and other third parties executing contracts.

1. History of Production Sharing Contracts

Since 1974, Malaysia has evolved from a concession-based model, to the Production Sharing Contract ("**PSC**") model in terms of petroleum arrangement contracts. Exploration rights are granted through PSCs, pursuant to Petronas' powers and role under the PDA and Petroleum Regulations. Companies successful in the bidding rounds explore for hydrocarbons on behalf of

Petronas. If oil and/or gas is discovered during the duration of the PSC, it can subsequently proceed to develop and produce the hydrocarbon resources.

Volatility in oil prices, as well as the challenges of dealing with maturing hydrocarbon reserves have contributed to the evolution of the PSCs through the years. The regulatory response from MPM has thus been to evolve the PSC types in order to address commercial and operational challenges. There are now four (4) recognised types of PSCs particularly used offshore, being:

(a) Revenue over Cost ("**R/C**") PSCs, mostly used in water depths under 200 metres;
(b) Deepwater PSCs, used for water depths between 200 to 1000 metres;
(c) Ultra Deepwater PSCs for water depths beyond 1000 metres; and
(d) High Pressure High Temperature PSCs.

The different PSC models usually denote different risk-sharing, or other policy details in terms of minimum work and financial commitments – depending on the level of risk the Operator or PSC Contractor is required to undertake in relation to particular fields. To attract greater international participation, Petronas via its subsidiaries tend to accord better fiscal terms, longer durations for discovery, and friendlier cost recovery mechanisms for marginal, brownfield, deep water or ultra-deep water fields. These also work hand in hand with Malaysia's tax regime, which accords a variety of incentives for marginal, high CO2, high-pressure high-temperature and enhance oil recovery projects.

Since 2011, Petronas have also executed Risk Service Contracts ("**RSC**") for the development and production of discovered marginal fields. This works on a reimbursement basis in which Petronas retains ownership of the oil, whilst exploration costs are borne by RSC contractors. Reimbursements are made upon discovery of commercial fields, with RSC contractors being entitled to a share of the profit.

Obligations are imposed contractually in the PSC, rather than as a matter of law. As such, obligations vary depending on the outcome of the PSC negotiations. In recent years, the combination of geological factors (e.g. Deepwater exploration, brownfields, and enhanced oil recovery projects, etc.) as well as lower oil prices resulted in cost-sharing regimes that generally saw Petronas Carigali Sdn. Bhd. ("**Carigali**"), Petronas' exploration and production arm, shoulder more risks than usual, such as was seen with PTTEP HKO in 2018 (as explained further below). The maturity of Malaysia's oil & gas fields does explain the move toward the R/C and Deepwater PSC models which are more flexible in accommodating reinvestment, and are geared towards small, or marginal discoveries.

The PSC arrangement has been the backbone of continued investment. Since 1974, Malaysia has produced 9 billion barrels of oil, and 50 trillion cubic feet of gas. In the last 45 years, there have been more than 1,200 exploration wells drilled, resulting in the discovery of around 7 billion barrels of oil, and 75 trillion cubic feet that have been considered to be commercially viable. In 2018 alone, Petronas published figures state that industry players have invested in more than RM 29 billion (USD $6.96 billion) in exploration, development and production activities in Malaysia.

Malaysia Oil & Gas Regulatory Framework

2. Exploration and Production

1. The Petroleum Arrangement Contract

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.

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, and provide for:

(a) Scope and duration of contract;
(b) Fiscal terms;
(c) Map and details of the contract area;
(d) Minimum work commitments;
(e) Minimum financial commitments;
(f) Participating interests of other contractors;
(g) Conduct of management of operations;
(h) Requirements for work programming and budgeting
(i) Methods of segregation and valuation of hydrocarbons; and
(j) Cost recovery mechanisms.

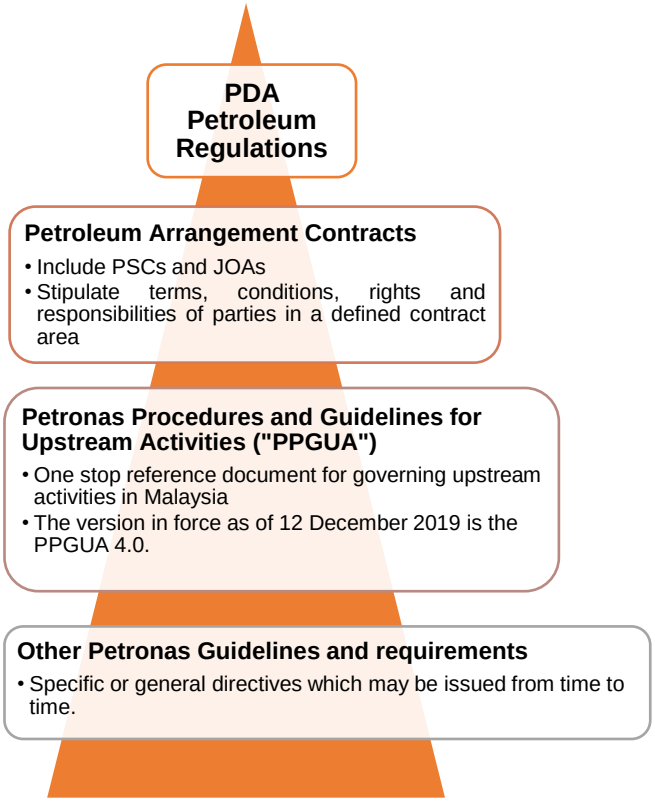
The R/C models typically involve a total contract duration of 27 years, with 3 years being the cap for exploration. Cost ceilings and profit sharing is done on a sliding scale, measured against an R/C Index, and supplementary payments. Profit sharing (after deducting royalty, export duty petroleum income tax, research cess, and costs) for oil goes up to a maximum of 70% of profits, and 60% for gas, to the PSC Contractor. The R/C model is the most common PSC model in operation in Malaysia today.

By comparison, a Deepwater PSC might carry a contract duration of 30 years, with longer periods set out for exploration, development and production, and a sliding scale for supplementary payments (e.g. 50% under 100 million barrels of oil or other liquid hydrocarbons (MMBbl), 60% between 100 to 200 MMBbl, and 70% above 200 MMBbl).

It is not unusual for there to be more than one contracting party to the PSC owing to the high-risk nature of the venture, including the risk that no commercially viable hydrocarbons may be found despite considerable capital outlay. However, there will usually be one designated "Operator" with primary responsibility who "operates" on behalf of all other participating contractors.

PSCs often work hand-in-hand with a Joint Operating Agreement ("**JOA**."). JOAs set out the obligations between the designated Operator, and other investors for petroleum operation responsibilities, as well as how revenue is to be split.

PSCs are very much part of the regulatory ecosystem for the oil and gas industry in Malaysia, which is summarised as follows:



PSC Contractors are time-bound under the PSCs, which define the periods for exploration, development and production. If no commercially viable hydrocarbons are found, or where the PSC has expired, the hydrocarbon field (also known as '*acreage*') is returned to MPM.

The PSC requires the PSC Contractor to provide all financing, and bear all costs and risks of exploration, development and production activities in exchange for a share of the total production in the PSC area. Petronas owns all PSC data and assets. The PSC Contractors are also required to, amongst others, submit a PSC Work Programme and Budget ("**WPB**") annually. The WPB is used to monitor and control Contractor expenditure via an approval process. Failure to comply with these requirements may result in automatic relinquishment of the rights to carry out the operations back to Petronas.

As part of PSC obligations, Operators are also required to budget for and accommodate all decommissioning and well abandonment activities. As many mature PSC blocks in Malaysia are reaching the end of their production life cycles, Petronas has reported in both its Activity Outlook 2019-2021 as well as its Activity Outlook 2020-2022, an expected ramp-up in demand for activity in this part of the upstream sector, with an estimated 44 per cent of facilities in Malaysian waters operating beyond design life.

2. General Licensing Regime

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 receive a licence from Petronas, which in practice, will normally take the form of a PSC.

For the supply of goods and services however:

(a) All companies wishing to supply goods and services in the upstream sector are required to be licensed by Petronas; and
(b) For certain activities, companies wishing to supply goods and services in the downstream sector are required to be licensed with MITI and/or MDTCA, however to the extent it is servicing a Petronas contract or sub-contract, such company may also have to be registered with Petronas.

It should also be noted that the PDA prohibits any person apart from Petronas from carrying on business in downstream operations (e.g. processing / refining petroleum, manufacturing petrochemical products from petroleum, marketing, or distributing petroleum or petrochemical products), unless he has permission given by the Prime Minister. Please see further below on the permits and regulatory authorities responsible.

Generally speaking, there are substantial local or Bumiputera equity conditions for companies wishing to supply goods and services enforced through Petronas' licensing and registration regime. As such, foreign companies in the business of supplying goods and services often either do so through an agency agreement with local companies licensed by Petronas, or by forming a joint venture with a local company / individual. In the case of agencies, the company providing agency services must be licensed by Petronas. For joint ventures, licensing, permits or authorisations from Petronas would still have to be obtained.

3. 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 MDTCA is responsible for administrating the PSMA. Licences for transportation and storage of petroleum are issued by the MDTCA.

The 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.

4. 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.

5. 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.

6. 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.

7. Goods and Service Providers

As stated above, the PDA, Petroleum Regulations, and Petronas' Licensing Guidelines, require providers of goods and services in the upstream sector to be licensed by Petronas. The licensing regime also imposes the same licensing requirements on affiliate and sub-contractors. This primarily takes the form of obtaining a 'Standardised Work and Equipment Categories', or "**SWEC Code**". As a matter of policy, Petronas also requires companies or individuals supplying goods and services to register with Petronas before participating in its own tenders for the supply of goods and services in the downstream sector. Although not always the case, the same consideration may sometimes apply in the case of where a provider is bidding for a contract with another downstream player which holds a Petronas contract, in which case SWEC registration can sometimes be imposed on sub-contractors. Other than that, the considerations for licensing from MITI and/or MDTCA will also apply.

SWECs are generally divided into two types, being 'Product SWECs' and 'Service SWECs'.

The general requirements for application of Petronas licence or registration are:

a) the company must be registered with the Registrar of Companies as a private incorporated or public incorporated company;

b) the company must have a minimum paid-up capital of not less than RM100,000 (for licence application) and RM10,000 (for registration application). Paid-up capital must be in the form of ordinary shares; and

c) meet the Bumiputra participation requirement for equity, Board of Directors, management and employee based on the SWEC Code applied (i.e. SWEC with a minimum Bumiputra 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 Code listings. The SWEC Code listings stipulate registration requirements, minimum mode of operation of the applicant, as well as the minimum Bumiputra participation requirements (if any). Operational stipulations are provided in the 'Enhanced Products & Services SWECs Minimum Technical Requirements', and often involve minimum experience and qualifications of key personnel, external body registration (e.g. business licenses from local authorities, DOSH or CIDB approvals), minimum facilities, and applicable standards (e.g. ISO, API).

If the SWEC requires 100% Bumiputra participation, the 100% requirement is only for equity, while the minimum Bumiputra requirement for the other levels are as follows:

a) 75% minimum Bumiputra participation for board of directors;

b) 75% minimum Bumiputera participation for management; and

c) 51% minimum Bumiputera participation for the applicant's employees.

There are however a limited number of 'Strategic SWECs' where Petronas does not impose any Bumiputera equity requirements.

If any category that an applicant wishes to apply for is not listed in the SWEC Code List, the applicant should contact the Petronas Licensing and Registration office, prior to selecting the SWEC closest to the scope that the applicant intends to apply for.

8. Processing & Refining and Marketing & Distribution

Pursuant to the Petroleum Regulations, downstream activities are regulated by two ministries: MDTCA 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 (Revised 1980). 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 MDTCA for their sale under the Control of Supplies Regulations 1974.

9. Latest Developments

1. Recent Activity

According to Petronas' latest published figures (December 2018), there are 98 PSCs, and 3 RSCs in Malaysia. However more updated figures as of August 2019 breakdown the list of investors to 21 designated Operators, amongst a total of 33 investors. Amongst the main Operators are ExxonMobil, Shell, Hess, Repsol, Mubadala Petroleum, Petrofac, Hibiscus Petroleum, Total Energy, PTTEP, and Sapura Energy.

In December 2019, a PSC and JOA for Block PM409 was awarded to EnQuest Petroleum Production Malaysia Ltd. and Carigali pursuant to the 2019 Malaysia Bidding Round. In 2018, Petronas awarded two offshore blocks, PM407 and Block PM415 to PTT Exploration and Production Hong Kong Offshore Ltd (PTTEP HKO) and Carigali. Unusually, Carigali maintained participating interests of 45% for Block PM407 and 30% for Block PM415 instead of the usual 15%.

In October 2019, Petronas opened its 2020 Malaysia Bidding Round for registration of interest for the bidding of PSCs. As of December 2019, Petronas is accepting registrations of interest for the following PSCs and contracts:

(a) Four (4) exploration/production blocks off the eastern coast of Peninsular Malaysia;
(b) Four (4) exploration/production blocks off the coast of Sabah;
(c) Two (2) discovered resource opportunities ("DRO") off the coast of Peninsular Malaysia;
(d) Two (2) DROs off the coast of Sabah; and
(e) Three (3) technical study opportunities focussing on late life assets and gas fields.

The PSCs for the 2020 Bidding Round are expected to be awarded sometime around Q3 of 2020.

2. Launch of the Annual Petronas Activity Outlook

As regulator, Petronas has committed to issuing an Activity Outlook report on an annual basis. The Activity Outlook report sets out the national oil company's views on the projection of oil and gas markets, and its expected activity pipeline. At the date of this Guide, the Activity Outlook 2020-2022 has been released.

For first time, Activity Outlook 2019-2021 listed major contracts, key categories and associated services due for tendering or re-tendering in 2020 to 2021. These include activities in both the upstream and midstream sector, with indications on current contracts, where contracts would potentially be extended, and where tenders are due to be open for new contracts. General categories are:

(a) Drilling rigs & hydraulic workover units (HWU);
(b) Offshore fabrications;
(c) Linepipes and flexible pipes;
(d) Offshore installations;
(e) Hook-up & Commissioning (HUC) and Modification, Construction & Maintenance;

(f) Underwater Services;
(g) Marine Vessels;
(h) Plant Turnaround; and
(i) Others (e.g. *wellhead maintenance, helicopter services, water treatment solution programmes, conductors, geological samples and lab core analysis services,* etc.).

Activity Outlook 2020-2022 has continued in this manner, providing even more specifics on its planned Engineering, Construction and Projects in both brownfield and greenfield projects, as well as further detail relating to its downstream sector.

Petronas' stated aim in releasing the information in a transparent manner is to enable industry players sufficient lead times to strategize, organise partnerships including where required, partnerships for manpower, financial support, and other logistical synergies, as well as be better prepared to offer competitive proposals.

3. Upgrade of Upstream, Midstream and Downstream Facilities in Malaysia Contributing to Holistic Integrated Industry

Since 2011, the Malaysian government and Petronas have embarked on a range of mega-projects aimed at up-scaling and adding value to the oil and gas industry in the country. Pengerang Integrated Complex ("**PIC**") is a project development in Pengerang, Southern Johor, Malaysia. The 22,000-acre project is nearing completion and will be essential in adding value to the downstream oil and gas production chain. The complex houses oil refineries, naphtha crackers, petrochemical plants, liquefied natural gas ("**LNG**") import terminal, a regasification plant, and also includes the Pengerang Independent Deepwater Petroleum Terminal ("**PIDPT**"), which is a joint-venture between DIALOG Group of Malaysia ("**Dialog**"), Royal Vopak of Netherlands and Johor State Secretary Incorporated. The PIDPT serves as a centralised storage facility for trading, refining and petrochemical industry.

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 PIC is poised to be a regional centre for oil and gas services, able to complement Singapore's oil and gas facilities, including storage.

The Refinery and Petrochemical Integrated Development ("**RAPID**") Project is the jewel in the crown of the PIC. Testing and commissioning are currently ongoing. Upon completion, RAPID will have a 300,000 bbl. per day refining capacity, and will produce a range of refined petroleum products including low sulphur jet fuel, motor gasoline and diesel meeting Euro 5 fuel specifications. It will also generate feedstock for the integrated petrochemical complex with a nameplate capacity of 3.3 million metric tonnes per annum.

In March 2018, Petronas and Saudi Aramco concluded a Share Purchase Agreement for equal ownership and participation of the refinery, cracker, and selected petrochemical facilities in RAPID and the PIC, resulting in two joint venture entities being the Pengerang Refining Company Sdn Bhd (PrefChem Refining), and the Pengerang Petrochemical Company Sdn Bhd (PrefChem Petrochemical). These two companies are collectively known as "PrefChem". The alliance is widely expected to synergise operations between the two joint venture partners, and strengthen Saudi Aramco's refining and fuels marketing, and chemicals business position in South East Asia.

Since 2017, Petronas has also looked to upgrading its LNG processing capacity. In April 2017, Petronas' first floating LNG facility, named PFLNG Satu loaded its first cargo in Bintulu. PFLNG Satu is designed for water depths between 70 to 200 metres and possesses a processing capacity of 1.2 million tonnes per annum. The construction of Petronas' second floating LNG processing facility is also currently underway. Named PFLNG Dua, the vessel is slated to commence sail away in February 2020 and will add production capacity of more than 34 million tonnes annually. PFLNG Dua is designed to extract gas from deep water gas reservoirs in depths of up to 1,500 metres, sealing Petronas' role as a fully integrated oil and gas player.

4. Dispute over oil Rights in Sarawak

Fresh PSC awards for Sarawak blocks have been understandably muted in recent years owing to the legal dispute between the State of Sarawak and Petronas over oil ownership rights and royalties. Via the 1969 Proclamation of Emergency, a series of laws have been passed pursuant to it since, limiting Sarawak's powers to within 3 nautical miles of the coast. This enabled Petronas to assume ownership of all offshore oil ownership off the coast of Sarawak since 1974 pursuant to the PDA, and other relevant laws that have been passed since. Relations between the Federal Government and the state began to break down in 2008 when the Federal Government announced that it had no plans to revise oil royalty rates due to Sarawak, and state politicians began to question the legality of the PDA.

In 2017, a 100% Sarawak-owned petroleum company was established by the state called Petros, aimed at assuming the role Petronas had historically played in the state as owner and regulator of all hydrocarbon rights.

In July 2018, the Sarawak state assembly passed the Sarawak Oil Mining (Amendment) Bill (2018), which purports to regulate all oil and gas activities in the state. All oil and gas companies operating in Sarawak waters have been given until the end of 2019 to comply. Since 1 January 2019, Sarawak has also enforced a 5% tax on sales of all petroleum products exiting the state, and charged Petronas with paying the sales tax due under the State Sales Tax Ordinance 1998. Petronas has disputed the legality of these taxes, and the Sarawak state government has commenced legal action against the national oil company at in the courts.

In May 2020, the State Government of Sarawak and Petronas reached an agreement on the management of Sarawak oil and gas assets and the sales tax on petroleum products. In addition to the withdrawal of all legal proceedings, Petronas through its subsidiaries, agreed to make full payment of sales tax imposed by the State Government of Sarawak on petroleum products for 2019 amounting to RM2 billion at 5% of the value of the product. Both parties further agreed that future sales tax on petroleum products will be lower and staggered based on future negotiations and the Sarawak State Government has also agreed that the sales tax will be limited to petroleum products provided under the State Sales Tax (Taxable Goods and Rate of Tax)(Amendment)(No 2) Order, 2018. However, all agreements between the Sarawak and Petronas under the PDA are still valid and in force. Similarly, Petronas is still recognised as a national oil company with full authority to regulate the entire development of the country's oil and gas industry, in accordance with the Federal Constitution.

10. Third Party Access

1. Background

Third Party Access ("**TPA**") is a system which allows third parties to access and utilise the capacity of a gas facility that they do not own or operate, for the purposes of delivering gas to consumers. The system aims to ensure security of supply, create a platform for healthy competition and to provide room for growth of the Malaysian gas industry. There are 3 types of gas facilities which are covered under the TPA, and they are the regasification terminals ("**RGT**"), transmission pipelines and distribution pipelines ("**Facilities**").

The TPA is implemented by way of the Gas Supply (Amendment) Act 2016, which effectively amended the Gas Supply Act 1993 and came into operation on 16 January 2017 ("**GSA**"). The ECM is the body responsible to implement the TPA. The amendments are in line with the Government's aim to liberalise the gas supply industry and to enable third party access.

The GSA, amongst other things, extends the regulatory ambit of the ECM and covers the regulation of the import into RGT, regasification, distribution, transportation, shipping, retail and use of gas (collectively, the "**Regulated Activities**"). "*Gas*" is defined under the GSA to mean natural gas, liquified natural gas or liquified petroleum gas.

2. *The Regulated Activities*

Parties involved or intending to participate in various aspects of the gas supply chain are now required to apply for a licence, from the ECM, to carry out any of the Regulated Activities. The list of the licences issued under the GSA and their corresponding licensed activities are set out as follows:

Licence Description	Licensed Activity
Import into RGT Licence	Bringing or causing to be brought LNG into or within Malaysia by any means other than by transhipment.
Regasification Licence	Operating and maintaining an RGT to regasify LNG into natural gas and includes receiving, storing and after the regasification, delivering the gas through the RGT pipeline.
Shipping Licence	Making arrangements with a regasification, transportation or distribution licensee for gas to be processed or delivered through an RGT, transmission pipeline or distribution pipeline to consumers' premises.
Transportation Licence	The activity carried out by a transportation licensee for the delivery of gas through the transmission pipeline under an arrangement with a shipping licensee.
Distribution Licence	The activity carried out by a distribution licensee to operate and maintain the distribution pipeline to deliver gas through the distribution pipeline under an arrangement with a shipping licensee.
Retail Licence	The sale or use of gas through the retail licensee's piping system to consumer's premises where the gas is either (a) received from a storage tank or cylinder on the retail licensee's own property or premises or on the property or premises of the owner of occupier; or (b) received through distribution pipelines.
Private Gas Licence	The use of gas for own utilisation through a piping system: (a) from a storage tank or cylinder on the licensee's own property or premises or on the property or premises of the owner or occupier; or (b) from gas received through a distribution pipeline, but does not include a person obtaining the supply of gas from a retail licensee.

Based on the Guidelines on Licence Application issued by the ECM, the general requirements applicable to the Regulated Activities are as follows:

a) save for private gas licensee and other circumstances as may be determined by the ECM, an entity may only hold one licence at any particular time;

b) other than the import into RGT licensee, the other licenses shall be granted only to persons incorporated in Malaysia and having its place of business in Malaysia;

c) GSA licence will not be granted if the ECM is of the opinion that it may give rise to a conflict of interest in the discharge of any duty imposed on an applicant (e.g. all directors sitting on the board of directors of the applicant may not hold any directorships on the board of directors of any other applicant or any other holder of a licence issued under the GSA); and

d) a minimum paid-up capital:

(i) of RM 5 million is required for a regasification licence, transportation licence, distribution and shipping licence;

(ii) of RM 1 million is required for an import into RGT licence; and

(iii) is not specified for retail licence.

The lists of licensees in respect of the import into RGT licence, shipping licence, regasification licence, transportation licence and distribution licence are published on the ECM website.

3. Codes and Guidelines under the TPA System

The ECM is empowered by the GSA to develop and issue amongst other things, codes and guidelines, such as the following:

a) the TPA Code for RGT;

b) the TPA Code for transmission pipelines;

c) the TPA Code for distributions pipeline;

d) Guidelines on Competition for the Malaysian Gas Market in relation to Market Definition, Anti-Competitive Agreements and Abuse of Dominant Position;

e) Guidelines on Licence Application;

f) Guidelines on Determination of Regasification Facility Tariff Under Incentive-Based Regulation;

g) Guidelines on Determination of Gas Transportation Facility Tariff Under Incentive-Based Regulation; and

h) Guidelines on Determination of Gas Distribution Facility Tariff Under Incentive-Based Regulation.

Each of the TPA Codes requires the Facility owner licensee to put in place the following documents for the utilisation of its facility:

a) Access Arrangement, a document which sets out the standard principles of arrangement between the respective owner of the Facility and the parties accessing the Facility.

b) Service Agreements, such as the Regasification Agreement, Gas Transportation Agreement and Gas Distribution Agreement, to be entered into between the shipping licensee and Facility owner licensee.

c) Gas Connection Manual, document to be established between each Facility owner licensee and the parties whose facilities are physically connected to its Facility.

4. Regulation of Tariffs

In view of the monopolistic nature of the Facilities owners' ownership of the Facilities, the tariffs for the utilisation of the Facilities are regulated to ensure a level playing field and fairness to gas market participants.

The ECM, with the approval of the Minister, may determine the regulated facility tariffs and charges as may be imposed by the regasification, transportation or distribution licensees for the use of their respective gas facilities; and prices for the sale or use of gas through the piping system imposed by retail licensee to its customers. The approved tariffs for the Facilities are published on the ECM's website[38].

On the other hand, the prices for the sale of gas at the importation stage (i.e., between the gas producer and/or import into RGT licensee and shipping licensee), shipping of gas (i.e., between the shipping licensee and consumer) and retail stage[39], are unregulated and

[38] https://www.st.gov.my/web/industry/details/3/4

[39] The GSA empowers the ECM with the right (with approval of the Minister) to regulate the tariffs and charges for the sale or use of gas through the piping system imposed by retail licensee to its customers, however, as of the date of this guide, such tariff has yet to be determined by the ECM. In the interim, the price is commercially determined between the retail licensee and customer.

commercially determined by the contracting parties involved in the transaction.

5. Latest Development

On 7 October 2019, Tenaga Nasional Berhad ("**TNB**") received its first delivery of gas from Shell Malaysia Trading Sdn Bhd to test the TPA arrangement via the RGT in Sungai Udang, Melaka and Peninsular Gas Utilisation (PGU) gas pipeline network owned by Petronas Gas Berhad. A total of 3.5 trillion British thermal units (TBtu) gas was delivered to TNB's Tuanku Jaafar Power Station in Port Dickson and TNB Connaught Bridge Power Station in Klang[40].

