Lex Mundi
World Ready

Guide to Doing Business

Malaysia

Prepared by Lex Mundi member firm,
Skrine

lexmundi.com

SKRINE

Doing Business in Malaysia 2021

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Key Contacts:


To' Puan Janet Looi
Senior Partner
E llh@skrine.com


Sheba Gumis
Partner
E sheba.gumis@skrine.com

In Malaysia, any business enterprise must take one of the following forms:

(a) a sole proprietorship;

(b) a partnership;

(c) a locally incorporated company; or

(d) a branch of a foreign company.

A) Sole Proprietorship

A sole proprietor is personally liable for all the debts and obligations of the business and the sole proprietorship must be registered with the Companies Commission of Malaysia ("CCM") under the *Registration of Businesses Act 1956*.

B) Partnership

Two types of partnership can be established in Malaysia – (i) a limited liability partnership ("LLP") or (ii) a conventional partnership.

An LLP combines the characteristics of a private company and a conventional partnership and as such, provides the protection of limited liability for its partners and the flexibility of a partnership arrangement for the internal management of its business. An LLP is regulated under the *Limited Liability Partnerships Act 2012*. Although an LLP must be formed by at least two persons, there is no limitation to the maximum number of its partners. An LLP may be registered with CCM.

In the case of a conventional partnership, all partners have unlimited liability, and are therefore jointly and severally liable for all the debts and obligations of the partnership. A conventional partnership may be formed by a party numbering from two to 20 persons. A formal partnership agreement may be drawn up to govern the rights and obligations of each partner, but this is not obligatory. In the absence of a formal partnership agreement, the provisions of the *Partnership Act 1961* shall apply.

C) Locally Incorporated Company

Under the *Companies Act 2016* ("CA2016"), any person may incorporate a company. Although there are three types of companies that may be formed, namely, a company limited by shares, a company limited by guarantee and an unlimited company, the most popular choice is a company limited by shares where the personal liability of its member(s) is limited to the amount if any, unpaid on their shares. A company limited by shares may be either a private or a public company.

A private company is one which restricts the right of its members to transfer their shares, restricts its membership to no more than 50 members and has share capital. A private company can have only one member. A public company must be formed if the objective is to raise capital from the public. Such companies typically go on to seek listing of their shares on Bursa Malaysia Securities Berhad ("Bursa Malaysia"), the Malaysian stock exchange.

D) <u>Branch of a Foreign Company</u>

A foreign company may operate a branch in Malaysia instead of incorporating a local company.

The branch must register itself with CCM first before commencing business or establishing a place of business within Malaysia in accordance with the CA2016.

A foreign company seeking to establish a branch in Malaysia must appoint an agent in Malaysia who must be a resident in Malaysia. The agent is answerable for acts, matters and things that are required to be done by the foreign company under the CA2016 and is personally liable for all penalties imposed on the foreign company in respect of any contravention of the CA2016 unless the agent satisfies the Malaysian court hearing the matter that the agent should not be held liable.

E) <u>Typical Foreign Business Ventures</u>

In practical terms, foreign investors seeking to carry on a business in Malaysia have the following options:

(a) register a branch office if the investor is a foreign company;

(b) incorporate a Malaysian company as its subsidiary;

(c) acquire all or a majority of the shares of an existing Malaysian company; or

(d) enter into a joint venture with a Malaysian company or individual typically through holding shares in a newly-incorporated joint venture company.

II. THE INVESTMENT REGULATORY FRAMEWORK

Key Contacts:


To' Puan Janet Looi
Senior Partner
E llh@skrine.com


Sheba Gumis
Partner
E sheba.gumis@skrine.com

In Malaysia, a two-pronged approach is used to regulate investments i.e. (i) policy; and (ii) legislation. Investor-friendly policies and legislation have been introduced over the years although certain economic sectors remain subjected to foreign ownership restrictions/ local equity requirements.

A) <u>New Economic Policy</u>

At the heart of the Malaysian Government's policy on investments was the New Economic Policy ("NEP"). Formulated in 1970, the objectives of the NEP were to eradicate poverty and to correct racial economic imbalance so as to lead to a capital ownership structure consisting of Bumiputeras, non-Bumiputeras and foreign interests in the proportion of 30%, 40% and 30% respectively.

B) National Development Policy and the National Vision Policy

The Malaysian Government subsequently introduced the National Development Policy ("NDP") in 1991 and the National Vision Policy ("NVP") in 2001 as the framework for economic policy. While still holding the NEP's twin objectives of poverty eradication and ethnic redistribution of wealth, the NDP and NVP place greater emphasis on redistribution through rapid growth.

C) Economic Planning Unit

The Economic Planning Unit of the Prime Minister's Department ("EPU") is the principal government agency responsible for the preparation of development plans for Malaysia. The EPU was established in 1961 and its main mission is to manage the country's socio-economic development in a strategic and sustainable manner.

Under the *Guideline on the Acquisition of Properties* issued by the EPU, approvals for property transactions are required to be obtained from the EPU where it involves:

(a) a direct acquisition of property valued at RM20 million and above, resulting in a dilution in the ownership of property held by Bumiputera interest and/or government agency; and

(b) 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 constituting more than 50% of its total assets, and where such property is valued at more than RM20 million.

The conditions for the acquisition of property as described in the preceding paragraph are subject to certain equity and paid-up capital conditions. In terms of equity, companies making the acquisition must have at least 30% Bumiputera shareholding. In terms of paid-up capital, local companies owned by local shareholders are to have at least RM100,000 in paid-up capital while local companies owned by foreign shareholders are to have at least RM250,000 in paid-up capital.

Notwithstanding the above, foreign interest is not allowed to acquire the following:

(a) properties valued less than RM1 million per unit;

(b) residential units under the category of low and low-medium cost as determined by the relevant state authority;

(c) properties built on Malay reserved land; and

(d) properties allocated to Bumiputera interest in any property development project as determined by the state authority.

Under section 433B of the National Land Code (Revised 2020), any acquisition of property (including industrial lands) by a non-citizen or a foreign company requires the prior approval of the relevant state authority. The application process and fees involved would differ from state to state. Further, each state imposes its own minimum purchase price for different types of property which may be acquired by a non-citizen or a foreign company.

D) Services Sector

In the effort to promote and develop the services sector in Malaysia, certain services sub-sectors have been liberalised. The liberalisation of these sub-sectors will be conducted in phases and includes private hospitals; medical and dental specialist clinics; architectural, engineering, quantity surveying services; accounting and taxation services; legal services; courier services; education and training services; as well as telecommunication services. This initiative would allow up to 100% foreign equity participation in the selected sub-sectors.

Examples of legislation which have been amended to reflect the abovementioned liberalisation initiative are as follows:

Architectural Services
Under the *Architects (Amendment) Act 2015*, any person (which includes a foreign national) may now qualify for registration as a Graduate Architect or Architect. As a result of this amendment, foreign practitioners will be allowed to have 100% ownership in an architectural consultancy practice.

Engineering Services
Under the *Registration of Engineers (Amendment) Act 2015*, the requirement that only a citizen or a permanent resident of Malaysia may qualify for registration as a Graduate Engineer or Professional Engineer has been removed. As a result of this amendment, foreign practitioners will be allowed to have 100% ownership in an engineering consultancy practice.

Quantity Surveying Services
Under the *Quantity Surveyors (Amendment) Act 2015*, the requirement that only a citizen or a permanent resident of Malaysia may qualify for registration as a Professional Quantity Surveyor has been removed. As a result of this amendment, foreign practitioners will be allowed to have 100% ownership in a quantity surveying practice.

E) Twelfth Malaysia Plan (2021 – 2025)

The Malaysian Government is currently formulating the Twelfth Malaysia Plan ("12MP") which seeks to develop three main components, namely, economic empowerment, environmental sustainability, and social re-engineering. The Prime Minister of Malaysia announced that several catalysts have been identified to help drive economic growth for the next five years and that industries such as aerospace, advanced electrical and electronics, biomass and smart agriculture have been identified as sources of new growth for Malaysia. It has been reported that the 12MP would be aligned with the various economic recovery and stimulus plans announced by the Malaysian Government to mitigate the economic downturn caused by the onset of the Covid-19 pandemic and that business-friendly investment policies would be introduced to attract foreign direct investments into the country.

F) Regulatory Bodies

(i) MIDA

With the aim of reducing red tape, the Malaysian Government has set up the Malaysian Investment Development Authority ("MIDA") which is an agency for the promotion and co-ordination of industrial development in Malaysia. Its role is to receive, process and convey decisions on manufacturing projects, including tax and investment incentives, exemptions from import and customs duty, expatriate posts and other matters affecting investors. Senior officers from certain Ministries, the Royal Malaysian Customs Department, the Department of Environment, the Department of Occupational Safety and Health, Tenaga Nasional Berhad (the main provider of electricity in Malaysia) and Telekom Malaysia Berhad (a provider of information communication technologies in Malaysia) are stationed at MIDA to help answer queries from investors.

(ii) MITI

The Ministry of International Trade and Industry ("MITI") spearheads the development of industrial activities to further enhance Malaysia's economic growth.

G) <u>Manufacturing</u>

(i) The Industrial Co-ordination Act 1975

The *Industrial Co-ordination Act 1975* ("ICA") requires persons involved in any manufacturing activity to obtain a manufacturing licence from MITI.

A manufacturing licence is required if the manufacturing company:

(a) has shareholders' funds of RM2.5 million and above; or

(b) employs 75 or more full time employees.

If the manufacturing company does not come within the requirements of the *ICA*, it is required to submit an application to MIDA to be exempted from the requirement of applying for a manufacturing licence. However, if the manufacturing company does exceed RM2.5 million in shareholders' funds or employs 75 or more full time employees at any time in the future, it would then be required to apply for a manufacturing licence .

(ii) Equity Policy for New, Expansion or Diversification Projects

To enhance Malaysia's investment climate, equity holdings in all manufacturing projects were fully liberalised effective from 17 June 2003. Foreign investors can now hold 100% of the equity in all investments in new projects, as well as investments in expansion/diversification projects by existing companies, irrespective of the level of exports and without any product/activity being excluded.

The new equity policy also applies to:

(a) Companies previously exempted from obtaining a manufacturing licence but whose shareholders' funds have now reached RM2.5 million or have now employed 75 or more full-time employees and are thus required to be licensed under the ICA; and

(b) Existing licensed companies previously exempted from complying with equity conditions but are now required to comply due to their shareholders' funds having reached RM2.5 million.

(iii) Equity Policy Applicable to Existing Companies

Equity and export conditions imposed on companies prior to 17 June 2003 were maintained. However, companies can request for these conditions to be removed. The Malaysian Government will be flexible in considering such requests and approval will be given based on the merits of each case.

H) Petroleum Industry

The primary legislation which shapes the foundation of the oil and gas industry in Malaysia is the *Petroleum Development Act 1974* ("PDA"). The PDA governs all activities in the value chain of the oil and gas industry save for the supply of gas through pipelines to consumers. Petroliam Nasional Berhad ("Petronas") was formed under the PDA with exclusive rights, powers, liberties and privileges of exploring and exploiting petroleum resources in Malaysia. Petronas is also the authority responsible for licensing goods and service providers operating in the upstream sector as well as licensing any third party contractors participating in upstream petroleum activities. Petronas Carigali Sdn. Bhd., Petronas' wholly-owned subsidiary, functions as its exploration and production arm.

Aside from Petronas, MITI has the authority under the PDA to issue permits for the processing of natural gas, manufacture of petroleum and petrochemical products and refining of crude oil.

Further, the Ministry of Domestic Trade, Co-Operatives and Consumerism ("MDTCC") is vested with the power to issue licenses for the marketing and distribution of petroleum and petrochemical products under the PDA.

Besides the PDA, the following legislation (which are by no means exhaustive) are applicable to the oil and gas industry:

- Atomic Energy Licensing Act, 1984;
- Communications and Multimedia Act, 1998;
- Continental Shelf Act, 1966;
- Customs Act, 1967;
- Environmental Quality Act, 1974;
- Excise Act, 1976;
- Exclusive Economic Zone Act 1984;
- Factories and Machinery Act, 1967;
- Gas Supply Act, 1993;
- Merchant Shipping Ordinance, 1952;
- Occupational Safety and Health Act, 1994;
- Petroleum (Income Tax) Act, 1967;

- Petroleum (Safety Measures) Act, 1984;
- Petroleum and Electricity Control of Supplies Act 1974.

The legislation abovementioned also require compliance with the subsidiary legislation made thereunder each of the primary legislation. The subsidiary legislation details the practicalities of complying with the laws, and include regulations on, *inter alia*, licensing, safety, management of supply, transport, technical and operational requirements and exemptions. The laws typically also empower the relevant ministers or regulatory authorities to produce further guidelines, rules or directives in respect of their regulatory realm.

The commercial settlement agreement between PETRONAS and Sarawak on 7 December 2020 imparted more active involvement to Sarawak whereby Sarawak maintains regulatory oversight through Petroleum Sarawak Berhad (PETROS) over onshore oil and gas exploration and production as well as the importation, distribution, and retail of gas.

To this end, licensing of contractors remains within the purview of PETRONAS however any company wanting to provide services to PETROS will require an additional license granted by PETROS.

Familiarity with the oil and gas regulatory landscape is essential to any party interested in entering the Malaysian oil and gas market.

I) <u>MSC Malaysia status</u>

For investors keen on developing or using multimedia technologies to provide value, the Malaysian Government offers several incentives to those who intend to set up companies that qualify for MSC Malaysia ("MSC") status.

A company which has been granted MSC status will enjoy (i) a Malaysian income tax exemption of 70% or 100% of its statutory income derived from MSC promoted activities (excluding royalty or other income derived from an intellectual property right) for a period of up to 10 years depending on the incentive tier; and (ii) duty-free importation of multimedia equipment.

To qualify for MSC status, the company making the application must fulfil the following criteria:

(a) Be a company incorporated under the CA2016;

(b) Propose to carry out one or more of MSC promoted activities;

(c) Has not issued any invoice for any MSC promoted activities on the date of the application; and

(d) Has not been granted any tax exemption by the Malaysian Government in respect of income from any activity on the date of application.

MSC promoted activities include:

- big data analytics;

- artificial intelligence (AI);
- financial technology (Fintech);
- internet of things (IOT);
- cybersecurity (technology/software/design and support);
- data centre and cloud (technology/software/design and support);
- blockchain;
- robotics (technology/software/design); and
- autonomous (technology/software/design and support),

but do not include:

- trading;
- manufacturing; and
- provision of telecommunication services.

A company that qualifies for MSC status will be expected to operate according to the following conditions in order to maintain this preferential designation:

(a) Locate itself in a MSC designated cyber city for incentive tiers 1 and 2;

(b) Employ a determined number of knowledge workers - a significant percentage of these knowledge workers must be Malaysians; and

(c) Achieve minimum annual operating expenditure, investment in fixed assets and paid-up capital.

J) <u>Securities Commission Malaysia</u>

The Securities Commission Malaysia is a statutory body established pursuant to the *Securities Commission Malaysia Act 1993*. In exercise of the powers conferred by section 217 of the *Capital Markets and Services Act 2007*, the Minister of Finance, on the recommendation of the Securities Commission Malaysia, has prescribed a code on take-overs and mergers known as the *Malaysian Code on Take-Overs and Mergers 2016* together with the Rules on Take-Overs, Mergers and Compulsory Acquisitions (collectively, "Take-over Code 2016").

The Take-over Code 2016 applies to public companies listed on the stock exchange, an unlisted public company with more than 50 shareholders and net assets of RM15 million or more, real estate investment trusts or business trusts listed in Malaysia (collectively, a "Company").

Any person who makes a take-over offer or acquires 33% or more of the voting shares of a Company or obtains control in a Company or triggers the creeping threshold (i.e. where the acquirer holding over 33% but not more than 50% of the voting shares acquires more than 2%

of the voting shares of a Company in any six-months period) must comply with the provisions of the Take-over Code 2016. The Take-over Code 2016 provides that this obligation arises irrespective of how the control or acquisition is effected, including by way of a trust scheme, scheme of arrangement, compromise, amalgamation or selective capital reduction and repayment.

K) Guidelines on Foreign Participation in Distributive Trade Services in Malaysia

Under the *Guidelines on Foreign Participation in Distributive Trade Services in Malaysia* ("DTS Guidelines"), all proposals for foreign involvement in distributive trade within the meaning of the *DTS Guidelines* must obtain the prior approval of the Ministry of Domestic Trade and Consumer Affairs ("MDTCA"). These include:

- acquisitions of interest;
- mergers and/or takeovers by foreign participation;
- opening of new branches/outlets/chain stores;
- relocation of existing branches/outlets/chain stores;
- expansion of existing branches/outlets/chain stores;
- buying over/taking over of outlets of other operators; and
- purchase and sale of properties to operate distributive trade activities prior to obtaining the approval/licence from the local authorities and other agencies to operate distributive trade activities.

