## NISHIMURA & ASAHI

First Quarter 2023 (Jan. - Mar.)

### Asian Legal Update

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#### Our new capabilities in Kuala Lumpur and Sapporo

#### <u>Kuala Lumpur<sup>1</sup></u>

In January 2023, Nishimura & Asahi established a strategic alliance with <u>WM Leong & Co</u>, a Malaysian law firm that offers local insights and expertise. This partnership will enhance our practice in Asia and enable us to better serve our clients who are expanding their businesses in Malaysia.

WM Leong & Co is led by Wan May Leong, a seasoned lawyer with a wealth of knowledge and experience in Malaysian law. She and her team provide high-quality, tailored legal services to meet the needs of various industries and sectors.

Daisuke Maeshiro, a partner of our firm who has successfully handled many cross-border Malaysian deals, will collaborate closely with WM Leong & Co, along with other lawyers from our Singapore office. They will form an integrated team that can deliver seamless and comprehensive solutions to our clients<sup>2</sup>.

#### Sapporo

Our Sapporo office opened in April 2023 as Nishimura & Asahi's Hokkaido base to provide clients with high-quality legal services. The office is headed by Miki Tsubono, an attorney who, in addition to experience working for a Hokkaido-based company, has substantial experience advising clients on general corporate matters, M&A transactions and energy matters.

Drawing on the extensive and specialized skills of lawyers from among Nishimura & Asahi's 800 professionals in Japan and abroad to match each client's specific needs, our Sapporo office handles a comprehensive range of business law matters and provide clients with a truly full-service legal team.



<sup>&</sup>lt;sup>1</sup> Associate office

<sup>&</sup>lt;sup>2</sup> In this alliance, matters concerning Malaysian Law will generally be reviewed and undertaken by lawyer(s) from WM Leong & Co.

Indonesia Authors: Miriam Andreta and Hans Adiputra Kurniawan

#### 1. Bankruptcy and Liquidation: Updates Brought by PPSK Law

With respect to bankruptcy and liquidation of certain parties (public listed companies, banks, non-bank financial institutions), there are certain updates and clarifications set out in Law on Development and Improvement of Financial Sector (also known by its local abbreviation "PPSK Law") - which came into effect on 12 January 2023 (except for certain provisions that are explicitly intended to take effect otherwise). Those updates and clarifications are, among others, as follows:

- (i) Clarification on the legal standing of Indonesia's Financial Services Authority and Central Bank of Indonesia, to file a bankruptcy petition against, among others, financial institutions and payment service providers;
- (ii) Clarification that, when an electronic money issuer is declared bankrupt, the bankruptcy pool estate does not include funds that have been separated by the issuer for the purpose of meeting the issuer's obligations owed to its users;
- (iii) Clarification that, in the liquidation of a publicly listed company, when the remaining of liquidation proceeds are distributed to shareholders, public shareholders must be paid in preference to the controlling shareholders; and
- (iv) Waiver of the zero-hour rule in a bankruptcy case for certain transactions of money market and foreign exchange instruments in the money market; therefore, those transactions must be completed and are not subject to the retroactive effect of a bankruptcy decision to 00:00 local time of the decision date.

#### 2. Banking Sector: Updates Brought by PPSK Law

The key highlighted changes introduced by the PPSK Law in the banking sector are as follows:

- (i) Form of Indonesian commercial bank. The PPSK Law no longer allows commercial banks to operate in the form of a cooperative (*koperasi*) or a regional enterprise (*perusahaan daerah*). Consequently, all Indonesian commercial banks now must take the form of a limited liability company (PT).
- (ii) Mandatory disclosure of customers' information. The PPSK Law explicitly requires banks to disclose customers' information upon the request of a liquidator/receiver in a bankruptcy or liquidation process. This means disclosure in a bankruptcy or liquidation process takes precedence over banks' general secrecy rules.
- (iii) Additional criminal sanctions. The PPSK Law introduces a new form of criminal sanction (in addition to imprisonment and penalties), namely mandatory compensation payment to the affected customers, for which purposes the convicted parties' assets may be confiscated and seized.