Prior to 7 October 2019, no other entity has ever brought in LNG cargo or delivered gas to the power generation sector except for Petronas, as the sole supplier. The main objective of TNB bringing in its maiden LNG trial cargo is to test the effectiveness of the TPA arrangement via the RGT in Sg. Udang, Melaka and Peninsular Gas Utilisation (PGU) gas pipeline network owned by Petronas Gas Berhad. It is hoped that the first delivery of gas under the TPA will attract more third-party cargo into Malaysia.

[40] https://themalaysianreserve.com/2019/10/03/tnb-unit-partners-shell-malaysia-on-maiden-lng-cargo/

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 led to problems with the supply and quality of water. In 2006, the Malaysian Government introduced two new pieces of legislation to reform the water services industry, namely the Water Supply Industry Act 2006 ("**WSIA**") and the Suruhanjaya Perkhidmatan Air Negara Act 2006 ("**SPAN Act**").

The SPAN Act established a National Water Services Commission known as Suruhanjaya Perkhidmatan Air Negara ("**SPAN**"). The SPAN Act outlines the functions of SPAN, 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, Science, Technology, Environment and Climate Change ("**MESTECC**") oversees water supply and sanitation policies. It is assisted by the Jabatan Bekalan Air (Water Supply Department).

Pengurusan Aset Air Berhad ("**PAAB**") is a holder of a facilities licence issued by SPAN pursuant to the WSIA and is a wholly-owned company of the Minister of Finance Inc., incorporated with the objective of holding the nation's water assets, developing water infrastructure in Malaysia and sourcing for its funding. As of March 2017, 8 of the 11 states in Peninsular Malaysia, including Negeri Sembilan, Melaka, Johor, Perak, Penang, Kelantan, Selangor and Perlis have signed an agreement to transfer assets to PAAB. These states are able to access financing for development of new water infrastructure, refurbishment and upgrading works by PAAB.

The MESTECC has also recently addressed the loss through Non-Revenue Water ("**NRW**"), a national issue, due to water leakage from worn-out pipes, water theft and inaccuracies of meters. This is in line with efforts to promote sustainable development. In December 2018, the Government had approved a RM1.9 billion allocation for the implementation of NRW reduction programmes to assist operators in achieving the nationwide NRW target of 31% by 2020. According to the MESTECC, NRW was over 31% in 2015. It has been reported that Pengurusan Air Selangor Sdn Bhd ("**Air Selangor**") has exceeded its target in reducing NRW by end 2017.

Air Selangor has also officially become the sole water supplier for Selangor, Kuala Lumpur and Putrajaya effective from 13 September 2019. It has completed the takeover of all private concessionaires, namely Puncak Niaga Sdn Bhd ("**PNSB**"), Syarikat Bekalan Air Selangor Sdn Bhd ("**SYABAS**"), Konsortium ABASS Sdn Bhd ("**ABASS**"), Konsortium Air Selangor Sdn Bhd ("**KASB**") and Syarikat Pengeluar Air Sungai Selangor Sdn Bhd ("**SPLASH**"). The wholly owned state firm will now be responsible to continuously improve its infrastructure to ensure uninterrupted and clean water supply and quality service to users in these three areas, as part of Selangor's water consolidation plan that finally concluded after a decade.

Air Selangor spent RM1.1 billion between 2016 and 2018 to upgrade and repair various assets and water supply infrastructures. This includes the repair of water treatment plants, reservoirs, pump houses and the replacement of water pipes and NRW reduction programmes.

The list of other state and private owned companies responsible for the supply of water services in the respective states are:

State	Name of Company
Penang	Perbadanan Bekalan Air Pulau Pinang
Johor	Ranhill SAJ Sdn Bhd
Pahang	Pengurusan Air Pahang Berhad
Terengganu	Syarikat Air Terengganu
Melaka	Syarikat Air Melaka Berhad
Negeri Sembilan	Syarikat Air Negeri Sembilan Sdn Bhd
Kelantan	Air Kelantan Sdn. Bhd.
Perlis	Syarikat Air Perlis

2. Sewerage Industry

Similar to the water supply industry, the sewerage industry is governed under the WSIA and is regulated by the Sewerage Services Department of SPAN. Apart from the WSIA, there are other regulations that relate to the planning, design and construction of sewerage system and the compulsory capital contributions by sewerage operators, namely:

a) the Water Services Industry (Sewerage Capital Contribution Fund) Regulations 2011;
b) the Water Services Industry (Planning, Design and Construction of Sewerage System and Septic Tank) Rules 2013; and
c) the Sewerage Services (Authorisation to Demand, collect and Retain Sewerage Charges) Order 1995.

Indah Water Konsortium Sdn Bhd ("**IWK**") is the national sewerage services operator, operated under the purview of the MOF, and is responsible for the development and maintenance of a modern and efficient sewerage system. As the only concession holder for sewerage services in Malaysia, IWK is currently serving people from major urban areas; for now, IWK covers 87 local authorities across Peninsular Malaysia. The tariff is regulated and at present for domestic users it ranges from RM2.00 to RM 8.00.

Current initiatives taken by IWK are as follows:

a) to simplify payment collection processes by incorporating joint billing with local state water companies; and
b) to reduce number of sewage treatment plants under IWK's maintenance, as part of rationalisation and connection of bigger treatment plants.

As at November 2018, Ranhill Holdings Berhad finalised a joint-billing deal with IWK to implement a single bill system for water and sewerage services in Johor.

3. Licensing Requirements under the WSIA

All operators have to be licensed by SPAN and have to achieve certain performance indicators specified in the licences.

There are two types of licences under the WSIA:

a) Individual Licence

An individual 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 or online at: https://www.span.gov.my/article/view/e-permit-online-application.

b) 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. Only a company incorporated in Malaysia is eligible to apply for a class 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 Licencees

Under each type of licence, there are two categories of licencees:

a) Facilities Licencee - a person who is licensed to own a water supply system, or sewerage system, and/or any part of the system; and
b) Service Licencee - a person who is licensed to undertake, provide and/or make available any water supply services or sewerage services.

4. 2020 Budget

According to Malaysia's Budget 2020 Speech, approximately RM587 million will be allocated for rural water projects, out of which RM470 million is for Sabah and Sarawak to meet the nation's target of 99% access to clean water.

The Sarawak government has also increased its allocation of RM2.8 billion to RM4 billion for the immediate implementation and upgrading of water supply systems throughout the state.

The MESTECC plans to expand the water supply coverage to 99% nationwide by 2020, by adopting trenchless technology.

H. Construction Industry of Malaysia

1. Introduction

According to the Economic Outlook Report 2020 released by the Finance Ministry of Malaysia on 11 October 2019, the construction industry is expected to see a growth of 3.7% in 2020 - an increase from the 1.7% predicted to be seen in 2019. The industry is anticipated to be worth RM69.9 billion ($16.7 billion) in 2020.[41] In the wake of the COVID 19 pandemic, which has disrupted the industry, it remains to be seen how these projections will be affected.

The expected growth of the construction industry is mainly attributable to the acceleration and revival of mega projects by the Malaysian government. Among the revived mega infrastructure projects is the 640 km-long East Coast Rail Link project (ECRL), which was initially put on hold by the government due to rising costs associated with it. The ECRL resumed work on 25 July 2019 and is currently on track for completion by 2026.[42]

The Malaysian government also plans to allocate RM1.1billion for various other infrastructure projects, with an additional RM1.6billion budgeted for the building of new hospitals in 2020.[43] Other projects such as the Light Rail Transit 3, Mass Rail Transit 2, Electrified Double Track Gemas-Johor Bahru, Klang Valley Double Track Phase 2, Central Spine Road, Pan Borneo Highway and Coastal Highway in Sarawak are expected to give a boost to the Malaysian construction industry in 2020.[44]

The Construction Industry Transformation Programme 2016-2020 of Malaysia ("**the CITP**") states that the construction industry provides significant employment opportunities with a registered workforce of 1.2million, representing 9.5% of Malaysia's total workforce. Furthermore, there are more than 120 industries that rely on the construction industry for the respective industry's own growth and sustainability. The CITP elaborates that the significance of the construction industry will continue to evolve and it will become increasingly critical as Malaysia becomes a developed nation. Malaysians will require more energy-efficient and higher quality buildings, infrastructure and cities. There are 4 strategic thrusts with 21 initiatives in the CITP to transform Malaysia's construction industry.

The Construction Industry Development Board ("**the CIDB**") has taken the lead in developing the CITP under the guidance of the MOW of Malaysia, the CIDB Board and the construction itself. In furtherance of the strategic thrusts under the CITP to improve productivity, the CIDB, MITI and MIDA have jointly launched the Industrialised Building Systems (IBS) and Building Materials Supply Chain 2017/2018 Directory ("**the Directory**") in November 2017. The Directory contains the contact details of over 4,000 companies and relevant stakeholders and is intended to act as a comprehensive point of reference for the construction industry particularly in the area of IBS and building materials.

The allocations provided in the 2020 Financial Budget shows that the Government of Malaysia prioritised the construction industry as one of the key drivers of the nation's economic development.[45] On top of that, the exemption of SST to the construction and building materials will further enliven the construction industry in Malaysia.

In June 2020, the Government of Malaysia, as part of its Short-Term Economic Recovery Plan, allocated RM1.6billion to provide financing support to small and medium size contractors and vendors who were awarded with small government projects (aggregate value of RM4billion) under the Pakej Rangsangan

[41] https://www.spglobal.com/platts/en/market-insights/latest-news/metals/102119-analysis-mega-projects-to-boost-malaysian-construction-sector-in-2020 ; https://www.treasury.gov.my/pdf/economy/2020/chart_Malaysia.pdf ; https://www.khl.com/international-construction/malaysian-construction-to-grow-37-in-2020/140775.article

[42] https://www.khl.com/international-construction/malaysian-construction-to-grow-37-in-2020/140775.article

[43] http://www.bnm.gov.my/documents/budget/bs2020.pdf

[44] https://www.malaysiakini.com/news/495399

[45] https://www.nst.com.my/news/nation/2019/10/529265/2020-budget-construction-sector-remains-economic-driving-force-says-cidb

Ekonomi (PRE) 2020 and the PRIHATIN stimulus package. This SME Go-Scheme is expected to benefit 16,000 G2 and G3 contractors. Under this scheme, no deposits or collateral is needed.[46]

2. The CIDB

a) Introduction

The responsibility of coordinating the needs and wants of the construction industry, planning the direction of the construction industry, addressing the pertinent issues and problems faced by the construction industry, and making recommendations in the formulation of policies for the construction industry is entrusted to the CIDB. The CIDB is a statutory body established by the Lembaga Pembangunan Industri Pembinaan Malaysia Act 1994 ("**the CIDB Act**").

The functions of the CIDB is prescribed in Section 4 of the CIDB Act and includes, amongst other:

a) regulating the conformance of standards for construction workmanship and materials;

b) providing, promoting, reviewing and coordinating trainings in the construction industry;

c) registering and accrediting contractors, as well as imposing any conditions of registration and accreditation of the contractors and revoking, suspending or reinstating the registration and accreditation;

d) registering, accrediting and certifying construction personnel and to revoke, suspend or reinstate the registration, accreditation and certification of such construction personnel;

e) regulating the implementation for quality and safe construction works; and

f) attending to any complaint or report made in relation to any failure of construction works or completed construction works which affect public safety and taking appropriate actions to address it.[47]

b) Contractor Registration with the CIDB

The CIDB Act prohibits any person from carrying out or completing, undertaking to carry out or complete any construction works or hold himself out as a contractor unless such person is registered with the CIDB and holds a valid certificate of registration issued by the CIDB under the CIDB Act. Hence, all contractors, whether local or foreign, must register with the CIDB before carrying out any construction works.

The Guidelines for Contractor Registration Requirement and Procedure ("**the Guidelines**") published by the CIDB sets out the requirements and steps in applying to be a registered contractor with the CIDB. The Guidelines provide differing requirements and process applicable depending on whether the applicant applies to be registered:

a) as a local contractor;

b) as a consortium or joint venture;

c) as an international contractor;

d) as a foreign contractor; or

e) for the purposes of government work procurement.[48]

Non-registration is an offence punishable by a fine not less than RM10,000 but not more than RM100,000.[49] However, the consequence which may be of more concern is that under Section 30(1) of the CIDB Act, if the CIDB finds that construction works are being carried out or completed, or undertaken to be carried out or completed by an unregistered person, the CIDB may by

[46] https://penjana.treasury.gov.my/pdf/PENJANA-Booklet-En.pdf ; https://www.theedgemarkets.com/article/govt-offers-rm16-bil-financing-aid-contractors-kickstart-small-scale-public-projects?fbclid=IwAR0ouwD0PgHDcZ4KyZDk24wPqSZ_x6ErOLSxIAkQ9vsmERjoGoqpzh8ELM0

[47] Section 4(1)(n) of the CIDB Act

[48] http://www.cidb.gov.my/images/content/pdf/Kontraktor/CRL-TRANSLATION-14112016FINAL.pdf

[49] Section 29 of the CIDB Act

serving a notice in writing, require such unregistered person to abstain from commencing or proceeding with the construction works or from undertaking to carry out or complete the construction works, with or without conditions. This would result in a delay in the project.

ii. **Local Contractor Registration**

Under the Guidelines, a local contractor is a company incorporated in Malaysia which has a local equity of 70% or more with the exception of equity distribution as stated in Annex 8 of the Guidelines (Annex 8 of the Guidelines provides that foreign equity from the ASEAN countries is allowed provided that such foreign equity does not exceed 51% of the total paid up capital or net worth of the applicant company). The number of contractors registered with the CIDB grew by 9.0% from 79,883 to 87,071 in 2017.[50]

A local contractor registered with the CIDB will be issued a Local Contractor Registration Certificate ("**the PPK**"). Each local contractor that applies be registered with the CIDB will be registered according to:

Grade
The Grade ranges from G1 to G7 and the Grade of the registered local contractor depends on the financial capacity of the contractor. The financial capacity of the contractor will be assessed by the CIDB based on the financial feasibility assessment. The Grade functions to limit the value of the tenders or works which the contractors may participate in or carry out.

Category
The Category reflects the academic qualification and experience of the technical person of the registered local contractor.

Specialization
The Specialization is based on the technical person of the registered local contractor and must comply with any law or written rule involving the activities which the registered local contractor intends to conduct or specialise in.

Classification Status
The Classification Status of the registered local contractor will be either 'Active' or 'Dormant' or 'New' depending on the information on the projects carried out with a valid certificate in the preceding 3 years.

iii. **Consortium or Joint Venture Registration**

A joint venture contractor is defined under the Guidelines to be a merger of two companies or more, incorporated in Malaysia or abroad. The Guidelines provides that a consortium or joint venture contractor, appointed to carry out a construction project must be registered with the CIDB. The registration is project-based and is valid only for the contractor to carry out the project as stated in the Registration Certificate. Hence, the applicant will need to furnish a letter of award or agreement which provides that the company has been awarded the said project, together with the joint venture agreement.

Under the Guidelines, there are 2 types of consortium or joint venture registration with the CIDB which are:

Type	Description
Consortium / joint venture between local contractor companies	At least one of the local contractors must be registered with the CIDB with the Grade appropriate for the value or the project

[50] http://www.cidb.gov.my/images/content/pdf/bisnes/prospect20182019/CIDB---Construction-Industries-Review-2018-2019-min-1.pdf

Type	Description
Consortium / joint venture between local and foreign contractor	The local contractor must be registered with the CIDB with the Grade appropriate for the value of the project. If the foreign equity in the joint venture agreement exceed 30%, the application for registration of such a consortium/joint venture between local and foreign contractor will have to be accompanied by a separate form known as Form R3.[51]

iv. **International Contractor Registration**

An international contractor is a local contractor registered with the CIDB who will carry out or has carried out construction work outside of Malaysia. Under the Guidelines, a local contractor can only be registered as an international contractor with the CIDB, if such contractor has been previously registered with the CIDB for at least three years and the registration is classified as 'Active'.[52]

v. **Foreign Contractor Registration**

A foreign contractor is a company incorporated in Malaysia or in a foreign country which has a foreign equity holding of 30% or more, with the exception of equity distribution as stated in Annex 8 of the Guidelines (Annex 8 of the Guidelines provides that foreign equity from the ASEAN countries is allowed provided that such foreign equity does not exceed 51% of the total paid up capital or net worth of the applicant company).

There are 2 types of foreign contractor registration with the CIDB which are the provisional registration of the foreign contractor and the foreign contractor registration which are applicable at different stages of a project:-

Provision Registration

A foreign contractor must apply for the Provisional Registration Certificate before participating in any tenders in Malaysia. No foreign contractor is allowed to participate in any tender exercise without first obtaining a Provisional Registration Certificate from the CIDB. The Provisional Registration Certificate is not for carrying out construction works. If the applicant is awarded the works that it has tendered for, such applicant is required to submit a separate application to be registered as a foreign contractor with the CIDB in order to be allowed to carry out any construction works for the project.

Foreign Contractor Registration

A Foreign Contractor Certificate is only issued when the foreign contractor has been awarded the construction works and is issued for a specific project. An applicant for a foreign contractor registration will need to furnish a letter of award or tender document which provides that the company has been awarded the construction works for the said project. As the Foreign Contractor Certificate is project specific, the Foreign Contractor Certificate is only valid until the completion of the project stated therein and the registered foreign contractor is only allowed to carry out works for the projects stated in the Foreign Contractor Certificate.

Despite the fact that a foreign contractor is defined as a company incorporated in Malaysia or in a foreign country, the Guidelines expressly provides that the foreign contractor will need to attach a copy of its registration certificate from the CCM to its application to be registered as a foreign contractor. An applicant is also required to have financial resources of at least RM750,000 and must employ at least two Malaysians holding a local degree in the field of construction, and one of the employees must

[51] http://www.cidb.gov.my/images/content/pdf/Kontraktor/CRL-TRANSLATION-14112016FINAL.pdf

[52] http://www.cidb.gov.my/images/content/pdf/Kontraktor/CRL-TRANSLATION-14112016FINAL.pdf

have more than 5 years of experience in the construction industry.[53]

vi. **Government Work Procurement Registration**

A contractor registered for the purposes of government work procurement will be issued a Government Work Procurement Certificate ("**the SPKK**") and as stated in the Treasury Circular No. 6, 2012 and the Treasury Bill Directive, Amendment No. 3, 2012 such SPKK certificate holder will be eligible to participate in any government work procurement in construction. Only contractors with valid PPK may apply for the SPKK and the SPKK must be renewed annually with the renewal of the PPK. The SPKK is contingent upon the validity of the PPK, as such, if the PPK expires, is cancelled, withdrawn, or suspended, the SPKK will automatically become void. A contractor with the SPKK will be subjected to additional terms and conditions as set out in Guidelines which includes a restriction on change in shareholding.[54]

c) Construction Personnel Registration with CIDB

Unless a construction personnel is registered with the CIDB and holds a valid certificate of registration issued by the CIDB, such person is prohibited from being involved in or engaging or undertaking to be involved in or engaged as a construction personnel. A "construction personnel" means:

i. general construction workers;
ii. semi-skilled construction workers;
iii. skilled construction workers;
iv. construction site supervisors;
v. construction project managers; and
vi. any other employee in construction industry as may be determined by the CIDB.

Non-compliance is an offence and the CIDB Act imposes personal liability on each person who is in contravention where it is provided that on conviction, such person found guilty shall be liable to a fine not exceeding RM5,000.

Further, Section 33A of the CIDB Act provides that only construction site supervisor or skilled construction worker, who are accredited and certified by the CIDB and holds a valid certificate issued by the CIDB under the CIDB Act may be involved in or engaged or undertake to be involved or engaged as a construction site supervisor or skilled construction worker. A contravention of Section 33A(1) of the CIDB Act is an offence. The CIDB Act imposes personal liability on each person who is in contravention and any person who engages such construction site supervisor or skilled construction worker who is not accredited and certified by the CIDB. In both instances, on conviction, such person found guilty shall be liable to a fine not exceeding RM5,000.

d) Payment of Levy to CIDB

Every registered contractor must declare and submit to the CIDB the contract for any construction works awarded to the registered contractor except where the contract sum does not exceed RM500,000. The failure to declare and submit the contract for construction works is an offence and on conviction, the registered contractor shall be liable for a fine not exceeding RM50,000.

Following from the declaration and submission of the contract with the CIDB, the CIDB will impose a levy, calculated as percentage of the contract sum, before the commencement of construction works by the registered contractor. The failure to pay any levy due to the CIDB is an offence and any registered contractor guilty of such offence shall on conviction, be liable to a fine not exceeding RM50,000 or 4 times the amount of levy payable on the contract, whichever is higher. The

[53] http://www.cidb.gov.my/images/content/pdf/Kontraktor/CRL-TRANSLATION-14112016FINAL.pdf

[54] http://www.cidb.gov.my/images/content/pdf/Kontraktor/CRL-TRANSLATION-14112016FINAL.pdf

amount of any levy payable to the CIDB is recoverable as a civil debt due to the CIDB.

Initially, the levy is calculated by the CIDB as 0.25% of the contract sum. However, the Minister of Works issued an order, Lembaga Pembangunan Industri Pembinaan Malaysia (Imposition of Levy) Order 2016 which reduced the rate of levy to 0.125% of the contract sum.

3. Safety

In Malaysia, there is an overlap of jurisdiction in respect of ensuring safety in construction between the CIDB and the DOSH.

Mainstream media reports that the DOSH has identified approximately 16,800 construction sites in Malaysia and based on the occupational accidents report as of October 2019, there were 275 accidents and 72 fatalities recorded, and such occupational accidents are most likely due to an almost non-existent safety culture and non-compliance with the Occupational Safety and Health Act 1994 ("**the OSHA**"). According to the DOSH, the construction industry accounted for 33.64% of all fatal injuries.

The OSHA applies to the construction industry throughout Malaysia. Under the OSHA, every employer and every self-employed person shall have the duty to ensure, so far as is practicable, the safety, health and welfare at work of all his employees. Some general duties under the OSHA are set out below:

a) the provision and maintenance of plant and systems of work that are, so far as is practicable, safe and without risks to health;

b) the making of arrangements for ensuring, so far as is practicable, safety and absence of risks to health in connection with the use or operation, handling, storage and transport of plant and substances; and

c) to prepare and as often as may be appropriate, revise a written statement of his general policy with respect to the safety and health at work of his employees and the organization and arrangements for the time being in force for carrying out that policy, and to bring the statement and any revision of it to the notice of all of his employees

Construction sites create a risk not only for the construction worker, but also for the public who move around the site or who may live nearby. In this respect, the OSHA imposes statutory obligation on every employer and self-employed person to persons other than their employees. For example, every employer and self-employed is:

a) to conduct his undertaking in such a manner as to ensure, so far as is practicable, that he and other persons, not being his employees, who may be affected thereby are not exposed to risks to their safety or health; and

b) to give to persons, not being his employees, who may be affected by the manner in which he conducts his undertaking, the prescribed information on such aspects of the manner in which he conducts his undertaking as might affect their safety or health.

Any employer and self-employed persons who contravenes his general duties to employees and to persons other than employees under the OSHA shall be guilty of an offence and shall, on conviction, be liable to a fine not exceeding RM50,000 or to imprisonment for a term not exceeding 2 years or to both. In the event that such offence is committed by a body corporate, every person who at the time of the commission of the offence is a director, manager, secretary or other like officer of the body corporate shall be deemed to have contravened the provision and may be charged jointly in the same proceedings with the body corporate or severally, and every such director, manager, secretary or other like officer of the body corporate shall be deemed to be guilty of the offence.

Besides the general provisions under the OSHA, pursuant to Section 66(1) and (2)(b) of the OSHA, the Human Resources Minister may make regulation for or with respect to the safety, health and welfare of persons at work in order to achieve the objects of the OSHA

including prescribe the requirements with respect to design, construction, guarding, siting, installation, commissioning, examination, repair, maintenance, alteration, adjustment, dismantling, testing, marking or inspection of any plant. Some of the guidelines pertinent to construction are the Guidelines on Occupational Safety and Health in Construction Industry (Excavation Work) 2017, Guidelines of Occupational Safety and Health in Construction Industry 2017, Guidelines for Approval of Design Scaffolding 2016, Guidelines for Public Safety and Health at Construction Sites 2007, Guidelines for the Prevention of Falls at Workplaces 2007, Guidelines on Trenching for Construction Safety 2000 and Guidelines on Occupational Safety and Health in Tunnel Construction.

In addition to the OSHA, there are also provisions under the Uniform Building By-Laws 1984 which are relevant to safety standards of buildings, particularly fire safety.

4. Quality Assessment System in Construction (QLASSIC)

Workmanship quality of a building construction work is vital for the industry players and the end-users of the construction work. Hence, industry players have been urged to adopt a quality-centric mindset to ensure quality of one's workmanship and earn the public's confidence in the quality of their construction work.

The CIDB had consistently called upon the industry players to submit their projects to be assessed according to the QLASSIC. One of the targeted key outcomes under the Quality, Safety and Professionalism strategic thrust of the CITP is to achieve more than 50% of public projects to exceed the acceptable QLASSIC score. The CIDB went as far as signing a MOU with Bank Pembangunan Malaysia Berhad ("**the BPMB**") in August 2018. Pursuant to the MOU, future infrastructure projects financed by the BPMB will undergo QLASSIC assessment progressively while the CIDB will provide QLASSIC training to enhance knowledge amongst the BPMB staffs.