Distribution of products and services that are specifically governed by other legislation such as petroleum products, pharmaceutical, medicinal and orthopaedic products, toxic substances and explosives, arms, ammunitions, agricultural raw materials and live animals are subject to the requirements provided for in the said legislation.

Distributive trade comprises all linkage activities that channel goods and services from the supply chain to intermediaries for resale or to final buyers. The linkages may be in the following forms:

- direct or indirect between two parties (or levels) or more than two parties (or levels) within the chain;
- real physical processes or electronic transactions as defined under the relevant laws;
- in person or electronic transactions as defined under the relevant laws; or
- transactions that may or may not involve transfer of title of ownership to the goods and services.

Distributive traders under the *DTS Guidelines* include wholesalers, retailers, franchise practitioners, direct sellers, suppliers who channel their goods in the domestic market, online businesses and commission agents or other representatives including those of international trading companies. The *DTS Guidelines* do not apply to:

(a) manufacturing companies which only distribute products under the same production line; and

(b) companies which are granted the status of regional establishments by MIDA.

Under the *DTS Guidelines*, all distributive trade companies with foreign equity are required to adhere to the following recommendations:

(a) appoint Bumiputera or Malay director(s);

(b) hire Malaysian personnel at all levels particularly for the management positions and above;

(c) have only 15% of the total workforce of low skilled foreign workers;

(d) develop and provide transparent standard operating procedures for local suppliers to market their goods;

(e) encourage Bumiputera or Malay participation in the distributive trade sector;

(f) hire at least 1% of the total workforce from persons with disabilities in large formats;

(g) increase the utilisation of local airports and ports in the export and import of goods as well as local professional services;

(h) submit audited annual financial reports to MDTCA;

(i) support the initiatives and the agenda for sustainable development as provided under the Sustainable Development Goals by the Malaysian Government; and

(j) abide with all by-laws and regulations of the local authorities.

Wholesale trade is defined as *"the sale or resale of new and/or used goods and services to distributors who purchase such goods and services for the purpose of conducting businesses"*.

Retail trade is defined as *"the sale or resale of new and/or used goods and services to the general public for final consumption. This may include sale and resale of fast consumable goods to organisational buyers who make the purchase for the purpose of conducting their organisation's business whereby there is no clear distinction between final and business consumption"*.

Under the *DTS Guidelines*, any foreign involvement in wholesale and retail trade would require the incorporation of a company under the CA2016.

Non-compliance with the *DTS Guidelines* may result in MDTCA rejecting an application to open a new business branch or revoking any existing approval given by MDTCA. In addition, although not expressly stated in the *DTS Guidelines*, non-compliance may also result in administrative sanctions/ consequences such as not being able to apply for an employment visa for foreign employees or a business premises licence.

The *DTS Guidelines* further provide that foreign involvement is not allowed in the following sectors:

- supermarkets/mini markets;
- provision shops/general vendors;
- news agents and miscellaneous goods stores;
- medical halls (traditional/alternative medicines plus general dry foodstuff);
- fuel stations;
- permanent wet market stores;
- permanent pavement stores;
- national strategic interest;
- non-exclusive textile, food and beverages, jewellery shops; and
- such other sectors as MDTCA may from time to time prescribe.

Although the *DTS Guidelines* do not apply to certain activities prescribed above, the *DTS Guidelines* apply to companies with foreign participation that are carrying on unregulated services. Such companies are required to obtain MDTCA's approval prior to commencement of any business of providing unregulated services as set out below:

- Market research and public opinion polling services
- Management consulting services
- Repair services incidental to metal products, machinery and equipment
- Repair services of fabricated metal products, except machinery and equipment, on a fee or contract basis
- Other land transport services and transport services via pipeline
- Supporting services for road transport such as parking services
- Project management services other than for construction
- Leasing or rental services concerning machinery and equipment without operator
- Leasing or rental services concerning office machinery and equipment (including computers) without operator
- Leasing or rental services concerning personal and household goods
- Research and experimental development services on social sciences and humanities
- Other business services (collection agency, telephone answering, duplicating, translation and interpretation, and specialty design services)

- Building cleaning services
- Photographic services
- Real estate services involving own or leased property
- Packaging services
- Services incidental to manufacturing except the manufacture of metal products, machinery and equipment
- Services of membership organisations

III. BANKS AND FINANCIAL INSTITUTIONS

Key Contacts:


Lee Ai Hsian
Partner
E lee.aihsian@skrine.com


Claudia Cheah
Partner
E cpy@skrine.com

The Central Bank of Malaysia or also known as Bank Negara Malaysia ("BNM") is a statutory body incorporated under the *Central Bank of Malaysia Act 2009*. Its functions and responsibilities include the supervision, control and regulation of the activities of commercial banks, financial institutions and the financial industry.

A) Regulatory Framework

The following are the principal legislation that regulate banks and financial institutions:-

(i) *Financial Services Act 2013* ("FSA") - provides for the regulation and supervision of financial institutions, payment systems and other relevant entities and the oversight of the money market and foreign exchange market to promote financial stability and for related, consequential or incidental matters.

The *FSA* also provides BNM with powers for oversight over financial groups and to respond effectively to new and emerging risks to the financial system with the aim to preserve public confidence in the system and ensure that critical financial intermediation activities which are vital to the economy are not disrupted.

Institutions within the ambit of the *FSA* consists of -

(a) commercial banks, investment banks and insurers (collectively known as 'licensed persons');

(b) operators of designated payment systems;

(c) operators of payment systems, issuers of designated payment instruments, insurance brokers, money-brokers and financial advisors (collectively known as 'approved persons'); and

(d) merchant acquirers and adjusters (collectively known as 'registered persons').

Under the *FSA*, a new concept of financial holding companies is introduced into the Malaysian financial services sector. A company that holds more than 50% shares in a licensed person is required to submit an application to BNM to be approved as a financial holding company.

An approved financial holding company is required to meet the prudential requirements imposed by the *FSA*. This entails having to seek BNM's approval for *inter alia* the declaring or paying of any dividends on its shares, the appointment, election, re-appointment and re-election of the chairman, directors, chief executive officer and auditors, and also the establishing or acquiring of subsidiaries, whether within or outside Malaysia.

Supervisory and enforcement powers of BNM would include the ability to conduct examination and to request information on any group entities and to issue directions to a financial holding company to rectify concerns or issue directions to any of its subsidiaries if there is a threat to the licensed person's safety and soundness.

The *FSA* which came into force on 30 June 2013 consolidates the regulatory and supervisory framework for Malaysia's banking industry, insurance industry, payment systems and foreign exchange administration matters, and supersedes the *Banking and Financial Institutions Act 1989*, *Insurance Act 1996*, *Payment Systems Act 2003* and *Exchange Control Act 1953*.

(ii) *Islamic Financial Services Act 2013* ("IFSA") - provides for the regulation and supervision of Islamic financial institutions, payment systems and other relevant entities and the oversight of the Islamic money market and Islamic foreign exchange market to promote financial stability and compliance with Shariah and for related, consequential or incidental matters.

Similar to the *FSA*, the *IFSA* provides BNM with adequate regulatory and supervisory powers. In promoting compliance with Shariah, the *IFSA* imposes a duty on Islamic financial institutions to ensure compliance with Shariah at all times and also empowers BNM to issue standards on Shariah requirements to facilitate institutions in complying with Shariah.

Regulated persons under the *IFSA* comprise of –

(a) Islamic banks, international Islamic banks, takaful operators, and international takaful operators (collectively known as 'licensed persons');

(b) operators of payment systems, takaful brokers and Islamic financial advisors (collectively known as 'approved persons');

(c) issuers of designated Islamic payment instruments; and

(d) conventional institutions approved to carry on its operations according to Shariah.

As in the case of the FSA, the IFSA also requires a company that holds more than 50% shares in a licensed person to submit an application to BNM to be approved as a financial holding company and to be subject to regulatory oversight by BNM.

The *IFSA* came into force on 30 June 2013 and repeals the *Islamic Banking Act 1983* and the *Takaful Act 1984*.

(iii) *Labuan Financial Services and Securities Act 2010* ("LFSSA") – provides, amongst others, for the licensing, regulation and supervision of institutions that conduct Labuan banking business, Labuan investment banking business, Labuan insurance-related businesses and Labuan financial and securities business.

(iv) *Labuan Islamic Financial Services and Securities Act 2010* ("LIFSSA") – provides, amongst others, for the licensing and regulation of Islamic financial services, takaful-related businesses, and Islamic securities-related businesses in Labuan and for other matters related thereto.

(v) *Development Financial Institutions Act 2002* ("DFIA") - provides for the designation of certain institutions as 'development financial institutions' ("DFIs") and the regulation and supervision of such institutions. DFIs are institutions established to develop and promote strategic sectors of the economy, such as agriculture, small and medium enterprises, infrastructure and shipping. Institutions which have been prescribed as DFIs include Bank Simpanan Nasional, Malaysian Industrial Development Finance Berhad, Export-Import Bank of Malaysia Berhad, Small Medium Enterprise Development Bank Malaysia Berhad (SME Bank), and Bank Pertanian Malaysia Berhad (Agrobank).

The following are other legislation that affect banks, financial institutions and quasi-financial and quasi-credit institutions:-

(i) *Moneylenders Act 1951* ("MLA") – provides for the regulation and control of the business of moneylending, the protection of borrowers of the monies lent in the course of such business, and matters connected therewith.

(ii) *Hire Purchase Act 1967* ("HPA") - regulates the conduct of hire purchase business in Malaysia as well as the form and contents of hire-purchase agreements and the rights and duties of parties to such agreements.

(iii) *Money Services Business Act 2011* ("MSBA") - provides for the licensing, regulation and supervision of "money services business." "Money services business" means any or all of the following businesses:

- money-changing business;
- remittance business;
- wholesale currency business.

(iv) *Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001* ("AMLATFPUAA") - provides for the offence of money laundering, the measures to be taken for the prevention of money laundering and terrorism financing offences and provides for the forfeiture of property involved in or derived from money laundering and terrorism financing offences, as well as terrorist property, proceeds of an unlawful activity and instrumentalities of an offence, and for matters incidental thereto and connected therewith. Reporting institutions under the *AMLATFPUAA* include, *inter alia*, licensed and approved persons under the *FSA* and *IFSA*, a licensee under the MSBA, a moneylender under the MLA and Labuan financial institutions under the *Labuan Financial Services Authority Act 1996*, in respect of prescribed activities carried out by it under the *AMLATFPUAA*.

B) Legal Structure

(i) FSA

A person who is to be licensed to carry on banking business, insurance business (other than a professional reinsurer) or investment banking business shall be a public company incorporated in Malaysia. A public company need not be a listed company and may have a single shareholder.

BNM may specify the form of establishment of a person who is to be licensed as a professional reinsurer; or a person who is to be approved to carry on an approved business.

Subject to the prior written approval of BNM, a licensed person is permitted to establish or relocate its office in or outside of Malaysia. On the other hand, an approved person is only required to notify BNM in writing when it establishes or relocates its office in or outside of Malaysia.

(ii) IFSA

A person who is to be licensed to carry on Islamic banking business or takaful business (other than a professional retakaful operator) shall be a public company, incorporated in Malaysia.

BNM may specify the form of establishment of a person who is to be licensed as a professional retakaful operator, or to carry on international Islamic banking business or international takaful business; or a person who is to be approved to carry on an approved business.

Subject to the prior written approval of BNM, a licensed person is permitted to establish or relocate its office in or outside of Malaysia. On the other hand, an approved person is only required to notify BNM in writing when it establishes or relocates its office in or outside of Malaysia.

(iii) LFSSA

To be eligible to hold a licence to carry on Labuan banking business, Labuan investment banking business or Labuan financial business, an entity must be:-

(a) a Labuan company or a foreign Labuan company incorporated or registered under the *Labuan Companies Act 1990*; or

(b) a Malaysian bank, namely a licensed bank, as defined in the *FSA* or a licensed Islamic bank, as defined in the *IFSA*.

C) Capital Requirements and Own Fund Rules

(i) FSA

(a) *Maintenance of Capital Funds*

A banking institution (i.e. licensed bank and licensed investment bank) is required to maintain at all times a minimum amount of capital funds.

Presently the minimum capital funds prescribed under the *Financial Services (Minimum Amount of Capital Funds or Surplus of Assets over Liabilities) (Licensed Person) Order 2013* is:-

- RM300 million in respect of a licensed bank which is a locally incorporated foreign bank; and

- RM2 billion in respect of a licensed bank, which is not a locally incorporated foreign bank; by itself, or in aggregation with the capital funds of its related corporation that is a licensed investment bank.

In addition to the minimum capital funds requirement, a banking institution must also comply with the minimum regulatory capital requirement as set out in the *Capital Adequacy Framework (Capital Components)* and *Capital Adequacy Framework (Basel II – Risk-Weighted Assets)*.

(b) *Maintenance of Reserve Funds*

Banking institutions are required to maintain a capital conservation buffer of 2.5% starting from 2019.

(c) *Other Requirements*

Any change in the paid-up ordinary shares or preference shares of a banking institution is subject to prior written approval of BNM. Further, irredeemable convertible unsecured loan stock ("ICULS") issued by a banking institution to its shareholders can be calculated as part of the capital funds as long as the total value of the ICULS to be included does not exceed 25% of the total capital funds (excluding the ICULS).

(ii) <u>IFSA</u>

(a) *Maintenance of Capital Funds*

An Islamic bank is required to maintain at all times, a minimum capital funds of RM300 million as prescribed in the *Islamic Financial Services (Minimum Amount of Capital Funds or Surplus of Assets over Liabilities) (Licensed Person) Order 2013*.

In addition to this minimum capital funds requirement, an Islamic bank must also comply with the minimum regulatory capital requirement as set out in the *Capital Adequacy Framework for Islamic Banks (Capital Components)* and *Capital Adequacy Framework for Islamic Banks (Risk-Weighted Assets)*.

According to the *Guidelines on International Islamic Bank*, the minimum paid-up capital for an international Islamic bank set-up as a subsidiary or a branch shall be RM10 million or its equivalent in other currencies.

(b) *Maintenance of Reserve Funds*

Islamic banking institutions are required to maintain a capital conservation buffer of 2.5% starting from 2019.

(c) *Maintenance of Net Working Funds*

According to the *Guidelines on International Islamic Bank*, the minimum net working funds for an international Islamic bank set-up as a subsidiary or a branch shall be RM10 million or its equivalent in other currencies.

(d) *Other Requirements*

Any change in the paid-up ordinary share or preference shares of an Islamic bank is subject to prior written approval of BNM.

(iii) LFSSA

(a) *Maintenance of Capital Funds*

Under the *LFSSA* and *LIFSSA*, a licensed Labuan bank and Islamic bank must maintain at all times a capital fund, unimpaired by losses, of not less than RM10 million or its equivalent in any foreign currency in cash or such amount as may be specified in writing by the Labuan Financial Services Authority.

D) Equity Holdings

For investment banks and domestic Islamic banks, the foreign equity limit is 70%. This is to promote foreign participation and the forging of strategic partnerships between foreign and local players. Such alliances will strengthen business potential and enhance growth prospects of financial institutions through international expertise and global networks of foreign shareholders. The foreign equity limit for domestic commercial banks remains at 30%.

Enhanced operational flexibilities have also been introduced to foreign institutions that operate in Malaysia to improve outreach of financial products and services, with greater flexibility to increase branches so as to achieve greater financial inclusion and insurance penetration in the country;

To provide a more flexible operating business environment, Labuan banking institutions licensed by the Labuan Financial Services Authority that meet the predetermined criteria will be accorded flexibility to have a physical presence onshore from 2010 onwards. This flexibility will be complemented by a strengthened regulatory and supervisory framework that govern these players.

Furthermore, greater flexibility is afforded for employment of expatriates in specialist areas that can contribute to the development of the financial sector.

Under the Financial Sector Blueprint 2011-2020 that was launched on 21 December 2011 ("Blueprint"), a more flexible foreign equity participation in financial institutions was proposed to be accorded under the Blueprint to boost the level of productive innovation, quality of financial services and risk management practices (Recommendation 3.1.1 of the Blueprint). Speaking after the launch of the Blueprint, the then Prime Minister indicated that the Malaysian Government may allow the foreign ownership of banks to be increased beyond the previously stipulated 30%. The increase in foreign shareholding will be assessed based on the merits of each case.