#### 3. New Criminal Code

The new criminal code was enacted on 2 January 2023 and will be effective after 3 years as from the enactment date. The law, once effective, will affect a number of other laws, such as, the law on eradication of corruption, and the law on electronic transactions.

The new code made it clear that corporations are subjects of Indonesia criminal law and can be punished with criminal sanctions. Under the new code, the main criminal sanction is fines, and supplementary criminal sanctions, ranging from payment of damages to company dissolution, also can be imposed.

Malaysia Authors: Daisuke Maeshiro and Wan May Leong

#### 1. Amendments to the Employment Act

Significant amendments to the Employment Act 1955 (the "EA") have been passed with effect from 1 January 2023.

It is pertinent to all employers to take note that the EA now applies to all employees (irrespective of wages) generally, with certain additional protections given to, among others, employees who earn no more than RM4,000 per month and manual labors ("**Protected Employees**").

We set out below certain mandatory provisions under the EA which apply to all employees:

- (i) Maximum working hours: Reduced from 48 hours per week to 45 hours per week;
- (ii) Paid maternity leave: Increased to no less than 98 days from 60 days for each confinement;
- (iii) Paid paternity leave: Paid paternity leave of 7 consecutive days for each confinement;
- (iv) Sick leave: The entitlement of paid sick leave and paid hospitalization leave are to be treated separately and will no longer be subject to a cap of 60 days in aggregate;
- (v) Notice on sexual harassment: To exhibit conspicuously a notice to raise awareness on sexual harassment. Also, employers are statutorily required to inquire into any complaint of sexual harassment; and
- (vi) Restriction on termination of pregnant employee: The EA now makes it an offence for the employer to terminate the services of a female employee who is pregnant or is suffering from an illness arising out of pregnancy, unless such termination is made on the ground of wilful breach of a condition of the employment contract, misconduct or closure of business.

On the other hand, additional protections given to Protected Employees include:

- (i) Overtime payment for work carried out in excess of the normal hours of work;
- (ii) Payment on rest days and paid holidays; and
- (iii) Termination and lay-off benefits.

Further, the EA now requires the employers to obtain prior approval of the Director General of Labour before hiring foreign employees (including knowledge workers and domestic employees). Approval of the Director General of Labour may be granted if the following conditions have been satisfied by the employer:

- (i) There is no pending matter relating to any decision, order or directive issued under the EA;
- (ii) There is no pending matter for any conviction of offence under the EA, the Employees' Social Security Act, the Employees' Minimum Standards of Housing, Accommodations and Amenities Act and the National Wages Consultative Council Act; and
- (iii) It is not subject to any offences under any written law in relation to human trafficking and forced labour.

#### 2. The Anti-Sexual Harassment Act 2022

The first sexual harassment legislation in Malaysia, which is not limited to the employment context only, was finally passed by the Parliament in the third quarter of 2022. The Anti-Sexual Harassment Act 2022 (the "**ASHA**") seeks to raise awareness in the community and to prevent the occurrence of sexual harassment in all aspects of daily lives (including but not limited to sexual harassment in the workplace).

The 3 elements to constitute "sexual harassment" are set out below:

- (i) any unwanted conduct of a sexual nature, in any form, whether verbal, non-verbal, visual, gestural or physical;
- (ii) directed at a person; and
- (iii) it is reasonably offensive or humiliating or is a threat to his well-being.

As of this writing, certain provisions under the ASHA relating to the functions and powers of the Minister of Women, Family and Community Development have come into effect. Other provisions of the ASHA relating to the tribunal and others will be implemented in phases.

Employers are recommended to take proactive measures and put in place adequate procedures to prevent workplace sexual harassment in view of the ASHA and the relevant provisions in the EA.