In March 2019, the Ministry of Works had reiterated (in the National Housing Policy 2.0 (NHP2.0)) its commitment to making QLASSIC certification mandatory for all upcoming developments.[55]

QLASSIC is a system and method to assess and evaluate the quality of workmanship of building projects based on the Construction Industry Standard (CIS 7), through a scoring system. QLASSIC had categorised buildings to be assessed into these 4 categories, namely:-

a) **Category A** (Landed housing) – Detached, semi-detached, terrace and cluster houses.

b) **Category B** (Stratified housing) – Flats, apartments, condominiums, service apartments, small office home office (SOHO) and town houses.

c) **Category C** (Public/commercial/industrial buildings without centralised cooling system) – Office buildings, schools, factories, warehouses, workshops, hangers, small office flexible office (SOFO), small office virtual office (SOVO), religious buildings, stadiums, community halls, hospitals, airports, universities, colleges, police stations, etc.

d) **Category D** (Public/commercial/industrial buildings with centralised cooling system) – Office buildings, schools, factories, warehouses, workshops, hangers, small office flexible office (SOFO), small office virtual office (SOVO), religious buildings, stadiums, community halls, hospitals, airports, universities, colleges, police stations, etc.

Marks will be awarded if the workmanship of the building complies with the standard under the QLASSIC. These marks will subsequently be used to calculate the QLASSIC score of the building. The average score of projects assessed under QLASSIC in 2017 was 72%.

[55] https://www.nst.com.my/business/2019/03/471636/works-ministry-make-qlassic-certification-mandatory-2020-onwards

5. Adjudication under Construction Industry Payment and Adjudication Act

Timely payment and proper cash flow are perhaps the two most important issues faced by players in the construction industry. The Construction Industry Payment and Adjudication Act 2012 ("**the CIPAA**") came into force in Malaysia on 15 April 2014. One of the key features of the CIPAA is the facilitation of regular and timely payment through an adjudication mechanism. The AIAC which is the adjudication authority, describes adjudication as a summary procedure for resolution of disputes under a construction contract. It allows a party who is owed monies under a construction contract (the claimant) to have the disputes resolved with the non-paying party (the respondent) in a quick and cheap manner. Disputes which may be referred to adjudication under the CIPAA must only relate to payment for work done and services rendered under the express terms of a construction contract. Adjudication is a statutory right in that any party to a construction contract who is neither excluded nor exempted under the CIPAA has the right to resort to adjudication for an interim solution.

In addition to introducing an adjudication mechanism, the CIPAA also prohibits the enforcement of conditional payment provision in a construction contract. Under Section 35(2) of the CIPAA, conditional payment provisions are clauses which provides that:

a) the obligation of one party to make payment is conditional upon that party having received payment from a third party; and

b) the obligation of one party to make payment is conditional upon the availability of funds or drawdown of financing facilities of that party.

Thus, the CIPAA removes the pervasive and prevalent practice of 'pay when paid', 'pay if paid' and 'back to back payment' which have sometimes caused standstills in construction projects and even insolvencies of parties involved in the construction projects.

During the CIPAA Conference 2017 organised by the AIAC, the AIAC stated that since the implementation of the CIPAA, a total of 373 decisions have been released (as of 15 April 2017) and 51% of these cases have received in the range of 80% to 100% of the claimed amount as the adjudicated amount. The analysis of the statistics on adjudication by the AIAC shows that there has been a remarkable rise in adjudication since the implementation of the CIPAA, indicating that the construction industry embraces the statutory mechanisms of the CIPAA.

The success of the regime under the CIPAA is also facilitated by the Malaysian judiciary. The Malaysian Courts are interpreting the CIPAA in its context as an interim solution to resolve the cash flow problem in the construction industry and approaching adjudication decisions as being 'binding but not final'. As such, the Malaysian Courts have been reluctant to interfere with the decisions of an adjudicator by setting aside the adjudication decisions save and except on the limited ground expressly set out in Section 15 of the CIPAA which includes that the adjudication decision was improperly procured through fraud or bribery, there was a denial of natural justice, and/or that the adjudicator had not acted independently or impartially and/or was in excess of his jurisdiction.

The CIPAA does not apply to construction contracts entered into prior to 15 April 2014. The Federal Court of Malaysia has recently ruled that the CIPAA only applies prospectively. In other words, it only applies to construction contracts entered into subsequent to the CIPAA coming into force on 15 April 2014.[56]

[56] Ireka Engineering & Construction Sdn Bhd v. PWC Corporation Sdn Bhd [2019] 1 LNS 1567

16. TELECOMMUNICATIONS, MEDIA & TECHNOLOGY

In light of significant developments and advancements within the Technology, Media and Telecommunications ("**TMT**") sectors across the globe, Malaysia has continuously been experiencing the ripple effect of the converging advancements across the three areas within the TMT sector. Embracing 5G technology and in preparation for the Fourth Industrial Revolution, efforts are being ramped up by the government in providing opportunities and incentives to individuals and businesses alike, which has made TMT one of the primary sectors in Malaysia.

In November 1998, the government adopted the convergence regulation model for purposes of administering the TMT sector. This initiative saw the enactment of two statutes, namely 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 Communication and Multimedia Malaysia/Kementerian Komunikasi dan Multimedia Malaysia ("**KKMM**") and the Malaysian Communications and Multimedia Commission ("**MCMC**"). The MCMC was established under the 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:

1. establish Malaysia as a major global centre and hub for communications and multimedia information and content services;
2. promote a civil society where information-based services will provide the basis of continuing enhancements to quality of work and life;
3. grow and nurture local information resources and cultural representation that facilitate the national identity and global diversity;
4. regulate the industry for the benefit of the end user;
5. promote a high level of consumer confidence in service delivery from the industry;
6. ensure an equitable provision of affordable services over ubiquitous national infrastructure;
7. create a robust applications environment for end users;
8. facilitate the efficient allocation of resources such as skilled labour, capital, knowledge and national assets;

9. promote the development of capabilities and skills within Malaysia's convergence industries; and

10. 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 CMA, which sets out the regulatory licensing regime within the TMT sector. The CMA has been in force since 1 April 1999 and serves to repeal the Telecommunications Act 1950 and Broadcasting Act 1988.

In order to increase governance of the communications and multimedia sector and impose parameters on the applicability of certain provisions under the CMA, the former Malaysian Communications and Multimedia Minister, Gobind Singh Deo had, in September 2018, proposed a few amendments to the CMA, which include:

(a) increasing penalties against licensees for non-compliance with directions issued by the MCMC by amending section 53 of the CMA; and

(b) introducing the requirement for proof of intent under section 233 of the CMA in determining if a statement made by means of any network facilities or network service or applications service is obscene, indecent, false, menacing or offensive.

The proposed amendments, if implemented, are expected to provide further clarity in terms of enforcement of certain provisions under the CMA and stronger governance of the licensing regime.

In this regard, the licensing regime propounded within the CMA mainly functions to control the entry of market players within the industry. However, the rather broadly worded CMA is expanded upon and more clearly spelt out within the numerous guidelines, regulations and plans issued by MCMC, which are to be read together with the Acts, including but not limited to the CMA and MCMC Act.

One of such examples 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 the said 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 needs to be read together with the Communications and Multimedia (Licensing) (Exemption) Order 2000 ("**Exemption Order**"). The Licensing Regulations sets 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). 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 need to be applied for through submitting a prescribed registration notice together with the licence registration fee.

In relation to individual licences, it should be noted that 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

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 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. As of 1 June 2017, the MCMC has issued a revised spectrum plan which revokes the previous spectrum plan issued on December 2014.

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. 2 of 2020 on the Spectrum Reallocation for the 2500MHz to 2570 MHz, 2575 MHz to 2615 MHz and 2620 MHz to 2690 MHz Frequency Bands, and Ministerial Determination No. 3 of 2020 on the Spectrum Reallocation for the 880MHz to 885 MHz and 925 MHz to 930 MHz Frequency Bands.

Recognising the need for different frequency ranges to deliver widespread coverage of broadband services in Malaysia, as well as to meet the requirements of future networks and 5G services, the MCMC has issued the Final Report on the Allocation of Spectrum Bands for Mobile Broadband Service in Malaysia ("**Report**") on 31 December 2019 in respect of the commercial rollout of 5G in Malaysia, following a public inquiry process earlier in the same year.

In the said Report, the MCMC identified the following bands to be the pioneer spectrum bands in Malaysia for the rollout of 5G:

(a) 700 MHz band;
(b) 3.4 GHz to 3.6 GHz bands ("**3.5GHz**"); and
(c) 24.9 GHz to 28.1 GHz bands ("**26/28 GHz**"),

According to the Report, assignment for the 700MHz and 3.5GHz bands will be made through a tender process and allocated to a single entity comprising a consortium formed by multiple licensees, instead of allocating these bands to individual licensees.

The said tender process is expected to commence during the first quarter of 2020, where 2x30 MHz of the 700 MHz band and 100 MHz of the 3.5 GHz band will be made available by the MCMC. The remaining frequencies within the 700 MHz and 3.5 GHz bands will be considered for assignment at a future date.

The 26GHz and 28GHz bands will be assigned using different methods depending on the frequency range. In this regard, four (4) blocks of 400 MHz in the frequency range of 24.9 GHz to 26.5 GHz will be assigned through a tender process to licensees on a nationwide basis, whereas the remaining four (4) blocks of 400 MHz in the frequency range of 26.5 GHz to 28.1 GHz will be assigned based on a first-come first-served basis and will be open to any party, including non-licensees, for the purpose of deploying localised and/or private networks.

The tender process for the frequency range of 24.9 GHz to 26.5 GHz is expected to commence during the first quarter of 2020. Any successful party of the tender process will not be eligible to apply for the remaining frequency range of 26.5 GHz to 28.1 GHz.

It is also stated in the Report that by 2021, the MCMC will review all of the abovementioned spectrum bands by taking into account the existing utilisation, global trends and ecosystem of these bands.

However, following a change of government, the current Malaysian Communications and Multimedia Minister, Dato' Saifuddin bin Abdullah had on 15 May 2020, issued the Ministerial Direction No. 4 of 2020 and Ministerial Direction No. 5 of 2020, assigning the 700 MHz bands and 900 MHz bands, which have been identified as among the pioneer bands in Malaysia for the rollout of 5G without going through an open tender process as stipulated in the Report, which however was cancelled on 3 June 2020. According to a media statement issued by MCMC, the assignment under the said Ministerial Direction was cancelled on the basis of technical and legal issues, as due to a need for transparency.

Due to these series of events it remains to be seen how and when will the identified pioneer spectrum bands be assigned for the rollout of 5G.

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 in order to create a level playing field for the benefit of consumers, regulatory intervention is required to allow competitors 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 are 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. Communications Equipment

All communications equipment is required to be certified by the MCMC or its registered certifying agency pursuant to the Communications and Multimedia (Technical Standards) Regulations 2000 ("**Technical Standards Regulations**"). Currently, the only registered certifying agency for the certification of communications equipment is SIRIM QAS International Sdn Bhd ("**SIRIM**").

"Communications equipment" is defined as (i) any network facilities (i.e. any element or combination of elements of physical infrastructure used principally for, or in connection with, the provision of network services), or (ii) any customer equipment (i.e. any equipment, whether hardware or software, or device, used on the customer side of the network boundary).
Communications equipment may be certified via a: (a) compliance approval; or (b) special approval. A compliance approval, which is also referred to as type approval, is granted to a specific model of a communications equipment which has been confirmed to comply with the standards under the Technical Standards Regulations. On the other hand, a special approval may be granted to any communications equipment which is used exclusively for:

(a) personal or company's own use;
(b) trials, market surveys or demonstration of equipment which uses network connections;
(c) exhibition purposes without network connection;
(d) research and development (R&D); or
(e) training;

In this regard, the usage of non-certified communications equipment is an offence under the Technical Standards Regulations, where if convicted, a person shall be liable to a fine up to RM100,000 and/or imprisonment of a term up to 6 months.

As such, manufacturers or importers (or their agents) of the communications equipment will need to obtain the said certification by obtaining the requisite approval by MCMC or SIRIM to ensure it meets the minimum requirements, which may be specified based on technical codes issued by MCMC, or any relevant national or international standards.

G. 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.

Further details on incentives in the TMT sector can be found in Chapter 6 and Chapter 17.

H. Other TMT Related Legislation

1. Computer Crimes Act 1997 ("CCA")

The CCA is enacted to criminalise certain forms of conduct targeted at computers and the contents therein, including but not limited to, unauthorised access to computer material, unauthorised modification of the contents of a computer and wrongful communication of passwords. It also carries penalties ranging from maximum fines of RM25,000 to RM 150,000 and/ or prison sentences of 3 to 10 years.

2. Digital Signature Act 1997 ("DSA")

The DSA allows for the development of, among others, electronic transactions, by providing an avenue for secure online transactions through the use of digital signatures. The legal recognition of digital signatures allows electronic communications to be transmitted securely, especially on the Internet. It provides an identity verification procedure using encryption techniques to prevent forgery and interception of communication. The DSA further specifies certain certification agencies which issue certificates containing the subscriber's public key. A list of these certification agencies is provided on a register which can be inspected on the MCMC's website.

3. Electronic Commerce Act 2006 ("ECA")

The ECA provides legal recognition of electronic messages in commercial transactions, the use of the electronic messages to fulfil legal requirements and to enable and facilitate commercial transactions via electronic means. It confers legal recognition to the formation of a contract via electronic means; recognises electronic messages and electronic signatures; and deems certain electronic documents to be considered original. It further states that the retention of documents in an electronic format fulfils the requirements of the law, provided certain qualifying criteria set out in the ECA are met.

In light of technological developments in the electronic trading sector, the Ministry of Domestic Trade and Consumer Affairs issued the Pre-consultation Document on the Review of Electronic Commerce Act 2006 ("**Pre-consultation Document**") to seek comments and recommendations from the public and various stakeholders on the need to revise the ECA.

The Pre-consultation Document proposes to, amongst others, amend provisions governing time and place of dispatch and receipt of electronic messages, and to introduce new provisions on the use of automated message systems in formation of contracts. As of the date of this edition, the consultation period for the Pre-consultation Document has ended, but the proposed amendments in the Pre-consultation Document have yet to come into legal effect.

4. Electronic Government Activities Act 2007 ("EGAA")

The EGAA mirrors the Electronic Commerce Act 2006 and was enacted to recognise the legal validity of electronic transactions and records to and from the Government.

5. Consumer Protection Act 1999 ("CPA")

The CPA lays down consumer protection principles which applies to all business offerings or supplying services to one or more consumers in trade, including where transactions are conducted through electronic means such as the Internet. The CPA, through the Consumer Protection (Electronic Trade Transactions) Regulations 2012, additionally requires websites conducting business to disclose certain information, including but not limited to, business name, description of the main characteristics of the services, etc.

6. Cybersecurity Malaysia and the National Cyber Security Agency

There is no single legislation in Malaysia in respect of cybersecurity as of the date of this edition. Existing

cybersecurity-related laws including the Communication and Multimedia Act 1998, Computer Crimes Act 1997, Penal Code, Personal Data Protection Act 2010, Copyright Act 1987, Defamation Act 1957 and Sedition Act 1948 are used to fight cyber threats.

In this regard, CyberSecurity Malaysia ("**CSM**") is the national cyber security specialist agency for cybersecurity matters under the supervision of the MCMC. Among CSM's tasks are to monitor aspects of national e-security, provide specialised cybersecurity services and identify possible areas that may be detrimental to national security and public safety.

The National Cyber Security Agency ('**NACSA**") was officially established in February 2017 as the national lead agency for cybersecurity matters with the objectives of securing and strengthening Malaysia's resilience in facing the threats of cyber-attacks, by coordinating and consolidating the nation's best experts and resources in the field of cybersecurity.

Among others, NACSA is responsible for the development and implementation of the National Cyber Security Policy ("**NCSP**"), which seeks to address cybersecurity risks in ten (10) identified Critical National Information Infrastructure ("**CNII**") sectors as follows:

(a) National Defence & Security
(b) Banking and Finance
(c) Information and Communications
(d) Energy
(e) Transportation
(f) Water
(g) Health Services
(h) Government
(i) Emergency services
(j) Food and Agriculture

In April 2019, the government announced the possibility of introducing an act of Parliament on cybersecurity and a National Cyber Security Strategy which aim to map out proactive actions to protect critical systems in a comprehensive manner, and implement preventive measures to tackle cyber threats. This was followed by the establishment of a National Cyber Security Workforce in September 2019 under the current NCSP to ramp up protection in the face of heightened cybersecurity risks.

I. Cyber Courts

The Malaysian Cyber Courts were launched in September 2016 to regulate cyber activities and in particular, to address the increasing number of civil and criminal cyber offences. Located in the Kuala Lumpur court complex, one Criminal Sessions Court has been designated as Cyber Court (Criminal) to handle all cyber related criminal cases while one Civil Sessions Court has been designated as Cyber Court (Civil) to handle all cyber related civil cases.

J. Film and Content Production, Distribution and Exhibition

The National Film Development Corporation of Malaysia ("**FINAS**") is a statutory corporation which has been established pursuant to the National Film Development Corporation Malaysia Act 1981 ("**FINAS Act**"), which aims to promote, nurture and facilitate the development of the film industry in Malaysia, by among others, regulating and controlling the production, distribution and exhibition of films in Malaysia, and to provide for the issuance of licences in relation thereto.

The FINAS Act widely defines "films" as "feature films, short films, short subject films, trailers, documentaries, advertising filmlets and any recording on material of any kind, including video tapes and video discs, of moving images, accompanied or unaccompanied by sound, for viewing by the public or any class of the public", and thus will include content broadcasted and published via terrestrial broadcasting (transmitted using analogue means) to over-the-top (OTT) broadcasting (transmitted using digital means).

In this regard, the licensable activities under the FINAS Act include the following:

(a) "film production" includes all activities related to the production or processing of films, or the recording or

duplicating of video tapes, for viewing by the public or any class of the public;

(b) "film distribution" includes the renting, hiring and loaning of films for profit or otherwise, the importation and distribution of films produced abroad and the distribution of films produced locally; and

(c) "film exhibition" means the screening of films for viewing by the public or any class of the public,

(collectively, "**Licensable Activities**").

It is pertinent to note that section 21 of the FINAS Act restricts persons from being engaged in all three Licensable Activities conjunctively, but does not restrict persons from engaging in any one of the following activities or any one of the following combinations of activities:

(a) production and distribution;
(b) production and exhibition; or
(c) distribution and exhibition.

In other words, a person is permitted to engage in any or combination of, but not all of the Licensable Activities, subject to a licence obtained under section 22 of the FINAS Act, which can be applied via FINAS' licensing portal, together with such documents and information as may be required by FINAS.
Apart from licensing requirements, the production of film and other content in Malaysia is also subject to various content-related regulations, such as those provided under the Content Code issued by MCMC, and the Film Censorship Act 2002 which is subject to the regulatory oversight of the Film Censorship Board.
With a view to encourage growth in the content creation and production industry in Malaysia, the government has also developed various incentives and grants for film and content development.

Among others, the Film in Malaysia Incentive ("**FIMI**") aims to provide an additional financial incentive for the production of creative content within Malaysia, by providing a 30% cash rebate on all expenditure incurred in Malaysia for the purposes of producing films. Both local and foreign production companies may apply for FIMI by submitting an application to the Film in Malaysia Office (FIMO), which is a division under FINAS and meeting the criteria set out under the Guidelines for Domestic Production (for locally incorporated company) or Guidelines for Foreign Production (for foreign company).

In respect of digital content such as animation, digital games and interactive media content, companies which are locally incorporated in Malaysia may apply for grants provided by the Malaysia Digital Economy Corporation (MDEC), such as the Digital Content Grant, which is a government funding designed and created to support local digital creative content companies in developing, producing, co-producing and marketing their digital content. Further details on incentives related to digital content can be found in Chapter 17.

Following recent media statements made by the current Malaysian Communications and Multimedia Minister, Dato' Saifuddin bin Abdullah, it is expected that several existing regulations and policies will be reassessed and updated to further accelerate the growth of the creative industry (which includes the film industry), as set out below:

(a) updating the National Creative Industry Policy to among others, cater for OTT media platforms and to protect the welfare of industry players in the creative industry;

(b) reviewing tax incentives and entertainment taxes; and

(c) reviewing existing laws related to the creative industry such as copyright, music licensing and royalty bodies.

K. E-money

The main regulator that provides regulatory oversight in issuance of electronic money ("**e-money**") is the Central Bank of Malaysia ("**BNM**").

"Payment Instrument" is defined in the Financial Services Act 2013 ("**FSA**") as any instrument whether tangible or intangible, that enables a person to obtain money, good or services or to make any payment, whereas a "designated payment instrument" means a payment instrument prescribed as a designated payment instrument under Section 31 of the FSA.

The Financial Services (Designated Payment Instruments) Order 2013 has prescribed that charge cards, credit cards, debit cards, electronic money or e-money and a combination of the foregoing have each been designated as designated payment instruments.

E-money is defined in the FSA as any payment instrument, whether tangible or intangible, that:

(a) stores funds electronically in exchange of funds paid to the issuer (defined below); and

(b) is able to be used as a means of making payment to any person other than the issuer.

The Guideline on Electronic Money (E-Money) published by BNM ("**E-Money Guidelines**") further explains that e-money:

(a) is a payment instrument that contains monetary value that is paid in advance by the user to the e-money issuer which can be used to make payments for purchases of goods and services to merchants who accept the e-money as payment; and

(b) can be issued in different forms, such as card-based (e.g. prepaid card) and network-based which can be accessible via the internet, mobile phones or any other devices.

In reference to the above, an "**Issuer of e-money**" is defined in the E-Money Guidelines as any person that is responsible for the payment obligation and assumes the liabilities for the e-money being issued.

The E-Money Guidelines further states that there are two types of E-Money schemes as determined by the purse size and the outstanding e-money liabilities, which are:

(a) small E-Money scheme, where the monetary value that can be stored in an E-Money instrument ("**Purse Limit**") does not exceed RM 200 and the outstanding E-Money liabilities are less than RM 1million; and

(b) large E-Money scheme, where the Purse Limit can exceed RM 200 and the maximum purse limit is capped at RM 1,500 or any other amount as approved by BNM or average monthly outstanding E-Money liabilities for 6 consecutive months amounts to RM 1million or more.

Any person who intends to issue electronic money must obtain BNM approval under Section 11 of the FSA.

It is also pertinent to note that e-money issuers are prohibited from:

(a) issuing the e-money at a discount, i.e. issue e-money that has a monetary value greater than the sum received;

(b) using the money collected to extend loans to any other persons;

(c) extending credit to the user, or paying interest or profit on the emoney balances, or anything else that would add to the monetary value of the e-money; and

(d) associating, linking or using the e-money scheme or platform to conduct illegal activities.

L. Digital Banking and E-Services Platform for Capital Market Products

1. Digital Banking

On 27 December 2019, BNM, having regulatory oversight on banking matters, has issued an Exposure Draft on the proposed Licensing Framework for Digital Banks in Malaysia ("**Exposure Draft**"), which outlines the licensing framework for persons who wish to carry out a "digital banking business" or "Islamic digital banking business" as defined under the FSA and IFSA respectively which is carried on primarily or wholly through digital or electronic means.

Some of the key points addressed in the Exposure Draft include:

(a) in assessing whether the applicant fulfils the "best interest of Malaysia" criteria (which are one of the factors considered by BNM where assessing an application for a banking licence), applicants are required to demonstrate a commitment to driving financial inclusion, including ensuring quality access and responsible usage of financial services, particularly to underserved and hard-to-reach segments that may be unserved;

(b) during the first 3 to 5 years of operations (the "**Foundational Phase**"), the licensed digital bank must maintain, at all times a minimum amount of capital funds of RM100 million and will be subject to an asset limit of RM2 billion;

(c) licensed digital banks will generally be subject to the same regulatory requirements which apply to licensed banks / licensed Islamic banks. However, during the Foundational Phase, the licensed digital bank will enjoy simplified regulatory requirements for the areas identified in the Exposure Draft; and

(d) to "graduate" from the Foundational Phase, the licensed digital bank may make an application to BNM after the first 3 years of operations, subject to fulfilment of the relevant criteria identified in the Exposure Draft.

In order to reduce the regulatory burden for new entrants that have strong value propositions for the development of the Malaysian economy, whilst safeguarding the integrity and stability of the financial system, BNM has issued an updated Exposure Draft on the Licensing Framework for Digital Banks ("**Updated Exposure Draft**"), which simplifies the following requirements:

(a) in respect of the capital adequacy requirement, while the previous Exposure Draft requires compliance with the Capital Adequacy Framework (Basel II – Risk-Weighted Assets) issued by BNM ("**Basel II Capital Framework**"), this Updated Exposure Draft provides for simpler risk categories to calculate the credit and market risk components for risk-weighted assets under the Basel II Capital Framework; and

(b) in respect of the liquidity requirement, the Updated Exposure Draft varies from the previous Exposure Draft, which now provides that 25% of a licensed digital bank's on-balance sheet liabilities must be held in high quality liquid assets ("**HQLA**"), and that the general and operational requirements relating to the HQLA shall refer to those set out in the Liquidity Coverage Ratio (LCR) Policy Document issued by BNM.

The Updated Exposure Draft also extends the consultation period where BNM will accept public feedback on the Updated Exposure Draft until 30 June 2020. Applications for the digital banking licence will open upon issuance of the final Policy Document, whereupon BNM has stated that it intends to issue up to five (5) licences to qualified applicants.

2. E-Services Platform for Capital Market Products

The main regulator that provides regulatory oversight in the distribution of capital market products is the Securities Commission Malaysia ("**SC**"), who has announced that it will facilitate the online distribution of capital market products (e.g. unit trusts), through e-services platforms (e.g. e-wallet or e-payment service providers).

To this end, the Guidelines on Recognised Markets were amended on 5 May 2020, to introduce a new Chapter 17 on e-services platform, which specifies the registration requirements for e-services platform operators, allowing them to partner with capital markets services licence holders to distribute capital market products to investors via online platforms.

In this regard, the SC has also clarified that e-wallets or e-payment operators which are currently subject to the oversight of another sectorial regulator (e.g. BNM) will be required to obtain the prior approval from the said regulator before submitting their application to the SC.