Under the financial sector's gradual liberalisation, the Prime Minister said the Government would look into the prudential aspects of the exercise and evaluate how foreign shareholders would be able to contribute to the local economy when they secure a larger equity interest in local banks. Amongst other considerations, the Government will evaluate these foreign shareholders' ability to contribute towards enhancing international trade and investment linkages.

E) Financial Sector Blueprint 2011-2020

BNM released the Blueprint on 21 December 2011. Recognising the increasingly complex linkages, both between the various components of the financial system and the greater international connectivity and regional financial integration, the Blueprint superseded and moved away from the sector-based approach of the previous Financial Sector Masterplan 2001-2010.

The Blueprint charted the future direction of the financial system for the years 2011-2020 and focused on nine areas to further advance the financial sector development in Malaysia:

(a) **Effective intermediation for a high value-added and high-income economy** - This entailed the mobilisation of diverse savings to productive investments in Malaysia and to meet the needs of both businesses and households. A vibrant risk-capital ecosystem to support innovation-driven economic activities and start-up ventures was developed.

(b) **Developing deep and dynamic financial markets** - Efforts were directed towards improving the liquidity, depth and participation in the money, foreign exchange and government securities markets in Malaysia. The foreign exchange administration rules were progressively liberalised to further raise efficiency in financial market transactions.

(c) **Financial inclusion for greater shared prosperity** - The aim was to enable all members of society, including the underserved, to have access to and usage of quality, affordable and essential financial services. Initiatives were focused on developing more innovative delivery channels such as agent banking to enhance the outreach of financial services in a cost-efficient manner and expansion of the range of products and services.

(d) **Strengthening regional and international financial integration** - Malaysia's investment policy was guided by two key considerations - (a) prudential criteria; and (b) the best interest of Malaysia criteria, which included the effect of the investment on Malaysia's economic activity, particularly in catalysing new high value-added activities, contribution towards enhancing international trade and investment linkages and impact on financial stability, including the level of competition.

(e) **Internationalisation of Islamic finance** - This entailed developing a more conducive environment for the mobilisation of higher volumes of international Islamic financial flows from a diverse range of players channelled through innovative Islamic financial instruments. In strengthening the legal and Shariah frameworks and further advancing Malaysia's thought leadership in Islamic finance, a single legislated body as the apex authority on Shariah matters in Islamic finance was established.

(f) **Regulatory and supervisory regime to safeguard the stability of the financial system** - A comprehensive legislative framework was enacted to reinforce a sound, transparent and accountable system for effective regulation and supervision.

(g) **Electronic payments for greater economic efficiency** - Accelerating the migration to electronic payments (e-payments) was emphasized. Measures to achieve this aim include providing the right price signals to encourage the switch from paper-based payments to e-payments, and facilitating wider outreach of e-payments infrastructure, such as point-of-sale terminals and mobile phone banking.

(h) **Empowering consumers** - A comprehensive and holistic approach towards consumer protection and education was pursued in collaboration with various stakeholders. The infrastructure to support greater consumer empowerment was strengthened through establishing a single consumer credit legislation, integrated dispute resolution system and an enhanced credit information framework.

(i) **Talent development to support a more dynamic financial sector** - A Financial Services Talent Council was established to drive, oversee and coordinate talent development efforts in the financial sector. Other initiatives include developing talent for entry level, promoting continuous learning for the existing workforce, and attracting talent from abroad.

BNM has announced on 31 March 2021 that it will set out its developmental and regulatory priorities for the next five years (2022 - 2026) under a new blueprint. This new blueprint, dubbed Blueprint 3.0, is aimed to be released in early 2022 and will focus on enabling technology and data-driven innovation, enhancing competitiveness of the financial sector, expanding access and responsible usage of financial solutions, and ensuring financial intermediation remains effective to support the future needs of the economy.

F) <u>Deposit Insurance</u>

In 2005, the Malaysian Government introduced a mandatory deposit insurance scheme for bank deposits under the *Malaysian Deposit Insurance Corporation Act 2005*. The *Malaysia Deposit Insurance Corporation Act 2005* has since been repealed and replaced with the *Malaysia Deposit Insurance Corporation Act 2011* ("MDICA"). The deposit insurance scheme is administered by the Malaysia Deposit Insurance Corporation ("MDIC").

The scheme protects the following deposits with commercial and Islamic banking institutions up to a maximum sum of RM250,000 per depositor per member bank (i.e. all commercial banks licensed under the *FSA* and all Islamic banks licensed under the *IFSA*):

- Savings accounts;
- Current accounts;
- Fixed deposits;
- Principal-guaranteed conventional structured products;
- Islamic deposit accounts;
- Foreign currency deposits; and
- Bank drafts, cheques, other payment instructions or instruments made against a deposit account.

MDIC may approve any other financial instruments as being eligible for deposit insurance protection from time to time.

The following deposits are not eligible for protection:

- Conventional structured products that are not principal-guaranteed;
- Deposits not payable in Malaysia;
- Interbank money market placements;
- Negotiable instruments of deposit (NIDs) and other bearer deposits;
- Repurchase agreements;
- Unit trusts, stocks and shares; and
- Gold-related investment products or accounts.

G) <u>Interest Rates</u>

BNM announced on 19 March 2014 that effective 2 January 2015, the Base Rate ("BR") will replace the Base Lending Rate ("BLR") as the main reference rate for new retail floating rate loans. The new Reference Rate Framework aimed to provide a more transparent reference rate to assist consumers in making better choices among the many loan products offered by financial institutions.

The BR is used for new retail floating rate loans and the refinancing of existing loans extended from 2 January 2015 onwards. After the effective date, BLR-based loans prior to 2015 will continue to be referenced against the BLR. However, when a financial institution makes any adjustments to the BR, a corresponding adjustment to the BLR will also be made. As such, financial institutions would be required to display both their BR and BLR at all branches and websites.

According to BNM, the shift to the new reference rate framework should have no impact on the effective lending rates charged to retail borrowers which are determined by various factors, including a financial institution's assessment of a borrower's credit standing, market funding rates and competitive considerations. It is also important to note that the changes do not represent a change in the Bank's monetary policy stance.

The new Reference Rate Framework ("Framework") was issued by BNM on 18 August 2016. The Framework stipulates, among others, the following requirements:

(a) Financial service providers[1] ("FSP") shall use the BR as the reference rate for the pricing of retail loans/financing facilities. This requirement applies to applications received for new retail loans/financing facilities and refinancing of existing retail loans/financing facilities, and the renewal of existing revolving retail loans/financing facilities, on or after 18 August 2016.

(b) FSPs shall determine the BR based on the FSP's benchmark cost of funds and statutory reserve requirement ("SRR").

[1] "Financial Service Provider" of "FSP" means a licensed bank under the FSA, a licensed Islamic bank under the IFSA or a prescribed bank under the Development Financial Institutions Act 2002.

(c) FSPs shall establish a BR methodology and ensure that the methodology is endorsed by the relevant internal committees and the board of the FSPs. FSPs shall obtain BNM's written approval for any change in the methodology used in determining the BR.

(d) In the event of an Overnight Policy Rate ("OPR") change, FSPs shall adjust the BR to reflect the quantum of change as set out in the FSP's BR methodology. FSPs must reflect the change to the BR within seven working days from the date of the OPR change.

(e) FSPs may determine the rates payable on deposits accepted based on their funding requirements and strategies.

IV. FINANCE AND EXCHANGE CONTROL

Key Contacts:

Oon Hooi Lin
Partner
E oon.hooi.lin@skrine.com

Lee Ai Hsian
Partner
E lee.aihsian@skrine.com

A) Bank Negara Malaysia

BNM is responsible for the foreign exchange administration in Malaysia. The approval of BNM is required for matters falling within the purview of the *FSA* and the *IFSA* and the Foreign Exchange Notices issued by BNM. The Foreign Exchange Notices may be revoked or varied by the issuance of subsequent Foreign Exchange Notices.

B) Foreign Exchange Administration

The foreign exchange administration rules in Malaysia are aimed at providing an appropriate framework that will influence capital flows and facilitate currency risk management to promote financial and economic stability in the country. All rules are applied uniformly to transactions carried out with all countries, except for the State of Israel for which special restrictions apply.

For foreign exchange administration purposes, the definition of residents and non-residents are as follows:

Residents comprise:

- Citizens of Malaysia (excluding citizens who have obtained permanent resident status of a country or a territory outside Malaysia and are residing abroad);
- Non-citizens who have obtained permanent resident status in Malaysia and are ordinarily residing in Malaysia; or
- Persons, whether body corporate incorporated or established, or an unincorporated body registered with or approved by any authority, in Malaysia.
- The Malaysian Government or any State Government in Malaysia.

Non-residents comprise:

- Persons other than residents;
- Overseas branches, subsidiaries, regional offices, sales offices, or representative offices of resident companies;
- Embassies, Consulates, High Commissions, supranational or international organizations; or
- Malaysian citizens who have obtained permanent resident status of a country or a territory outside Malaysia and are residing outside Malaysia.

With the relaxation on the foreign exchange administration rules, the following are highlights of certain rules affecting non-residents in foreign exchange transactions:

(1) Investment in Malaysia by Non-residents

(a) Non-residents are free to invest in any form of ringgit assets either as direct or portfolio investments. They are also free to remit out divestment proceeds, profits, dividends or any income arising from investments in Malaysia. Repatriation, however, must be made in foreign currency.

(b) Ringgit assets purchased by residents from non-residents may be settled in ringgit or foreign currency, other than the Restricted Currency (currency of the State of Israel). However, all remittances abroad must be made in foreign currency other than the Restricted Currency.

(2) Extension of Credit Facilities to Non-residents

(i) Ringgit Credit Facilities

A non-resident is free to obtain ringgit credit facilities:

(a) From licensed onshore banks in Malaysia (excluding licensed international Islamic banks), any amount of ringgit trade financing to finance the settlement of goods and services in ringgit with a resident.

(b) From licensed onshore banks (excluding licensed international Islamic banks), up to the amount of an overdraft facility (not exceeding two (2) business days and with no roll over option) obtained by a non-resident custodian bank or a non-resident stockbroking corporation to facilitate the settlement of shares or ringgit instruments traded on Bursa Malaysia or through the Real Time Electronic Transfer of Funds and Securities System (RENTAS) to avoid settlement failure due to inadvertent delays of payment by the non-resident.

(c) From resident licensed stockbroking companies provided that the borrowing shall be in the form of margin financing to finance the purchase of securities, Islamic securities, financial instruments or Islamic financial instruments traded on Bursa Malaysia; this does not apply to a non-resident financial institution.

(d) From licensed insurers or licensed takaful operators up to the attained cash surrender value of any life insurance policy or family takaful certificate purchased by the non-resident.

(e) From residents and licensed onshore banks, any amount in ringgit to finance a 'Real Sector Activity' in Malaysia. 'Real Sector Activity' is defined as an activity relating to (a) construction or purchase of a residential or commercial property, excluding purchase of land which will not be utilised for construction or production of goods or services; or (b) production or consumption of goods or services, excluding (i) activity in financial services sector, whether Islamic or otherwise; (ii) purchase of securities or Islamic securities; or (iii) purchase of Financial Instrument or Islamic Financial Instrument.

(ii) Foreign Currency Credit Facilities

A non-resident is allowed to borrow in foreign currency:

(a) in any amount from a licensed onshore bank. Proceeds of the borrowing can be utilised in or outside Malaysia.

(b) up to the limit as set out in Parts A and B of Notice 3 from other residents.

(c) in any amount from another non-resident in Malaysia.

(d) in any amount from any of his immediate resident family members.

V. TAX STRUCTURE

Key Contacts:

Preetha Pillai
Partner
E psp@skrine.com

The taxation system in Malaysia is territorial in nature. All income of companies and individuals accrued in, derived from or received in Malaysia from outside Malaysia, are liable to income tax. Foreign sourced income received in Malaysia from outside Malaysia by any person (other than a resident company carrying on banking, insurance, air and sea transportation business which is taxed on world income basis) is exempted from income tax in Malaysia.

The Malaysian taxation system comprises direct and indirect taxes. The forms of direct taxes are income tax, real property gains tax, petroleum income tax and stamp duty. Indirect taxes come in the form of excise duty, customs duties, and sales tax and service tax. There is no capital gains tax in Malaysia apart from real property gains tax.

Income Tax

(i) Sources of Taxable Income

Under the *Income Tax Act 1967* ("ITA") the classes of income chargeable to income tax are as follows:

- gains or profits from an employment (salaries, remunerations, etc.);
- gains and profits from a business which includes profession, vocation and trade and every manufacture, adventure or concern in the nature of trade;
- dividends, interests or discounts;
- rents, royalties or premiums;
- pensions, annuities or other periodic payments;
- other gains or profits of an income nature not falling under any of the above; and
- special classes of income.

(ii) <u>Basis of Assessment</u>

The basis period for a particular year of assessment for an individual is the calendar year, whilst for a company, it is the close of accounting year.

An individual not carrying on a business is required to file tax return by 30 April of the year following the basis period. For an individual carrying on a business, the tax return filing deadline is 30 June of the year following the basis period.

A company is required to file tax return within seven months from the date of the close of its accounting year.

A) <u>Personal Income Tax</u>

A resident individual in Malaysia is chargeable to income tax on income accruing in or derived from Malaysia. The rate of tax depends on the individual's resident status, which is determined by the duration of his stay in the country as stipulated under section 7 of the *ITA*. Generally, an individual residing in Malaysia for more than 182 days in a year has tax resident status.

A resident individual is taxed on his chargeable income at a graduated rate from 0% to 30% after deducting tax reliefs. A non-resident individual is not eligible for any personal tax relief and is subject to 30% tax on the chargeable income accruing in or derived from Malaysia unless there are tax reliefs under the double tax treaties. Other sources of income received by a non-resident individual are subject to withholding tax as discussed below. Non-resident public entertainers are taxed at 15% of the gross income.

In order to attract local and foreign talent as well as intensify the development of Iskandar Malaysia (a special development corridor launched by the Malaysian Government), the income tax on the employment income of Malaysians and foreign workers residing and working in Iskandar Malaysia was imposed at the rate of 15% compared with the maximum rate of 25% for the rest of the country. Those eligible for the tax treatment must be engaged in qualifying activities such as green technology, biotechnology, education services, healthcare, creative industry, financial advisory and consultancy services as well as logistic services and tourism. The incentive will be available to those who apply and commence work in Iskandar Malaysia before the end of 2015 and will enjoy this incentive indefinitely.

A preferential income tax rate of 15% on the employment income was introduced in 2012 to encourage skilled Malaysian professionals to return and boost the country's economic growth under the Returning Expert Programme ("REP"). The REP incentive was extended for another three years (from 1 January 2021 until 31 December 2023) and the revised REP tax incentives are, among others, (i) tax flat rate of 15% on employment income for a period of five years of assessment ("Yas"), and (ii) exemption on import duty and excise duty for the purchase of Complete Built-Up vehicle or excise duty exemption for the purchase of Completely Knocked Down vehicle (limit to duty exemption of RM 100,000.00).

Income tax at a rate of 15% for a period of five years is available to non-resident individuals who hold key positions for strategic new investment companies relocating their operations to Malaysia under the Pelan Jana Semula Ekonomi Negara ("PENJANA") incentive package.

An employee on a short-term visit to Malaysia enjoys tax exemption in respect of his income from an employment exercised in Malaysia when his employment does not exceed 60 days in a calendar year, and he is a non-resident. However, the income of a non-resident individual who performs independent services such as consultancy services is not exempted from tax.

(i) Personal Reliefs

The chargeable income of a resident individual is arrived at after deduction of reliefs. These include the personal reliefs for self (a further deduction will be given if the taxpayer is a disabled person), spouse and unmarried children below 18 years of age; parents' medical expenses; medical expenses on serious diseases (including medical examinations) for individual, spouse or child; expenditure for purchase of basic support equipment for the individual, spouse, child or parent who is disabled; and contributions to the Employees Provident Fund ("EPF"), life insurance premiums, and insurance premiums for education or medical benefits, purchase of computer, books and sports equipment etc.

An amount limited to a maximum of RM7,000 is allowed as a deduction on fees expended by the individual for pursuing studies at the tertiary level (including a degree in masters and doctorate level) undertaken for the purpose of acquiring technical, vocational, industrial, scientific, technological, law, accounting, Islamic financing skills or qualification.

(ii) Tax Rebate

The tax liability of a resident individual is reduced by way of the following rebates:

- An individual with a chargeable income not exceeding RM35,000 enjoys a rebate of RM400. Where the spouse is not working or the spouse's income is jointly assessed, and the combined chargeable income does not exceed RM35,000, the spouse enjoys a further rebate of RM400.