**Philippines** Authors: Michelle Marie F. Villarica and Steffi Sales

#### 1. Lower Income Tax Rates Based on Tax Reform Regulations for 2023

Pursuant to Republic Act No. 10963 or the Tax Reform for Acceleration and Inclusion ("**TRAIN**") Law, lower tax rates for individuals earning more than PHP250,000.00 to below PHP8 million took effect on 1 January 2023. From previously being taxed at graduating rates from 20% to 32%, these individual taxpayers now enjoy lower income tax rates ranging from 15% to 30%. Considering these changes, since the initial implementation of the TRAIN Law in 2018, the new income tax rates for individual taxpayers have now decreased by 5% for those with taxable income of more than PHP250,000.00 to PHP2 million, while those individuals with taxable income of more than PHP2 million now benefit from a 2% decrease in tax rates. Individual taxpayers with annual taxable income amounting to PHP250,000.00 or below are still exempt from paying income tax, while those with taxable income of more than PHP8 million are still subject to an income tax rate of 35%.

### 2. Amended Regulations for the Registration of Data Processing Systems and Designation of Data Protection Officers

On 3 February 2023, the National Privacy Commission ("**NPC**") launched the National Privacy Commission Registration System ("**NPCRS**"), a new portal for individuals and entities processing personal data subject to Philippine data privacy regulations, to register their Data Processing Systems and Data Protection Officers. Prior to the launch of this online registration system, the NPC only had a system for registration of Data Protection Officers which was done through email.

The NPCRS was launched pursuant to NPC Circular No. 2022-04 ("**2022 Circular**") which repealed a previous NPC Circular issued in 2017 on the registration of personal data processing systems, notifications regarding automated decision-making and profiling, and the designation of data protection officers. Under the 2022 Circular, a personal information controller or processor that employs 250 or more persons, or those processing sensitive personal information of 1,000 or more individuals, or those processing data that will likely pose a risk to the rights and freedoms of data subjects must register its Data Processing Systems and Data Protection Officers through the NPCRS within 20 days from the commencement of such system. Those who are already processing personal data and are required to register pursuant to the 2022 Circular have until 10 July 2023 to comply. Those who are not required to register with the NPC must instead submit a notarized document of Annex 1 of the 2022 Circular – Sworn Declaration and Undertaking for Exemption from Registration of Data Processing Systems.

#### 3. Amendments to Central Bank Foreign Exchange Regulations

On 29 March 2023, the Monetary Board of the Central Bank of the Philippines ("**BSP**") approved BSP Circular No. 1171 which made permanent the amendments to the foreign exchange ("**FX**") regulations that were initially issued under BSP Circular No. 1080 in 2020 as temporary relief measures during the outbreak of the COVID-19 pandemic. The amendments pave the way for more efficient transactions with the BSP. The following are among the major amendments implemented under BSP Circular No. 1171:

- (i) Applications for approval and registration of foreign/foreign currency loans/borrowings/investments, other requests to the BSP, and the sale of FX by Philippine banks no longer have to be submitted to the BSP in hard copy and may be submitted electronically;
- Supporting documents for trade and non-trade current account transactions and foreign investments no longer require notarization;
- (iii) All BSP-issued documents including BSP letter-approvals for registration applications and Central Bank Registration Documents for the registration of foreign investments (BSRD) will be in electronic form;
- (iv) The waiver of monetary penalties for delays incurred in the submission of reports to the BSP-International Operations Department remain effective until 30 June 2023 (unless extended by the BSP); and
- (v) Processing fees imposed on FX transactions under Appendix 20 of the Manual of Regulations on Foreign Exchange Transactions were removed.