M. Digital Assets, Initial Coin Offering (ICO) and Initial Exchange Offering (IEO) Schemes

1. Digital Assets

Digital assets are defined as digital currencies (i.e. a digital representation of value which is recorded on a distributed digital ledger whether cryptographically-secured or otherwise, that functions as a medium of exchange and is interchangeable with any money, including through the crediting or debiting of an account) and digital tokens (i.e. digital representation which is recorded on a distributed digital ledger whether cryptographically-secured or otherwise).

The main regulator that provides regulatory oversight in digital asset exchanges ("**DAX**") in Malaysia is the SC. To a certain extent, BNM also provides some regulatory oversight, but this is mainly from an anti-money laundering perspective. We set out below additional information in respect of each of the regulators and the main regulations that govern DAX in Malaysia.

SC and the Capital Markets and Services Act 2007 ("CMSA")

In Malaysia, the CMSA generally regulates and provides for all matters relating to the activities, markets and intermediaries in the capital markets, including virtual currency and DAX and for matters consequential and incidental thereto.

It is to be highlighted that the regulations in respect of DAX in Malaysia are fairly new as the SC has only introduced new guidelines and orders pursuant to the CMSA last year for the purpose of developing a framework to facilitate the trading of digital assets.

On 15 January 2019, the Capital Markets and Services (Prescription of Securities) (Digital Currency and Digital Token) Order 2019 ("**Digital Assets Order**") came into legal effect. Pursuant to the Digital Assets Order, the SC is now authorised to regulate digital assets (including cryptocurrencies, digital currencies, and digital tokens), as prescribed securities. Hence, all digital assets will need to comply with the relevant security laws and regulations in Malaysia.

Following the issuance of the Digital Assets Order, the SC had issued a statement that all ongoing digital asset platform operators are required to cease all activities and return all monies or digital assets collected from investors. All the then existing digital asset platform operators were required to apply to the SC for authorisation when guidelines in relation to the same are issued.

To this end, the SC has revised their Guidelines on Recognised Markets on 31 January 2019 by introducing a new chapter 15 on the requirements to operate a digital asset exchange ("**DAX**"). In light of this, any person who is interested in operating a DAX is required to apply to be registered with the SC as a recognised market operator ("**RMO**") by fulfilment of certain criteria set out under new chapter 15 of the Guidelines on Recognised Markets.

It is also pertinent to note that no DAX operator can facilitate the trading of any digital asset unless the SC has approved the trading of the said digital asset.

BNM and Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2011 ("AMLA")

Over and above the relevant laws, it is also pertinent to note that AMLA, being the main legislation which governs the measures to be taken for the prevention of money laundering and terrorism financing offences, and for matters incidental thereto and connected therewith, will also be applicable to DAX.

Due to the rapid growth in the field of digital currencies and the increasing functionality of its use, BNM has, pursuant to AMLA, issued the Anti-money Laundering and Counter-financing of Terrorism – Digital Currencies (Section 6) ("**Policy Document**").

The Policy Document sets out, amongst others, the minimum requirements and standards that reporting

institutions (i.e. any person offering services to exchange digital currencies) must observe when carrying out any one or a combination of the following types of activities:

(i) exchanging digital currency for money;
(ii) exchanging money for digital currency; or
(iii) exchanging one digital currency for another digital currency, whether in the course of carrying on a digital currency exchange business or otherwise.

BNM has highlighted that the reporting obligations imposed on the DAX is the first step towards making digital currency activities more transparent in Malaysia, but it does not in any way connote the authorisation, licensing, endorsement or validation by BNM of any entities involved in the provision of DAX services.

As at the date of this publication, only 3 RMOs have been granted full approval from the SC to establish and operate a DAX in Malaysia, namely Luno Malaysia Sdn Bhd, SINEGY Technologies (M) Sdn Bhd and Tokenize Technology (M) Sdn Bhd.

2. Initial Coin Offering ("ICO") and Initial Exchange Offering ("IEO") Schemes

ICO refers to the creation and issuance of digital assets, in exchange for established digital currency (such as Bitcoin or Ether) or fiat currency, whereas IEO refers to an offering of digital tokens by an issuer through an electronic platform.

Following the issuance of the Digital Assets Order and taking into consideration the feedback obtained pursuant to the Public Consultation Paper No. 1/2019 – Proposed Regulatory Framework for the Issuance of Digital Assets through Initial Coin Offerings (ICOs), the SC has further issued the Guidelines on Digital Assets on 15 January 2020 ("**Guidelines on Digital Assets**"), which mainly sets out the requirements for:

(a) registration of an IEO platform operator; and

(b) an issuer seeking to raise funds through digital token offering.

The SC has also issued a statement to remind the public that no person is permitted to offer or issue any digital tokens in Malaysia until the coming into force of the Guidelines on Digital Assets, which is expected to be during the second half of year 2020.

Under the Guidelines on Digital Assets, the requirements imposed on an IEO platform operator are among others, as set out below:

(a) must be registered as a DAX operator under the Guidelines on Recognised Markets;

(b) must be a company incorporated in Malaysia;

(c) must have a minimum paid-up capital of RM5,000,000;

(d) where an IEO operator is a public company, at least 1 member of the board must be an independent director;

(e) must ensure that board of directors and senior management are fit and proper, meeting the criteria prescribed under the Guidelines on Digital Assets; and

(f) must appoint a responsible person as the main contact person for the purpose of liaising with the SC and perform duty as may be directed by the SC, who must be a chief executive of the IEO operator with a minimum 5 years' experience in carrying out due diligence, assessment on business proposals and fundraising or any other relevant experience.

The requirements imposed on an issuer seeking to raise funds through digital token offering are among others, as set out below:

(a) must be a company with main business operations and incorporated in Malaysia;

(b) must have a minimum paid-up capital of RM500,000;

(c) must have at least 2 directors whose principal or only place of residence in Malaysia;

(d) must ensure that board of directors and senior management are fit and proper, meeting the criteria prescribed under the Guidelines on Digital Assets;

(e) on the date of issuance of digital tokens, members of the board and senior management must, in aggregate, own at least 50% equity holding in the issuer;

(f) after issuance of digital tokens, the initial board and senior management members may only sell, transfer or assign not more than 50% of their initial equity holding until completion of the digital token's project; and

(g) offering may only be carried out through an IEO platform by submitting the required application and whitepaper to the IEO operator, containing information as required under the Guidelines on Digital Assets.

N. Equity Crowdfunding (ECF), Peer-To-Peer Financing (P2P) and Property Crowdfunding (PCF)

Crowdfunding refers to the practice of funding projects or ventures by raising money from members of the public via the Internet. The current methods of crowdfunding available in Malaysia are equity crowdfunding ("**ECF**") peer-to-peer lending ("**P2P**") and Property Crowdfunding ("**PCF**"). Specifically:

(a) ECF allows members of the public to invest in a company (usually SMEs) in exchange for equity or shares in the company;

(b) P2P allows members of the public to lend money to individuals or businesses, which is repaid back at fixed intervals with interest included. Both ECF and P2P are offered and facilitated through online platforms; and

(c) PCF offers the same potential as that of ECF and P2P financing platforms in providing an alternative source of financing but is specifically tailored for first-time homebuyers. In addition, it will provide investors access to a new investment option.

In Malaysia, ECF, P2P and PCF platforms are regulated by the SC through the Guidelines on Recognised Markets last revised as at 5 May 2020. Any person who operates ECF P2P and/or PCF platforms without prior authorisation from the SC may be held liable under section 7 of the Capital Markets and Services Act 2007, which carries a maximum fine of ten million ringgit and/or imprisonment term up to ten years.

O. Digital Tax

With effect from 1 January 2020, the Government of Malaysia has imposed a digital service tax of 6% on foreign digital service providers, pursuant to amendments to the Service Tax (Amendment) Act 2019 ("**STA**").

Pursuant thereto, foreign service providers of digital services will be required to register with the Royal Malaysian Customs Department as a foreign registered person. In this regard, a service tax of 6% will be imposed on any digital service provided by a foreign registered person to any consumer in Malaysia.

Further details on the implementation of the digital tax regime can be found in Chapter 7.

P. Digital Disruption

Digital disruption is the change that occurs due to emerging digital technologies and business models which affect the value proposition of existing goods and services. The pace of digital disruption has accelerated at such speed that it has blindsided industries, requiring new laws and regulations to be implemented to assist industries to adjust to such disruptions.

E-hailing services and short-term rental of premises is amongst these digital disruptors, and the government has passed legislation in order to regulate the same.

The relevant laws applicable to e-hailing services and short-term rentals are briefly set out below.

1. E-hailing

The e-hailing industry is rapidly booming and public calls, especially from the taxi service industry have led to governmental efforts to regulate provision of e-hailing services.

In July 2018, the Commercial Vehicle Licensing Board Act 1987 and the Land Public Transport Act 2010 were amended to impose new requirements for e-hailing service providers and e-hailing drivers.

(a) e-hailing service providers are subject to an intermediation business licence under section 26A(1) of the Commercial Vehicle Licensing Board Act 1987 ("**CVLB**"); and

(b) e-haling vehicle are considered as a public service vehicle (PSV) under section 14(1B) of CVLB, and as such, e-hailing drivers are required to obtain a PSV licence under section 56 of the Road Transport Act 1987.

These regulatory requirements have been enforced by using a gradual approach by the Ministry of Transport starting from 12 October 2019.

2. Short-term Accommodations

The short-term accommodation platforms such as Airbnb have become one of the largest accommodation providers in the world despite being exempted from licensing requirements under existing laws.

In Malaysia, the main legislation governing the tourism industry is the Tourism Industry Act 1992 ("**TIA 1992**"). The TIA 1992 is a Federal law that applies to all States in Malaysia. Over and above the TIA 1992, each State authority, pursuant to the powers conferred by the Local Government Act 1976, may issue their own by-laws or other legislation to govern this industry in their respective States. In Kuala Lumpur, the main legislation governing hotels or "accommodation premises" is the Hotels (Federal Territory of Kuala Lumpur) Act 2003 ("**Hotels Act**").

Both the TIA 1992 and Hotels Act are drafted in such a manner where short term rental of homes would be considered as an "accommodation premise" or "hotel" such that the hosts would be required to register their Airbnb accommodation with the Commissioner of Tourism and obtain a hotel licence from the relevant local authority, in this case, Kuala Lumpur City Hall ("**DBKL**").

Prior to 2018, it was apparent from the lack of enforcement of the registration of accommodation premises, that the relevant regulators in Malaysia do not view short term rentals in the same manner as hotels that are required to be registered and licensed and hence, were exempted from the licensing requirement.

Such view, however, was not long-lived as starting January 2018, all online registered accommodation premises are required to register with the Ministry of Tourism, Arts and Culture ("**MOTAC**").

Aside from this registration requirement, the government has also recently announced in November 2019 that a Short Term Residential Accommodation Taskforce has been established under MOTAC and the Ministry of Housing and Local Government to regulate short-term accommodations nationwide, details of which are expected to be announced in year 2020.

Q. MCMC's Regulatory Initiatives

1. National Fiberisation and Connectivity Plan ("NFCP")

NFCP is formulated in response to the nation's desire to improve broadband quality and coverage, reduce broadband price and provide Internet access across all spectrums of society. It is a plan that aims to put in place robust, pervasive, high quality and affordable digital connectivity for the well-being of the people and progress of the country. The time frame for the implementation of NFCP is 5 years, from 2019 to 2023.

The strategies drawn up for realisation of NFCP include the following: -

(a) manage funding for NFCP from a variety of sources in a prudent and sustainable manner and leverage on relevant regulatory policies and instruments where necessary;

(b) optimise digital infrastructure development and deployment nationwide and clear any impediments to its development;

(c) regional and international networks are connected extensively with domestic networks; and

(d) enhance connectivity in high impact socio-economic sectors such as education, agriculture and health care, small and medium enterprises and underserved areas.

The key targets of NFCP are, amongst other things, gigabits availability in selected industrial areas by 2020 and to all state capitals by 2023, 20% availability for premises in sub-urban and rural areas with a speed up to 500Mbps by 2022, average speed of 30Mbps in 98% of populated areas by 2023, and improve mobile coverage along Pan Borneo highway upon completion.

As at 28 February 2020, MCMC has announced the implementation of 6 NFCP projects for 2020 in line with the Economic Stimulus Package 2020.

It aims to provide public cellular and fixed broadband services across the country, spur investments and innovations in related industries as well as create approximately 20,000 new job opportunities. The proposed initiatives and timelines in relation to the NFCP projects for 2020 are as below:

NCFP	Proposed Initiatives and Timelines
NFCP 1	Implementation began on 15 February 2010.
NFCP 2	Expanding use of public cellular services in various states throughout the country.
NFCP 3	Provisioning of fibre optic broadband access networks and services, with speeds of up to 500Mbps in 100,000 commercial and residential premises. The Request for Proposal ("**RFP**") for the NFCP 3 project was issued on 14 February 2020, and the deadline for submissions has closed on 12 May 2020.
NFCP 4	Provisioning of connectivity to 151 Orang Asli settlements. The issuance of the RFP for this project is expected to be in the second quarter of 2020.
NFCP 5	Upgrading 377,360 copper broadband subscribers to fibre, which is expected to commence in the first quarter of 2020 by Telekom Malaysia Berhad (TM) using its major contribution provided for in the Communications and Multimedia (Universal Service Provision) Regulations 2002.
NFCP 6	Installing facilities and the deploying network services for the provisioning of public cellular services at approximately 740 locations nationwide. The issuance of the RFP for this project is expected to be in the fourth quarter of 2020.

2. Analogue Switch Off

Following a successful switchover from analogue to Digital Terrestrial Television broadcasting that took place in Langkawi in July 2019, MCMC has announced the commencement of the Digital Terrestrial Television (DTT) Project, which is the nationwide transition to digital TV. Further on 6 August 2019, a complete list of switchover date on the remaining areas was released by MCMC.

The switchover to Digital Terrestrial Television broadcasting allows the public to enjoy free channels via

myFreeview, which is the designated brand for Malaysia's Free Digital Television Digital Terrestrial Television services, which currently offers 15 TV channels and 6 radio channels.

The analogue switch off marks a new era of technological advancement in Malaysia's broadcasting field and is one of the crucial efforts by the government to drive the nation towards digitalisation, as well as to gain digital dividends from the use of the 700MHz spectrum to further enable other services such as wireless broadband communications including 5G.

3. 5G Task Force

The MCMC has established a national 5G Task Force in November 2018 to study and recommend a holistic strategy for 5G deployment in Malaysia. The 5G Task Force is comprised of members from the private sector, Ministries and agencies representing the demand and supply side of the ecosystem. There are 4 working groups in the 5G Task Force, which are (i) business care, (ii) infrastructure, (iii) spectrum management and allocation and (iv) regulatory.

The main objective of 5G Task Force is to study and recommend to the government a holistic 5G implementation strategy with analysis from the perspectives of business care, infrastructure, spectrum management and allocation, and regulatory.

On 30 September 2019, the MCMC announced the rollout of the 5G Demonstration projects commencing from October 2019 to March 2020 in order to test the preparedness of the country in implementing 5G technology.

4. National Digital ID

The National Digital ID is an advanced method to verify the identity of an individual over the internet or individual virtual identity in the online environment. It serves as a secure and trusted digital credential as well as a platform for authentication of the identity of an individual over the internet, but is not a compulsory requirement and not a substitute of the existing National Registration Identity Card.

The implementation of the National Digital ID will enhance the development of the digital economy which is expected to benefit and make a positive impact to the government, online service providers, and consumers.

A National Digital ID Task Force has been established to conduct comprehensive research which commenced on 21 November 2019 in order to establish a user-centric National Digital ID framework for Malaysians and a final report of the said comprehensive research is expected to be ready by year 2020.

17. THE DIGITAL ECONOMY

The Digital Economy refers to economic activities which adopt and utilise digital technology. The Government has identified, in its Budget 2020, the acceleration of the digital economy as one of the Government's key strategies and has announced new initiatives to accelerate digital adoption in Malaysia.

The Malaysia Digital Economy Corporation ("MDEC") is the main government body driving Malaysia's digital economy. MDEC's digital economy initiatives place heavy focus on attracting investments from global technology companies and cultivating digital adoption and inclusivity when doing business in Malaysia.

A. Budget 2020 and the Digital Economy

The following initiatives have been proposed in Budget 2020 for acceleration of the digital economy:

1. National Fiberisation & Connectivity Plan ("NFCP")

To construct a Digital Malaysia, the Government will implement the NFCP over the next 5 years to provide wider coverage and higher speed of digital connectivity nationwide.

The NFCP will provide comprehensive coverage of high speed and quality digital connectivity nationwide including in rural areas.

To do so, the Government will allocate RM21.6 billion for implementation of the NFCP, and an additional RM250 million will be allocated to improve connectivity in remote areas of Malaysia via the provision of broadband access through satellite technology.

The Government has also announced an allocation of RM210 million to accelerate the deployment of new digital infrastructure for public buildings, particularly schools and high impact areas such as industrial parks, with priority to be given to locations within States that can facilitate and expedite the implementation of the NFCP.

2. 5G and Digital Applications

Riding on the implementation of the NFCP, the Government will introduce a RM50 million 5G Ecosystem Development Grant, with an additional allocation of a RM25 million matching grant fund to spur digital application pilot projects. Identified projects include drone delivery, autonomous vehicles, blockchain technology and other products and services that leverage on fibre optics and 5G infrastructure.

Budget 2020 looks to seed technological developments by Malaysian companies to adopt 5G technology, which is up to 100 times faster than 4G, particularly in the era of the Internet of Things where increased capacity is required to cope with rising demands to bridge the digital gap and build a digitally-connected Malaysia.

3. *Digitalisation of Companies*

The Government has allocated RM550 million to provide Smart Automation grants to 1,000 manufacturing and 1,000 services companies, to automate business processes on a matching basis of up to RM2 million per company.

Small Medium Enterprises ("**SMEs**") are also encouraged to adopt digitalisation measures for their business operations such as electronic Point of Sale systems, Enterprise Resource Planning and electronic payroll systems. The Government will provide a 50% matching grant of up to RM5,000 per company for the subscription of such services, amounting to RM500 million over five years.

As the lead agency for the digital economy, MDEC will be allocated RM70 million to set up 14 one-stop Digital Enhancement Centres ("**DEC**") in all states to facilitate access to financing and capacity building of businesses, especially to SMEs that are keen to embrace digital transformation in line with the Fourth Industrial Revolution. The DEC will provide direct access to advisory services, training and direct financing, including grants.

MDEC will also continue to manage the Digital Transformation Acceleration Programme (DTAP) which aids mid-tier and large companies to increase productivity, reduce foreign labour dependency and develop new sources of growth or business models.

4. *Tax Incentives for Electrical and Electronics Industry*

The Government will provide income tax exemptions and a Special Investment Tax Allowance to accelerate high value-added activities in the Electrical and Electronics (E&E) industry to facilitate transition into the digital economy. Further details on such incentives can be found in Chapter 6.

B. Digital Free Trade Zone

The Digital Free Trade Zone ("**DFTZ**") was launched by the Government on 22 March 2017, together with Jack Ma (founder of Alibaba Group). This initiative comprises both physical and virtual DFTZs, which are intended to pave the roadmap for SMEs to capitalize on the exponentially growing Internet economy by providing a platform on which they can conduct businesses and services.

The physical zone comprises an eFulfilment hub to facilitate exports of local SMEs and businesses, as well as a satellite services hub to further facilitate cross-border trade by connecting SMEs and businesses with necessary services such as financing, last mile fulfilment and insurance. The virtual zone sees the construction of an eServices platform, which facilitates the management of processes needed for cross-border trade, such as cargo clearance, by digitally connecting users with government and business services.

DFTZ is divided into 2 phases. The 1st phase involves the development of the eFulfilment hub of DFTZ centred at KLIA Aeropolis whereas the 2nd phase involves the development of the satellite services hub of DFTZ centred at Kuala Lumpur Internet City, Bandar Malaysia. The 1st phase was launched in November 2017 and the 2nd phase is targeted to be operational in 2020.

A number of initiatives have been put in place in respect of the 1st phase of the DFTZ.

Since 2016, several regional eFulfilment hubs have been established in Malaysia, as operated by POS Malaysia (namely SnT Global Logistics Sdn Bhd, YCH Logistics Sdn Bhd (for Zalora's regional distribution hub), FM Global Logistics Sdn Bhd and Xin Hwa Trading and Transport Sdn Bhd).

Malaysia Airports Holdings Bhd (MAHB) have partnered Cainiao Smart Logistics Network (Hong Kong) Ltd to develop the DFTZ Park at KLIA Aeropolis. The DFTZ Park is a collaboration between the Government, SME Corporation Malaysia, Malaysia External Trade Development Corporation (MATRADE), MDEC and

Alibaba to facilitate the development of an e-commerce platform for SMEs from China and Malaysia.

The DFTZ Park is expected to be operational in September 2020. MAHB will develop a 90-acre piece of land at the DFTZ Park, of which 60 acres will be allocated for Cainiao KLIA Aeropolis to build a regional e-fulfilment hub, which is set to be the world's first e-World Trade Platform outside China.

Other infrastructure developments include a free commercial zone corridor, an airport cargo freight station to support intermodal connectivity to seaports and big data analytics for operational efficiency.

KLIA Aeropolis' air cargo and logistics development cluster is projected to generate RM1.6 billion in GDP and create 6,000 jobs in the next three years.

In July 2019, three further locations were announced to be under the DFTZ initiative, namely the Penang International Airport, the Sultan Abdul Aziz Shah Airport (or Subang Airport) and Port Klang.

According to the Minister of Communications and Multimedia, with the developments achieved under the DFTZ initiative to date, Malaysia has facilitated more than 6,200 SMEs to be trained in cross-border e-commerce. With further and impending developments to the DFTZ initiative, SMEs and businesses can generally expect to enjoy high efficiency e-fulfilment warehouse services, unified government services platform, improved regulatory processes and reduction of turnaround time and improved trackability across the value chain upon full implementation of the DFTZ initiatives.

SMEs, businesses including traders and manufacturers, service providers and multinational corporations are encouraged by MDEC to reach out to MDEC directly for MDEC to assess and determine how each party can best participate in and benefit from these initiatives. Further details can be accessed via DFTZ's official website at https://mydftz.com/.

C. Smart Cities

One of the main thrusts of the Twelfth Malaysia Plan is the conversion of Malaysian cities into smart cities, by leveraging on digital solutions such as 5G connectivity, cashless communities, autonomous public transport, drone delivery, energy-efficient buildings and smart treatment of water and waste management to improve public safety and quality of life.

To this end, the Housing and Local Government Ministry launched the Malaysia Smart City Framework ("**Framework**") on 23 September 2019.

The Framework is the Government's commitment in ensuring that Malaysian cities strive to be smart and sustainable and will leverage on other national initiatives such as the NFCP.

The Framework acts as a guideline for cities, state and local authorities. The implementation roadmap for the Framework is divided into three phases:

a) Phase 1 (Foundation Stage) from 2019 to 2020 (2 years);
b) Phase 2 (Development Stage) from 2021 to 2022 (2 years); and
c) Phase 3 (Advanced Development and Monitoring Stage) from 2023 to 2025 (3 years).

Five cities have been chosen as pilot project areas, namely Kuala Lumpur, Johor Bahru, Kota Kinabalu, Kuching and Kulim.

30 priority initiatives have been identified to be rolled out within Phase 1 (Foundation Stage) of the implementation roadmap by 2020, encompassing the seven components of the Malaysia Smart City. Notably, these include:

a) enhancing the usage of e-payment;
b) implementing Predictive Policing;
c) developing a Cloud-Based Flood Prevention and Monitoring System;
d) enhancing the use of digital platform to create a two-way interaction between the community and local authority;

e) utilisation of digital documents;
f) utilisation of A.I. and IoT sensors for data collection, traffic management and pollution tracking; and
g) ensuring compliance to MSQoS standards on network coverage covering wireless broadband, wired broadband and public cellular service.

D. Multimedia Super Corridor

Multimedia Super Corridor ("**MSC**") is a special economic zone designated by the Government to house companies that embrace information and communications technology ("**ICT**").

This initiative was officially inaugurated on 12 February 1996 with the aim of propelling Malaysia into a knowledge based society. MDEC was tasked to manage and facilitate the development of the MSC and the award of MSC status to qualifying ICT companies.

D1. Promoted Activities

Companies seeking to apply for MSC status must be a provider of services relating to any of the following:

a) Big Data Analytics (BDA);

b) Artificial Intelligence (AI);

c) Financial Technology (FinTech);

d) Internet of Things (IoT);

e) Data Centre and Cloud (technology / software / design and support);

f) Blockchain;

g) Creative Media Technology;

h) Sharing Economy Platform;

i) User Interface and User Experience (UI / UX);

j) Integrated Circuit (IC) Design and Embedded Software;

k) 3D Printing (technology / software / design and support);

l) Robotics (technology / software / design);

m) Autonomous (technology / software / design and support);

n) Systems / Network Architecture Design and Support; and

o) Global Business Services or Knowledge Process Outsourcing (excludes non-technical and / or low value call centre, data entry, and recruitment process outsourcing).

The following activities are <u>not</u> considered as Promoted Activities:

a) Trading;

b) Manufacturing; and

c) Provision of telecommunication services.

D2. Incentives for MSC Status

Applicants for MSC status must select one of the three incentive categories at the point of application. The incentive categories are divided into three tiers, each with their own set of conditions to be fulfilled for a company to be entitled to the corresponding incentives.

The incentive tiers are as follows:

a) **Tier 1**: 100 % tax exemption for 5 years (extendable for an additional 5 years);

b) **Tier 2**: 100% tax exemption for 5 years (extendable for an additional 5 years); and

c) **Tier 3**: 70% tax exemption for 5 years (may apply for extension provided company changes to Tier 1 or Tier 2 and fulfils conditions imposed).