- Any zakat, fitrah or any other Islamic religious dues.

- Any departure levy paid for performing umrah and pilgrimage to holy places (limited to twice in a lifetime).

B) Company Tax

A company, whether resident or not, is assessable on income accrued in or derived from Malaysia. With effect from year of assessment 2004, income derived from sources outside

Malaysia and received by a resident company in Malaysia is exempted from tax, except in the case of the banking and insurance business, and sea and air transport undertakings. A company is considered a resident in Malaysia if the control and management of its affairs are exercised in Malaysia.

Effective from year of assessment 2016, the corporate tax rate for all companies was reduced from 25% to 24%. Companies with a paid-up capital of RM2.5 million and below (and are not controlled by or does not directly or indirectly control by another company with a paid-up capital of more than RM 2.5 million and having a gross business income of less than RM 50 million) will be charged at a tax rate of 17% for the first RM 600,000.00 of chargeable income and any subsequent chargeable income will be taxed at 24%.

A company carrying on petroleum upstream operations is subject to a petroleum income tax of 38%. Petroleum income derived from Joint Development Areas is taxed at 0% for the first eight years of production, followed by 10% for the next seven years and subsequent years of production at 20%.

C) <u>Real Property Gains Tax</u>

Capital gains are generally not subject to tax in Malaysia. Under the *Real Property Gains Tax Act 1976* ("RPGT Act"), real property gains tax is chargeable on capital gains arising from the disposal of real property and on the disposal of shares in a real property company.

Effective 1 January 2019, the RPGT rate was increased to curb speculative activities in the property market. The table below sets out the current RPGT rates.

Disposal period	*RPGT rate 2019 onwards*		
	Companies	Individual (Citizen & Permanent Resident)	Individual (Non-citizen)
For disposals within three years	30 per cent	30 per cent	30 per cent
For disposals in the fourth year	20 per cent	20 per cent	30 per cent
For disposals in the fifth year	15 per cent	15 per cent	30 per cent
For disposals in the sixth and subsequent years	10 per cent	5 per cent	10 per cent

D) <u>Withholding Tax</u>

Under the *ITA*, withholding tax is to be withheld and remitted to the Malaysian Inland Revenue Board ("IRB") by the resident payer within 30 days after payment or crediting such payment to a non-resident person (includes individual and company).

Withholding taxes in Malaysia are limited to certain categories of income under the *ITA* as follows:

(i) 10% on the following special classes of income derived in Malaysia in respect of:

- amount paid in consideration of services rendered in connection with the use of property or rights belonging to, or the installation or operation of any plant, machinery or other apparatus purchased from, such person;

- amount paid in consideration of advice, assistance or services rendered in connection with management or administration of any scientific, industrial or commercial undertaking, venture, project or scheme;

- rent or other payment made under any agreement or arrangement for the use of any moveable property.

Withholding tax will not be applicable for income received in respect of the services (a) and (b) rendered or performed outside Malaysia.

(ii) 10% of the gross income of non-residents under Section 4(f) of the *ITA*, that is, gains and profits not covered under Sections 4(a) to 4(e) of the *ITA*.

(iii) 10% on royalties derived from Malaysia or attributable to a business carried on in Malaysia.

(iv) 15% on interest derived from Malaysia or attributable to a business carried on in Malaysia.

(v) 5% on interest (except exempt interest) paid by approved financial institutions in Malaysia.

(vi) 15% on the services of a public entertainer in Malaysia.

(vii) Distribution of income of a Real Estate Investment Trust ("REIT") to persons other than a resident company (including resident and non-resident individuals) at 10%, non-resident company at 25% and foreign institutional investors at 10%.

(viii) Profit distribution from takaful operators to resident and non-resident individuals at 8% and non-resident company at 25%.

(ix) 10% on contract payment in respect of services rendered in Malaysia under a contract and 3% on contract payment to the employees of that non-resident company. (As opposed to the other categories above, this is not a final tax but an advance payment to the IRB until the final tax of the non-resident is computed).

The withholding tax rates are subject to reduction in the double taxation treaties, if any.

Effective from 1 January 2009, to reduce the cost of technical services provided by non-residents, reimbursements relating to hotel accommodation in Malaysia will not be included in the computation of gross technical fees for the purpose of withholding tax.

E) <u>Indirect Taxes</u>

Goods and Services Tax ("GST") has been abolished with effect from 1 September 2018. With the abolishment of GST, Malaysia reintroduced sales tax and service tax by enacting *Sales Tax Act*

2018 and *Service Tax Act 2018*, respectively.

Sales tax is a one stage *ad valorem* tax levied on taxable goods imported for local consumption and on taxable goods manufactured and sold locally except petroleum products where the rates are specific. Sales tax does not apply to the Joint Development Area, Labuan, Langkawi, Tioman, Free Zones and Licensed Manufacturing Warehouses ("LMW"). Manufacturers of taxable goods are required to be registered under the *Sales Tax Act 2018* when the total sale value of taxable goods exceeds MYR500,000.00. Sales tax is generally at 10% but certain foodstuffs and building materials are taxed at 5%.

Service tax is charged and levied on taxable services (e.g. accommodation, food and beverage, wellness centre, private club, golf club, betting and gaming, certain professional and consultancy services) provided in Malaysia by a registered person in the carrying on of his or her business at the rate of 6%. However, an exemption of service tax is available for intra-group services. Service tax does not apply to Free Zones, Langkawi, Labuan, Tioman and the Joint Development Area. Any taxable person carrying on taxable services must register as a taxable person under the *Service Tax Act 2018* when the total value of taxable service exceeds MYR500,000.00 over a 12-month period.

Digital service tax at the rate of 6% is imposed on any foreign service provider who provides any digital service delivered or subscribed over the internet or other electronic network, which cannot be obtained without the use of information technology and where delivery of service is essentially automated.

Customs duties (include import duty and export duty) are imposed under the *Customs Act 1967*. The rates of customs duties vary based on the type of goods. The rates and exemption of customs duties are prescribed in subsidiary legislation made under the *Customs Act 1967*.

Stamp duty is imposed on certain instruments and documents under the *Stamp Act 1949*. The rate of stamp duty chargeable depends on the nature of the instrument involved and varies from a fixed charge or an *ad valorem* rate based on the value of the subject matter of the transaction.

Excise duties are levied on selected products manufactured in Malaysia for local consumption and selected imported goods. Goods which are subject to excise duty include cigarettes, liquor and motor vehicles. In order to encourage the export of locally manufactured goods, companies with LMW status that manufacture goods subject to excise duty are exempted from being licensed under the *Excise Duty Act 1976*.

F) <u>Double Taxation Agreement</u>

Malaysia has entered into more than 70 bilateral double taxation agreements. Generally, under the double taxation agreements ("**DTAs**"), income such as business profits, dividends, interests and royalties derived from Malaysia by non-residents are not subject to Malaysian income tax unless the non-resident carries on activities within Malaysia through a permanent establishment ("**PE**"), that is, a fixed place in Malaysia where a trade or business is carried on.

Generally, DTAs define a PE as a fixed place of business through which the business of an enterprise is wholly or partly carried on and shall include, especially:-

(i) a place of management;

(ii) a branch;

(iii) an office;

(iv) a factory;

(v) a workshop;

(vi) a mine, an oil or gas well, a quarry or other place of extraction of natural resources; and

(vii) a building site or construction, installation or assembly project which exists for more than six months.

PEs do NOT include:-

(i) the use of facilities solely for the purpose of storage, display or delivery of goods or merchandise belonging to the enterprise;

(ii) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of storage, display or delivery;

(iii) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of processing by another enterprise;

(iv) the maintenance of a fixed place of business solely for the purpose of purchasing goods or merchandise, or collecting information, for the enterprise;

(v) the maintenance of a fixed place of business solely for the purpose of carrying on for the enterprise, any other activity of a preparatory or auxiliary character.

A non-resident shall be considered as having a PE in Malaysia if they engage an agent (other than a broker, general commission agent or any other agent of an independent status, where such persons are acting in the ordinary course of their business) to act on its behalf in Malaysia, and that agent:-

(i) has, and habitually exercises in Malaysia, authority to conclude contracts in the name of the non-resident (unless his activities are limited to the purchase of goods or merchandise for the non-resident); or

(ii) maintains in Malaysia a stock of goods or merchandise belonging to the non-resident from which he regularly fills orders on behalf of the non-resident.

G) <u>Petroleum Income Tax</u>

Under the *Petroleum Income Tax Act 1967* ("PITA"), income tax is levied annually on the chargeable income derived by any person carrying on petroleum operations in Malaysia. Petroleum operations mean the searching for and the winning or obtaining of petroleum and any sale or disposal of petroleum so won or obtained. Petroleum operations are conducted within the framework of the production sharing agreements ("Agreement") which are entered into between PETRONAS, and the petroleum companies ("Production Sharing Companies").

Petroleum companies which carrying on upstream activities are subject to a flat tax rate of 38%. However, income derived from refining or liquefying of petroleum and any activity dealing with refined products is subject to the normal company tax as provided under the *ITA*.

Under the Agreement, 10% of petroleum produced goes to the Government (5% to the Federal Government and 5% to the State Government) while the remaining production is divided between PETRONAS and the Production Sharing Companies in accordance with an agreed formula.

PETRONAS as well as Production Sharing Companies are chargeable to tax on their respective shares of production. Miscellaneous receipts incidental to and arising from petroleum operations are also subject to petroleum income tax. Various deductions are given to petroleum companies under Schedules to *PITA* including qualifying exploration expenditure, transfer of asset, capital allowances and charges.

VI. TAX INCENTIVES

Key Contacts:

Preetha Pillai
Partner
E psp@skrine.com

Tax incentives, both direct and indirect, are provided for mainly in the *Promotion of Investments Act 1986*, *Income Tax Act 1967*, *Customs Act 1967*, *Sales Tax Act 1972*, *Excise Act 1976* and *Free Zones Act 1990*. The incentives are applicable to investments in the manufacturing, agriculture, tourism and approved services sectors as well as R&D, training and environmental protection activities.

The direct tax incentives grant partial or total relief from income tax for a specified period, while indirect tax incentives come in the form of exemptions from import duty, sales tax and excise duties.

The major tax incentives for companies investing in the manufacturing sector are the *Pioneer Status* or *Investment Tax Allowance*. The eligibility for Pioneer Status or Investment Tax Allowance is based on certain criteria, including the levels of value-added products, local content, technology used and industrial linkages. Under the *Promotion of Investments (Promoted Activities and Promoted Products) Order 2012*, such eligible projects are termed as "promoted activities" or "promoted products", and include the following:

- Agricultural production;
- Processing of agricultural produce;
- Manufacture of rubber products;
- Manufacture of oil palm products and their derivatives;
- Manufacture of chemicals and petrochemicals;
- Manufacture of pharmaceutical and related products;
- Manufacture of wood-based products;
- Manufacture of pulp, paper and paperboard;
- Manufacture of textiles and textile products;
- Manufacture of clay-based, sand-based and other non-metallic mineral products;

- Manufacture of iron and steel;
- Manufacture of non-ferrous metals and their products;
- Manufacture of machinery and machinery components;
- Supporting products/activities (metal castings, metal forgings, surface engineering, machining, jigs and fixtures, moulds, tools and dies, and heat treatment)
- Manufacture of electrical and electronic products and components and parts thereof and related services;
- Manufacture of professional, medical, scientific and measuring devices/parts;
- Manufacture of photographic, cinematographic, video and optical goods;
- Manufacture of plastic products;
- Miscellaneous (sports goods or equipment, jewellery of precious metal, costume jewellery, biodegradable disposable packaging products and household wares)
- Hotel business and tourist industry;
- Manufacturing related services;
- Manufacture of kenaf based product; and
- Protective equipment and devices.

A) Pioneer Status

A company that has been granted Pioneer Status will enjoy a five to ten years tax exemption on 70% to 100% of its statutory business income depending on the promoted activities or promoted products. 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. Effective from YA 2018, unabsorbed losses can only be carried forward for seven consecutive years, any remaining unabsorbed losses thereafter will be disregarded.

B) Investment Tax Allowance

As an alternative to Pioneer Status, a company may apply for Investment Tax Allowance. A company granted Investment Tax Allowance gets an allowance of up to 100% on qualifying capital expenditure incurred for the purposes of the promoted activities or products within five years to ten years from the date on which the first qualifying capital expenditure was incurred.

The company can offset this allowance against 70% to 100% of its statutory income for each year of assessment depending on the promoted activities or promoted products. Any unutilized allowance can be carried forward to subsequent years until fully utilized. The remaining 15% or 30% of its statutory income will be taxed at the prevailing company tax rate.

C) Reinvestment Allowance

Malaysian resident companies engaged in manufacturing and selected agricultural activities that have been in operation for at least 36 months and incur qualifying capital expenditure to expand production capacity, modernize or automate its production facilities and diversify into related products can obtain a reinvestment allowance ("RA").

The RA is 60% on qualifying capital expenditure incurred by the company which can be offset against 70% of its statutory income for the YA and up to 100% of its statutory income (if it could demonstrate that the level of process efficiency ratio exceeds the industrial average) for a period of 15 consecutive years beginning from the year the first reinvestment was made. Previously, any unutilized allowances can be carried forward to subsequent years until fully utilised. Effective from YA 2019, unutilised allowances can only be carried forward for seven consecutive years (starting from the end of the qualifying period of 15 years incentive period). The RA is given in addition to the normal capital allowances.

Companies can only claim the RA upon completion of the qualifying project, i.e. after the building is completed or when the plant/machinery is put to operational use. Assets acquired for the reinvestment disposed of within five years from the time of reinvestment will trigger an RA drawback. The drawback of RA claimed will be deemed as the statutory income in the basis period for the year of assessment in which such asset is disposed.

A company that intends to reinvest before the expiry of its Pioneer Status incentive can surrender its Pioneer Status for cancellation and be eligible for RA.

D) <u>Enhanced incentives</u>

(i) <u>Manufacturers of Pharmaceutical Products</u>

Any manufacturer who invests in Malaysia to manufacture pharmaceutical products (including vaccines) will enjoy 0% to 10% income tax rate for the first 10 years, and 10% income tax rate for the next 10 years, and exemptions from import duty and sales tax for machineries, equipment and raw materials. The application for such incentive must be made between 7 November 2020 to 31 December 2022.

(ii) <u>Relocation of Manufacturing Facility to Malaysia</u>

Any manufacturer who relocates its overseas manufacturing facility to Malaysia will enjoy 0% income tax rate for 10 years if it makes new capital investment of RM300 million to RM500 million, or 0% income tax rate for 15 years if it makes new capital investment of more than RM500 million. For the existing companies, they would enjoy investment tax allowance of 100% on the qualifying capital expenditure to be set-off against 100% of their statutory income. The application period for such incentive must be made between 7 November 2020 to 31 December 2022.

E) <u>Deduction for Promotion of Exports</u>

Certain expenses incurred by resident companies for the purpose of seeking opportunities to export Malaysian manufactured and agricultural products and services qualify for deduction.

Some of the eligible expenses that qualify for single deduction are the registration of patents, trademarks and product licensing overseas and hotel accommodation for a maximum of three nights in providing hospitality to potential importers invited to Malaysia. Some of the eligible expenses that qualify for double deduction include:

- overseas advertising;
- publicity and public relations work;
- supplying samples abroad, including delivery costs;
- undertaking export market research;
- preparing tenders for supply of goods overseas
- supply of technical information abroad;
- preparing exhibits and participation costs in trade/industrial exhibitions, virtual trade shows and trade portals and fares for overseas travel by company employees for business;
- accommodation expenses up to RM300 per day and sustenance expenses up to RM150 per day for company representatives who travel overseas for business;
- maintaining sales offices and warehouses overseas to promote exports;
- using local professional services to design packaging for exports;
- undertaking feasibility studies for overseas projects identified for the purpose of tenders;
- preparing architectural and engineering models, perspective drawings and 3-D animations used for participation in international competitions;
- participating in trade or industrial exhibitions in the country or overseas; and
- participating in exhibitions held in Malaysian Permanent Trade and Exhibition Centres overseas.

F) <u>Principal Hub</u>

An approved Principal Hub refers to a locally incorporated company which uses Malaysia as a base for conducting its regional and global businesses and operations to manage, control and support its key functions including management of risks, decision-making, strategic business activities, trading, finance, management and human resources.