Singapore Authors: Melissa Tan and Chin Su Xian

#### 1. Changes to Verification Requirement for Employment Pass Applications

The Ministry of Manpower ("**MOM**") has announced that with the implementation of the points-based Complementarity Assessment Framework (COMPASS), all post-secondary diploma and above qualifications declared will have to be supported by third-party verification. This requirement will apply to new Employment Pass ("**EP**") applications from 1 September 2023, and renewals from 1 September 2024. So long as a qualification is declared in the EP application, such verification is mandatory and requires additional supporting documents in relation to education certificates, transcripts and/or verification from a background screening company (depending on the country which such qualifications are from).

Under the two-stage COMPASS framework, as previously announced, employers will not only be required to meet the qualifying salary (which has recently been raised to SGD5,000 for all sectors except financial services and SGD5,500 for financial services) under stage one (1), but also pass a points-based COMPASS under stage two (2), scored on foundational criteria in relation to the candidate's salary and qualifications, the firm's diversity and support for local employment, and bonus criteria in relation to skills bonuses (for candidates in jobs where skills shortages exist) and strategic economic priorities bonuses (for partnership with government on ambitious innovation or internationalization activities). Employers who require points from these educational qualifications for its candidates to pass COMPASS have to declare them in their EP application, while employers who do not require these points are not required to declare these qualifications.

#### 2. Recommendations for Proposed Workplace Fairness Legislation

MOM announced on 24 March 2023 that, based on the interim report released by the Tripartite Committee on Workplace Fairness ("**Tripartite Committee**") on 13 February 2023, there are 20 recommendations ("**Recommendations**") for the proposed workplace fairness legislation, which are intended to complement the existing Tripartite Guidelines on Fair Employment Practices (TGFEP) to further entrench fair employment standards, provide workers with better assurance of fair treatment and protection against discrimination at work, foster strong employer-employee relationships, and deliver good workplace outcomes for employees.

Under the proposed legislation, amongst others, employees who experience discrimination that results in adverse employment outcomes would have access to remedies, and would also be protected from retaliation for reporting workplace discrimination and harassment. Further, employers would be required to put in place grievance handling mechanisms and protect the confidentiality of the identity of reporting persons. The proposed legislation also will take into consideration employers' practical needs – for example, allowing them to consider a protected characteristic in employment decisions if there is a genuine and reasonable job requirement.

Further, the proposed legislation will require compulsory mediation as the main avenue to address discrimination complaints at the Tripartite Alliance for Dispute Management (TADM) first, with adjudication at the Employment Claims Tribunals (ECT) as a last resort, and also will provide for enhanced sanctions and penalties enabling MOM to take appropriate enforcement action.

#### 3. Mandatory Business Conduct Requirements for Corporate Finance Advisors

The Monetary Authority of Singapore (MAS) has issued a new Notice SFA 04-N21 ("Notice") on 23 February 2023, which imposes mandatory baseline standards of due diligence and conduct for corporate finance advisers with effect from 1 October 2023 – this applies to holders of a capital markets services license to advise on corporate finance, and persons exempted from holding a capital markets services license under section 99(1)(a), (b) or (c) of the Securities and Futures Act 2001 of Singapore in respect of advising on corporate finance, which includes banks, merchant banks and finance companies and their representatives in respect of advising on corporate finance.

This Notice sets out specific requirements, which include conducting background checks and interviews with relevant stakeholders, conducting site visits of prospective issuers' key assets, assessing knowledge, skills and experience of third-party service providers, as well as ensuring that material issues are satisfactorily resolved or clearly disclosed. The enhanced requirements to mitigate conflicts of interests, such as where the adviser's related corporations or controlling shareholders also provide services to the same customer. Advisers acting in the capacity of an issue manager, sponsor or financial adviser (as the case may be) for initial public offers and reverse takeovers, including business combinations, are encouraged to start complying with such requirements in the interim.