The requirements for the individual tiers are as follows:

a) Tier 1:
- must be located within Designated Premises at MSC Malaysia Cybercities or Cybercentres;
- must have paid up capital of at least RM500,000 (to be increased to RM2.5 million for extension of exemption after 5 years);

- 70% of Knowledge Workers must be Malaysians; and
- must comply with one of the following:
  - 50 Knowledge Workers with a minimum salary of RM5,000 and annual operating expenditure and investment in fixed assets of at least RM3.5 million;
  - 30 Knowledge Workers with a minimum salary of RM10,000 and annual operating expenditure and investment in fixed assets of at least RM3.5 million; or
  - (Option for Data Centres only): 5 Knowledge Workers with a minimum salary of RM5,000 and annual operating expenditure and investment in fixed assets of at least RM10 million.

b) Tier 2:
- must be located within MSC Malaysia Cybercities or Cybercentres;
- must have paid up capital of at least RM500,000 (to be increased to RM2.5 million for extension of exemption after 5 years);
- 70% of Knowledge Workers must be Malaysians; and
- must comply with one of the following:
  - 50 Knowledge Workers with a minimum salary of RM5,000 and annual operating expenditure and investment in fixed assets of at least RM3.5 million;
  - 30 Knowledge Workers with a minimum salary of RM10,000 and annual operating expenditure and investment in fixed assets of at least RM3.5 million; or
  - (Option for Data Centres only): 5 Knowledge Workers with a minimum salary of RM5,000 and annual operating expenditure and investment in fixed assets of at least RM10 million.

c) Tier 3:
- must have paid up capital of at least RM250,000 (to be increased to RM2.5 million for extension of exemption after 5 years);
- 50% of Knowledge Workers must be Malaysians; and
- must comply with one of the following
  - 30 Knowledge Workers with a minimum salary of RM5,000 and annual operating expenditure and investment in fixed assets of at least RM1 million; or
  - 20 Knowledge Workers with a minimum salary of RM8,000 and annual operating expenditure and investment in fixed assets of at least RM1 million.

D3. Change in MSC Tax Exemption Regime

With Malaysia's participation in the Organisation for Economic Co-operation and Development (OECD) Base Erosion and Profit Shifting (BEPS) taxation initiatives, the grant of MSC status and its incentives were put on hold from 1 July 2018.

Under the previous regime, companies were granted tax exemption for income derived from MSC Malaysia Approved Activities, which may comprise income deriving from intellectual property (IP income) and/or income deriving from non-intellectual property (non-IP income).

Moving forward, companies will be granted tax exemptions for income derived from either services activities ("**Services Incentive**") and/or intellectual property ("**IP Incentive**").

The relevant policy for the IP Incentive is still being reviewed by the Government. The Services Incentive has been approved by the Government and is regulated by the Income Tax (Exemption) (No. 10) Order 2018.

Applications for the Services Incentive were accepted beginning 2 April 2019.

In addition, companies granted MSC status under the previous regime were qualified to a set of incentives, privileges and rights from the Government as enshrined in the ten Bill of Guarantees ("**BoGs**").

With the transition to the new regime, all BoGs are currently being reviewed. While existing MSC status companies will still enjoy benefits from the ten BoGs (as set out in their MSC certificates), new applicants will only enjoy tax incentives (which are guaranteed under BoG 5).

D4. Transition to New Regime

Existing MSC status companies with tax incentives under the previous regime are given the following options:

a) to "grandfather", i.e. to continue to enjoy the income tax exemption granted for IP income and/or non-IP income under their existing MSC status conditions of grant until 30 June 2021; or

b) to move to the new regime and be subjected to the new criteria / conditions.

D5. Eligibility for Services Incentive

To qualify for the Services Incentive, an organisation must:

a) be a company incorporated in Malaysia;

b) propose to carry out one or more MSC Promoted Activities (as set out in Section D1);

c) not have issued any previous invoices for Promoted Activities on the date of application (however, applicants who have issued invoice for Promoted Activities no more than 12 months prior to the date of application may still be eligible if the applicant has at least 60% Malaysian equity ownership during the exemption period); and

d) not have enjoyed any income tax exemption in respect of any activity granted by the Government on the date of application.

E. MDEC Programmes and Initiatives

To promote continued growth of the nation's Digital Economy, MDEC offers numerous programmes and initiatives, some of which are set out below.

1. Global Tech Fund

The Global Tech Fund ("**GTF**") funds technology innovation activities in the following technology areas:

a) Big Data Analytics;

b) IoT;

c) Artificial Intelligence / Deep Learning;

d) Blockchain;

e) Cybersecurity;

f) Robotics;

g) Drone technology;

h) Virtual reality/ Augmented reality; and

i) Other emerging technologies.

The GTF aims to support the following three focus pillars:

a) nurturing global champions - targets local scale-up technology companies who are ready to go into their first global market or expand their existing global market presence via technology innovation and commercialisation of market-driven product/service;

b) driving investments - targets foreign technology companies to set up Centre of Excellence to conduct high value technology innovation/R&D activities leading to the development and commercialisation of market driven, innovative product/service for the global market as well as contribute to ecosystem development; and

c) catalysing digital innovation ecosystem - targets companies who can improve and assist the prospects of innovative, high growth Malaysian technology startups and develop Malaysia's digital ecosystem in identified technology areas.

The applicable eligibility criteria and funding quantum for each of the focus pillars above are as follows:

Focus Pillar	Eligibility Criteria	Funding Quantum
Nurturing global champions	• Local Technology Company • A business entity incorporated in Malaysia with paid-up capital of at least RM20,000. • Malaysian equity of at least 51%.	Up to 50% of the approved total project cost, subject to an undisclosed ceiling limit.
Driving investments	• Foreign Technology Company • Business entity incorporated in Malaysia with paid-up capital of at least RM50,000.	Up to 30% of the approved total project cost, subject to an undisclosed ceiling limit.
Catalysing digital innovation ecosystem	• Business entity specialising in technology that provides money, mentor and market access to businesses. • Business entity incorporated in Malaysia with paid-up capital of at least RM50,000. • No specific criteria on Malaysian ownership requirement.	Up to 30% of the approved total project cost, subject to an undisclosed ceiling limit.

2. *Cybercentre-Digital Hub*

Cybercities and Cybercentres are designated areas in which companies from the same sector are placed together to spur growth.

As a general guide, applicants for MSC Malaysia Cybercity or Cybercentre status must be able establish that they:

a) are driven by State Governments, and MSC Malaysia Cybercity / Cybercentre stakeholders;

b) have broadband and infrastructure readiness;

c) have customer-focused management with KPIs;

d) have a competitive environment to attract investments, nurture start-ups / SMEs and house knowledge workers;

e) have talent pool availability;

f) have proximity to universities and research centres;

g) have adopted relevant e-applications to enhance service delivery; and

h) have ICT Blueprints or value propositions for MSC Malaysia Status entities and the local economy.

MSC Malaysia has also created a separate category of Cybercentre known as the Cybercentre-Digital Hub (or also known as the Malaysian Digital Hub), which are tailored for start-ups and internet economy companies. Further details on Digital Hubs and the relevant qualifying criteria can be accessed via the following link: https://mdec.my/what-we-offer/digital-hubs/

3. *Malaysia Tech Entrepreneur Programme*

The Malaysia Tech Entrepreneur Programme ("**MTEP**") is another MDEC initiative to attract technology talents and aspiring entrepreneurs from around the globe. The MTEP enables work pass applications from qualified entrepreneurs to be expedited and issued within 6 weeks, and is specifically catered for tech founders who want to capture the ASEAN market from Malaysia.

An individual with no track record of established business may apply for a 1 year pass, whereas

individuals with a previous track record of established business may apply for a 5 year pass.

Application requirements include having a business pitch deck, a certificate of good conduct issued by the relevant embassy or enforcement agency from the applicant's residing country, a letter of offer or tenancy agreement from any Malaysia Digital Hubs or MTEP recognised partners, bank statements showing a minimum of RM50,000 etc. Additional requirements apply for established entrepreneurs in the venture capital industry, where the applicant must be the founder, co-founder or the Malaysian venture partner, have minimum funds of RM10 million, and be registered with the Securities Commission of Malaysia as a venture capital management corporation. The portal to apply for a work pass can be accessed via the following link: https://www.mtep.my/

4. Global Acceleration and Innovation Network

The Global Acceleration and Innovation Network ("**GAIN**") is a programme that provides customised assistance based on every qualified company's needs and goals. Examples of assistance provided include elevating brand visibility, facilitating market access, upskilling capabilities match-making for mergers or acquisitions or facilitating access to funds. To qualify as a GAIN company, the company must (among other criteria) be majority Malaysian owned, possess a strong financial track record, and possess scalable or innovative technology products and solutions. Further details on the GAIN programme can be accessed via the following link: https://gainconnex.com.my/

5. Malaysia Animation and Creative Content Centre

The MSC Malaysia Animation and Creative Content Centre ("**MAC3**") is designed to assist content creator entrepreneurs in the global creative content sphere, and to facilitate collaboration and support between small and medium animation startups in order to accelerate their businesses.

To apply for MAC3 Status, applicants must be:

a) a registered company involved in creative content and technology activities;

b) operating in one or more of the following main sectors:

- Animations;
- Games and Interactive Media;
- VFX for Film and TV; and or
- New Media and Platforms,

c) own at least one new uncommercialised or commercialised intellectual property;

d) for incorporated companies, 51% of legal and beneficial ownership of the applicant must be vested in Malaysia, and the applicant must have paid up capital of not more than RM300,000; and

e) for enterprise or sole proprietorship, the applicant must be registered under the Registration of Businesses Act 1956 and be Malaysian owned.

6. Digital Transformation Acceleration Programme

The Digital Transformation Acceleration Programme ("**DTAP**") aims to provide Malaysian companies with the necessary assistance to undergo digital transformation and adopt emerging digital technologies.

The DTAP partners with Digital Transformation Labs, which are experts who help companies to brainstorm on new ideas, design new business models, develop new products and/or services and finally pilot the implementation plan. The DTAP also offers a DTAP Pilot Grant, which is a matching grant to implement the digital transformation pilot, in order to cater for execution and pilot development for digital transformation activities.

To apply for the DTAP Pilot Grant, a company must fulfil the following criteria:

a) be a company incorporated under the Companies Act 2016;

b) the effective equity of the company must be at least 60% owned by Malaysians;

c) have minimum revenue of more than RM 20 million;

d) be a company from the manufacturing sector and provide services related to manufacturing; and

e) the business must not be a recipient of, or have previously received, any government funding for the same approved expenses or project.

7. DroneTech Global Testbed

On 23 January 2020, MDEC and the World Economic Forum ("**WEF**") announced a collaboration to co-design and pilot policy principles and regulatory frameworks with a view to develop a policy framework that allows for drone delivery and a potential launch of the first drone delivery service in Southeast Asia, serving as a model for the region and beyond.

MDEC intends to leverage on WEF's mechanisms and case studies to support the implementation of the DroneTech Global Testbed on drone deliveries and is anticipated to position Malaysia as the heart of Digital ASEAN. The DroneTech Global Testbed aims to bring together key industry partners, government agencies, regulators, academic and investors with a view to demonstrate how technology can drive adoption across various industries given a conducive environment for it to operate in.

F. Digital Tax

With effect from 1 January 2020, the Government of Malaysia will impose a digital service tax of 6% on foreign digital service providers, pursuant to amendments to the Service Tax (Amendment) Act 2019 ("**STA**").

Pursuant thereto, foreign service providers of digital services will be required to register with the Royal Malaysian Customs Department as a foreign registered person, wherein a service tax of 6% will be imposed on any digital service provided by a foreign registered person to any consumer in Malaysia.

Further details on the implementation of the digital tax regime can be found in Chapter 7.

G. Government Initiatives to Overcome the Effects of COVID-19

1. Economic Stimulus Package (27 February 2020)

Pursuant to the Economic Stimulus Package announced on 27 February 2020, the following allocations were made by the Government in relation to the digital economy:

a) RM50 million subsidy towards the financing of short courses, particularly in digital skills (in fields such as coding, digital marketing and data science);

b) RM20 million to the Perkhidmatan e-Dagang Setempat (PeDAS) programme to transform Rural Internet Centres (Pusat Internet Desa or "PID") into e-commerce hubs, by assisting rural entrepreneurs to market their products on e-commerce platforms with facilities available at the PIDs;

c) RM10 million in grants for 10,000 local entrepreneurs to promote sales of their products on e-commerce platforms;

d) RM300 million for the establishment of the Smart Automation and Digitalisation Facility by BNM, for SMEs to upgrade, modernise and rejuvenate their productive assets; and

e) provision of accelerated capital allowances for qualifying capital expenditures on machinery and equipment (including ICT equipment) over a 2-year period, to incentivise businesses to undertake investments.

2. People-centric Economic Stimulus Package (PRIHATIN)

On 18 March 2020, the Government implemented the Movement Control Order in Malaysia to curb the outbreak of COVID-19 in Malaysia. To mitigate the

economic impact of COVID-19, on 27 March 2020, the Government introduced the Prihatin Rakyat Economic Stimulus Package (or PRIHATIN), which acts as an enhancement to the earlier Economic Stimulus Package announced in February.

As part of PRIHATIN, the following allocations have been made in relation to the digital economy:

a) RM600 million for the provision of free internet services to the people of Malaysia, by way of special packages offered in collaboration with telecommunication companies;

b) RM400 million to be invested by telecommunication companies, in order to widen network coverage and capacity and maintain stable and high-quality telecommunication services;

c) RM500 million of additional funds granted under the Micro Credit Scheme for micro-entrepreneurs in all business sectors, including those in the creative industry and online businesses; and

d) RM60 million allocation for the provision of one-off cash assistance of RM500 to 120,000 e-hailing drivers.

3. Short-term Economic Recovery Plan (PENJANA)

In June 2020, the Government announced the Short-term Economic Recovery Plan (PENJANA), a RM35 billion stimulus package primarily aimed at helping businesses recover from the impact of COVID-19. Under PENJANA, the Government has introduced multiple initiatives to encourage businesses to shift online. These include:

a) RM140 million in matching grants under MDEC for technological training, seller subsidies and sales assistance;

b) RM700 million in grants and loans for SMEs to finance digital transformation under the following programmes:

- SME Digitalisation Matching Grant of RM100 million, in partnership with telecommunication companies;
- SME Technology Transformation Fund of RM500 million loan; and
- Smart Automation Grant of RM100 million, capped at up to RM1 million per company;

c) RM75 million to promote the gig economy and the welfare of gig economy workers. In this regard, the Government will provide MDEC with RM25 million for the Global Online Workforce (GLOW) programme to train Malaysians to earn income from serving international clients while working from home.

4. MDEC #DigitalvsCovid Campaign

MDEC has also launched the #DigitalvsCovid campaign in collaboration with local technology companies to help mitigate the effect of COVID-19 on the economy. Pursuant to the campaign, more than 80 Malaysian technology companies have collaborated with MDEC to offer technology solutions and services for SMEs on a pro-bono basis, or on discounted rates. The comprehensive list of technology solutions and services available can be accessed at MDEC's website, at **https://mdec.my/home/c19techrelief/**.

18. LABUAN – INTERNATIONAL BUSINESS AND FINANCIAL CENTRE

Labuan is one of the three federal territories of Malaysia and has its own laws and regulations for financial activities carried on within the Labuan International Business and Financial Centre ("**Labuan IBFC**"), separate from the domestic Malaysian laws. Since its inception in 1990, Labuan IBFC has evolved to become a mid-shore financial centre to serve the growing demands for international financial services within the region.

A. Labuan IBFC

The Labuan Financial Services Authority ("**LFSA**") is a statutory body established under the Labuan Financial Services Authority Act 1996 to be responsible for the development and administration of the Labuan IBFC. The LFSA is the sole authority of the Labuan IBFC and is empowered under legislation to administer all financial activities that take place within the Labuan IBFC and to enforce the laws of Labuan.

B. Labuan Companies

The Labuan Companies Act 1990 ("**LCA**") provides for the incorporation, registration and administration of Labuan companies, as well as the registration of foreign companies incorporated outside Malaysia as a foreign Labuan Company.

Every Labuan company is required to appoint a Labuan trust company to attend to their company secretarial matters and must have a registered office in Labuan which shall be the principal office of the Labuan trust company. A company incorporated under the LCA is required to have at least one (1) director (who may be a resident or a non-resident) and one (1) resident company secretary. The minimum number of shareholders in a Labuan company is one (1) and the shareholder may be an individual, a corporation or a trust company holding the shares as a nominee, or on trust. A Labuan company may be limited by shares, limited by guarantee or an unlimited company. There are also no foreign ownership restrictions in Labuan companies. Subject to its articles of association, a Labuan company may also establish a branch or an office in any part of the world except for any part of Malaysia outside Labuan, unless approved by the LFSA.

Labuan business activities shall be carried out in, from or through Labuan with non-residents or with another Labuan entity.

Furthermore, it should also be noted that a Labuan company must not carry on its business for more than six (6) months without any member. Failure of compliance shall result in every officer, servant, employee or agent

of that company during the time it so carries on business who has knowledge of the absence of its members to be liable, and if more than one, jointly and severally, for the payment of all of the company's debts contracted during the time it so carries on business after such six (6) months period.

C. Exchange Controls

BNM deems all Labuan entities as non-residents for foreign exchange controls purposes.

D. Labuan Taxation

There have been a number of significant developments in the Labuan tax regime in 2019, including: (a) abolishment of the RM20,000 flat rate tax election; (b) introduction of the substantial activity requirement; (c) lifting of the restriction on Labuan entities dealing in Malaysian Ringgit and with Malaysian residents; (d) changes to the tax treatment for intellectual property rights; and (e) restrictions on tax deductions for transactions with Labuan companies, which are further discussed below.

Labuan entities come under the purview of the Labuan Business Activity Tax Act 1990 ("**LBATA**"), unless it makes an irrevocable election to be taxed under the Income Tax Act 1967 ("**ITA**"). "**Labuan entities**" generally include companies, trusts, foundations, partnerships, bank licensees and financial institutions established or authorised under Labuan-specific laws as specified in the LBATA.

Under the LBATA, a Labuan entity carrying on a "Labuan business activity" will come within the LBATA tax regime. A "**Labuan business activity**" is a Labuan trading activity[57] or a Labuan non-trading activity[58] carried on in, from or through Labuan, excluding any activity which is an offence under any written law. With effect from 1 January 2019: (a) Labuan entities are permitted to carry on activities in the Malaysian currency and with Malaysian residents and still fall within the LBATA tax regime; and (b) are subject to Substantial Activity Requirements, further discussed below.

Under the LBATA tax regime, a Labuan entity carrying out a "Labuan non-trading activity" is not subject to any tax, and a Labuan entity carrying out a "Labuan trading activity" will pay tax at a rate of 3% of its net audited profits. This effectively requires all Labuan entities carrying out Labuan trading activities to have audited accounts for the purposes of tax filings.

Previously, a Labuan entity carrying out a "Labuan trading activity" can elect to pay tax at either, the rate of 3% of its net audited profits, or a flat rate of RM20,000, but this regime has been abolished on 1 January 2019 and Labuan entities no longer have the option to elect to pay tax at a flat rate of RM20,000.

Further, income generated from intellectual property assets held by a Labuan entity is subject to tax under the ITA and can no longer be taxed under the LBATA tax regime.

Additionally, Malaysian taxpayers transacting with Labuan companies will no longer be able to claim full tax deductibility and will instead only be able to claim a partial tax deduction, depending on the type of payments made for a particular transaction:

Type of Payment	Amount Not Allowed for Deduction
Interest Payment	33%
Lease rental	33%
Other payments	97%

There is no capital gains tax, indirect tax, stamp duty or estate tax in Labuan. There is also no withholding tax on interest, technical fees and royalties for payments made

[57] "**Labuan trading activity**" includes banking, insurance, trading, management, licensing, shipping or any other activity that is not a Labuan non-trading activity.

[58] A "**Labuan non-trading activity**" means an activity relating to the holding of investments in securities, stock, shares, loans, deposits or any other properties situated in Labuan by a Labuan entity on its own behalf.

by a Labuan company to non-residents or other Labuan companies.

Substantial Activity Requirements

With effect from 1 January 2019, all Labuan entities carrying on a Labuan business activity are subject to substance requirements which requires the Labuan entity to have a physical and operational office, an adequate number of full-time employees in Labuan[59] and an adequate amount of annual operating expenditure in Labuan.

The number of employees and amount of operating expenditure depends on the nature of the business activity. For example:

Activity	Minimum Number of Full-Time Employees	Minimum Amount of Annual Operating Expenditure (RM)
Labuan insurer, Labuan reinsurer, Labuan takaful operator or Labuan retakaful operator	4	150,000
Labuan international commodity trading company	3	3,000,000
Labuan bank, Laban investment bank, Labuan Islamic bank or Labuan Islamic investment bank	3	180,000
Labuan trust company	3	120,000
Labuan leasing company or Labuan Islamic leasing company	2	100,000
Labuan fund manager	2	100,000
Holding company	2	50,000

A full-time employee means that the employee is employed by the Labuan entity to serve the entity in Labuan. This can be evidenced by, but not limited to, the employment contract and the organisational chart of the Labuan office. The operating expenses (invoices and receipts issued in Labuan) that qualify as part of the annual operating expenditure in Labuan includes defraying payments, professional and statutory fees e.g. salaries, lease rental, service providers' fees and licence fees to Labuan FSA.

For instance, if the employees are in Labuan but under the payroll of the headquarters (not based in Labuan), and the salary expenses are subsequently reimbursed by the Labuan entity, this arrangement suffices the employment and annual operating expenditure requirements. However, if the salary expenses are absorbed entirely by headquarters, then the annual operating expenditure requirement is not fulfilled.

Labuan entities that do not meet the substance requirements would not be treated as carrying on a "Labuan business activity" and would be subject to tax under the ITA instead of the LBATA, which is generally imposes a tax rate of 24% instead of 3%.

Recent Development

The Malaysian Budget 2020 proposed that with effect from 1 January 2020 until 31 December 2020, a full exemption on entertainments duty is given on admission tickets for stage performances, including cultural and artistic performances by local and international artists held at any venue in Labuan, Kuala Lumpur and Putrajaya.

[59] With the exception of business activities related to pure equity holding (LBAT (Exemption) Order 2020).

E. Labuan Protected Cell Companies

A Labuan protected cell company ("**PCC**") is a limited liability company with a single legal entity that can form one or more "cells", which in turn has the ability to take on different assets and liabilities per cell, while allowing each cell to operate independently. A creation of a cell by a Labuan PCC does not create a separate legal entity from the Labuan PCC. A Labuan PCC only has one board of directors, regardless of the number of cells it creates. However, the ownership of the cells and its underlying assets may be held by different owners.

A Labuan PCC may be incorporated as a Labuan company or converted from an existing company.

The cells of a Labuan PCC may comprise of: (a) a core for holding non-cell assets or general assets; and (b) any number of cells with the intention of segregating and protecting the assets of each respective cell.

A Labuan PCC may only conduct the following types of business: (a) a Labuan captive insurance or takaful business; and (b) a business as a mutual fund or an Islamic mutual fund.

In addition, where a liability arises which is attributable to a particular cell of a Labuan PCC, only the cell assets attributable to that cell shall be used to satisfy the liability and a creditor in respect of the said cell. The creditor will not be entitled to have any recourse against the cell assets of any other cell or the general assets of the Labuan PCC.

Similarly, where a liability arises which is not attributable to a particular cell of a Labuan PCC, the liability shall be satisfied solely from the general assets of the Labuan PCC.

F. 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 business. It is important to note that these financial services industries are not subject to the jurisdiction of BNM, but instead are regulated by the LFSA.

G. 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 LFSA; (b) Labuan investment banking business; (c) Labuan financial business; (d) Labuan Islamic banking business; or (e) such other business as the LFSA, with the approval of the Minister, may specify, in any currency (including in Malaysian Ringgit where permitted under the FSA or such other relevant law in force).

Any person wishing to carry on a Labuan banking business must be licensed with the LFSA. The minimum eligibility criteria for applicants is that the applicant: (a) must be a bank or a financial institution; (b) possesses 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) conforms 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 wherein the Islamic divisions of Labuan banks may open operations offices anywhere in Malaysia, subject to the consideration of the LFSA; (b) no limitation on the staffing and number of operations offices to be opened outside of Labuan; (c) the operation 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 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 LFSA, with the approval of the Minister, may specify, in any currency (including in Malaysian Ringgit where permitted under the FSA 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 LFSA. 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 FSA with prior approval from BNM; or (d) corporations with the necessary expertise and experience in the financial industry with at least three (3) 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 LFSA, with the approval of the Minister, may specify, in any currency (including Malaysian Ringgit where permitted under the FSA 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 LFSA.

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 LFSA. 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 LFSA.

Labuan Islamic Financial Services and Securities

The Labuan Islamic Financial Services and Securities Act 2010 ("**LIFSSA**") is the LFSSA's counterpart for the Islamic finance sector in Labuan. The LIFSSA governs, amongst others, Labuan Islamic banking business, Labuan Islamic investment banking business, Labuan Islamic financial business and Labuan takaful business.

Labuan International Financial Exchange ("**LFX**")

The LFX was launched in 2000 and is wholly-owned by Bursa Malaysia. The LFSA is the regulator of the LFX. The LFX functions as an international financial exchange and it caters for the listing of a multitude of multi-currency financial instruments including equities, investment funds, debt instruments and insurance related instruments.

There are no restrictions on the types of financial instruments and there is also no predetermined minimum quantity for listing on the LFX. All listings on the LFX shall be denominated in currencies other than Malaysian Ringgit.

19. ECONOMIC CORRIDORS

In order to propel the growth of certain under-developed regions within Malaysia, the Malaysian government had launched five economic growth corridors under its 9th Malaysia Plan. The primary objective of this initiative was to bridge development imbalances in the nation.

Each corridor has a distinct focus with its own respective high impact clusters, chosen for their own specific geographical and sectoral advantages. Measures were also put in place to allow businesses to benefit from the sharing of common resources, the facilitation of labour market matching and knowledge sharing.

