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# REGIONAL ROUND-UP 2023: MALAYSIA



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# Introduction



Throughout the year, we have been keeping you up to date on noteworthy developments across the region with our Regional Round-up Publications. As we enter 2024, we are pleased to share with you our *2023 year-in-review of the Regional Round-up* for our Regional Offices in the Rajah & Tann Asia network.

In each jurisdiction, we recount the key milestones in the path that has been travelled in 2023, as well as consider the terrain of the road that lies ahead in 2024. In the "**Looking Back: 2023**" section, we take stock of the past year and highlight the key legal and regulatory developments affecting each jurisdiction in 2023. In the "**Gazing Into: 2024**" section, we look ahead to some key areas of development that you should take note of in the year to come, referencing the legal and business trends shaping up potential legislative and regulatory changes in each jurisdiction.

We hope that this year-in-review edition of the Regional Round-up provide some perspective and insight into the legal landscape of the jurisdictions across the region. As always, please feel free to contact our lawyers in our Regional Offices if you have any queries or for further discussions.

Please click on the links below to access the full collection of our country-specific *2023 year-in-review of the Regional Round-up*:

- [Cambodia](#)
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## Looking Back: 2023

*Following the transition in government at the close of 2022, 2023 paved the way for a return to normalcy for the nation after the COVID-19 pandemic and ushered in fresh direction and policies from the new government. These were introduced in lockstep with the Government's aspiration to shift to a high value green economy and position itself as a digital economy powerhouse.*

*In 2023, generative AI also began to make its presence felt with its transformative potential prompting the Government to reassess existing regulatory frameworks and establish a regulatory environment that would not only encourage innovation, but also safeguard against potential risks and ethical concerns associated with the widespread adoption of generative AI.*



*Notable key developments and trends from 2023 include:*

- *enforcement of prohibition against forced labour under the **Employment Act 1955**;*
- *new **General Code of Practice of Personal Data Protection** under the Personal Data Protection Act 2010;*
- *amendments to the **LEAP Market Transfer and Recognised Approved Adviser Framework**;*
- *launch of Malaysia's **National Energy Transition Roadmap**;*
- *revised consent and disclosure requirements for customer information under **new Policy Document on Management of Customer Information and Permitted Disclosures** for financial institutions;*
- *additional requirements under **Revised Policy Document on Risk Management in Technology** for financial institutions; and*
- *new **Guidelines on Technology Risk Management** for the capital markets sector.*

*On the dispute resolution front, the Malaysian High Court in **Elisabeth Regina Maria Gabriele Von Pezold & Ors v Republic of Zimbabwe [2023] MLJU 2657**, for the first time in Malaysia, recognised a foreign award made by an arbitral tribunal established under the Convention on the Settlement of Investment Disputes between States and National of Other States and thereby reaffirmed Malaysia's continued commitment in respecting the principles of international law and comity. In another landmark ruling in the case of **Wiramuda (M) Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri [2023] 4 MLJ 753**, the Malaysian Federal Court held that taxing the compensation received in respect of compulsorily acquired lands is unconstitutional as it would*



*deprive the landowner of their right to adequate compensation guaranteed under Article 13(2) of the Malaysian Federal Constitution.*

### **Employment & Benefits – Enforcement of Prohibition against Forced Labour under the Employment Act 1955**

Forced labour and human trafficking incidents in Malaysia were frequently discussed and reported in 2023. There were 137 trafficking investigations (including 95 for labour trafficking) in 2023; up from 108 overall trafficking investigations in the previous year. Significantly, the authorities prosecuted 86 of the 126 alleged traffickers under the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 ("**ATIPSOMA**") in 2023 – an almost 277% increase from 2022. This is expected to continue (likely with greater frequency) in 2024.

In 2023, the Employment (Amendment) Act 2022 came into effect, adding a statutory prohibition of forced labour under the Employment Act 1955. This is supplementary to other forced labour related offences under the Penal Code and the ATIPSOMA.