The Principal Hub incentive replaced the Operational Headquarters ("OHQ"), International Procurement Centres ("IPC"), and Regional Distribution Centres ("RDC") incentives as of 1 May 2015. Applications for the status and incentives of a Principal Hub can be submitted to MIDA from 1 May 2015 to 31 December 2020 (now extended to 31 December 2022).

An approved Principal Hub is eligible for a 3-tiered corporate tax rate of 0%, 5% or 10%, with the applicable rate depending on whether the company qualifies as a Tier 1, Tier 2 or Tier 3 Principal Hub. The company's level of commitment, which amongst others, includes the commitment for high value jobs, key positions, percentage of Malaysians employed, annual business spending, serving or business control of network companies in countries outside of Malaysia, and the annual sales turnover from trading of goods, determine the company's qualification as a Tier 1, Tier 2 or Tier 3 Principal Hub. However, only new companies will be eligible for these reduced tax rates.

Other benefits of a Principal Hub include 100% foreign ownership, customs duty exemptions for importation of raw materials, components or finished products into free industrial zones, licensed manufacturing warehouses and free commercial zones, expatriate posts based on requirements of the applicant company, use of foreign professional services where locally-owned services are not available, and foreign exchange administration flexibilities. The Principal Hub incentive is for a period of five years, with a possible extension for another five years.

The Principal Hub incentive will be provided pursuant to Section 127 of the Income Tax Act 1967. To qualify for the Principal Hub incentive, the company must be a locally incorporated company under the Companies Act 2016 and have a paid-up capital of a minimum of RM2.5 million. The company must carry out at least three of the following qualifying services with one of the three qualifying services being "Regional P&L/Business Unit Management"-

Qualifying Services		
Strategic services	Business services	Shared services
• Regional P&L/Business Unit Management • Strategic business planning and corporate development • Corporate finance advisory services • Brand management • IP management • Senior-level talent acquisition and management	• Bid and tender management • Treasury and fund management • Research, development and innovation • Project management • Sales and marketing • Business development • Technical support and consultancy • Information management and processing • Economic/investment research analysis • Strategic sourcing, procurement and distribution • Logistic services	• Corporate training and human resource management • Finance and accounting (transactions, internal audit)

Existing OHQ, IPC and RDC may continue to enjoy their tax incentives and facilities accorded under the relevant schemes until the end of their concession period.

Upon the expiration of the concession period, such companies may apply for the Principal Hub incentive. Existing approved OHQ, IPC and RDC can enjoy the Principal Hub incentive for a period of five years.

G) <u>Other Incentives</u>

Other tax incentives include Accelerated Capital Allowances in the manufacturing and agricultural sectors, incentives for High Technology Companies, Strategic Projects, Small and Medium Enterprises, amongst others, in the manufacturing industry, incentives for Environmental Management, Treasury Management Centre ("TMC") and other selected industries (e.g. Halal products, Aerospace, Biotechnology, Tourism, Medical Tourism, Shipping, Information and Communication Technology, Industrial Design Services, and Private and International Schools).

VII. NON-TAX INCENTIVES

Key Contacts:

Preetha Pillai
Partner
E psp@skrine.com

A) Exemption from Import Duty on Raw Materials/Components

Full exemption from import duty can be considered for raw materials/components, regardless of whether the finished products are meant for the export or domestic market. With regard to products for the export market, full exemption from import duty on raw materials/components is normally granted, provided the raw materials/components are not produced locally or, where they are produced locally, are not of acceptable quality and price. As for products for the domestic market, full exemption from import duty on raw materials/components that are not produced locally can be considered. Full exemption can also be considered if the finished products made from dutiable raw materials/components are not subject to any import duty. Most machinery and equipment not locally produced are not liable for import duty. However, machinery and equipment on which import duty is imposed can be considered for exemption subject to certain conditions.

B) Drawback of Import Duty, Sales Tax and Excise Duty

Under the *Customs Act 1967*, *Sales Tax Act 2018* and *Excise Act 1976*, a drawback on import duty, sales tax and excise duty that have been paid may be claimed by a manufacturer if the parts, raw materials or packaging materials are used in the manufacture of goods for export within a year.

C) Sales Tax Exemption

Under the *Sales Tax Act 2018*, the Minister of Finance may, by way of statutory orders, grant full or partial exemptions (with or without conditions) on taxable goods or taxable persons from sales tax.

VIII. INSURANCE

Key Contacts:

Mubashir Mansor
Partner
E mbm@skrine.com

Loo Peh Fern
Partner
E lpf@skrine.com

Similar to banks and financial institutions, the insurance industry is governed by BNM.

A) Regulatory Framework

The insurance industry is regulated under the *FSA* which provides laws for the licensing and regulation of insurance business, insurance broking business, adjusting business and financial advisory business.

Under the *FSA*, "insurance business" is divided into two classes:

(a) life business (which in addition to all insurance business concerned with life policies includes any type of insurance business carried on as incidental only to the life insurer's business); and

(b) general business (which means all insurance business which is not life business).

B) Legal Structure

Under the *FSA*, a person who is to be licensed to carry on insurance business (other than a person who is to be a professional reinsurer) must be a public company. BNM may specify the form of establishment of a person who is to be licensed as a professional reinsurer; or a person who is to be approved to carry on insurance broking and financial advisory business.

C) Minimum Capital Requirements and Surplus of Assets Over Liabilities

Under the *FSA*, no person shall be granted a licence or an approval if:

(a) in the case of a company, its capital funds; or

(b) in the case of a branch established in Malaysia by a foreign institution, its surplus of assets over liabilities,

is less than the minimum amount as may be prescribed by the Minister of Finance in the case of a licensed person, or BNM in the case of an approved person.

According to the *Financial Services (Minimum Amount of Capital Funds or Surplus of Assets over Liabilities) (Licensed Person) Order 2013* and the *Financial Services (Minimum Amount of Capital Funds) (Approved Person) Order 2013*, the respective minimum amounts are as follows:

(a) Minimum capital funds

- Licensed local insurer - RM100 million

- Licensed local life professional reinsurer - RM50 million
- Licensed local general professional reinsurer - RM100 million
- Approved insurance broker – RM1,000,000
- Approved Islamic financial adviser – RM50,000

(b) Minimum surplus of assets over liabilities

- Licensed foreign professional reinsurer- RM20 million

(c) Minimum paid-up capital unimpaired by losses

- Registered adjuster – RM150,000

D) Takaful

Takaful (Islamic insurance) is a concept whereby a group of participants mutually guarantee each other against loss or damage. Each participant fulfils his/her obligation by contributing a certain amount of donation (or *tabarru*) into a fund, which is managed by a third party - the takaful operator.

In the event of loss or damage suffered, the takaful operator will disburse the funds accordingly to its participants. Any surplus is paid out only after the obligation of assisting the participants has been fulfilled. Through this principle, takaful operates as a protection and profit-sharing venture between the takaful operator and the participants.

Takaful business is regulated by the *IFSA* and a person who is to be licensed to carry on takaful business (other than a person who is to be a professional retakaful operator) must be a public company. BNM may specify the form of establishment of a person who is to be licensed as a professional retakaful operator, or to carry on international takaful business; or a person who is to be approved to carry on takaful broking and Islamic financial advisory business.

Under the *IFSA*, no person shall be granted a licence or an approval if:

(a) in the case of a company, its capital funds; or

(b) in the case of a branch established in Malaysia by a foreign institution, its surplus of assets over liabilities,

is less than the minimum amount as may be prescribed by the Minister of Finance in the case of a licensed person, or BNM in the case of an approved person.

According to the *Islamic Financial Services (Minimum Amount of Capital Funds or Surplus of Assets over Liabilities) (Licensed Person) Order 2013* and the *Islamic Financial Services (Minimum Amount of Capital Funds) (Approved Person) Order 2013*, the respective minimum amounts are as follows:

(a) Minimum capital funds

- Licensed local takaful operator - RM100 million

- Licensed international takaful operator – RM10 million
- Licensed local professional retakaful operator - RM100 million
- Approved takaful broker – RM1,000,000
- Approved Islamic financial adviser – RM50,000.

(b) Minimum surplus of assets over liabilities

- Licensed international takaful operator – RM10 million
- Licensed foreign professional retakaful operator - RM20 million

E) Equity Holdings

For the purposes of allowing insurance companies and takaful operators to have greater flexibility in relation to tie-ups with foreign partners, the foreign equity participation in insurance companies and takaful operators has been increased to a limit of up to 70%. Any foreign equity limit beyond 70% for insurance companies will be considered on a case-by-case basis for players who can facilitate consolidation and rationalisation of the insurance industry.

To improve insurance and takaful penetration in the country, locally-incorporated foreign insurance companies and takaful operators are allowed to establish branches nationwide without restriction.

Further, insurance companies and takaful operators are afforded greater flexibility to employ specialist expatriates that have expertise to contribute to the development of the financial system in Malaysia.

Labuan insurance companies licensed by the Labuan Financial Services Authority that meet the predetermined criteria will be accorded flexibility to have a physical presence onshore from 2011 onwards. This flexibility will be complemented by a strengthened regulatory and supervisory framework that will govern these players.

F) Types of Business-Related Insurance Policies

The following are business-related insurance policies that are typically offered by insurers in Malaysia:

(a) Business Insurance

- Fire policy
- All risks (office equipment and/or personal effects) policy
- Burglary policy
- Money insurance policy
- Public liability insurance policy

- Workmen's compensation policy
- Employer's liability policy
- Electronic equipment insurance

(b) Factory and Machinery Insurance

- Boiler and pressure vessel policy
- Business machines and equipment policy
- Contractors' all risks policy
- Erection all risks insurance
- Machinery insurance

(c) Marine Insurance

- "Goods in transit" policy
- Marine cargo policy

The above policies are also offered by certain takaful operators in the form of machinery and equipment takaful, fire takaful and others.

IX. FEDERAL TERRITORY OF LABUAN

Key Contacts:

Fariz Abdul Aziz
Partner
E fariz.aziz@skrine.com

Labuan, an island off the coast of East Malaysia, is an integrated international financial offshore centre offering a wide range of financial products and services. Labuan was designated as Malaysia's official offshore financial hub in 1990, operating under the official name, Labuan International Offshore Financial Centre until the end of 2007. The name Labuan International Business and Financial Centre ("Labuan IBFC") was introduced in January 2008 to reflect the jurisdictions' growth and international status and was accompanied by an aggressive rebranding and marketing exercise. There are various legislation enacted for the creation of the Labuan IBFC including the establishment of Labuan companies which enjoy protection against public scrutiny of their existence and records.

The Labuan Financial Services Authority operates as the regulatory body of the Labuan IBFC and is tasked with spearheading and coordinating efforts to promote and develop Labuan as an international business and financial centre.

Under the *Labuan Business Activity Tax Act 1990*, subject to certain provisos, "Labuan business activity" means a Labuan trading or a Labuan non-trading activity carried on in, from or through Labuan in a currency other than the Malaysian currency, by a Labuan entity with non-resident or with another Labuan entity. A Labuan entity includes, *inter alia*, a Labuan company, a Labuan foundation, a Labuan limited partnership and limited liability partnership, a Labuan trust, and a Labuan financial institution.

Labuan trading activities include banking, insurance, trading, management, licensing, shipping operations or any other activity which is not a Labuan non-trading activity. Labuan non-trading activities refer to activities relating to the holding of investments in securities, stocks, shares, loans, deposits or any other properties situated in Labuan by a Labuan entity on its own behalf. Where a Labuan entity carries on both a Labuan trading activity and a Labuan non-trading activity, it shall be deemed to be carrying on a Labuan trading activity.

The *Labuan Business Activity Tax Act 1990* provides for the reduction of income tax in respect of Labuan business activities carried on by Labuan entities in Labuan.

Effective from 1 January 2019, a Labuan entity carrying on a Labuan business activity which is a Labuan trading activity or Labuan non-trading activity must comply with the requirements under the Labuan Business Activity Tax (Requirements for Labuan Business Activity) Regulations 2018 (amended by Labuan Business Activity Tax (Requirements for Labuan Business Activity) 2018 (Amendment) Regulations 2020) ("Labuan Regulations") in order to enjoy a tax rate of 3% on net profit/chargeable profit for a Labuan trading activity or 0% on net profit for a Labuan non-trading activity.

Depending on the type of business activity, the Labuan Regulations provide that a Labuan entity must incur a prescribed minimum amount of annual operating expenditure ranging from RM20,000 to RM3,000,000 and employ a prescribed minimum number of full-time employees that usually ranges from nil to 4.

If a Labuan entity does not fulfil the minimum operating expenditure or employment requirements as specified in the Labuan Regulations for a basis period for a year of assessment, its chargeable profit will be subject to tax at the rate of 24% for that YA. The election of RM20,000 as the fixed tax payable for a YA has ceased to apply since the year of assessment of 2020.

A Labuan entity is given the option to subject its income from Labuan business activities to tax under the *Income Tax Act 1967* or the *Labuan Business Activity Tax Act 1990* ("*LABATA*"). The election, once made, is irrevocable.

The chargeable profits under the *LABATA* exclude any income derived from royalty and intellectual property right, such income is subject to tax under the *ITA* at the rate of 24%.

Pursuant to Income Tax (Deductions Not Allowed for Payment Made to Labuan Company by a Resident) Rules 2018, payments made by a resident payer to a Labuan entity are no longer qualified for full tax deductions as 33% of the payments for interest and lease rental are disallowed and 97% of the payment for other expenses are disallowed.

The following exemptions remain available under the *Income Tax Act 1967:*

(a) Dividends paid by a Labuan company out of income derived from a Labuan business activity or out of exempt income are not subject to income tax in the hands of the recipient. Such dividends will be paid gross without any tax deducted at source.

(b) The distribution made by a Labuan trust is not subject to income tax in the hands of the beneficiary.

(d) Interest paid by a Labuan company to a non-resident person (other than interest accruing to a business carried on by a non-resident person in Malaysia carrying on a banking, finance company or insurance business) or another Labuan company is exempted from withholding tax.

(e) Interest paid by a Labuan company to a resident person, other than a person carrying on a banking, finance company or insurance business in Malaysia, is exempted from tax.

X. LABOUR AND SOCIAL SECURITY

Key Contacts:

Selvamalar Alagaratnam
Partner
E sa@skrine.com

The main statutes regulating labour law and social security are as follows:-

A) Employment Act 1955

The *Employment Act 1955* ("Employment Act") applies to Malaysian employees and foreign nationals employed in West Malaysia:

(a) with income up to and including MYR2,000 a month; or

(b) in certain categories of employment, such as:

- manual labourers or their supervisors;
- persons who maintain or operate mechanically propelled vehicles;
- domestic servants; and
- persons in certain positions in sea-faring vessels.

The Employment Act contains minimum terms and conditions of employment applicable to employees failing within its ambit which must be observed by employers. However, the Employment Act also contains select provisions applicable to all employees regardless of salary or nature of work, including provisions on maternity protection and sexual harassment.

Equivalent legislation to the Employment Act exists for employees in East Malaysia, although the provisions may differ.

The terms and conditions of employment for employees who do not fall within the ambit of the Employment Act are subject to contract.

B) Industrial Relations Act 1967

The *Industrial Relations Act 1967* ("Industrial Relations Act") applies to Malaysian and foreign nationals employed in Malaysia including employees of statutory bodies. It regulates the relations between employers and employees (including trade unions) and seeks to prevent and settle differences and disputes arising between them. Some of the main features of the *Industrial Relations Act* are:

(a) the protection afforded to workmen to form and/or join a trade union and to participate in union activities;

(b) the provisions relating to trade union recognition and collective bargaining;

(c) the law and process involved in the settlement of trade disputes;

(d) the protection afforded to workmen against unjust dismissals; and

(e) proceedings in the Industrial Court.

In terms of protection against unjust dismissal, the *Industrial Relations Act* creates a procedure where any employee may seek reinstatement if he considers himself dismissed without just cause or excuse. The Director General of Industrial Relations shall refer representations for dismissal without just cause or excuse under section 20 of Industrial Relations Act directly to the Industrial Court if he/she is satisfied that there is no likelihood of the representations being settled through conciliation. Since 2021, there is no longer be a requirement for the Minister of Human Resources to exercise his discretion to refer a representation of unjust dismissal.

C) Trade Unions Act 1959

The *Trade Unions Act 1959* ("Trade Unions Act") applies to both foreign and Malaysian employees. It provides for the registration, constitution and administration of trade unions and regulates their activities in matters relating to union disputes and usage of funds.

D) Employees Provident Fund Act 1991

The *Employees Provident Fund Act 1991* makes it mandatory for all employers and most employees to contribute to a state-managed provident fund in accordance with the rates prescribed therein. Contributions by foreign nationals employed in Malaysia are voluntary.