The government has also sought to attract participation from the private sector to accelerate the development of these corridors. To that end, policies were implemented to incentivise investors to aid the cause. The Public Private Partnership Unit was established for this purpose and is responsible for formulating such policies.

Each corridor is governed by a Corridor Development Authority that is empowered to oversee and implement the development plan specific to its particular corridor.

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 these economic corridors by legislating and implementing supportive government policies such as liberal equity requirements, tax incentives and the flexibility to recruit expatriates. These policies are mainly implemented through the respective Corridor Development Authorities of each individual corridor.

In May 2015, the Malaysian government announced the 11th Malaysia Plan in order to facilitate the nation's socio-economic progress, for the 5-year period from 2016 to 2020, towards realising Vision 2020 – a goal for Malaysia to achieve the status of a self-sufficient industrialised nation by the year 2020. Under the 11th Malaysia Plan, efforts were proposed to stimulate investments and improve infrastructure within the 5 economic corridors. Such efforts include 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.

As of June 2018, the economic corridors have successfully attracted investments amounting to almost

RM800 million and created some 1.87 million jobs since their inception.

In October 2019, the Government had, in conjunction with Malaysia's 2020 Budget, allocated RM1.1 billion towards advancing the economic corridors. This was said to represent the Government's support of projects related to the corridors such as the Chuping Valley Industrial Area in Perlis, Kuantan Port, Sungai Segget Centralised Sewerage Treatment Plant, Samalaju Industrial Park in Sarawak and Sabah Agro-Industrial Precinct.

In particular, the Government has reportedly allocated RM50 million for the development of Chuping Valley by the Northern Corridor Implementation Authority and RM69.5 million for the Kuantan Port related projects by the ECER.

Further, RM42 million has been allocated for IRDA's construction of the Sungai Segget Centralised Sewerage Treatment Plant.

Looking to East Malaysia, RM55 million has been allotted in respect of the Samalaju Industrial Park in Sarawak by RECODA and RM20 million for the Sabah Agro-Industrial Precinct by SEDIA.

Towards the end of 2019, the Government announced plans to create another new economic corridor stretching from Kuala Lumpur to Johor. This new economic corridor is slated to be implemented in 2020. Commentators have hypothesised that the creation of the new economic corridor could spell a revival of the currently suspended high-profile high-speed rail (HSR) project with Singapore.

A. Iskandar Malaysia ("Iskandar")

IRDA is a Malaysian Federal Government 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 Iskandar Development Region ("**IDR**") status Company must be a company incorporated under the Companies Act 2016 and approved by the Ministry of Finance ("**MOF**") and 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 FIC 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.

As of December 2018, Iskandar has successfully attracted over RM 285 billion worth of investments since its inception, 38% of which consists of investment from foreigners in countries such as China, Singapore, the United States, Japan and Spain. The area has also become a popular migration destination for young professionals nationwide, as a direct consequence of the increasing availability of lucrative career opportunities.

In February 2019, IRDA announced that the geographical coverage of Iskandar will be doubled from

2,217 square km to 4,749 square km to include parts of Kota Tinggi, Kluang and Pontian.

After being put on hold for some time, the Malaysia and Singapore governments have, at the end of 2019, confirmed that the Rapid Transit System (RTS) Link project that is intended to connect Johor Bahru and Singapore, will go ahead as planned. The link will go some ways to reduce the heavy traffic on the Johor Causeway and connect Singapore to the Iskandar region.

Iskandar is situated in southern Johor and is divided into five flagship zones, namely:

1. Flagship A: Johor Bahru

Johor Bahru is located within the central region of Iskandar Malaysia. It is bound by Senai to the North, Nusajaya to the west, Singapore to the south, and Pasir Gudang to the east.

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. Flagship B: Nusajaya

Nusajaya is located west of Johor Bahru, in close proximity to Port of Tanjung Pelepas and Gelang Patah. It is also strategically located within a 45-minute drive from Singapore's Changi International Airport, a regional aviation hub, and 20 minutes from Johor's Senai International Airport. The regional city combines residential, commercial and industrial elements.

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. Flagship C: Western Gate Development

Flagship C is located within the south-western region of Iskandar Malaysia. It is bound by Mukim Jeram Batu and Mukim Jelutong to the north; Mukim Serkat and Mukim Sungai Karang to the west; Selat Tebrau to the south; and Gelang Patah and Nusajaya to the east. It covers an area of more than 30,000 acres.

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. Flagship D: Eastern Gate Development

Pasir Gudang is located 30km east of Johor Bahru. It is located at the western end of the Johor Bahru metropolitan area. The population is around 100,000.

Current key economic activities in this flagship zone are focused on heavy industries and logistics, including electrical and electronics (E&E), chemical, oleochemical, food products, research and development (R&D) and engineering-based industries as well as ports and logistics and warehousing.

5. Flagship E: Senai – Skudai

Senai-Skudai development is located within the northern region of Iskandar Malaysia. It is bound by Mukim Sedenak to the north; Gunung Pulai to the west; Mukim Tebrau to the south; and Seelong to the east.

Current key economic activities in this flagship zone are airport services, engineering, electrical and electronics (E&E) and education. Going forward, the Senai – Skudai flagship zone would also be the hub for agro and food processing, ICT and retail tourism.

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 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 is 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. 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.

In January 2018, the NCIA had announced 5 new initiatives worth up to RM 1 billion. The targeted areas of development are:

a) developing public infrastructure and transportation;

b) upgrading works for the Langkawi and Penang international airports;

c) erecting a new global lifestyle development for high income residents and businesses;

d) establishing a futuristic, applied auto research and commercialisation area;

e) improving technical and vocational education and training;

f) transforming Pulau Pangkor into a duty-free island; and

g) generating further job opportunities.

More recently in June 2019, the NCER was reported to receive a boost in the form of the implementation of hi-tech contract farming, consistent with the Government's aims to modernise the country's agriculture industry.

The approach is being spearheaded by the private sector by providing farmers with the necessary apparatus and training, with a view of buying back the resultant produce from those farmers.

The implementation of this hi-tech contract farming method is expected to enhance agricultural productivity, thereby providing farmers in the region with a competitive edge.

Towards the end of 2019, the NCIA also jointly launched four human capital and entrepreneurship development programmes together with the Kedah state government. These programmes are aimed at providing participants with the relevant skills training, with a view for such participants to eventually join the workforce to catalyse the development of the NCER.

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 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:

a) **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.

b) **ECER Talent Enhancement Programme ("ETEP")**

The ETEP 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.

In June 2019, the Government through the East Coast Economic Region Development Council launched the ECER Master Plan 2.0 to with the aim of facilitating the next leap of the ECER's socio-economic transformation. Some of the key objectives envisioned to be achieved through the ECER Master Plan 2.0 by 2025 includes the generation of RM70 billion in new private investment and the creation of approximately 120,000 new jobs and 60,000 entrepreneurial opportunities for the people.

The ECER has secured RM7 billion in 2019 in committed investments from 36 new projects, which will create over 5,700 job opportunities.

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 the SDC, the Sabah State Legislative Assembly had approved the establishment of a statutory body known as 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 Sipitang, 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 SDC.

In order to enjoy the incentives, investors must make an application to SEDIA and applications received by 31 December 2020 are eligible for the incentives listed in the table below. 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.
Further details on the investment tax incentives for the SDC may be found in http://www.sedia.com.my/SDC_Incentives.html.

E. Sarawak Corridor of Renewable Energy ("SCORE")

In terms of land area, SCORE had initially covered 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. To date, SCORE has further expanded its boundary by 30%, which has increased its land area to approximately 100,000 square kilometres. 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. The corridor has 1.2 billion of known oil reserves, over 80 million tonnes of Silica sand and over 22 million tonnes of China clay. 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.

In view of this, the 2008 – 2030 development plan for SCORE focuses on developing the energy sector and targets 10 high impact industries that will complement the development plan and also provide downstream opportunities for SMEs. The 10 industries are aluminium, glass industries, steel, oil-based industries, palm oil, fishing & aquaculture, livestock, timber-based industries, marine 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 seaport 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.
Currently, two agro-based projects owned by Taiwan's Sea Party and Fieldmart Sdn Bhd are in operation.

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.
Recent development components include:

i. New Mukah Airport

ii. Mukah Water Supply

iii. Mukah Polytechnic and UiTMMukah Campus

iv. Approval of Matadeng Industrial Park Site

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. MOE 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.

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.

RECODA also provides continuous support to foreign and domestic companies wishing to set up or expand their businesses in SCORE by providing comprehensive assistance from arranging and hosting visits to SCORE, initiating meetings with relevant deferral or state authorities, gaining approvals, acquiring licenses, visas and permits to ongoing support even after the investor is up and running.

To accelerate the development of SCORE, the state government has set up three development agencies under RECODA, being the Upper Rejang Development Agency, Highland Development Agency and the Northern Regional Development Agency.

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 capital deductions, 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.

F. Special Zones

In addition to the Economic Corridors, the Malaysian Government has recently launched 2 new zones to promote specific types of economic activity. These zones are:

a) Digital Free Trade Zone

b) Malaysian Vision Valley 2.0

Digital Free Trade Zone

The world's first Digital Free Trade Zone ("**DFTZ**") was launched by the Malaysian Government on 22 March 2017 together with Jack Ma, founder and Executive Chairman of Alibaba Group. This initiative comprises both physical and virtual DFTZs to facilitate SMEs to capitalise on the exponential growth of the internet economy and cross border eCommerce activities.

The DFTZ consists of three main components that combine both physical and virtual zones. The physical zone comprises of the eFulfilment Hub and Satellite Services Hub while the virtual zone consists of the eServices Platform.

For a better understanding of the DFTZ and the three main components mentioned above, please refer to Chapter 17 of this Guide on Digital Economy, where the DFTZ is elaborated in more detail.

Malaysian Vision Valley 2.0 (MVV 2.0)

Touted as the sixth economic corridor in Malaysia, the Malaysian Vision Valley (MVV) was an economic zone encompassing some 379,086 acre of land from Port Dickson to Seremban and Nilai and will be divided into five strategic clusters covering Central Business District, Nature City, Education Tech Valley, Tourism and Wellness and New Liveable Township. This metropolis project was expected to attract investments worth over RM290 billion and offer over 1.38 million job opportunities by 2045. However, in December 2018, the MVV was relaunched as MVV 2.0 and a comprehensive development plan (CDP) and the MVV 2045 was unveiled. The MVV 2.0 is envisioned to be a world class metropolis with the following 4 main economic drivers:

(a) high tech manufacturing;
(b) wellness tourism;
(c) skill-based education and research; and
(d) specialised commerce.

The CDP lays out the development plans for the MVV 2.0, which consists of 2 phases and 7 heartbeat projects to drive the development in cluster of areas based on the existing strengths and potential in each cluster. The MVV 2045 sets out the land use zoning and development initiatives, and outlines action plans for environment enhancement, accessibility, infrastructure, liveability and industries within the MVV 2.0 development. The master developer for the MVV 2.0 remains as Sime Darby Property Bhd, who was also the designated master developer under the MVV.

The 2 phases in the CDP are referred to as Phase 1 and Phase 2 respectively. Phase 1 is a 30-year development spanning across 27,000 acres of land, consisting 6 heartbeat projects, namely the High Tech and Industrial Park, the Integrated Transport District, the Sports & Recreation City, the World Knowledge City, the Biopolis & Wellness City and the Tourism District & Bird/River Sanctuary. The first of six projects in Phase 1 to be developed is the High Tech and Industrial Park covering 2,838 acres across Hamilton Estate, Labu estate, New Labu Estate and Kirby Estate in Negeri Sembilan. The development of Phase 2 is scheduled to commence beyond 2045 and will cover an area of 42,500 acres.

As at February 2020, Sime Darby has kickstarted its first project in the MVV 2.0 development with an industrial park - XME Business Park - which spans an area of 69.72 acres of freehold land in Nilai Impian, Negeri Sembilan. The park has a gross development value of RM520 million and will be developed in two phases, with the first phase expected to be completed by November 2021.

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 commercial activities so as not to infringe the 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 commercial activities regulated under the Communications and Multimedia Act 1998, the Malaysian Aviation Commission Act 2015, the Energy Commission Act 2001, the Petroleum Development Act 1974 and the Petroleum Regulations 1974 (exemption limited to upstream activities only) .

The regulator of the Competition Act is the Malaysia Competition Commission ("**MyCC**"). There is no merger regime in Malaysia yet although MyCC has announced since end-2018, that it is reviewing the Competition Act to include merger controls.

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. agreements 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. MyCC has indicated that a good guide to assess the triviality or otherwise of the impact of an anti-competitive agreement is to consider the combined market share of those participating in such an agreement. As a starting point and to provide greater certainty, MyCC has specified that it 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. By MyCC's Guidelines on Anti-competitive Agreements, 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". These 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 minimum resale price maintenance. 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".

By MyCC's Guidelines on Abuse of Dominant Position, generally, 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 issued its 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 issued its 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

MyCC has conducted investigations into various associations, companies and industries. As of June 2020, , there are seven (7) findings of an infringement and five (5) proposed decisions issued by MyCC which have yet to be finalised. These are against (a) the General Insurance Association of Malaysia ("**PIAM**") and its 22 members, issued in October 2017 ; (b) Dagang Net Technologies Sdn Bhd ("**Dagang Net**"), issued in July 2018; (c) eight (8) enterprises involving procurement of IT services, issued in March 2019; (d) Grab Inc and its affiliates in the ride hailing business i.e. GrabCar Sdn Bhd and MyTeksi Sdn Bhd (collectively, "**Grab**"), issued in October 2019; and (e) seven (7) warehouse operators, announced on 9 January 2020. MyCC has also received undertakings (e.g. commitments to cease anti-competitive activities) from various associations and companies.

1. Section 4 of the Competition Act

a) MyCC's first cartel enforcement was in 2012. Non-financial remedies were imposed on the Cameron Highlands Floriculturist Association ("**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%).

b) An 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 for a judicial review to reinstate MyCC's decision which imposed a fine of RM10 million on each of MAS and AirAsia. On 20 December 2018, the High Court ordered the reinstatement of MyCC's decision. However, MAS and AirAsia have appealed to the Court of Appeal against the High Court's decision.

c) In January 2015, a penalty of RM252,250 was imposed by MyCC on ice manufacturers for price-fixing. Subsequent to that, in February 2015, MyCC took enforcement action against Sibu Confectionary and Bakery Association ("**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 Sibu 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. Three (3) of the members, namely To Eat Bakery Sdn Bhd, Farley Bakery Sdn Bhd and Chung's Bakery Sdn Bhd, filed an appeal against MyCC's decision but subsequently withdrew the appeal.

d) In June 2016, MyCC released its final decision against Containerchain (Malaysia) Sdn Bhd ("**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. One of the CDOs, Prompt Dynamics Sdn Bhd, filed an appeal on 29 June 2016 against MyCC's decision. However, a decision was given by the CAT on 27 February 2017 that the appeal was dismissed.

e) On 22 February 2017, MyCC issued a proposed decision against PIAM and its 22 members for being parties to an alleged anti-competitive agreement to fix the parts trade discount at 25% for six vehicle makes namely Proton, Perodua, Nissan, Toyota, Honda and Naza and 15% for the Proton Saga BLM model, as well as the labour hourly rate of RM30 per hour for PIAM Approved Repairers Scheme workshops.

f) In October 2018, MyCC imposed a collective sum of RM33,068.85 on seven (7) tuition and day care centres for infringing Section 4(2) of the Competition Act by collectively agreeing to fix and standardise the fees charged for the tuition and day care services in the SS19 Subang Jaya area. This decision illustrates that MyCC's enforcement actions are far-reaching regardless of how small an enterprise may be.

g) On 10 March 2019, MyCC issued its first proposed decision on bid-rigging against eight (8) enterprises for their involvement in bid rigging of Request for Quotations ("**RFQs**") and tenders valued at RM 1.92 million submitted to Akademi Seni Budaya dan

Warisan Kebangsaan ("**ASWARA**"), a public higher learning institution in the field of performance arts in Malaysia. The 8 enterprises were alleged to have been colluding with each other by sharing each other's tender proposal information, manipulating prices and preparing documents for one another and the winner of the tender were alleged to have also shared their profits with the losing bidders.

h) On 9 January 2020, MyCC announced that it has issued a proposed decision against seven (7) warehouse operators who had allegedly engaged in price fixing conduct in relation to the rates for Long Length Handling and Heavy Lift Handling surcharges for all import and export cargoes in Northport and Westport areas in Port Klang. MyCC added that they had found evidence in the form of conversations on an online platform, which suggested that most of these warehouse operators had implemented these rates on their customers.

i) Apart from findings of infringement of the Competition Act, MyCC also made findings of non-infringement. MyCC found that there was no infringement of Section 4 of the Competition Act by Sarawak Restaurants Association, My Egg Consortium Sdn Bhd, the Federation of Stationers and Booksellers Association of Malaysia, Avery Dennison Materials Sdn Bhd, UPM Raflatac Sdn Bhd, Dongwha Fibreboard Sdn Bhd and Evergreen Fibreboard Bhd. In a key decision, MyCC had on 25 November 2019, issued a finding of non-infringement to Coco-Cola Bottlers (Malaysia) Sdn Bhd and Coco-Cola Refreshments Malaysia Sdn Bhd ("**Coca-Cola Refreshments**") (collectively "**Coco-Cola**"). This is MyCC's first decision concerning resale price maintenance. Investigations against Coca-Cola were launched around August 2018 by MyCC in compliance with a ministerial directive issued by the Ministry of Domestic Trade and Consumer Affairs ("**KPDNHEP**"), concerning a notice issued in July 2018 by Coca-Cola to certain supermarkets and hypermarkets in Peninsular Malaysia ("**Notice**"). The Notice contained recommended resale prices ("**RRP**") and recommended consumer prices ("**RCP**") at which various Coca-Cola beverages were to be sold to retailers and consumers respectively. MyCC's investigation on Coca-Cola was conducted to determine whether the RRP and RCP issued by Coca-Cola had restricted supermarkets and hypermarkets from determining their resale prices independently. As part of its investigations, MyCC had conducted a surprise raid at Coca-Cola Refreshments' premises and had also on various occasions requested clarifications from Coca-Cola Refreshments. MyCC had also sought the assistance of the Enforcement Office of KPDNHEP to obtain market prices for selected Coca-Cola beverages retailed at supermarkets and hypermarkets within the Klang Valley.

2. Section 10 of the Competition Act

a) One important case in MyCC's enforcement of Section 10 of the Competition Act is its action against Megasteel Sdn Bhd ("**Megasteel**"). Megasteel was claimed to have abused its dominance and 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. Melewar Industrial Group Berhad, the complainant, appealed to CAT but subsequently withdrew it.

b) The second enforcement on abuse of dominance is MyCC's decision on My E.G. Services Berhad ("**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 relevant market. MyCC had 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. 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 PIAM within 60 days from the date of the decision. MyEG then filed an appeal on 22 July 2016 against MyCC's decision. On 28 December 2017, the CAT dismissed MyEG's and MyEG Commerce's appeal against MyCC's decision. The CAT found that MyCC was right to find that MyEG and MyEG Commerce had abused their dominant position within the meaning of Section 10(2)(d)(iii) of the Competition Act. The CAT, in dismissing the appeal, affirmed MyCC's directions and orders, save for the undertaking to comply with the rules and regulations of PIAM, as MyEG and MyEG Commerce did not fall within the jurisdiction of PIAM. Consequential amendments were also made by CAT to the financial penalty to account for a daily penalty from the date of MyCC's decision to the date of CAT's decision. MyEG subsequently sought a judicial review of the CAT's decision. On 22 January 2019, the High Court dismissed the judicial review and affirmed MyCC's decision. MyEG raked up a fine of RM2.935 million from a daily penalty of RM7,500 from the date after CAT's decision to the date of the High Court's decision. At the same time, a further daily penalty of RM7,500 continued to accrue for each day of non-compliance by MyEG to take the remedial actions in line with the directives imposed by MyCC in its decision. In March 2019, MyCC accepted the changes made by MyEG to the online foreign worker renewal system and the daily penalty ceased with immediate effect. MyEG also settled RM6.41 million out of the RM 9.64 million fine imposed. MyEG has appealed to the Court of Appeal against the decisions made by MyCC and CAT.

c) In July 2018, MyCC issued a proposed decision against Dagang Net for allegedly abusing its position as a monopoly in the provision of trade facilitation services under the National Single Window, refusing to supply its electronic mailboxes to end users of the Sistem Maklumat Kastam and also imposing barriers to entry to the extent that may harm competition. The proposed financial penalty on Dagang Net is RM17.4 million.

d) MyCC announced on 3 October 2019 that it has proposed a fine of RM86.7 million against Grab for collectively infringing the Competition Act. MyCC alleged that Grab has abused its dominance by imposing a number of restrictive clauses on its drivers that prevented the drivers from promoting and providing advertising services for Grab's competitors in the e-hailing and transit media advertising market. Grab sought a judicial review of MyCC's proposed decision. On 9 March 2020, the High Court dismissed the judicial review application filed by Grab on the basis that the request is premature as MyCC's proposed decision is not yet finalised. Grab is currently appealing against the High Court's dismissal of its judicial review application.

3. Undertakings

a) In 2014, MyCC's enforcement actions against Malaysian Indian Hairdressing Saloon Owners Association ("**MIHSOA**") and Pan-Malaysia Lorry Owners Association ("**PMLOA**") had resulted in both associations giving their respective undertakings that (i) MIHSOA would stop the fixing of price of haircut services of its members and ensure that each of its members do not engage in any anti-competitive conduct in the future; and (iii) PMLOA would apologise in major newspapers for the anti-competitive behaviour of its members and ensure that its members do not engage in any anti-competitive conduct in the future.

b) Other enforcement actions against cartel where MyCC received undertakings 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 Carries Sdn Bhd where these logistics service providers have given their undertaking that they would stop any exclusive logistics activities and remove any exclusivity clauses in their agreements unless (I) such agreements have been entered or are entered into following open tendering process; and (II) such agreements contain exclusivity clauses which are of a duration of 2 years or less; and (ii) an action against the Malaysia Heavy Construction Equipment Owners' Association ("**MHCEOA**") for increasing machinery rental where MyCC has accepted an undertaking from MHCEOA to cease all anti-competitive activities.

c) On 25 September 2017, MyCC accepted an undertaking from a group of sand operators in Kelantan concerning the alleged fixing of sand prices in Kelantan. The sand operators had on 10 January 2017 issued a price list for sand which MyCC considered to potentially raise competition concerns. These sand operators undertook to rescind the said price list, terminate any other anti-competitive behaviour in relation to the said price list as well as issue a press release of their undertaking to the major newspapers.

d) In September 2019, MyCC accepted an undertaking from the Sabah Tourist Guides Association ("**STGA**") on behalf of all its 477 members regarding a competition concern in relation to the fixing of tourist guides' professional fees set by STGA. The members of STGA have undertaken to rescind the issued Minimum Tourist Guides Professional Fees dated 1 March 2009, not to hold any form of discussion in relation to the tourist guides' fees applicable to STGA members and to halt implementation of the proposed STGA Sabah Professional Guiding Fee Rates. The STGA also undertook to remind all members to fully comply with the Competition Act and STGA will not hesitate to provide full cooperation to MyCC in the event of any future complaints made against their members.

4. MyCC's Market Reviews

Pursuant to MyCC's power under Section 11(1) of the Competition Act to conduct a review into any market in order to determine whether any feature or combination of features of the market prevents, restricts or distorts competition in the market, MyCC has conducted market reviews on various sectors. Since its establishment, MyCC has conducted market reviews on the following sectors: (a) the fixing of prices/fees by professional bodies, concluded in August 2013; (b) the domestic broiler market, concluded in March 2014; (c) the pharmaceutical sector, concluded in January 2018; (d) building materials in the construction industry, concluded in January 2018; (e) the food sector, concluded in August 2019; and (f) the service sector (wholesale and retail for selected products), which is pending finalisation. Based on MyCC's announcement of an open tender inviting potential qualified consultants to submit proposals for conducting a market review on the transportation sector focusing on the after-port transportation services provider and supply of parts for servicing and repairing of car parts, MyCC appears to be proposing a market review to be conducted on this sector.

G. Guidelines on Intellectual Property Rights and Competition Law ("IPR Guidelines")

The IPR Guidelines came into force on 6 April 2019 and it provides guidance on MyCC's approach on competition issues under the Competition Act relating to intellectual property rights ("**IPR**").

The IPR Guidelines must be read together with the Competition Act and all the other MyCC guidelines since the latter apply to competition law generally. For example, MyCC's Guideline on Market Definition needs to be considered together with the IPR Guidelines when analysing the relevant market which the IPR concerned is involved in.

The IPR Guidelines provide various illustrations of when MyCC would consider certain horizontal and vertical agreements as anti-competitive in nature. As regards abuse of a dominant position, the IPR Guidelines expressly recognizes that if an enterprise is found to be dominant in the relevant market due to its IPR, that in itself is not illegal unless it abuses its dominant position.

A link to the IPR Guidelines can be found here: https://www.mycc.gov.my/sites/default/files/WJW013224%20Teks%20%282%29.pdf

F. Merger Controls

There are no merger control provisions in the Competition Act. The Chairman of MyCC, Dato' Seri Mohd Hishamudin Md Yunus, announced in late 2018, MyCC's commitment to introduce an economy-wide merger control regime in Malaysia sometime during the course of 2019. As at 30 June 2020, no merger control rules have been introduced. The Chief Executive Officer of MyCC, Iskandar Ismail, has been reported to state that the Competition Act is expected to be amended to include merger control laws in 2020. However, in wake of the COVID 19 pandemic, we anticipate a delay.