### **Technology, Media & Telecommunications / Data Protection – New General Code of Practice of Personal Data Protection Issued under the Personal Data Protection Act 2010**

Under the Personal Data Protection Act 2010 ("**PDPA**"), 13 specified classes of data users ("**Specified Data Users**") are required to establish their own data user forums and draw up their respective Codes of Practice, in order to provide for data protection requirements specific to their particular industries (e.g., the Personal Data Protection Code of Practice for the Insurance sector). However, there are a number of Specified Data Users that have yet to do so. Consequently, the Personal Data Protection Commissioner ("**Commissioner**") issued the General Code of Practice of Personal Data Protection ("**General COP**") in January 2023. The General COP applies to the classes of Specified Data Users that have yet to establish data user forums and register their respective Codes of Practice with the Commissioner.

While the General COP is not binding upon other data users, it is a useful guide as it reflects the expectations of the Commissioner in relation to the minimum measures to be implemented by data users pursuant to the PDPA. Click [here](#) for a brief overview of the General COP and

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key provisions that data users should be aware of under the General COP.

### **Capital Markets – Amendments to the LEAP Market Transfer and Recognised Approved Adviser Framework**

Amendments to the LEAP Market Transfer Framework came into effect on 1 April 2023. The LEAP Market Transfer Framework facilitates the graduation of eligible Leading Entrepreneur Accelerator Platform ("**LEAP**") Market-listed corporations to the Access, Certainty, Efficiency ("**ACE**") Market of Bursa Malaysia Securities Bhd.

Key amendments were introduced in the ACE Market Listing Requirements ("**ACE LR**"), including the introduction of a Recognised Approved Adviser Framework, and the expansion of the pool of Sponsors / Advisers in the ACE Market on transfer listings and permitted corporate exercises. Click [here](#) for more information about the amendments to the LEAP Market Transfer Framework.

### **Energy & Natural Resources – Launch of Malaysia's National Energy Transition Roadmap**

Malaysia's Ministry of Economy launched the National Energy Transition Roadmap ("**NETR**") setting out the Government's blueprint to accelerate the country's energy transition, and providing a framework for the country's shift from a traditional fossil fuel-based economy to a high value green economy. The NETR expounds on Malaysia's energy transition ambitions by outlining 10 flagship catalyst projects and initiatives to be carried out by the Malaysian government and by identifying five enablers that will facilitate the country's energy transition aspirations. Click [here](#) and [here](#) to read our Legal Updates regarding the NETR.

### **Technology, Media & Telecommunications / Data Protection – Revised Consent and Disclosure Requirements for Customer Information under the New Policy Document on Management of Customer Information and Permitted Disclosures for Financial Institutions**

The Central Bank of Malaysia, Bank Negara Malaysia ("**BNM**") issued a revised version of the Policy Document

on Management of Customer Information and Permitted Disclosures ("**Revised MCIPD**"). The Revised MCIPD introduces, amongst others, enhanced requirements for financial institutions ("**FIs**") when obtaining customers' consent to the disclosure of their information to third parties. The Revised MCIPD came into effect on 3 April 2023 (save for provisions related to consent requirements on permitted disclosures to third parties, which took effect on 1 January 2024). Click [here](#) for further information regarding the changes introduced in the Revised MCIPD.

### Technology, Media & Telecommunications / Data Protection – Additional Requirements under Revised Policy Document on Risk Management in Technology for Financial Institutions

On 1 June 2023, BNM issued a revised version of its Policy Document on Risk Management in Technology ("**Revised RMIT PD**") for financial institutions ("**FI**").

The Revised RMIT PD set out additional requirements for FI's management of cloud technology risks and the adoption of multi-factor authentication ("**MFA**") security controls by FIs. The Revised RMIT PD came into effect on 1 June 2023. However, the revised requirements specifically relating to cloud technology risk management take effect as follows: (a) from 1 June 2023 for licensed digital banks and Islamic digital banks; and (b) from 1 June 2024 for FIs other than licensed digital banks and Islamic digital banks. Click [here](#) for more information.