E) Employees' Social Security Act 1969

The *Employees' Social Security Act 1969* ("SOCSO Act") makes it mandatory for social security contributions to be made on behalf of all employees, except for those excluded from the application of the SOSCO Act. Contribution rates are as prescribed by the SOSCO Act.

F) The Minimum Wages Order 2020

The Minimum Wages Order 2020 prescribes the minimum wage payable to employees as being RM1200 per month or RM5.77 per hour for employees in City Council or Municipal Council areas and RM1100 per month or RM5.29 per hour for employees in any area other than the City Council areas or Municipal Council areas.

G) Minimum Retirement Age Act 2012

The *Minimum Retirement Age Act 2012* imposes the minimum (not mandatory) retirement age at 60 years old. An employer may not retire an employee before he or she attains this age. Any existing contractual term that provides for retirement at an earlier age is revised by law to 60 years. However, optional early retirement according to the employee's contract of service or any applicable collective agreement is allowed.

H) Employment Insurance System Act 2017

The *Employment Insurance System Act 2017* ("EIS Act") requires the employer and employee to make contributions, at a rate prescribed under the EIS Act, in order to offer certain benefits and reemployment placement programme for insured employees who have lost employment.

An employee in Malaysia enjoys security of tenure. Once a contract of service is entered into between an employer and an employee, the employer may only terminate the contract for just cause or excuse.

The following grounds are generally considered to be just cause or excuse provided the requirements of law are fulfilled:

(a) Expiry of contract period;

(b) Attainment of retirement age;

(c) Voluntary resignation;

(d) Breach of contract by the employee;

(e) Frustration of contract i.e. the obligations under the contract of employment can no longer be performed by either party;

(f) Dismissal for poor performance or misconduct on the part of the employee;

(g) Redundancy;

(h) Closure of business; and

(i) Sale or take-over of business

If an employee is dismissed without just cause or excuse, he may make a representation for reinstatement under the Industrial Relations Act. If the employer is not able to prove that the dismissal was with just cause or excuse, the employee will become entitled to reinstatement and back wages from the date of termination of employment to the date of the final hearing in court (capped at 24 months). Alternatively, if reinstatement is not ordered, the employee will be awarded compensation of one month's salary for each year of service, in lieu of reinstatement.

I) Occupational Safety and Health Act 1994

The *Occupational Safety and Health Act 1994* ("the OSHA") was enacted with the intent to ensure safety, health and welfare of all persons at all places of work. It is based on the concept of self-regulation, with the primary responsibility of ensuring safety and health at the workplace lying with those who create the risks and work with the risks. The OSHA also provides for a consultative process at the policy level with the establishment of the National Council for Occupational Safety and Health.

The main objectives of the OSHA are to:

(a) To secure the safety, health and welfare of persons at work against the risks to safety or health arising out of the activities of persons at work;

(b) To protect persons at place of work other than persons at work against risks to safety or health arising out of the activities of persons at work;

(c) To promote an occupational environment for persons at work which is adapted to their physiological and psychological needs;

(d) To provide the means whereby the associated occupational safety and health legislation may be progressively replaced by a system of regulations and approved industry codes of practice operating in combination with the provisions of this Act designed to maintain or improve the standards of safety and health.

The OSHA specifies the general duties of employers, manufacturers, suppliers and employees. For example, employers with more than five employees are required to formulate a written Safety and Health Policy, whilst the establishment of a Safety and Health Committee at the workplace is required if there are 40 or more persons employed. In carrying out their respective duties under the OSHA, parties are required to satisfy the standard of '*so far as is practicable*'. Any contravention of the provisions of the OSHA will be an offence which upon conviction, carries the penalty of a fine or a term of imprisonment or both.

J) Factories and Machinery Act 1967

The Factories and Machinery Act 1967 ("the FMA") together with the OSHA are enforced by the Department of Occupational Safety Malaysia with the aim of ensuring the safety, health and welfare of workers and other persons from the hazards of work activities. The FMA provides for the control of factories with respect to matters relating to the safety, health, and welfare of persons therein, the registration and inspection of machineries and for matters connected thereto. Part II of the FMA sets out the provisions in relation to safety, health, and welfare. Amongst others, it provides that foundations, floors and roofs shall be of sufficient strength, means to ensure safe access to any place of work shall be provided and maintained as far as reasonably practicable, that no person shall be employed to lift or carry a load heavy enough to cause bodily injury and that there shall be precautions against fires in the factory which encompasses the means of escape and means of extinguishing the fire. Any contravention of the provisions of the FMA will be an offence which upon conviction, carries the penalty of a fine or a term of imprisonment or both.

K) Employees Minimum Standards of Housing Act 1990

Under the Employees Minimum Standards of Housing Act 1990 ("EMSHA"), amongst others, foreign employees, i.e. holders of a Visit Pass (Temporary Employment) are required to be provided with accommodation in line with EMSHA and the Employees' Minimum Standards of Housing Accommodations and Amenities (Accommodation and Centralised Accommodation) Regulations 2020 ("Regulations").

The Regulations lay down extensive obligations on the part of the employer in respect of the standard of accommodation, including in relation to ensuring the safety and health of employees, minimum requirements in respect of sleeping and personal areas, supply of water and electricity and minimum requirements in respect of the accommodation building. All centralised accommodation must be issued with a Certificate for Accommodation before it may be provided to employees for accommodation.

XI. IMMIGRATION AND EXPATRIATE POSTS

Key Contacts:

Selvamalar Alagaratnam
Partner
E sa@skrine.com

The Government's policy is to encourage employment of Malaysians. However, the Government allows foreign nationals to work in Malaysia subject to the issuance of a valid work pass.

The following work passes are issued to foreign nationals to work in Malaysia:

A) Employment Pass

The Employment Pass may only be applied for the individual through the hiring employer. There are three types of Employment Passes as follows:-

Characteristics	**Employment Pass – Category I (Expatriate)**	**Employment Pass – Category II (Expatriate)**	**Employment Pass – Category III (Knowledge/ Skilled Worker)**
Basic Monthly Salary	Minimum RM 5,000 per month	Minimum RM 5,000per month	Between RM 2,500 – RM 4,999 per month
Employment Contract Duration	Minimum 2 years	Less than 2 years	Must not exceed 12 months
Dependents Allowed	Yes	Yes	No

When employed under an Employment Pass, the Malaysian employer and the expatriate employee will be subject to all employment obligations and responsibilities such as payment of income tax.

B) Professional Visit Pass

Professional Visit Passes are issued to foreign nationals who hold acceptable professional qualifications for the purpose of taking up temporary professional work in Malaysia for a Malaysian entity not exceeding 12 months (non-renewable). Under a Professional Visit Pass, the expatriate does not become an employee of the Malaysian employer but is permitted to work in Malaysia for the duration stated in the Professional Visit Pass. The permitted areas of work include expertise transfer, research, training at ESD-related companies, volunteer work, exhibitors under the regulation of Malaysian Convention & Exhibition Bureau and student internships. Applications must be made by the Malaysian hosting company.

C) <u>Residence Pass - Talent</u>

The Residence Pass - Talent is issued to foreign nationals considered to be high-achieving individuals with the capacity to drive business results that contribute towards the national key economic areas (NKEA) namely: oil, gas and energy; palm oil; financial services; tourism; business services; communication[s?], content and infrastructure; electronics and electrical; wholesale and retail; education; health care; and agriculture. The Residence Pass – Talent is not linked to a Malaysian employer/ hosting company and is valid for 10 years. A foreign national must meet several eligibility criteria before applying for the Residence Pass – Talent, such as possessing a valid Employment Pass and having worked in Malaysia for a minimum period of 3 years.

D) <u>Visit Pass (Temporary Employment)</u>

The Visit Pass (Temporary Employment) is issued for the employment of unskilled foreign citizens, from specific source countries in certain sectors of the economy, such as agriculture, construction, manufacturing, plantation and services.

Family members of a holder of an Employment Pass Category I and II may apply for a Dependant's Pass (limited to legal spouse, child below 18 years of age (biological, stepchild, legally adopted) or disabled child regardless of age of the Employment Pass Category I or II holder) or Social Visit Pass (Long Term) (limited to children above 18 years of age, parents and parents-in-law of the Employment Pass Category I or II holder; common law spouse of Employment Pass holder can be considered).

In respect of Employment Passes and Professional Visit Passes which must be applied for by the Malaysian hiring/hosting company, the following criteria must be satisfied by the hiring/ hosting company:

(a) It must fall within any of the following categories of employers:-

- Must be registered with the Companies Commission of Malaysia;
- Must be registered with the Registry of Societies Malaysia;
- Firms incorporated under specific acts such as law firms or accounting firms;
- Organisations supported by ministries or government agencies; or
- International organisations certified by the Ministry of Foreign Affairs.

(b) It must fulfil the following paid-up capital (not applicable to public limited companies, companies limited by guarantee, associations and organisations incorporated under specific acts):

EQUITY	PAID-UP CAPITAL
100% Local Owned	RM 250,000
Joint Venture (30% Foreign Shareholding required)	RM 350,000
100% Foreign Owned	RM 500,000
Foreign Owned companies (foreign equity at 51% and above) operating in the Wholesale, Retail and Trade sectors or unregulated services	RM 1,000,000

XII. INTELLECTUAL PROPERTY

Key Contacts:


Charmayne Ong
Partner
E co@skrine.com


Khoo Guan Huat
Partner
E kgh@srkine.com

The scope of intellectual property rights protection in Malaysia is wide-ranging and currently the legislative regime covers trademarks, patents, copyright, industrial designs, geographical indications and layout designs of integrated circuits. Other areas such as confidential information and trade secrets are recognized and given protection under common law. Malaysia is also a member of the World Intellectual Property Organisation (WIPO) and a signatory to a number of international treaties which govern intellectual property rights, including the Berne Convention for the Protection of Literary and Artistic Works 1886, the Paris Convention, the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs), the Patent Cooperation Treaty (PCT), Madrid Agreement Concerning the International Registration of Marks of 1891 and the Protocol Relating to the Madrid Agreement (1989).

A) <u>Trademarks</u>

In general, the nature of protection that may be accorded to a trademark will be determined by whether or not the trademark is registered. Protection of registered trademarks is provided for under the Trademarks Act 2019, Trademarks Regulations 2019 and the Guidelines of Trademarks 2019, and the predecessor statutes Trade Marks Act 1976 and Trade Marks Regulations 1997. Upon registration, no one other than the registered proprietor or registered user/ licensee is allowed to use the trademark. In the event of any unauthorised use or infringement of a trademark, the proprietor may take civil action against the purported infringing party.

The Trademarks Act 2019 also provides an avenue for the registered proprietor to lodge a complaint to the relevant authorities (Enforcement Division of the Ministry of Domestic Trade and Consumer Affairs) to investigate any person who has committed or is committing an offence under the Act. The offences include counterfeiting a trademark, falsely applying a registered trademark to goods or services, making or possessing of article for committing offence, importing or selling goods with falsely applied trademark and falsely representing a trademark as registered.

With regards to trademarks that are either unregistered or pending registration, an aggrieved party may have recourse to a remedy under the law of passing off. However, in order for a passing off action to succeed, the aggrieved party must prove that there is goodwill or reputation in the unregistered mark, that there is misrepresentation by the other party and that he has suffered damage or loss to his goodwill or reputation as a result of that misrepresentation. Notably, in conformance with TRIPs, the *Trademarks Act 2019* also has provisions setting out the scope of protection for well-known trademarks in Malaysia.

B) Patents

The *Patents Act 1983* and *Patent Regulations 1986* govern the protection of inventions in Malaysia. An invention is patentable if it is universally novel, involves a non-obvious step and is capable of industrial application. Once granted, a patent owner will be entitled to fully exploit the patent, assign or transmit the patent, and to conclude licence contracts.

It should be noted that, as of 16 August 2006, PCT applications can be filed with the Intellectual Property Corporation of Malaysia ("MyIPO").

C) Copyright

Unlike trademarks, patents and industrial designs, the protection afforded by copyright is not dependent on registration. Copyright law in Malaysia is governed by the *Copyright Act 1987* as well as various subsidiary legislations. The *Copyright Act 1987* confers copyright on three broad categories of work: (i) original works (i.e. literary, musical and artistic works, films, sound recordings and broadcasts); (ii) derivative works (i.e. translations, adaptations, arrangements and other transformations of works eligible for copyright, collections of works or collections of mere data, whether in machine readable or other from, eligible for copyright which, by reason of the selection and arrangement of their contents, constitute intellectual creation); and (iii) published editions of literary, musical or artistic works. As Malaysia is a member of the Berne Convention, works of foreign authorship are also entitled to the same rights and protection in Malaysia as a work created by a Malaysian author. Works that were first published in a country that is a member of the Berne Convention, or where it is first published elsewhere, it is then published in a country that is a member of the Berne Convention within 30 days of such publication elsewhere would be accorded the protection in Malaysia as if it were first published in Malaysia. .

In line with its obligations under the TRIPs Agreement, Malaysia has also recognised a performer's right in his live performance. Pursuant to the *Copyright (Amendment) Act 2000*, performers' rights are now incorporated as part of the *Copyright Act 1987*. Thus, a performer may now control the way his live performance will be communicated to the public as well as the fixation (i.e. recording) of his live performance as a sound recording or on film. Additionally, a performer may also control the reproduction, distribution, rental or sale of a fixation of his live performance.

The *Copyright (Amendment) Act 2012* introduced a voluntary mechanism for notification of copyright works. Applications for voluntary notification of copyright works may, as of 2 February 2021, be made online. The *Copyright (Amendment) Act 2012* also sets forth anti-camcording provisions and limitations on the liability of internet service providers in respect of copyright infringements.

The *Copyright (Amendment) Act 2020* (which came into force on 1 July 2020) introduced provisions empowering the Copyright Tribunal to hear any dispute relating to royalties arising between a licensing body and any of its members, providing for an alternative dispute resolution mechanism.

D) Industrial Designs

Malaysia also provides for the protection of industrial designs by virtue of the *Industrial Designs Act 1996* and *Industrial Designs Regulations 1999*. An industrial design is defined as features of shape, configuration, pattern or ornament applied to an article by any industrial process or means, such features appealing to and being judged by the eye in the finished article. A design can only be registered if it is new and does not merely involve a method of construction or dictated solely by function. It is to be noted that an artistic work incorporating a design may also be registrable under the *Industrial Designs Act 1996*. Industrial designs are granted 25 years protection from the time of filing of the application or the date of the priority application, if any.

E) Layout-Designs of Integrated Circuits

Integrated circuits are now accorded protection in Malaysia under the *Layout-Designs of Integrated Circuits Act 2000*. In order to qualify for protection, the layout design of an integrated circuit has to be original, to the extent that the layout design must result from the creator's own intellectual effort and be freely created. Similar to copyright, registration is not a pre-requisite to the granting of protection for layout designs of integrated circuits.

F) Geographical Indications

The *Geographical Indications Act 2000* was introduced in Malaysia to accord protection to goods which are named after the region or locality in which the goods are produced. Akin to trademarks, there is a requirement for registration for geographical indications. However, geographical indications which are contrary to public order and morality are not registrable. Once registered, a geographical indication would be given protection for 10 years' duration, subject to renewals. In the case of any infringement of geographical indications, the actions and remedies available to an aggrieved party are also similar to those of trademark infringement.

G) Confidential Information and Trade Secrets

Apart from the intellectual property rights protected by statute, confidential information and trade secrets are also entitled to protection under the principles of common law and equity. An action for breach of confidence requires that the information be confidential in nature, that it was imparted in circumstances importing an obligation of confidence and that the use of the information was unauthorised.

H) Administration of IP Matters

A statutory body known as the Intellectual Property Corporation of Malaysia (MyIPO) was set up to take over the functions of the Intellectual Property Division of the Ministry of Domestic Trade, Co-operatives and Consumerism. Pursuant to the *Intellectual Property Corporation of Malaysia Act 2002*, the body has been given jurisdiction over all issues relating to intellectual property, such as registration as well as advising on the review and updating of all intellectual property legislation in Malaysia.

XIII. PERSONAL DATA PROTECTION

Key Contacts:

Jillian Chia
Partner
E jc@skrine.com

The *Personal Data Protection Act 2010* came into force on 15 November 2013 and provides various safeguards to protect the interests of data subjects. It regulates the processing and use of personal data but only covers personal data that is information in respect of commercial transactions. The personal data must relate directly or indirectly to a data subject, who is identified or identifiable from the information or other information in the possession of a data user, and the data must be capable of being processed wholly or partly by means of equipment operating automatically, be recorded with the intention that it should be processed wholly or partly by such equipment or be recorded as part of or with the intention that it should form part of a relevant filing system.