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 & Medical Regulations 2017	Malaysian Medical Council	Registration & Annual Practicing Certificate
Dentists	Dental Act 1971 & Dental Regulations 1976	Malaysian Dental Council	Registration & Annual Practicing Certificate
	Dental Act 2018[60]	Malaysian Dental Council Malaysian Dental Therapist Board	Registration & Annual Practicing Certificate
Nurses	Nurses Act 1950 & Nurses Registration Regulations 1985	Malaysia Nursing Board	Registration & Annual Practicing Certificate
Midwives	Midwives Act 1966 & Midwives Regulations 1990	Malaysia Midwives Board	Registration & Annual Practicing Certificate

[60] The new Dental Act 2018 has been gazetted but, as at the date of this publication, is not yet in force. Please refer to Section E for more information.

Professions	Act & Regulations	Regulators	Licensing
Pharmacists	Registration of Pharmacists Act 1951 & Registration of Pharmacists Regulations 2004	Malaysia Pharmacy Board	Registration & Annual Certificate
Medical Assistants	Medical Assistants (Registration) Act 1977 & Medical Assistants (Registration) Regulations 1979	Medical Assistants (Registration) Board	Registration & Annual Certificate of Registration
Opticians & Optometrists	Optical Act 1991 & Optical Regulations 1994	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 CCM under the Registration of Business Act 1956 or incorporate a company under the CA 2016.

B. Establishing a Private Hospital

PHFS and PHFS Regulations

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 Sections 3 and 14 of the PHFS respectively. The approval and licence may only be issued to[61]:

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 body corporate 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:[62]

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 an area;

c) the need for the healthcare facility or service in an 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 must meet all the regulatory requirements prescribed in the PHFS and the PHFS Regulations. 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 are that all private hospitals need to have a plan of organisation outlining the staff and practitioners in the facility and the chain of command[63] and the person-in-charge is responsible for the employment of qualified healthcare professionals

[61] Section 6 of PHFS
[62] Section 9 of PHFS
[63] Regulation 11 of PHFS Regulations

including foreigners registered under the law and recognised by the Director General[64].

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 comply 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.

Generally, pharmaceutical products can be classified as:

a) new drug products;

b) biologics;

c) generics (i.e. controlled medicine or over the counter medicine);

d) health supplements; and

e) natural products (i.e. traditional medicine, finished herbal product, herbal remedy and homeopathic medicine).

2. Regulatory Requirements

In Malaysia, the Drug Control Authority ("**DCA**") of the MOH 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 Regulatory Agency ("**NPRA**") acts as the secretariat to DCA. NPRA's main roles and functions are 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. Dental Industry in Malaysia

1. Overview of the Dental Industry in Malaysia

The dental industry in Malaysia is currently regulated by the Dental Act 1971 and the Dental Regulations 1976. As of 2019, there are 10,817 active dental practitioners in Malaysia.[65]
Registered dental practitioners under the Dental Act 1971 comprise of dental surgeons and dentists that are registered under Division I and Division II of the Dental Register respectively. The latter category was created to cater for dental practitioners that were registered as dentists prior to the coming into force of the Dental Act 1971. Registration of dentists in this category was closed in 1972.

The Dental Act 1971 contains a list of qualifying institutions and requisite dental qualifications to be fulfilled by dental surgeons that intend to be registered under Division I of the Dental Register. New dental

[64] Regulation 13 of PHFS Regulations

[65] Based on statistics published by MOH

surgeons who are registered on or after 1 July 2015 are required to carry out compulsory service in the public sector for a period of 1 year.

2. The New Dental Act 2018

The Dental Act 2018 was gazetted on 26 June 2018 and is meant to repeal the existing Dental Act 1971. It seeks to provide more effective regulation on the dentistry profession and will also place stricter disciplinary procedures on the relevant practitioners.

As at the date of this publication, the Dental Act 2018 is not yet in force. Once the Dental Act 2018 comes into force, it will introduce several key changes to the current regime.

Notably, the Dental Act 2018 expands the categories of regulated practitioners to include dental therapists and dental specialists.

A dental therapist must be registered under the Dental Therapist Register and can only practise dentistry under the direct supervision of a dental surgeon and can only execute a limited set of procedures.

A practitioner is only allowed to practise as a dental specialist if he/she is registered under the Specialist Division of the Dental Register. Contrary to the current practice, this would prevent experienced general dental practitioners, who are not registered as specialists, from carrying out procedures that would be classified as specialist procedures (e.g. orthodontic treatment) or from representing themselves as specialists.

E. Aged Care Industry in Malaysia

In an effort to increase the standards within the aged care industry, the Private Aged Healthcare Facilities and Services Act 2018 ("**PAHFAS**") and the Care Centres (Amendment) Act 2018 ("**CCA**") were gazetted in March 2018 and will come into force on a date to be appointed by the MOH. As at the date of this publication, the PAHFAS and the CCA have not yet come into force and the Care Centres Act 1993 still regulates the aged care centres in Malaysia.

Under the PAHFAS and CCA, there is a distinction between regulations which are applicable to centres providing care to those below 60 and to aged persons (i.e. persons 60 years old or above). PAHFAS regulates centres providing care to aged persons, which are noticeably more stringent. Meanwhile, CCA imposes regulations on centres providing care to those below 60.

Pursuant to Section 4(1) of the PAHFAS, in order to provide healthcare facilities and services to 4 or more aged persons, individuals are required to obtain a pre-approval and an operating license from the Director General of Health.

The PAHFAS contains a transitional provision that allows a care centre registered under the CCA which provides care to 4 or more aged persons to be deemed to have been licensed under the PAHFAS for a limited period of 5 years from the date of coming into operation of the PAHFAS. The operator of such care centre must within the 5 year period, apply for an approval and a licence under the PAHFAS. Failure to do so may attract liability of:

a) for an individual, a fine of up to RM30,000; or

b) for a body corporate, partnership or society, a fine of up to RM100,000.[66]

Under the PAHFAS, a licensee must:

a) ensure that the healthcare professionals employed or engaged are qualified under the relevant law regulating their profession;

b) ensure that the caregivers are trained and competent;

[66] Section 4(3) of PAHFAS.

c) ensure that the assessment of a care recipient is carried out by a healthcare professional;

d) ensure that arrangements are made for a healthcare professional to be available at the facilities and services;

e) ensure that the facilities and services is managed by a person in charge;

f) submit an annual report on the facilities and services to the Director General of Health in such form and manner as the Director General of Health will determine; and

g) perform other duties and responsibilities as the Director General of Health will determine.[67]

F. Equity Policy

The MOH has the discretion to impose restrictions on foreign equity participation in private healthcare facilities. These restrictions are imposed in the form of conditions in the licences or registration approvals. For private hospitals, the present policy is that new facilities are allowed to be 100% foreign owned, but foreign participation is not allowed for existing facilities.

G. Employment of Foreigners

1. Employment of Foreign Medical Practitioners

Under Section 16(1) of the Medical Act 1971, a temporary practicing certificate may be issued to enable foreign medical practitioners to practice in Malaysia for the duration of not more than three months for the purpose of teaching, conducting research, attending post-graduate courses, fellowship training or clinical attachments. The temporary practicing certificate is not to be used for employment purposes.

Based on the Malaysian Medical Council's (**'MMC'**) Guidelines for Temporary Practicing Certificate 2019, to be eligible for the TPC:

a) the foreign practitioner should be fully registered with a foreign Medical Council or Professional Licensing Authority in the last country of practice;

b) the local registered practitioner who will be supervising the applicant/foreign practitioner should:

   (i) be fully registered with the MMC;
   (ii) possess a valid and current Annual Practicing Certificate ("**APC**"); and
   (iii) have the address(es) where the foreign practitioner will be supervised listed in his APC.

The temporary practicing certificate is only valid for a period of not more than three months from the date printed in the certificate and is subject to renewal.

Under Section 16(5) of the Medical Act 1971, 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; 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

Pursuant to Section 11A of the Registration of Pharmacists Act 1951 ("**RPA**"), a temporary practicing

[67] Section 20 of PAHFAS

certificate may 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 the PBM.

In granting a certificate, the PBM will take into consideration the applicant's immigration documents. The PBM will only grant temporary certificates in cases where the foreigner is the spouse of a Malaysian citizen.

The validity period of the certificate will depend on the applicant's immigration documents and will be subjected to annual renewals. It should also be noted that applicants may 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.

H. Tax Incentives 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, companies establishing new private healthcare facilities or existing private healthcare facilities undertaking expansion, modernisation or refurbishment to promote healthcare travel can apply for an Income Tax Exemption equivalent to an Investment Tax Allowance of 100% on the qualifying capital expenditure incurred within a period of 5 years. The allowance can be used to offset against 100% of the statutory income for each year of assessment. Any unutilised allowance can be carried forward to subsequent years until fully utilised. For purposes of this incentive, private healthcare facilities mean private hospitals or ambulatory care centres. This incentive is applicable for applications received by MIDA from 1 January 2015 to 31 December 2020.[68]

At the moment, the manufacture of pharmaceuticals, biopharmaceuticals, nutraceuticals, microbials and probiotics are also eligible for Pioneer Status with income tax exemption of 70% of statutory income for a period of 5 years; or Investment Tax Allowance incentives of 60% on qualifying capital expenditure incurred for a period of 5 years (to be offset against 70% statutory income for each assessment year); or Reinvestment Allowance of 60% on qualifying capital expenditure (to be offset against 70% statutory income) for 15 consecutive 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 incurred for 5 years (to be offset against 100% of statutory income for each assessment year). Other incentives available for the pharmaceutical industry includes incentives for Strategic Projects, Research & Development, Automation Capital Allowance Expenditure and Principal Hub.[69]

[68] Guidelines on Application for Tax Incentive for the Promotion of Healthcare Travel by the Malaysian Investment Development Authority, published on 15 May 2020

[69] Guide on Pharmaceutical Industry in Malaysia by the Malaysian Investment Development Authority, published in November 2019

22. PRIVATE HIGHER EDUCATION INSTITUTIONS

Private higher education institutions ("**PHEI**") in Malaysia are governed by the Private Higher Educational Institutions Act 1996 ("**PHEI 1996**") under the jurisdiction of the Ministry of Higher Education ("**MOE**"). The Act facilitates the establishment of private colleges, universities, university college and foreign branch campus in Malaysia.

Under the PHEI 1996, approval must be obtained from the MOE 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, MQA.

There are four stages in starting a PHEI business in Malaysia namely:

a) company / PHEI establishment;

b) pre-operational registration;

c) operational approvals; and

d) additional approvals.

A. Establishment of PHEI

Under Section 6 of the PHEI 1996, prior approval of the MOE 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 PHEI 1996 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 MOE shall be obtained. It is also important to note that only applications from companies registered with the 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.

Upon being granted an approval, the applicant shall ensure that:

a) its issued and paid up capital shall be of an amount as determined by the MOE;

b) its equity participation and composition of the board of directors shall be as determined by the MOE; and

c) the sole object of the applicant's Constitution shall be to establish and manage PHEI and shall contain provisions for such matters as may be described.

If the successful applicant is a company limited by guarantee, the applicant shall ensure that:

a) its initial funds shall be of an amount as determined by the MOE;

b) the source of its initial funds must be disclosed to, and approved by, the MOE;

c) the composition of its board of directors shall be in accordance with the MOE's direction; and

d) the sole object of the applicant's constitution shall be to establish and manage the PHEI and shall contain provisions for such matters as may be prescribed by the MOE.

In addition, the PHEI requires the recommendation from the MQA in order to receive approval to conduct courses. Approval from the MOE 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.	Notice 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	MOE
	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 draft PHEI Constitution	MOE
4.	Approval for Company's Constitution	MOE
5.	Approval to Conduct Courses of Study	MOE
6.	Certificate of Provisional Accreditation	MQA

1. Issued and Paid-up Capital

The applicant must ensure that, amongst others, its issued and paid-up capital shall be of an amount as determined by the MOE. The issued and paid up capital for the different types of PHEI as prescribed under the Private Higher Educational Institutions (Establishment of Private Higher Educational Institution and Branch) Regulations 2018 ("**PHEI Regulations**") are:

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

Generally, the minimum Bumiputera shareholding required for the establishment of a PHEI with Colleges is 30%. Whereas for the establishment of University, University College and Foreign Branch Campus, there is no such minimum Bumiputera shareholding requirement. Instead, 100% foreign ownership is permitted.

3. Other Requirements

An applicant must also comply with the other prescribed requirements set out in the PHEI Regulations which include:

a) demonstrating its capability of preparing the site and premises;

b) demonstrating that it has the appropriate experience or an excellent performance record in education;

c) demonstrating that it is capable of providing qualified and experienced teachers in the relevant fields;

d) having a strong financial position and demonstrating that it is capable of providing good financial management; and

e) demonstrating that it is capable of conducting courses of study or training programmes individually or in affiliation, association, or collaboration with any higher educational institutions, whether private or

public, or professional bodies within or outside Malaysia.

B. Registration of the PHEI

Once the MOE 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 itself with the necessary resources including facilities to commence operations of the PHEI. It is necessary for registration to be completed within this three-year period, failing which the approval granted for its establishment shall be deemed to have been withdrawn unless an extension of time is granted by MOE.

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	MOE
2.	Registration of Chief Executive PHEI	MOE
3.	Premise Licence	Respective Local Authorities *Note: the PHEI provider is also required to comply with the requirements in relation to the PHEI premises set out in the PHEI 1996 and its regulations.*
4.	Advertisement Licence	Respective Local Authorities *Note: the PHEI provider is also required to comply with the requirements in relation to advertisement as set out in the PHEI 1996 and its regulations*
5.	Teaching Permit (for local teaching staff)	MOE
6.	Teaching Permit & Employment Pass (for foreign teaching staff)	MOE and the Immigration Department of Malaysia *Note: The application for an employment pass for a foreign teacher/lecturer shall be submitted to MOE for its recommendation before submitting to the Immigration Department of Malaysia.*

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.

The Malaysian Qualifications Agency ("**MQA**") is responsible for quality assurance of higher education for both the public and the private sectors. In general, the 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) continuous quality improvement.

Section 38 of the Malaysian Qualifications Agency Act 2007 ("**MQA Act**") 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. The institutional audit is conducted by academicians who have a wide background in quality academic university systems. The 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 Levels 1-3, Diploma, Advanced Diploma, Bachelors, Masters and Doctoral.

Levels 1 – 3	Levels 4 – 5	Levels 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 MOE 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	MOE
2.	Approval of amendment of courses requirement	MOE
3.	Approval for fees increase	MOE
4.	Approval of change of PHEI's name	MOE
5.	Approval of change in Company's issued and paid-up capital	MOE

No.	Type of Approvals	Issuing Authority
6.	Approval of change of/addition to /renovation of premise	MOE
7.	Recommendation by MOE for recruitment of international students	MOE
8.	Approval for recruitment of international students	Ministry of Home Affairs (Immigration Department)
9.	Application for extension of period for teaching permit of local and foreign teaching staff	MOE
10.	Approval to sell/dispose/reconstruct the business of PHEI relating to education	MOE

E. Applications for Establishment of PHEI as at December 2019

On 1 February 2013, MOE 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 until December 2020. The objectives of the moratorium are:

a) to prevent an excess supply in the private higher education sector;

b) to focus on the rationalisation of the private higher education sector by means of mergers and acquisitions, collaborations or restructuring of existing PHEIs; 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:

a) applications for the upgrading of a PHEI;

b) the establishment of the foreign branch campus of a University that rates among the top 100 in the international rankings; and

c) the establishment of a PHEI in the development area of Pagoh and Iskandar Malaysia, Johor.

F. Looking Forward

The Education Minister, in May 2019, made an announcement on various initiatives aimed at enhancing stakeholder involvement in developing and charting a roadmap for the private higher education sector. One of the initiatives proposed was the harmonisation of the respective regulations of private and public higher learning institutes as currently private higher learning institutes are governed by the Private Higher Educational Institutions Act 1996, whilst public higher learning institutes are governed by the University and University Colleges Act 1971.

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 2013 ("**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 2013 ("**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 not allowed to carry on both life business and general business under a single entity under the FSA. 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 the IFSA provide that only a public company can be licensed to carry on an insurance business or takaful, with the exception of professional reinsurers and professional retakaful operators which 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 a principal place of residence within Malaysia and devote the whole of his/her 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 to 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 exceeds the prescribed limit or results 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 in him holding an aggregate interest of 5% or more 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 in 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 in 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

Generally, 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 prohibited business conduct. 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, Paragraph 2 of 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 businesses 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.

BNM has recently on 23 October 2019 issued a policy document on Outsourcing ("**Outsourcing Guidelines**") which supersedes the policy document on Outsourcing issued on 28 December 2018. The policy document sets out the scope of arrangements relevant to the outsourcing policy, and the requirements and expectations on financial institutions to maintain appropriate internal governance and outsourcing risk frameworks, including those relevant to the protection of data confidentiality.

The Outsourcing Guidelines provide that the board and senior management are accountable for ensuring effective oversight and governance of outsourcing arrangements entered into by the licensed insurers and prescribes the roles and responsibilities of the board and senior management.

Licensed insurers are required to comply with specified standards on the assessment of service provider, outsourcing agreement, protection of data confidentiality and business continuity planning. Outsourcing arrangements where the service provider is located, or performs the outsourced activity outside Malaysia are also governed by the Outsourcing Guidelines.

Where the outsourcing arrangement involves a cloud service provider, a licensed insurer has to take effective measures to address risks associated with data accessibility confidentiality integrity, sovereignty, recoverability and regulatory compliance. At the minimum, a licensed insurer must comply with the requirements of the Outsourcing Guidelines as well as other BNM requirements, such as the RMiT.

It should be noted that a licensed insurer must obtain BNM's approval before: (a) entering into a new material outsourcing arrangement; or (b) making a significant modification to an existing material outsourcing arrangement. In this regard, BNM may take the view that an arrangement is considered material and a licensed insurer shall then have to obtain prior written approval. This approval is separate from the yearly submission of the outsourcing plan.

Such approval is not required where: (a) the outsourced activity is to be performed by an affiliate which is a financial institution or a financial holding company; or (b) the outsourced activity is to be performed by an affiliate which is not supervised by BNM and BNM determines that the outsourcing risk is effectively managed by the licensed insurer and having regard to other factors.

A licensed insurer is required to submit an outsourcing plan approved by its board to BNM within 3 months following the licensed insurer's financial year end detailing: (a) all planned outsourcing arrangements, both new and renewal of existing arrangements, for the following financial year; (b) the outsourced activity and material arrangements, including main factors supporting the materiality assessment; and (c) overall impact of existing and planned outsourcing arrangements on employment and talent capacity within the licensed insurer, including any measures by the licensed insurer to manage the potential displacement of staff as a consequent of outsourcing arrangements.

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 527(1) of the CA 2016), and debts due and owing to the Malaysian Government still maintain priority over the assets of the insurance fund in such instance. Similar provisions can also be found in the IFSA for winding up of a licensed takaful operator.

J. Recent changes

1. Insurance and Takaful Aggregation Business

Insurance and takaful aggregation business will be regulated by BNM as a new category of registered business under the Financial Services Act 2013. In this regard, BNM has on 18 June 2019 issued an Exposure Draft on Insurance and Takaful Aggregation Business Registration Procedure and Requirements ("**ITAB Exposure Draft**").

Once the new category of registered business comes into effect, insurance and takaful aggregators approved by the Bank under the Financial Technology Regulatory Sandbox and persons intending to become a registered

insurance and takaful aggregator will be required to be registered under the FSA.

Insurance and takaful aggregation business is defined in the ITAB Exposure Draft as the business of providing services through any electronic means that: (a) sources, aggregates and compares insurance or takaful products of more than one licensed person; and (b) makes referral to any such licensed person in respect of the procurement of such insurance or takaful products; or (c) arranges the procurement of such insurance or takaful products through electronic means.

A person intending to carry out such business must comply with the registration requirements and procedures set out in the ITAB Exposure Draft. Notably, it has been provided that the shareholder, director and chief executive officer must not be a licensed person or director or chief executive officer of a licensed person.

Aggregators are required to comply with certain business conduct requirements which, amongst others, prohibits the aggregator from indirectly promoting products from certain licensed persons. Aggregators are also prohibited from entering into exclusive arrangements with a licensed person as well as providing a recommendation to consumers in respect of any insurance or takaful products.

It should be noted that recommendation is defined as an activity which: (a) involves the provision of a qualitative judgment, evaluation or opinion on the merits of an insurance or takaful product; and (b) is intended to influence a person to take a specific action with respect to one or more insurance or takaful product. This includes generating a shortlist of products instead of the full list of products the customer is eligible to purchase and make a claim.

Besides the requirements in relation to the promotion of insurance and takaful products, the ITAB Exposure Draft also specifies the applicable standards for data protection and information technology and security and requires aggregators to establish a consumer assistance and redress mechanism.

2. Fair Treatment of Financial Consumers

On 6 November 2019, BNM issued a policy document on Fair Treatment of Financial Customers (**"FTFC Guidelines**") which took effect on 6 May 2020. A licensed insurer is required to implement the requirements of the FTFC Guidelines with the following objectives:

(a) outcome 1: financial consumers have the confidence that they are dealing with a financial service provider where the fair treatment of its financial consumers and consideration of their best interests are integral to its corporate culture and core values;

(b) outcome 2: financial consumers are not subject to unfair discriminatory practices, including unfair contract terms that significantly disadvantage financial consumers;

(c) outcome 3: financial consumers are provided with clear, relevant and timely information for them to make informed decisions before, during and after the point of sale, including the costs, risks and important exclusions or limitations;

(d) outcome 4: staff, representatives and agents of a financial service provider exercise due care, skill and diligence when dealing with financial consumers;

(e) outcome 5: financial consumers receive suitable advice and recommendations that take into account their financial needs and circumstances; and

(f) outcome 6: financial consumers' complaints and claims are handled in a prompt, fair and effective manner.

3. Risk Management in Technology (RMiT)

On 18 July 2019, BNM issued a policy document on Risk Management in Technology ("**RMiT Guidelines**") which took effect on 1 January 2020. A licensed insurer is

required to comply with BNM's requirements in relation to the management of technology risk as set out in the RMiT Guidelines.

The RMiT guidelines prescribe policy requirements in relation to governance, technology risk management, technology operations management, cybersecurity management, technology audit, internal audit and training. BNM has also prescribed standards in relation to storage and transportation of sensitive data in removable media, control measures on self-service terminals, control measures on mobile application and devices, control measures on cybersecurity.

A licensed insurer is required to notify BNM prior to conducting internet insurance and takaful services and this includes introducing new technology relating to internal insurance and takaful. In the event a licensed insurer intends to introduce new services or any enhancements to existing services not listed in the RMiT Guidelines, it shall undertake additional measures prior to notifying BNM which includes: (a) engaging an independent external party to provide assurance that the associated technology risks and security controls are addressed; and (b) providing confirmation of the licensed insurer's readiness.

In the event the control measures prescribed is departed from, a licensed insurer is expected to explain alternative risk management practices and demonstrate their effectiveness in addressing technology risk exposure.

4. Operating Cost Controls for Life Insurance and Family Takaful Business

On 24 December 2019, BNM issued the policy document on Operating Cost Controls for Life Insurance and Family Takaful Business ("**OCC Exposure Draft**") which sets out a revision to the Operating Costs Controls for Life Insurance and Family Takaful Business policy document which was issued on 26 December 2018.

The revision provides for the operational details of the balanced scorecard framework for bancassurance partners and incorporates existing specifications on the commission limits for financial advisers and brokers which were previously stipulated by the Life Insurance Association of Malaysia ("**LIAM**"). The revised policy took effect on 1 January 2020.

A summary of the gradual implementation is set out below:

(a) Effective from 1 January 2018 onwards

- Removal of commission limits for pure protection term products offered through all intermediaries, subject to meeting the specific requirements.
- Implementation of the balanced scorecard framework for agents, financial advisers and brokers.

(b) Effective from 1 March 2019 onwards

- Removal of commission limits for pure protection critical illness and pure protection medical and health products offered through all intermediaries, subject to meeting the specific requirements.

(c) Effective from 1 July 2019 onwards

- Removal of limits on commission and agency-related expenses for investment-linked products.

(d) Effective from 1 July 2020 onwards

- Removal of limits on commission and agency-related expenses for investment-linked takaful products

(e) Effective from 1 January 2021 onwards

- Implementation of BSC Framework for bancassurance partners
- Adjustment of commission limits for bancassurance partners

5. Offering of Trade Credit Insurance and Trade Credit Takaful

BNM recently announced plans to regulate trade credit insurance and trade credit takaful. Through the issuance of policy document on trade credit insurance and trade credit takaful on 3 May 2019, BNM sets out the approval process and requirements for the offering of trade credit insurance and trade credit takaful by licensed insurers and takaful operators in Malaysia. The trade credit insurance and trade credit takaful generally protect businesses against the risk of non-payment of goods and services by buyers and assist businesses to manage country risks. Additionally, the trade credit insurance and trade credit takaful are recognised as Credit Risk Mitigation (CRM) under the Capital Adequacy Framework for financial institutions in Malaysia.

6. Re-introduction of the SST Regime

On 1 September 2018, the Malaysian Government re-introduced the SST regime. As a result, general insurance products are now taxable under the SST regime. Customers who purchase or renew their general insurance policies on or after 1 September 2018 will be charged the SST at 6% on their premium.

7. Application Procedures for New Licences under Financial Services Act 2013 and Islamic Financial Services Act 2013

On 27 December 2019, BNM also issued the Application Procedures for New Licences under Financial Services Act 2013 and Islamic Financial Services Act 2013 policy document.

In line with BNM's duty to assess an application for a licence to carry on banking business, Islamic banking business, insurance business, takaful business or investment banking business, having regard to relevant factors including prudential requirements and whether the application will be in the best interest of Malaysia pursuant to Section 10 of the FSA or IFSA, this policy document sets out the:

(a) considerations under the law in assessing an application for a licence;

(b) application procedure; and

(c) information and documents to be submitted to BNM to facilitate the assessment of the application.

8. Application Procedures for Acquisition of Interest in Shares and to be a Financial Holding Company

The policy document Application Procedures for Acquisition of Interest in Shares and to be a Financial Holding Company was issued on 27 December 2019 as well.