### Technology, Media & Telecommunications / Data Protection – New Guidelines on Technology Risk Management for the Capital Markets Sector

The Securities Commission of Malaysia ("**SC**") issued the Guidelines on Technology Risk Management ("**TRM Guidelines**") to enhance the management of technology risks by capital market entities ("**CMEs**"), in response to the growing adoption of technology among CMEs in recent years. The TRM Guidelines supersedes existing requirements under SC's Guidelines on Management of Cyber Risk. Key requirements of the TRM Guidelines include the requirement to establish a technology audit plan and also comprehensive technology risk management framework, minimum technology operations management (including network and operational resilience), as well as guidance for CMEs when adopting AI and machine learning technologies.

The TRM Guidelines is expected to come into effect by the third quarter of 2024, subject to further confirmation from SC on the exact effective date for the TRM Guidelines. Click [here](#) for more information.

### Dispute Resolution – First Malaysian Judgment Recognising ICSID Arbitration Award

The Malaysian High Court in the case of *Elisabeth Regina Maria Gabriele Von Pezold & Ors v Republic of Zimbabwe* [2023] MLJU 2657 ("**Von Pezolds**"), for the first time in Malaysia, recognised a foreign award made by an arbitral tribunal established under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("**ICSID Convention**") as if it is a judgment of the Malaysian High Court. The full grounds of judgment was released by the High Court recently and can be accessed [here](#).

The Plaintiffs had commenced arbitration against Zimbabwe with the International Centre for Settlement of Investment Disputes ("**ICSID**") for the expropriation of its properties without compensation. The ICSID arbitral tribunal ruled in favour of the Plaintiffs and awarded a sum over USD200 million in compensation and damages ("**ICSID Award**"). Zimbabwe sought to annul the ICSID Award, but its application was dismissed ("**Decision on Annulment**"). Subsequently, the Plaintiffs commenced an action before the Malaysian High Court, pursuant to the Convention on the Settlement of Investment Disputes Act 1966 ("**Malaysian ICSID Act**"), seeking to enforce both the ICSID Award and the Decision on Annulment (collectively referred to as "**ICSID Awards**") in Malaysia ("**Plaintiffs' Applications**"). Zimbabwe opposed the Plaintiffs' Applications on various grounds.

The Malaysian High Court, in recognizing the ICSID Awards as if the same were judgments of the Malaysian High Court, held, *inter alia*, that:

- (a) Parliament has expressly vested jurisdiction on the High Court to recognise the ICSID awards and give effect to the same, through the enactment of the Malaysian ICSID Act.
- (b) Zimbabwe could not claim sovereign immunity to resist or prevent recognition of the ICSID Awards. Considerations of immunity are premature at the recognition stage and can only be pursued if and when execution is attempted. Further, Zimbabwe, by ratifying the ICSID Convention, had acquiesced

to contracting states, including Malaysia, recognising the ICSID Awards as a binding domestic judgment and it could not claim immunity from such recognition.

- (c) Despite the lack of a procedural framework in Malaysia relating to the enforcement of the ICSID awards, the High Court remains imbued with intrinsic and inherent powers, as a superior court of law, to adapt existing procedures to the extent required to serve justice.
- (d) It was noted that the Germany-Zimbabwe Bilateral Investment Treaty ("**German BIT**") and the Switzerland-Zimbabwe Bilateral Investment Treaty ("**Swiss BIT**") (collectively referred to as "**BITs**"), pursuant to which the ICSID Awards were made, restricted the enforcement of an ICSID award outside Zimbabwe. However, the suggested interpretation that the BITs expressly limited enforcement of the ICSID awards to only Germany, Switzerland, and/or Zimbabwe was not consistent with the Most Favoured Nation clauses present in the BITs. The High Court noted that there was no restriction in the bilateral investment treaty between Zimbabwe and a third state – the Netherlands – limiting enforcement of an award to only Netherlands and/or Zimbabwe and therefore, the Plaintiffs, who were Swiss and German investors, should not be restricted to enforcement of the ICSID Awards in Germany, Switzerland, and/or Zimbabwe only.
- (e) The Malaysian High Court was bound to recognise the ICSID awards under Article 54(1) of the ICSID Convention notwithstanding the absence of identified seizable Zimbabwean assets in Malaysia.
- (f) The absence of specific Malaysian legislation governing the service of process on a foreign state akin to the UK or Singapore did not restrict the court's discretionary power to grant an order for service out of jurisdiction in cases involving the enforcement of an international arbitral award. Order 11, Rule 1(1)(M) of the Rules of Court 2012 could be relied upon to permit service of an originating process out of the jurisdiction on a foreign state for the enforcement of an arbitral award.