The *Personal Data Protection Act 2010* imposes various obligations on a data user by way of seven data protection principles, including the notice and choice principle, the disclosure principle and the data integrity principle. It also provides for the appointment of a Personal Data Protection Commissioner to oversee compliance with its provisions. The *Personal Data Protection Act 2010* purports to safeguard personal data by requiring the data user to comply with the data protection principles and by conferring certain rights to the data subject in relation to his personal data, such as access and correction rights, as well as the right to revoke consent.

Several regulations and orders were also issued pursuant to the *Personal Data Protection Act 2010*, addressing issues pertaining to consent, standards and registration of data users.

Pursuant to the *Personal Data Protection (Class of Data Users) Order 2013*, certain classes of data users are required to register with the Personal Data Protection Commissioner; namely those involved in the following sectors: Communications, Banking & Financial institutions, Insurance, Health, Tourism & Hospitalities, Transportation, Education, Direct Selling, Services, Real Estate and Utilities. Subsequently, in late 2016, Moneylenders and Pawnbrokers were also added to the list of data users required to be registered. There are fees chargeable for registration and renewal. Failure to register is an offence under the *Personal Data Protection Act 2010.*

Data user forums were formed for specific industries and each data user forum was directed by the Personal Data Protection Commissioner to develop its own codes of practice for adherence by data users in the respective sectors. The following enforceable codes of practice have been registered: Code of Practice for the Utilities (Electric) Sector, Code of Practice for the Insurance/Takaful Industry, Code of Practice for the Banking and Financial Sector, Code of Practice for the Transportation Sector (Aviation), and Code of Practice for the Communications Sector.

At the end of 2015, the Personal Data Protection Standards were introduced. The Standards spell out detailed measures and requirements pertaining to data security, data retention and data integrity for implementation by data users. Compliance with the Standards is mandatory for all parties who process or handle personal data.

Several proposal and consultation papers have also been issued from time to time by the Personal Data Protection Commissioner in relation to matters such as the management of employee data, consent requirements, direct marketing, management of CCTV, proposed whitelisted countries in respect of transfers of data out of Malaysia as well as data breach notification requirements. Notably, in February 2020, a proposal paper has also been issued to seek the views and comments of the public, as part of an ongoing review of the *Personal Data Protection Act 2010*. All the consultation papers remain at consultation stage and have not matured into operative law.

XIV. RENEWABLE ENERGY

Key Contacts:

Richard Khoo
Partner
E richard.khoo@skrine.com

Fariz Abdul Aziz
Partner
E fariz.aziz@skrine.com

A) Renewable Energy Act 2011

In an effort to promote energy security and a sustainable environment for the country, the Ministry of Energy and Natural Resources drafted the National Renewable Energy Policy and Action Plan culminating in the passing of the *Renewable Energy Act 2011* ("RE Act") to encourage the development of renewable energy and to reduce Malaysia's national dependency on fossil fuels power generation, *via* the implementation of the feed-in tariff ("FiT") mechanism.

The RE Act is applicable throughout Malaysia, except for the State of Sarawak. The FiT programme under the RE Act allows individuals or companies to sell electricity generated from renewable energy resources to power utility firms at a fixed premium price for a specific period. The four renewable resources eligible for FiT are biogas, biomass, small hydropower, and solar photovoltaic.

The RE Act also requires compliance with the subsidiary legislation made thereunder which details at length the practicalities of complying with the laws and include regulations on, *inter alia*, licensing, technical and operational requirements and exemptions. The laws also empower the relevant ministers or regulatory authorities to issue further rules, guidelines or directives within their regulatory ambit.

The Sustainable Energy Development Authority Malaysia ("SEDA") is a statutory body established under the *Sustainable Energy Development Authority Act 2011* and is tasked with administering and managing the implementation of the FiT programme and the Net Energy Metering programme.

To be eligible to participate in the FiT programme, there must be a proposal by the applicant to generate renewable energy from a renewable energy installation with an installed capacity of not more than 30MW, or such higher installed capacity as may be approved by the Minister. As stipulated under Rule 3 of the *Renewable Energy (Feed-In Approval and Feed-In Tariff Rate) Rules 2011*, if the producer is a corporate body, the corporate body will be subject to the following requirements:

(a) the company must be incorporated in Malaysia;

(b) the foreign equity participation in the corporate body must not exceed 49 % during the application and for the entire period of approval; and

(c) if the company holds an existing licence under the *Electricity Supply Act 1990* ("ESA"), or if it is an associate of an existing ESA licence holder, then that corporate body is prohibited from making any application for a feed-in approval relating to a renewable energy installation proposed to be connected to the electricity distribution network of the ESA licence holder.

Further, it should be noted that other prerequisites for SEDA approval differs depending on the renewable energy source and the output of the renewable energy installation. SEDA has issued a host of guidelines detailing the tests, application processes, and checks to be conducted and technical requirements for each type of renewable energy installation. As an example, SEDA has stipulated that corporate applicants must have a minimum paid-up capital of MYR 20,000 or equivalent if they intend to develop renewable energy installations with a rated kWp or net export capacity of up to 72kWp or 72kW. The minimum paid-up capital must be increased to MYR 50,000 or its equivalent if the installation's net export capacity exceeds 72kWp.

Feed-in tariff approvals are also subject to quotas publicized by SEDA on its official website. Successful applications will be subject to balloting until the quota is fully allocated.

The generation of energy using renewable energy resources is a promoted activity under the *Promotion of Investments Act 1986* and is eligible for Pioneer Status or Investment Tax Allowance:

(i) <u>Companies generating energy from renewable sources</u>

(a) Pioneer Status with income tax exemption of 100% of statutory income for 10 years; or

(b) Investment Tax Allowance of 100% on the qualifying capital expenditure incurred within a period of five years. This allowance can be set-off against 100% of statutory income for each year of assessment; and

(c) Import duty and sales tax exemption on equipment used to generate energy that is not produced locally and sales tax exemption on equipment purchased from local manufacturers.

(ii) <u>Net Energy Metering ("NEM")</u>

The NEM programme was introduced in 2016 as a solar incentive to further boost the uptake of solar adoption in Malaysia by employing a mechanism which allows excess solar PV generated energy to be exported back to the grid on a "one-on-one" offset basis. The mechanism under the NEM scheme operates such that the energy produced from the solar photovoltaic (PV) systems will be consumed first, and any excess will be exported and sold to the appropriate distribution licensee (Tenaga Nasional Berhad for Peninsular Malaysia or the Sabah Electricity Sdn. Bhd. for Sabah and Labuan).

The authority responsible for implementing the NEM scheme is the Ministry of Energy and Natural Resources. The Energy Commission of Malaysia ("Energy Commission") performs its regulatory functions whereas SEDA is the implementing agency under the scheme.

In order for an applicant to participate in NEM, an applicant must register as a customer of distribution licensees in Peninsular Malaysia, Sabah and Labuan. Foreign entities also are eligible to apply as long as they comply with the registration requirement abovementioned. It is worth noting that the resources for producing electricity shall be from solar PV only. Other renewable energy resources, such as biogas, biomass and such, may be allowed on a case by case basis at the discretion of the Energy Commission.

Upon obtaining a NEM approval, an application will need to be made by the NEM consumer to the Energy Commission for a licence for public installation. Thereafter, an NEM contract is entered into between the NEM consumer and the distribution licensee.

Upon the success of the NEM 2.0 program, the NEM 3.0 program was launched by the Malaysian Government in late 2020, in order to further encourage installation of solar power panels across residential areas as well as commercial and industrial sectors throughout Malaysia.

The NEM 3.0 program is available from 2021 to 2023 with a quota of 500MW allocated. Three new main initiatives have been introduced under the NEM 3.0 to further boost the uptake of solar adoption. The three main initiatives are as follows:

(a) *NEM Rakyat Programme*

This program is aimed at reducing energy bills for domestic consumers through the use of solar PV system. This program has been allocated a total capacity of up to 100MW.

(b) *NEM GoMEn (Government Ministries and Entities) Program*

This program is aimed at reducing the energy bills of government buildings and offices through the use of solar PV system.

(c) *NOVA (Net Offset Virtual Aggregation) Program*

This program targets commercial and industrial consumers by reducing business costs through the use of solar PV system.

The NEM 3.0 program further recognizes third party financing and ownership models which opens an avenue for more participants to venture into the market.

(iii) Large Scale Solar ("LSS")

The Malaysian Government has geared up its efforts over the last few years to push the country in the direction of renewable energy, as evident by the commissioning of a number of LSS in the country which saw and increase in renewable energy capacity in the National Grid. The Energy Commission Annual Report 2019 detailed that the increase in renewable energy was from 179 MW in 2018 to 725MW as of 2019, out of a total installed capacity of 26,132MW.

In an effort to reduce the country's reliance on fossil fuels and promote renewable resources, a number of competitive bidding processes to select developers for the development of LSS PV plants have been launched by the Energy Commission. The location of these LSS PV plants are set to be in West Malaysia and Sabah. The plant will sell its energy to the Single Buyer Unit of Tenaga Nasional Berhad or to Sabah Electricity Sdn. Bhd. (as the case may be) pursuant to a power purchase agreement. The LSS capacity to be tendered will be between 1 MWac and 100 MWac.

The LSS programme requires applicants to pass the prescribed minimum Malaysian equity interest thresholds in order to be eligible for participation. The thresholds for the LSS programme are as follows:

(a) the equity of the project company is held by at least 51% Malaysians; or

(b) the equity of the project company to be established in the event of an award will comprise at least one Malaysian shareholder, and an overall minimum Malaysian equity participation of 51%.

In respect of foreign investor participation in LSS projects, they differ according to the specific tender requirements issued which was a maximum of 49% in LSS 1 to 3. As for LSS@MEnTARI, the project companies must be 100% locally owned incorporated or registered companies or a company listed on Bursa Malaysia which has at least 75% local shareholding.

The bidders must fulfil all conditions precedents under the power purchase agreements upon the successful negotiation between parties. All LSS plants shall be licensed under the *Electricity Supply Act 1990* (Section 9).

It is further useful to note that under the terms of the latest request for tender of the LSS programme, all contractors engaged for the development of the project must be registered as a 'local contractor' with the Construction Industry Development Board of Malaysia, which significantly hampers foreign contractors' participation in these projects.

The Malaysian Government thrust its force for large-scale renewable projects. It was reported in press releases on 12 March 2021 that the Energy Commission had shortlisted 30 companies in Malaysia's fourth LSS bidding cycle, with commissioning scheduled to commence in late 2022 or early 2023.

XV. COMPETITION ACT 2010

Key Contacts:

Tan Shi Wen
Partner
E tan.shi.wen@skrine.com

A) <u>Competition Authority</u>

The relevant competition authority in Malaysia is the Malaysia Competition Commission ("MyCC"), which has been given wide powers of investigation and enforcement under the Malaysian Competition Commission Act 2010.

B) <u>Restrictive Agreements and Practices</u>

Malaysia enacted the Competition Act 2010 on 10 June 2010. The Act came into operation on 1 January 2012 and applies to any commercial activity (carried out by both local and foreign entities) within Malaysia, and outside Malaysia if it has an effect on competition in any market in Malaysia.

The Act prohibits any horizontal or vertical agreement between enterprises, insofar as the agreement has the object or effect of significantly preventing, restricting or distorting competition in any market for goods or services. In particular, the Act deems certain specified horizontal agreements (fixing prices, dividing markets, limiting production or supply, or rigging bids) as anti-competitive. Other agreements can infringe the Act if they have the effect of significantly preventing, restricting or distorting competition. The MyCC will not consider the effect of an agreement as significant if:

- The parties to the agreement are competitors in the same relevant market and have a combined market share of 20% or less.

- The parties to the agreement are not competitors and all of the parties individually have market shares of less than 25% in any relevant market.

An enterprise that is a party to an anti-competitive agreement is potentially liable for an infringement and an associated financial penalty. However, the parties may avoid liability if:

- the agreement has significant technological, efficiency or social benefits that could not have been provided absent the agreement;

- the detrimental effect of the agreement is not disproportionate to the benefits; and

- the agreement does not eliminate competition completely.

These conditions are the criteria on which the MyCC determines applications for exemptions to the anti-competitive agreements prohibition.

C) <u>Unilateral Conduct</u>

The Competition Act 2010 regulates unilateral conduct by enterprises that are in a dominant position in any market for goods or services. Whether an enterprise is dominant in any market depends on whether it possesses "such significant power in a market to adjust prices or outputs or trading terms, without effective constraint from competitors or potential competitors". However, the Act states that the market share of the enterprise is not conclusive as to whether that enterprise occupies a dominant position in that particular market. Under section 10(2) of the Competition Act 2010, conduct that may amount to an abuse includes:

- Imposing unfair purchase or selling price or other unfair trading conditions on any supplier or customer;

- Limiting or controlling production, market outlets or market access, technical or technological development, or investment;

- Boycotts;

- Discrimination;

- Tying and bundling;

- Predatory behaviour towards competitors; and
- Buying up scarce resources or intermediate goods required by a competitor.

D) <u>Other Key Provisions</u>

There are both civil and criminal penalties for violations of the competition laws in Malaysia. The MyCC is empowered by the Act to impose a financial penalty of up to 10% of the worldwide turnover of an enterprise for any infringement of the prohibitions over the period during which the infringement occurred. The Act contains leniency provisions that provide for up to a 100 per cent reduction in applicable fines for enterprises that report their involvement in any of the agreements which are deemed to be anti-competitive (see above) to the MyCC and cooperate with the investigation. The MyCC is also empowered to accept voluntary undertakings from parties to cease infringements. A decision by the MyCC is subject to appeal to the Competition Appeal Tribunal, the decision of which is final and binding.
The Act also stipulates that it is an offence to interfere with, or obstruct, the MyCC's investigation into any suspected infringement of the prohibitions. Offences include:

- The destruction and non-disclosure of documents and information;
- Reprisals against whistle blowers; and
- Tipping-off of any impending MyCC raids.

Upon conviction, a company can be fined up to MYR5 million for its first offence and up to MYR10 million for its second and subsequent offence. The CEOs, COOs (chief operating officers), directors, officers, managers and secretaries of the convicted company may also be criminally liable and may be fined up to MYR2 million and/or imprisoned for up to five years.

Excluded from the Act are activities regulated by the Malaysian Communications and Multimedia Commission and the Energy Commission, activities directly or indirectly in the exercise of a government authority, activity based on the principle of solidarity, and any purchase of goods or services not for the purpose of offering goods and services as part of an economic activity.

The Competition (Amendment of First Schedule) Order 2013, which came into operation on 1 January 2014, further excludes any activities regulated under the Petroleum Development Act 1974 and the Petroleum Regulations 1974 directly in connection with upstream operations comprising the activities of exploring, exploiting, winning and obtaining petroleum whether onshore or offshore of Malaysia.

XVI. DISPUTE RESOLUTION

Key Contacts:

Leong Wai Hong
Partner
E lwh@skrine.com

Mubashir Mansor
Partner
E mbm@skrine.com

A) Malaysian Court Structure

The Malaysian judicial system is composed of five tiers of Courts. The hierarchy of the courts begin from the Magistrates' Court, moving on to the Sessions Court, High Court, Court of Appeal, and lastly with the Federal Court as our apex court.

The Magistrates' Court and the Sessions Court are the Subordinate Courts. The jurisdiction and powers of the Subordinate Courts are stipulated in the Subordinates Courts Act 1948.

The High Court (consisting of the High Court of Malaya, and the High Courts of Sabah and Sarawak), the Court of Appeal and Federal Court are the Superior Courts. The Superior Courts derive their powers and jurisdiction from the Courts of Judicature Act 1964.

(i) Magistrates' Court

For civil matters, the First Class Magistrates Courts have jurisdiction to try all actions and suits where the amount of dispute or value of the subject matter does not exceed RM100,000.00. On the other hand, the Second Class Magistrates Courts only have jurisdiction to try original actions or suits where the plaintiff seeks to recover a debt or liquidated monetary demand not exceeding RM10,000.00.

For criminal matters, the First Class Magistrates Courts have jurisdiction to try all offences for which the maximum term of imprisonment provided by law does not exceed 10 years imprisonment or which are punishable with fine only not exceeding RM 100,000.00. Furthermore, the two offences of robbery (pursuant to section 392 of the Penal Code), and lurking, house-trespass or housebreaking by night in order to commit an offence punishable with imprisonment (pursuant to Section 457 of the Penal Code) are also specifically stated to be under the jurisdiction of the First Class Magistrates Courts. On the other hand, the Second Class Magistrates Courts only have the jurisdiction to try offences for which the maximum term of imprisonment provided by law does not exceed 12 months' imprisonment or which are punishable with fine only.