Pursuant to the FSA, BNM's approval is required prior to:

(a) a person entering into an agreement or arrangement to acquire any interest in shares of a licensed person which will result in the person holding an aggregate interest in shares of the licensed person of any multiple of 5% or more; or

(b) a person having control or holding an aggregate interest in shares of a licensed person of more than 50%.

This policy document sets out the:

(a) considerations under the law in assessing an application to acquire interest in shares or control of a licensed person or a proposed licensed person, or to be a financial holding company;

(b) application procedure; and

(c) information and documents to be submitted to BNM to facilitate the assessment of the application.

9. Equity Investments

BNM recently issued the policy document on Equity Investments on 24 December 2019, which took effect on 1 January 2020. It provides for the approval and notification requirements relating to equity interests held by financial institutions in corporations. The policy document also puts in place prudential safeguards to address risks from equity exposures, including a targeted prudential limit to replace existing aggregate

limits on equity-related exposures applied to banking specific institutions.

10. Valuation of Insurance and Takaful Liabilities (Exposure Draft)

Specific to the insurance and takaful sector, the exposure draft on Valuation of Insurance and Takaful Liabilities was issued by BNM on 24 December 2019 which contains the proposed requirements on the valuation of insurance and takaful liabilities. The exposure draft sets out enhancements to the valuation to ensure that it is:

(a) adequately reflective of the underlying cash flow obligations of the insurance and takaful contracts; and

(b) consistent and comparable across different insurance and takaful products.

This exposure draft is part of BNM's holistic review of the overall capital adequacy framework, taking into account the developments in global regulatory and accounting standards.

11. Universal Life Business

On 23 December 2019, BNM issued the Universal Life Business policy document which comes into effect on 1 January 2021. The policy document defines a "universal life policy" as referring to a contract of insurance on human life or an annuity where the benefits are, wholly or partly, to be determined by reference to a non-unitised account, and the value of which is related to:

(a) the income from property of any description; or

(b) the market value of such property.

The policy document sets out:

(a) the roles and responsibilities of the board and senior management in the licensed insurer's management of universal life business;

(b) overall governance in the management of universal life business, including product design, establishment and revision of fees and charges, and management of expenses;

(c) investment, valuation and capital treatment of the universal life fund; and

(d) disclosure requirements to promote transparency to universal life policy owners.

12. COVID 19 Test Fund (CTF)

The COVID 19 Test Fund ("**CTF**") was established by LIAM, Persatuan Insurans Am Malaysia ("**PIAM**") and the Malaysian Takaful Association (" **MTA**") to support the Ministry of Health's ("**MoH**") efforts to conduct more COVID 19 testing by subsidising the costs of the test for policyholders/takaful certificate holders who have been referred by registered doctors for COVID 19 testing at recognised private laboratories.

Eligible policyholders/takaful certificate holders will be reimbursed up to a maximum of RM300 per test (one reimbursement per individual) and the insurance and takaful industry has pledged RM8 million to set up the CTF, which is anticipated to be able to support more than 26,600 tests.

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. 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** – generally, 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 provide a notice informing individuals whose personal data is collected of several matters, including that their personal data is being processed and provide a description of the personal data, the purpose of collection, the categories of parties that it is to be shared with and whether it is obligatory to provide the said personal 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 ("**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 the data user;

b) an individual is entitled to correct his personal data it 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.).

In May 2017, the Commissioner published on its official website the Public Consultation Paper No. 1/2017 entitled "Personal Data Protection (Transfer of Personal Data to Places outside Malaysia) Order 2017" ("**Proposed Order**"). The Proposed Order is essentially a "White List" which permits the transfer of personal data to certain jurisdictions outside Malaysia (as listed in the Proposed Order), in accordance with Section 129(1) of the PDPA.

However, based on the Commissioner's latest proposals in the Public Consultation Paper on the review of the PDPA issued in February 2020 (which is further discussed below), it would appear that the Proposed Order will likely be withdrawn as the Commissioner has stated his intention to remove the provisions in Section 129 of the PDPA which provide for the issuance of a whitelist identifying the places to which personal data may be transferred.

It should be noted that the proposed removal of the whitelist provisions from the PDPA will not impact how cross border transfers are presently carried out, as to date, the Commissioner has not issued a White List under Section 129. As such, to carry out cross border transfers of personal data, one of the avenues available to transferors is to establish that the transfer satisfies one of the requirements prescribed under Section 129(3) of the PDPA (as explained above).

6. Working with Data Processors

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 (and amended pursuant to an amendment order in 2016), there are 13 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;
k) utilities;
l) pawnbrokers; and
m) moneylenders.

The 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.

As at the date of this edition, codes of practice have been prepared and registered with the Commissioner for the following sectors:

a) utilities sector (electricity) (w.e.f. 23 June 2016);
b) insurance and takaful sector (w.e.f. 23 December 2016);
c) banking and financial sector (w.e.f. 19 January 2017);
d) aviation sector (w.e.f. 21 November 2017); and
e) communications sector (w.e.f. 23 November 2017).

The codes of practice for several other sectors are still in the process of being finalised by the respective data user forums, such as the codes of practice for the legal services sector.

A data user who fails to comply with any provision of the code of practice that is applicable to the data user commits an offence and shall, upon conviction, be liable to a fine not exceeding RM100,000 or to an imprisonment term of up to one year or both.

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 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 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.

11. Enforcement Phase of PDPA

On 3 May 2017, a company became the first data user to be charged in court for alleged breach of the PDPA. The company, which operates a local private college, was charged in the Sessions Court for processing personal data of former employees of the college without a valid certificate of registration issued by the Commissioner's department, in contravention with Section 16(1) of the PDPA. Section 16(1) requires certain classes of data users to be registered and to be issued with a valid certificate of registration. The charge, under Section 16(4) of the PDPA, provides that in the event of conviction, the company would be liable to a fine of up to RM500,000, or imprisonment of its officer(s) for up to three years, or both.

The Commissioner has subsequently instituted enforcement actions and proceedings against several other data users, including the following (as reported in its official website):

Sector	Offence / Maximum Penalty	Penalty Imposed
Tourism (Hotel)	**Section 16(4)** *(Processing personal data without certification from the Commissioner)* Fine of RM500,000 or imprisonment not more than 3 years or both **Section 5(2)** *(Processing personal data without consent of data subject)* Fine of RM300,000 or imprisonment not more than 2 years or both	Fine of RM10,000 or 8 months imprisonment
Education (IPTS)	**Section 16(4)** *(Processing personal data without certification from the Commissioner)* Fine of RM500,000 or imprisonment not more than 3 years or both	Fine of RM10,000 or 3 months imprisonment
Service (Recruitment Agency)	**Section 16(4)** *(Processing personal data without certification from the Commissioner)* Fine of RM500,000 or imprisonment not more than 3 years or both	Fine of RM10,000

(Source: http://www.pdp.gov.my/index.php/en/pusat-media/berita/989-pengguna-data-yang-telah-dikenakan-tindakan-di-bawah-akta-perlindungan-data-peribadi-2010-akta-709)

In August 2019, the Commissioner served its first enforcement notice on a Malaysian satellite television provider in response to a data breach incident involving unauthorised access to customer data. The organisation was required to respond to all questions raised by the Commissioner pursuant to the enforcement notice within 30 days, and to specify the steps taken to remedy contraventions of the PDPA.

12. Proposed Implementation of Data Breach Notification Regime

In August 2018, the Commissioner issued the Public Consultation Paper No. 1/2018 entitled "*The Implementation of Data Breach Notification*" (the "**DBN Public Consultation Paper**").

The DBN Public Consultation Paper seeks to introduce a data breach notification regime in Malaysia, where organisations will be required to notify regulators and/or affected individuals in the event of a data breach incident.

The DBN Public Consultation Paper identifies the proposed elements to be included in a data breach notification, such as details about the data breach, the containment or control measures taken by the organisation, parties to whom notification must be made and timeframe for notification, as well as details on previous training and guidance on data protection provided by the organisation.

The Commissioner has proposed to implement the DBN regime by way of imposing conditions upon the certificates of registration issued to data users who are required under the PDPA to register with the Commissioner. In other words, the DBN Public Consultation Paper currently only envisages mandatory application upon registered data users.

In the later Public Consultation Paper issued by the Commissioner on the review of the PDPA (further discussed below), the Commissioner has, once again, proposed the introduction of a mandatory data breach notification obligations applicable to data users. In the event a DBN regime is introduced in Malaysia, it remains to be seen whether the Commissioner will implement the DBN regime as proposed under the DBN Public Consultation Paper, or whether the DBN regime will be implemented based on the feedback received from the latest public consultation exercise.

13. Amendments to the PDPA

On 14 February 2020, the Commissioner issued a public consultation paper entitled the Public Consultation Paper No. 01/2020 on the Review of the PDPA ("**Public Consultation Paper**").

Under the Public Consultation Paper, the Commissioner has, by way of a total of 22 proposed suggestions, identified general areas within the PDPA which may be subject to amendment, accompanied by brief points explaining each proposal for amendment, in respect of which public feedback has been sought.

The proposed suggestions under the Public Consultation Paper include the following:

a) to impose direct obligations on data processors to comply with the PDPA, including obligations to register with the Commissioner to process personal data;

b) to introduce the right to data portability, i.e. the right for data subjects to obtain access to their data in a structured, machine-readable format which can be transferred from one data to another;

c) to require data users to appoint a data protection officer ("**DPO**") for the organisation, and for the Commissioner to issue a guideline on the mechanism of having a DPO;

d) to impose mandatory data breach notification obligations on data users, and for the Commissioner to issue guidelines on the mechanism of data breach incident reporting;

e) to provide clarity on the subject matter of consent and to restructure Section 6 of the PDPA (i.e. the General Principle);

f) to amend Section 129 of the PDPA (which provides for transfers of personal data outside of Malaysia) by removing the existing whitelist provisions;

g) to require data users to implement privacy by design, i.e. a concept which requires data users to integrate privacy into its system life cycle, and for the Commissioner to issue a guideline expanding on the mechanism to be adopted;

h) to require data users to establish a Do Not Call Registry, which allows data subjects to opt-out from receiving unsolicited direct marketing materials;

i) to introduce the right of data subjects to identify the third parties to whom his personal data has been or will be disclosed to;

j) to introduce a provision in the PDPA which expressly provides for the right of data subjects to bring civil actions against data users;

k) to issue a policy on endpoint security, in order to provide clarity on the use of specific technologies (e.g. facial recognition, trackers) in processing personal data;

l) to extend the application of the PDPA to the Federal and State Governments (who are currently not subject to the PDPA);

m) to issue a guideline in respect of cross border transfers between Malaysian organisations with group entities outside of Malaysia, in order to address the mechanism and implementation of such cross-border data transfers;

n) to exempt business contact information (i.e. contact details that are obtained in a business-to-business relationship) from the PDPA, and to issue a guideline to clarify the status of business contact information;

o) to issue a guideline to clarify the level of permitted disclosures of personal data by data users to government regulatory agencies;

p) to classify data users based on business activities as opposed to licences issued by regulating agencies / bodies;

q) to introduce voluntary registration by data users that are not required to register pursuant to the PDPA;

r) to extend the application of the PDPA to non-commercial transactions;

s) to extend the application of the PDPA to data users outside of Malaysia that monitor and profile Malaysian data subjects;

t) to require data users to provide a clear mechanism for data subjects to unsubscribe from online services, and for the Commissioner to issue a guideline on the mechanism applicable to digital and electronic marketing;

u) to allow data users to make first direct marketing calls to data subjects and for the Commissioner to issue guidelines on direct marketing; and

v) to issue guidelines on the processing of personal data by cloud computing services.

The abovementioned public consultation exercise closed in March 2020. As at the date of publication of this Doing Business Guide, the amendments have not yet been tabled in Parliament.

25. ANTI-MONEY LAUNDERING AND ANTI-CORRUPTION LAWS

The principal legislation enacted to combat money laundering is the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ("AML Act") whereas the principal legislation enacted to combat corruption is the Malaysian Anti-Corruption Commission Act 2009 ("MACC Act").

A. Anti-Money Laundering "AML") Laws

Authority in Charge

The competent authority appointed under the AML Act to regulate the AML framework and oversee domestic and international cooperation in combating money laundering offences is BNM.

However, as money laundering offences include various serious offences set out under Schedule 2 of the AML Act, various ministries and agencies are given enforcement powers in respect of offences under their respective purview.

For example, the Director General of the IRB is vested with the power to require a taxpayer to pay a penalty for wilful evasion of tax whereas the MDTCA can enforce provisions relating to false trade descriptions, both of which are examples of serious offences under Schedule 2 of the AML Act.

It is also worth highlighting that most money laundering offences involve corrupt elements, hence the MACC has set up a special AML division to investigate offences under the AML Act.

What is Money Laundering?

BNM succinctly explains money laundering as "a process of converting cash or property derived from criminal activities to give it a legitimate appearance, and it is a process to clean 'dirty' money in order to disguise its criminal origin."

To establish a money laundering offence, Section 4 of the AML Act provides that any person who:

a) Is directly or indirectly involved in a transaction dealing with proceeds of an unlawful activity;

b) uses proceeds of an unlawful activity;

c) removes or bring into Malaysia proceeds of an unlawful activity; or

d) conceals or disguises the true origin of proceeds of an unlawful activity,

commits a money laundering offence.

Penalties for the Key Offences

Contravening Section 4 of the AML Act attracts a fine up to RM 5 million or at least five times the value of the proceeds of an unlawful activity or a jail term up to 5 years or both.

Extra-Territorial Effect

The AML Act provides that any offence:

a) by citizens and permanent residents of Malaysia outside Malaysia;

b) against a Malaysian citizen (including Malaysian companies outside Malaysia); and

c) by any person after the commission of offence is present in Malaysia,

can be dealt with as if the offence had been committed within Malaysia.

The AML Act further provides for seizing and forfeiture of property held outside Malaysia.

Duty to Report Money Laundering Offences

Reporting institutions listed under Schedule 1 of the AML Act have a duty to report money laundering offences to BNM, in addition to putting in place other preventive measures to prevent itself from being used as a conduit for money laundering activities.

Reporting Institutions

Reporting institutions include banks, insurance companies, money services business providers, accountants, lawyers, real estate agents, company secretaries, casino operators, trust companies, jewellers etc. BNM has issued 3 different policies and guidelines for reporting institutions under different sectors. The policies and guidelines can be accessed at http://amlcft.bnm.gov.my/AMLCFT07.html

Key Takeaways

The AML Act covers not just the receipt, use or facilitation of the transfer of proceeds of an unlawful activity, which the majority of us would commonly associate the AML Act with. Instead, the AML Act covers a broad range of offences set out in various legislation and cuts across all sectors ranging from brick and mortar businesses to new age digital businesses. Further, the AML Act mandates a host of reporting and compliance requirements which differ for different sectors.

As such, it is vital for everyone to keep in mind the complex compliance requirements when conducting business, in and outside Malaysia.

B. Anti-Bribery Laws

The MACC Act is the principal legislation to fight corruption in Malaysia. The MACC Act was enacted to promote the integrity and accountability of public and private sector administration by establishing an independent and accountable body i.e. the Malaysian Anti-Corruption Commission ("**Commission**"), and to educate public authorities, public officials and members of the public about corruption and its detrimental effects on the public and private sector administration and the community.

There is also other legislation in Malaysia which regulate bribery and corrupt conduct in specific areas. These are found in, *inter alia*:

a) the Penal Code;
b) the Election Offences Act 1954; and
c) the Customs Act 1967.

Authority in Charge

The Commission was established in January 2009 under Section 4 of the MACC Act. The Commission's role is to manage the country's anti-corruption efforts, specifically to eradicate corruption, abuses of power and malpractice in Malaysia. The core divisions of the Commission comprise:

a) the investigation division;
b) the intelligence division;
c) the legal and prosecution division; and
d) the record management and information division.

Extra-Territorial Effect

The MACC Act has an extra territorial effect. When an offence is committed in any place outside Malaysia by any citizens and permanent residents of Malaysia, he/she may be dealt with in respect of the offence as though it was committed in Malaysia. In addition to that, the new Section 17A of the MACC Act will apply to companies or partnerships established under the laws of Malaysia carrying on business in Malaysia or elsewhere; or such foreign companies or partnerships which carry on business or part of a business in Malaysia.

The MACC Act applies to both public and private sectors, with specific provisions under the MACC Act catering for different offences.

What is Gratification?

Gratification is broadly defined under Section 3 of the MACC Act and includes various forms of bribery such as:

a) money, donation, gift, loan, property, financial benefit;

b) any office, dignity, employment, contract of services;

c) any payment, release or discharge of any loan, obligation or liability;

d) any discount, commission, rebate, bonus or percentage;

e) any forbearance to demand any money or money's worth; and/or

f) any favour of any description, including protection from any penalty or proceedings of a disciplinary or criminal nature.

Duty to Report Bribery Offences

Under the MACC Act, a person: (i) being offered gratification; or (ii) from whom gratification is sought, must report the third party to the Commission or the police. Failure to report the third party offering gratification attracts a fine up to RM100,000 or jail term up to 10 years, or to both; whereas failure, without reasonable excuse, to report the third party seeking gratification from you attracts a fine up to RM10,000 or jail term up to 2 years, or to both.

Key offences under the MACC Act

The main offences under the MACC Act include:

a) corruptly soliciting/receiving OR offering/giving gratification to a third party as an inducement or reward to do or forbear from doing anything [Section 16];

b) corporate liability offence where a person associated with the commercial organisation ("**CO**") corruptly gives or promise to give any gratification for the benefit of a third party with intent to obtain or retain business or obtain an advantage in the conduct of business of the CO [Section 17A]

c) intending to deceive principal by agent [Section 18]

d) corruptly procuring withdrawal of tender [Section 20]

e) bribery of officer of public body [Section 21]

f) bribery of foreign public officials [Section 22]

g) misuse of position for gratification [Section 23]

NOTE: Once gratification is proved to have been received or offered, it is presumed that the gratification is received or offered in a corrupt manner, and the burden of proof is on the accused to show, on the balance of probability, that the gratification was not received or offered in a corrupt manner.

Penalties for the Key Offences

Contravening Sections 16, 17, 20, 21, 22 and 23 of the MACC Act attract a fine up to 5 times the value of the gratification or RM10,000, whichever is higher, or a jail term up to 20 years or both.

Contravening Section 17A of the MACC Act attracts a fine up to 10 times the value of the gratification or RM1 million, whichever is higher, or a jail term up to 20 years or both.

Same Threshold in Bribery Offences in the Public and Private Sector

The same threshold applies to same offences involving either the public or the private sector, but there are different provisions under the MACC Act catering to different types of offences.

Defence to a Corporate Liability Charge

The defence to a Section 17A corporate liability charge is to put in place adequate procedures. The Commission had in December 2018, issued an adequate procedures guideline outlining 5 guiding principles forming the bedrock of adequate procedures:

T – Top level management
R – Risk assessment
U – Undertaking control measures
S – Systematic review, monitoring and enforcement
T – Training and communication

NOTE: The guidelines is not a one-size-fits-all guide, and should be applied practically, in proportion to the scale, nature, industry, risk and complexity of a CO. In addition, as Section 17A is not yet tested in Courts, it remains to be seen how the Courts would assess the adequacy of the policies and procedures of a CO and the manner of their implementation.

Defence for Officers of a Commercial Organisation

Under Section 17A(3) of the Act, if a CO is convicted of a corporate liability offence, the following persons will be deemed to have committed the same offence unless he/she can prove the offence was committed without his/her consent or connivance and he/she had exercised due diligence to prevent commission of that offence:

a) a director, controller, officer or partner; or

b) a person who is concerned in the management of the CO's affairs.

C. Investigation, prosecution & enforcement trend

Whistleblowing coming into play

Apart from detecting non-compliance through audits, the authorities rely on whistleblowing reports from the public. Reports can be done on any anonymous basis, if preferred, but whistleblowers are encouraged to provide their name and contact details to facilitate the relevant authorities' efforts to follow up and acquire further information if the disclosure warrants an investigation.

Protection for whistleblowers

Under the Whistleblowers' Protection Act 2010 ("**WP Act**"), a whistleblower or informant is accorded protection from detrimental action, civil action, criminal or disciplinary consequences for making a disclosure. His/her identity will also be kept confidential, even during trial in Court or tribunal.

To qualify for protection, the disclosure must be made to either one of these enforcement agencies:

a) the Commission
b) the Companies Commission of Malaysia
c) the Immigration Department
d) the Royal Malaysian Police
e) the Royal Malaysian Customs Department
f) the Road Transport Department
g) the Securities Commission

It is important to keep in mind this protection can be revoked by the relevant enforcement agency offering the protection if the whistleblower or informant is found to have:

a) participated in the improper conduct;

b) wilfully made disclosure which he/she believed to be false;

c) made disclosure which is frivolous or vexatious;

d) questioned the merits of government policy in his/her disclosure;

e) made disclosure solely or substantially with the motive of avoiding dismissal or other disciplinary action; or

f) in the course of making a disclosure or provide further information, commits an offence under this WP Act 2010 e.g. making a disclosure specifically prohibited under the Official Secrets Act 1972.

D. Alternatives to prosecution

Deferred prosecution agreements are gaining popularity overseas but have yet to be introduced in Malaysia. We currently have the option to make a plea bargain for a charge or a sentence to the charge or to both under the Criminal Procedure Code.

Double jeopardy rule for corruption and money laundering charges

Subject to certain exceptions, Article 7(2) of the Federal Constitution provides that a "person who has been acquitted or convicted of an offence shall not be tried again for the same offence" and Section 302 of the Criminal Procedure Code contains a similar rule.

Section 66 of the MACC Act and Section 82 of the AML Act further provide that proceedings brought under these acts are a bar to subsequent proceedings against the accused for the same offence, and is a bar to subsequent proceedings under any written law relating to the extradition of persons, in respect of the same offence, outside Malaysia.

Other recent anti-corruption and anti-money laundering initiatives in Malaysia

The key anti-corruption initiatives launched to date include:

a) the introduction of the ISO 37001 Anti-Bribery Management System which is a voluntary internal control system for organisation to manage, handle, enforce, evaluate and improve its anti-corruption measures;

b) a voluntary corporate integrity pledge where an organisation makes a unilateral declaration against corrupt practices and express its resolve to work towards conducting business in an ethical business environment;

c) the National Anti-Corruption Plan which includes extensive strategies to promote integrity and good governance within the political and public sector administration;

d) the Securities Commission's Code on Corporate Governance with a recently approved recommendation for listed companies to put in place anti-corruption measures and a framework to promote the effective discharge of directors' responsibilities; and

e) in line with the amendment to the Code of Corporate Governance, the Main Market and ACE Market listing requirements of Bursa Malaysia were amended to require all listed issuers and its board of directors to implement policies and procedures on anti-corruption and whistle-blowing.

On the other hand, the most recent anti-money laundering initiative launched in November 2019 is the Public Private Partnership initiative between BNM, the SC, law enforcement agencies and major financial institutions in Malaysia, where timely and seamless financial intelligence will be shared amongst these parties to combat money laundering crimes.

Enforcement trend of anti-corruption and anti-money laundering laws in Malaysia

Both the government and the public's appetite to curb graft and financial crime is strong – as evidenced by the Commission's total arrests of 1042 from January to July 2019 alone, and the on-going high profile money laundering trials.

Now that the corporate liability provision is in force and the Commission can bring errant corporations to book, we should expect an even higher number of arrests.

26. ACKNOWLEDGEMENTS

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Edited by
Christopher Lee, Tracy Wong, Ooi Ju Lien, Law Jun Chin & Nereen Kaur

REGIONAL CONTACTS

CHRISTOPHER & LEE ONG | *Malaysia*

Christopher & Lee Ong
T +60 3 2273 1919
F +60 3 2273 8310
www.christopherleeong.com

R&T SOK & HENG | *Cambodia*

R&T Sok & Heng Law Office
T +855 23 963 112 / 113
F +855 23 963 11
kh.rajahtannasia.com

RAJAH & TANN 立杰上海
SHANGHAI REPRESENTATIVE OFFICE | *China*

Rajah & Tann Singapore LLP
Shanghai Representative Office
T +86 21 6120 8818
F +86 21 6120 8820
cn.rajahtannasia.com

ASSEGAF HAMZAH & PARTNERS | *Indonesia*

Assegaf Hamzah & Partners

Jakarta Office
T +62 21 2555 7800
F +62 21 2555 7899

Surabaya Office
T +62 31 5116 4550
F +62 31 5116 4560
www.ahp.id

RAJAH & TANN | *Lao PDR*

Rajah & Tann (Laos) Sole Co., Ltd.
T +856 21 454 239
F +856 21 285 261
la.rajahtannasia.com

RAJAH & TANN | *Singapore*

Rajah & Tann Singapore LLP
T +65 6535 3600
F +65 6225 9630
sg.rajahtannasia.com

RAJAH & TANN | *Myanmar*

Rajah & Tann Myanmar Company Limited
T +951 9345 343 / +951 9345 346
F +951 9345 348
mm.rajahtannasia.com

GATMAYTAN YAP PATACSIL
GUTIERREZ & PROTACIO (C&G LAW) | *Philippines*

Gatmaytan Yap Patacsil Gutierrez & Protacio (C&G Law)
T +632 894 0377 to 79 / +632 894 4931 to 32 /
+632 552 1977
F +632 552 1978
www.cagatlaw.com

RAJAH & TANN | *Thailand*

R&T Asia (Thailand) Limited
T +66 2 656 1991
F +66 2 656 0833
th.rajahtannasia.com

RAJAH & TANN LCT LAWYERS | *Vietnam*

Rajah & Tann LCT Lawyers

Ho Chi Minh City Office
T +84 28 3821 2382
F +84 28 3520 8206

Hanoi Office
T +84 24 3267 6127
F +84 24 3267 6128
www.rajahtannlct.com

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