Zimbabwe has filed an appeal against the High Court's decision in *Von Pezold* and the hearing of the appeal is pending before the Malaysian Court of Appeal.

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## Dispute Resolution – Malaysian Apex Court ruled Taxing the Compensation Received from Compulsory Acquisition is Unconstitutional

In the case of *Wiramuda (M) Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* [2023] 4 MLJ 753, the Federal Court of Malaysia made a landmark ruling that section 4C of the Income Tax Act 1967 ("**ITA 1967**") (which, in essence, provides that compensation on account of compulsory acquisition is considered as business income and therefore chargeable for income tax) is liable to be struck down for infringing Article 13(2) of the Federal Constitution – making it one of the rare occasions where the Federal Court has invalidated a statutory provision.

By way of background, several land parcels owned by Wiramuda (M) Sdn Bhd ("**Wiramuda**") were compulsorily acquired and compensation was paid for the said acquired lands. The Director-General of the Inland Revenue ("**LHDN**") later issued a notice of assessment to Wiramuda for a sum of over RM52 million, claiming that the compensation received by Wiramuda was subject to tax by virtue of sections 4C and 24(1)(aa) of the ITA 1967. Dissatisfied, Wiramuda, by way of a judicial review application, sought to quash the decision of the LHDN.

The Federal Court held that section 4C of the ITA 1967 was unconstitutional, *inter alia*, for the following reasons:

- (a) Article 13(2) of the Federal Constitution provides that '*no law shall provide for the compulsory acquisition or use of property without adequate compensation*'. Adequate compensation places the landowner in the original position as if the land has not been acquired;
- (b) Section 4C of the ITA 1967 considers compensation from compulsory acquisition to be a form of profit or gain. However, profit and compensation have different meanings. Therefore, Section 4C of the ITA 1967 is flawed in providing that profits or gains of a business include compensation from compulsory acquisition, as an award of adequate compensation has no element of profit or gain, nor any pecuniary advantage;
- (c) Further, charging income tax on the compensation received will mean that the landowner has not in fact received adequate compensation for the land acquired. Therefore, Section 4C of the ITA 1967 infringes Article 13(2) of the Federal Constitution.



# Gazing Into: 2024

*In 2024, we expect to see developments in several areas of law including:*

- *the introduction of sales tax on low value goods on online marketplaces;*
- *the potential impact of the upcoming EU's Corporate Sustainability Due Diligence Directive;*
- *the long-awaited amendments to the Personal Data Protection Act 2010;*
- *upcoming draft Cybersecurity Bill; and*
- *upcoming Code of Ethics and Governance for Artificial Intelligence ("AI").*

*Summaries of the key developments relating to the above areas are provided below.*

## Technology, Media & Telecommunications / Data Protection – Introduction of Sales Tax on Low Value Goods on Online Marketplaces

With the aim of levelling the playing field and providing fair tax treatment between local and imported goods, the Sales Tax (Amendment) Act 2022 amended the Sales Tax Act 2018 ("**STA**") to impose sales tax on imported low value goods ("**LVG**") that have a sale value of not more than RM500 and which are brought into Malaysia by land, sea or air.

The imposition of sales tax on LVG officially took effect on 1 January 2024. Online local and foreign sellers with total sales values of LVG exceeding RM500,000 within the preceding 12 months would be required to register with the Royal Malaysian Customs Department ("**RMCD**") as a Registered Seller. Click [here](#) for a brief summary of the new LVG sales tax and its relevance to e-commerce businesses.

## Employment & Benefits – The Impact of EU's Corporate Sustainability Due Diligence Directive

Malaysia will be affected by the implementation of new EU laws that is expected to come into force in 2024, namely the Corporate Sustainability Due Diligence Directive ("**CSDDD**"), which imposes on large EU Companies the requirement to conduct due diligence on its supply chain for human rights or environmental breaches. Non-EU companies will be required to comply with the CSDDD if they generate a high enough turnover from the EU.