(ii) Sessions Court

For civil matters, the Sessions Courts have jurisdiction to try all actions and suits of a civil nature in respect of motor vehicle accidents, landlord and tenant, and distress. The Sessions Court also has the jurisdiction to try all actions where the amount in dispute or the value of the subject matter does not exceed RM1million.

For criminal matters, the Sessions Courts have jurisdiction to try all offences other than offences punishable by death.

(iii) High Court

Proceedings in the High Court are heard and disposed of by a single judge.

The High Courts have unlimited original jurisdiction to try all actions and suits for any criminal and civil matters and may pass any sentence and award provided for under statute.

The High Courts also exercise supervisory, revisionary, and appellate jurisdiction. For instance, the High Court may decide on Constitutional questions or hear judicial review challenges against a public authority's decision. The High Court would also hear appeals from the

Subordinate Courts. However, there can be no appeal to the High Court where the decision of the Subordinate Court involves a civil action where the amount in dispute or value of the subject matter is RM10,000 or less, except on a question of law. The only exception to this is where the appeal is against a decision of a Subordinate Court in any proceedings relating to the maintenance of wives or children wherein the appeal can be heard by the High Court regardless of the amount involved.

(iv) <u>Court of Appeal</u>

Proceedings in the Court of Appeal are usually heard and disposed of by a panel of three judges.

(a) *Civil Appeals*

The Court of Appeal has jurisdiction to hear and determine appeals from any judgment or order arising from any High Court in the exercise of its original jurisdiction or of its appellate jurisdiction except in any of the following cases: -

- Where the amount or value of the subject matter of the claim (exclusive of interest) is less than RM250,000.00, unless the leave of the Court of Appeal is first obtained;

- Where the judgment or order is made by consent of parties;

- Where the judgment or order relates to costs only, unless the leave of the Court of Appeal is first obtained;

- Where, the judgment or order of the High Court, is expressly declared by statute to be final.

The notice of appeal must be filed with the Registrar of the Court from which the decision appealed against was given within 30 days of the date of judgment or order appealed against.

(b) *Criminal Appeals*

The Court of Appeal has jurisdiction to hear all appeals against any decision made by the High Court in the exercise of its original jurisdiction and in the exercise of its appellate or revisionary jurisdiction in respect of any criminal matter decided by the Sessions Court.

For criminal appeals, the notice of appeal must be filed with the Registrar of the Court from which decision appealed against was given within 14 days after the date of decision.

(v) <u>Federal Court</u>

(a) *Civil Appeals*

The Federal Court is the apex court in Malaysia. Save where otherwise expressly provided for under the law, the appeal to the Federal Court against a decision of the Court of Appeal is a two-tiered process.

First, one will have to seek leave to appeal from the Federal Court within one month from the date on which the decision appeal against was given or within such further time as may be allowed by the Court. A panel of three judges will usually hear the application for leave to appeal. The Federal Court will grant leave to appeal if the appeal satisfies any of the statutory conditions of appeal set out below: -

- The appeal is from any judgment or order of the Court of Appeal in respect of any civil cause or matter decided by the High Court in the exercise of its original jurisdiction involving a question of general principle decided for the first time or a question of importance upon which further argument and a decision of the Federal Court would be to public advantage; and/or

- The appeal is from any decision as to the effect of any provision of the Constitution including the validity of any written law relating to any such provision.

In the event leave is granted by the Federal Court, the appeal will then be heard on its merits. Only approximately 20% of applications for leave to appeal would be allowed.

The appellant will then have to file the notice of appeal within 14 days from the date that leave to appeal was granted. At this stage, the appeal will usually be heard and disposed of before a panel of three judges or such greater uneven number of judges as the Chief Justice may in any particular case determine. The Federal Court has empanelled a panel of nine judges in recent times for hearings involving landmark/constitutional matters.

Where leave to appeal to the Federal Court is not required, the notice of appeal shall be filed within 30 days from the date on which the decision appealed against was given.

(b) *Criminal Appeals*

The Federal Court has jurisdiction to hear and determine any criminal appeal from any decision of the Court of Appeal in its appellate jurisdiction in respect of any criminal matter decided by the High Court in its original jurisdiction. The notice of appeal shall be filed within 14 days of the decision of the Court of Appeal at the Registry of the Court of Appeal.

B) <u>Rules and Key Legislation in Civil Proceedings</u>

(i) <u>Rules of Court 2012</u>

The Rules of Court 2012 ("Rules of Court") is applicable in all proceedings before the Magistrates' Courts, the Sessions Courts, and the High Courts. The Rules of Court are a procedural code which sets out the civil procedure and timelines for parties to comply with when taking part in court proceedings.

The Rules of Court also provide for modes to enforce judgments and/or orders granted by the Subordinate and Superior Courts. For instance, enforcement of judgments for payment of money can be done by way of garnishee proceedings, writ of seizure of sale, charging order, appointment of a receiver or an order of committal. On the other hand, enforcement of judgments for possession of immovable property can be effected by a writ of possession or an order of committal, and enforcement of judgment for delivery of movable property can be done by a writ of delivery or an order of committal.

In administering the Rules of Court, the Court shall have regard to the overriding interest of justice.

(ii) Rules of The Court of Appeal 1994

The Rules of Court of Appeal 1994 ("Rules of The Court of Appeal") are applicable to every proceeding before the Court of Appeal.

The Rules of The Court of Appeal sets out, amongst others, the procedures and timelines to be complied with by parties in proceedings before the Court of Appeal. For instance, it sets out the relevant documents to be included in the records of appeal.

Where no other provision is made by any written law or by the Rules of The Court of Appeal, the procedure and practice in the Rules of Court shall apply mutatis mutandis in the event of a lacuna.

(iii) Rules of The Federal Court 1995

The Rules of The Federal Court 1995 ("Rules of The Federal Court") applies to all proceedings in the Federal Court.

The Rules of The Federal Court set out, amongst others, the procedures and timelines to be complied with by parties in Federal Court proceedings. It is also interesting to note that under Rule 137 of the Rules of the Federal Court, the Federal Court has an inherent power to review any of its previous decisions to prevent injustice or to prevent an abuse of the Court process.

Similarly, where no other provision is made by any written law or by the Rules of The Federal Court, the procedure and practice in the Rules of Court shall apply mutatis mutandis.

(iv) Key Legislation

Other key legislation in the Malaysian legal jurisprudence include the Civil Law Act 1956, Limitation Act 1953, Government Proceedings Act 1956, Specific Relief Act 1950, Debtors Act 1957, Insolvency Act 1967 and Companies Act 2016.

C) Alternative Dispute Resolution Mechanisms

The Malaysian legal system recognises a number of alternative dispute resolution ("ADR") mechanisms for parties who wish to resolve their disputes without resorting to the court process. The main ADR processes in Malaysia are (1) arbitration; (2) adjudication; and (3) mediation.

(i) Arbitration in Malaysia

In 2005, Malaysia adopted the UNCITRAL Model Law on International Commercial Arbitration and enacted the Arbitration Act 2005 ("Arbitration Act"). The Arbitration Act governs all arbitral proceedings in Malaysia, both domestic and international, and sets out the law for all stages of an arbitration – including the requirements of a valid arbitration agreement, the jurisdiction of an arbitral tribunal, the conduct of arbitral proceedings, applications to set aside an arbitral award, and the enforcement of an arbitral award.

Malaysian law on arbitration recognises the central pillar of arbitration, that is party autonomy. In summary, party autonomy ensures that the choice of the parties will usually take precedence with regard to matters including, amongst others, the composition of the arbitral tribunal, the seat of the arbitration and the procedural rules governing the arbitration. It also ensures that intervention by the Malaysian courts is minimal, with their primary function being a supervisory one.

Institutional arbitrations in Malaysia are conducted under the auspices of the Asian International Arbitration Centre ("AIAC"). Parties who conduct institutional arbitrations in Malaysia may opt for the procedural rules published by the AIAC, the primary set of rules being the AIAC Arbitration Rules 2018. The AIAC Arbitration Rules 2018, which incorporate the UNCITRAL Arbitration Rules, provides a comprehensive procedural framework governing matters such as the commencement of an arbitration and the powers of the appointed arbitral tribunal. Of particular note are the provisions of the UNCITRAL Arbitration Rules which provide for the conduct of arbitral proceedings through means of telecommunications (such as video conferencing), namely the examination of witnesses. This can aid in overcoming obstacles posed by the COVID-19 pandemic (e.g., travel restrictions).

Further rules published by the AIAC include the AIAC Fast Track Arbitration Rules 2018, which provide the parties to an arbitration with options which may expedite the arbitral process, such as the ability to conduct the arbitration on a documents-only basis. Additionally, there are the AIAC i-Arbitration Rules 2018, which present a Shariah-compliant set of rules for parties who wish to resolve their disputes through arbitration.

Malaysia is also a signatory to the Convention on Recognition and Enforcement of Foreign Arbitral Awards 1958 ("New York Convention"). The New York Convention, amongst others, facilitates the enforcement of foreign arbitral awards in the Courts of signatory states. As such, valid arbitral awards obtained in Malaysia can be enforced in the Courts of other signatory states to the New York Convention. Similarly, valid arbitral awards obtained in other signatory states can be enforced by the Malaysian High Courts.

(ii) Adjudication

Adjudication allows parties to resolve disputes on an expedited basis, by referring their disputes to a third-party decision maker who can issue a temporarily binding decision. An adjudication decision is temporarily binding as it remains subject to a final determination in either litigation or arbitration. In this regard, adjudication is an attractive option for parties whose contract involves a project where speedy resolutions to disputes are necessary to ensure the continued progress of the project. As such, like in many other countries, adjudication in Malaysia is most typically used in the realm of construction contracts.

Under the Construction Industry Payment and Adjudication Act 2012 ("CIPAA"), parties to a construction contract have a statutory right to refer payment claims to adjudication. The CIPAA governs matters such as pre-adjudication procedure, the initiation of an adjudication, the appointment of an adjudicator, the conduct of an adjudication, the enforcement of an adjudication decision, and any challenges to set aside an adjudication decision. An adjudication decision is binding on the parties until and unless (1) it is set aside by the Malaysian High Court; (2) the parties agree in writing to settle the matter in dispute; or (3) the dispute is finally determined in arbitration or court. A party may enforce an adjudication decision by applying to the Malaysian High Court to enforce it as a judgment or order of the Court.

For adjudications under CIPAA, the AIAC serves as the adjudication authority in Malaysia. Its role includes the setting of competency standards and criteria of an adjudicator, the determination of standard terms of appointment of an adjudicator and the fees of an adjudicator, and the provision of general administrative support.

(iii) Mediation

Parties who wish to resolve their disputes without the involvement of a third-party decision maker (as opposed to the case in litigation, arbitration and adjudication) may do so through mediation. In summary, mediation allows the parties to employ a neutral third party (i.e., a mediator) who can facilitate discussions and negotiations between the parties with the aim of resolving their disputes by way of agreement.

In Malaysia, mediation is given formal recognition and regulation by the Mediation Act 2012 ("Mediation Act"). The Mediation Act governs matters such as the commencement of mediation, the requirements for a valid mediation agreement, the appointment of a mediator, the mediation process, and the enforcement of a settlement agreement obtained through mediation. Importantly, the Mediation Act also contains provisions on confidentiality and privilege, which are key attractive features of the mediation process.

Settlement agreements obtained through mediation are binding on the parties. They may be enforced as a contractual agreement between the parties. Furthermore, if court proceedings have been commenced, a settlement agreement obtained through mediation may be recorded before the Court as a consent judgment or judgment of the Court, and thus may be enforced thereafter.

Aside from private mediation, parties in litigation may elect to mediate their disputes, if suggested to do so by the presiding Judge, at the pre-trial case management stage. Upon an agreement of the parties, the Judge presiding over their dispute may refer the parties to another Judge who will sit as mediator. The process and guidelines of judge-led mediation are set out in Practice Direction No. 4 of 2016 issued by the Chief Justice of Malaysia. The mediation process would be carried out on a without prejudice bass and will not infringe upon the interests and rights of the parties in litigation in the event the mediation is unsuccessful.

Mediations may also be administered through the AIAC, where the AIAC Mediation Rules 2018 may be employed. Additionally, mediations may be administered through the Malaysian Mediation Centre ("MMC") in accordance with the MMC Rules. The MMC has a list of Certified Mediators registered with the Centre.

Malaysia is a signatory to the United Nations Convention on International Settlement Agreements Resulting from Mediation ("Singapore Convention"). Similar to the effect of the New York Convention in arbitration, the Singapore Convention strives to facilitate the enforcement of settlement agreements obtained through mediation among signatory states.

D) Enforcement of Foreign Judgments

(i) The Reciprocal Enforcement of Judgments Act 1958

Under the Reciprocal Enforcement of Judgments Act 1958 ("REJA"), certain judgments of foreign courts may be registered and enforced in Malaysia. The list of applicable countries is contained in the First Schedule to the REJA. It includes the United Kingdom, Hong Kong, Singapore, New Zealand, Sri Lanka, India, and Brunei Darussalam ("Reciprocating Countries").

The procedure governing applications to register a foreign judgment in Malaysia under REJA is further set out in Order 67 of the Rules of Court 2012.

(a) *Requirements to Enforce a Foreign Judgment*

Under REJA, only a judgment of the superior courts of the Reciprocating Countries may be enforced in Malaysia, provided that it first satisfies the following requirements:

- The judgment is final and conclusive as between parties thereto (section 3(3)(a) REJA);
- Under the judgment, a sum of money is payable, not being a sum payable in respect of taxes or other charges of a like nature or in respect of a fine or other penalty (section 3(3)(b) REJA); and
- The judgment is registered in Malaysia in accordance with the procedure set out in section 4 REJA (the key procedural steps are detailed in Part D.2. below).

(b) *The Registration of a Foreign Judgment*

A party who wishes to enforce a foreign judgment under REJA must first apply to the High Court to register the judgment. The ex-parte application must be made within six years from the date of the judgment and the judgment must not have been satisfied in full by the judgment debtor. It is a mechanistic process. The application must also exhibit a duly verified/certified/authenticate copy of the foreign judgment together with a certified translation if the foreign judgment is not in the English language.

Importantly, a judgment, once registered, has the same effect as if it were a judgment originally granted by High Court. In summary, this provides the following:

- Enforcement/Execution proceedings may be taken on a registered judgment;
- The sum of the registered judgment shall carry interest;
- The registering court shall have the same powers to levy execution on a registered judgment.

Once the registration order is pronounced, a sealed copy of the said order must be served personally on the judgment debtor together with a notice of registration. The notice of registration must consist of the following:-

- The particulars of the judgment, and the registration order;
- The name and address of the judgment creditor or his solicitor on whom any application to set aside the registration order may be served;
- The right of the judgment debtor to set aside; and
- The period within which such application to set aside the registration may be made (usually 14 to 21 days).

(c) *Applications to Set Aside Registered Judgments*

The party against whom a registered judgment may be enforced may apply to set aside the registered judgment within the time period stated in the registered judgment. Grounds to set aside a registered judgment include, amongst others, the following:

- The judgment is not applicable under REJA or was registered in contravention of the requirements under REJA;
- The original court had no jurisdiction in the circumstances of the case;
- The defendant in the original proceedings did not receive notice of the said proceedings in sufficient time to enable them to defend the proceedings and thus did not appear;
- The foreign judgment was obtained by fraud;
- The enforcement of the foreign judgment would be contrary to public policy in Malaysia; or
- The rights under the foreign judgment are not vested in the person by whom the application for registration was made.

(ii) Common Law Enforcement of Foreign Judgment

Where the judgment originates from a non-Reciprocating Country and/or is a non-monetary judgment, common law provides for the recognition and enforcement of the foreign judgment via the initiation of a fresh suit in court to enforce such judgment.

The requirements for an action on a foreign judgment at common law is similar to those under REJA, with the only substantive difference being that it need not be a judgment of a superior court.

In recognising and enforcing a foreign judgment under common law, an action on the judgment must first be commenced by way of a writ action or an originating summons (together with an affidavit in support). Thereafter, the plaintiff may apply for a summary judgment, in reliance on the foreign judgment, or seek an order in terms of its application at the hearing of the originating summons.

For further information, please contact:-

Level 8, Wisma UOA Damansara
50 Jalan Dungun, Damansara Heights
50490 Kuala Lumpur, Malaysia.
T: +603 2081 3999
F: +603 2094 3211
E: skrine@skrine.com
W: www.skrine.com