The CSDDD will require companies who supply to affected EU Companies to report on and remedy any human rights breaches such as forced labour practices. It is important to note that an EU company operating in a high-risk sector such as manufacturing and agriculture only needs to hit €40 million in global net turnover to come under the CSDDD. The EU is Malaysia's 4<sup>th</sup> largest





trading partner, accounting for 9.6% of Malaysia's exports in 2021. As such, it is expected that Malaysian businesses will be pressured into correcting its current labour standards and practices.

## **Technology, Media & Telecommunications / Data Protection – Amendments to the Personal Data Protection Act 2010**

First announced in 2018, the development of the long-awaited amendments to the PDPA – which faced repeated delays due to the COVID-19 pandemic and several changes in the Government – is now within reach. It is anticipated that the draft amendment bill to the PDPA will be tabled for Parliament's consideration sometime in 2024.

Key proposed amendments, as highlighted by the Government so far, include:

- (a) the introduction of a requirement to appoint a Data Protection Officer for organisations;
- (b) the introduction of mandatory data breach notification obligations for data users;
- (c) the extension of the scope of the Security Principle to data processors; and
- (d) increased penalties for misuse of data or breach of the PDPA.

Click [here](#) for information about updates provided by the Government regarding areas that have been earmarked for amendments by the Government.

## **Technology, Media & Telecommunications / Data Protection – Upcoming Draft Cybersecurity Bill**

Over the course of 2023, the Malaysian government reaffirmed its commitment to introduce a Cybersecurity Bill to address existing gaps in Malaysia's cybersecurity legal framework to Parliament by 2024.

To this end, the drafting team involved in the preparation of the draft Cybersecurity Bill has provided updates on matters that will be addressed in the Cybersecurity Bill. Key provisions that will be introduced include:

- (a) establishment of the National Cyber Security Agency ("**NACSA**") as the cybersecurity regulator of Malaysia, which will be entrusted with regulatory

and enforcement powers to regulate cybersecurity in Malaysia;

- (b) designation of Critical National Infrastructure Information ("**CNII**") Sectors and CNII Sector Leads that will act as a bridge between NACSA and CNII owners;
- (c) designation of computer and computer systems that will fall within the CNII boundaries;
- (d) issuance of specific direction / codes of practice to set out cybersecurity standards for CNII owners;
- (e) introduction of baseline audit and risk assessment requirement for CNII owners, where they will be required to conduct annual cybersecurity audits and risk assessment (every two years) and submit such reports to NACSA; and
- (f) introduction of mandatory cybersecurity incident notification requirement.

Click [here](#) for updates about the upcoming draft Cybersecurity Bill.

## **Technology, Media & Telecommunications / Data Protection – Upcoming Code of Ethics and Governance for AI**

In response to heightened interest in the transformative potential of generative AI applications, and recognising the need to tackle substantial issues related to the use of AI, the Ministry of Science, Technology and Innovation ("**MOSTI**") is exploring the possibility of regulating the development and use of AI applications.

It is currently drawing up a Code of Ethics and Governance for AI ("**AI Code**") to provide guidelines and regulations that address ethical use of AI by stakeholders across all sectors. The AI Code is being crafted in alignment with the Recommendation on the Ethics of AI adopted by the United Nations Educational, Scientific and Cultural Organisation ("**UNESCO**") in November 2021.

The AI Code is expected to be presented to the public in the First Quarter of 2024.

## **Technology, Media & Telecommunications / Data Protection – Upcoming Regulatory Developments in the Technology, Media and Telecommunications Sector**

We anticipate significant regulatory developments in the Technology, Media and Telecommunications sector, following government announcements in 2023 about ongoing regulatory initiatives. The recent government decision to split the Communications and Digital Ministry into two new ministries – the Communications Ministry, and the Digital Ministry – underscores the Government's focus on digital transformation-related policies and initiatives in the year ahead.

However, the new ministries may require time to recalibrate and align their respective focus areas and functions. Consequently, we are likely to witness more substantial development and initiatives unfold in the latter half of the year.

In this context, noteworthy regulatory initiatives currently in development that may be finalised or presented for Parliament's consideration this year, apart from those already highlighted above, include:

- (a) the introduction of the proposed Malaysian Media Council Bill, to advance self-regulation in Malaysia's media industry and establish a comprehensive code of conduct for the media industry;
- (b) amendments to the Communications and Multimedia Act 1998 ("**CMA**"), which include, amongst others, increasing existing penalties under the CMA and making amendments to the content standards under Sections 211 and 233 of the CMA; and
- (c) amendments to the Digital Signature Act 1997.

## KEY CONTACTS



**Kuok Yew Chen**  
Partner

T +603 2272 1919

[yew.chen.kuok@christopherleeong.com](mailto:yew.chen.kuok@christopherleeong.com)



**John Mathew**  
Partner

T +603 2273 1919

[john.mathew@christopherleeong.com](mailto:john.mathew@christopherleeong.com)



**Yau Yee Ming**  
Partner

T +603 2267 2669

[yee.ming.yau@christopherleeong.com](mailto:yee.ming.yau@christopherleeong.com)



**Deepak Pillai**  
Partner

T +603 2273 1919

[deepak.pillai@christopherleeong.com](mailto:deepak.pillai@christopherleeong.com)



**Chor Jack**  
Partner

T +603 2267 2729

[jack.chor@christopherleeong.com](mailto:jack.chor@christopherleeong.com)



**Intan Haryati**  
Partner

T +603 2267 2674

[intan.haryati@christopherleeong.com](mailto:intan.haryati@christopherleeong.com)



**Annette Soh**  
Partner

T +603 2273 1919

[annette.soh@christopherleeong.com](mailto:annette.soh@christopherleeong.com)



**Lim Siaw Wan**  
Partner

T +603 2273 1919

[siawwan.lim@christopherleeong.com](mailto:siawwan.lim@christopherleeong.com)



**Ooi Ju-Lien**  
Partner

T +603 2273 1919

[ju.lien.ooi@christopherleeong.com](mailto:ju.lien.ooi@christopherleeong.com)

---



# OUR REGIONAL CONTACTS

## R&T SOK & HENG | *Cambodia*

### **R&T Sok & Heng Law Office**

T +855 23 963 112 / 113

F +855 23 963 116

kh.rajahtannasia.com

## RAJAH & TANN | *Myanmar*

### **Rajah & Tann Myanmar Company Limited**

T +95 1 9345 343 / +95 1 9345 346

F +95 1 9345 348

mm.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

## GATMAYTAN YAP PATACSIL

GUTIERREZ & PROTACIO (C&G LAW) | *Philippines*

### **Gatmaytan Yap Patacsil Gutierrez & Protacio (C&G Law)**

T +632 8894 0377 to 79 / +632 8894 4931 to 32

F +632 8552 1977 to 78

www.cagatlaw.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.co.id

## RAJAH & TANN | *Singapore*

### **Rajah & Tann Singapore LLP**

T +65 6535 3600

sg.rajahtannasia.com

## RAJAH & TANN | *Thailand*

### **R&T Asia (Thailand) Limited**

T +66 2 656 1991

F +66 2 656 0833

th.rajahtannasia.com

## RAJAH & TANN | *Lao PDR*

### **Rajah & Tann (Laos) Co., Ltd.**

T +856 21 454 239

F +856 21 285 261

la.rajahtannasia.com

## RAJAH & TANN LCT LAWYERS | *Vietnam*

### **Rajah & Tann LCT Lawyers**

#### **Ho Chi Minh City Office**

T +84 28 3821 2382 / +84 28 3821 2673

F +84 28 3520 8206

## CHRISTOPHER & LEE ONG | *Malaysia*

### **Christopher & Lee Ong**

T +60 3 2273 1919

F +60 3 2273 8310

www.christopherleeong.com

#### **Hanoi Office**

T +84 24 3267 6127

F +84 24 3267 6128

www.rajahtannlct.com

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