**Thailand** Authors: Jirapong Sriwat and Apinya Sarntikasem

#### 1. Amendment to the Regulation for Private Placement

The Notification of the Capital Market Supervisory Board No. TorJor. 28/2565 Re: Permission for Listed Company to Issue New Shares Through Private Placement (the "**CMSB Notification**") was published in the Government Gazette on 1 February 2023 and will enter into force on 1 July 2023. The CMSB Notification revokes all previous regulations issued in relation to the issuance of new shares through private placement, and cancels the requirement to obtain the Securities and Exchange Commission's approval for the offering of shares through private placement. Nonetheless, the issuing company would still have to comply with other requirements, including but not limited to, the disclosure and submission of information in the notice convening the shareholders' meeting and the approval requirements by the shareholders' meeting. The CMSB Notification also prescribes that the opinion of an independent financial advisor may be required in certain circumstances and that the shares remaining from the preferential public offering (PPO) may be offered through private placement to investors, while also revising the method of calculating the market price.

#### 2. New Provision on Work From Home

On 19 March 2023, the Labor Protection Act (No. 8) B.E. 2566 (2023) was published in the Government Gazette with the effective date of 18 April 2023. This new legislation revises the Labor Protection Act B.E. 2541 (1998) by introducing the newly added Section 23/1 which governs the rights and duties between the employer and the employee who is working from home. Under the new provision, the employer and the employee may agree to allow the employee to work at the employee's home or residence, or through information technology mediums from any location, if the nature of work permits. The employer has the duty to prepare such agreement in writing or electronic form which may contain the following details: (i) duration of the agreement; (ii) normal working days and hours, rest periods, and overtime work; (iii) criteria for overtime work, holiday work, and types of leave; (iv) scope of work of the employee and control or supervision of the employer; and (v) duty to procure work tools or equipment, as well as necessary costs incurred in relation to the work.

In addition, this new provision entitles the employee to refuse any communication with the employer beyond the agreed normal working hours unless the written consent of the employee has been provided in advance. Furthermore, the employees working remotely shall have the same rights as the employees working at the establishment of the employer.

#### 3. New Measures on Technology Crime Suppression

The Emergency Decree on Technology Crime Protection and Suppression Measure B.E. 2566 (2023) (the "**Emergency Decree**") which was published in the Government Gazette on 16 March 2023 and became effective on the following day, was enacted as a response to the increase in technology crime or cyber crime in Thailand. Pursuant to the Emergency Decree, in the case where there is reason to believe that a technology crime has occurred or is likely to occur, financial institutions, operators of payment system business, telecommunication service providers, and other types of service providers, are required to disclose and exchange information pertaining to their customers' accounts or transactions which are suspected of being related to cybercrime via the system or disclosure process prescribed by the relevant government authorities. The Emergency Decree imposes several penalties for the commission of cybercrime related offences, such as a term of imprisonment not exceeding three years or a fine of THB 300,000, or both in the case where a person has allowed another person to use his/her bank account for the commission of cybercrime.

#### 4. Guideline and Regulation for Advertising Content

With an intention to provide clarification to business operators and to provide fairness and protection to consumers, the Committee on Advertisement (the "Committee") has issued the Notification Re: Guidelines on Use of Advertisement Statements By Confirming Facts Which are Difficult to Prove and Guidelines on Proof of Advertisement Statements B.E. 2565 (2022) (the "Advertisement Notification") which was published in the Government Gazette on 13 January 2023 and entered into force on the following day. The Advertisement Notification sets out the rules on the statements used in advertisement; for instance, a statement must be in the Thai language and must be visible, easily heard or read, and must not be misleading, and where the statement is published in a foreign language, the Thai translation of the material information also must be provided. Furthermore, the business operator and the person making the advertisement shall bear the duty of proof in relation to references to results of testing or experiments mentioned in the advertisement at the request of the Committee.

Vietnam Authors: Vu Le Bang and Nguyen Thi Thanh Huong

#### 1. Decree 08/2023/ND-CP amending the decrees on corporate bonds ("Decree 08")

Decree 08 was issued and came into effect on 5 March 2023, amending, supplementing, and suspending the effect of a number of articles prescribed in the previous decrees on private placement and trading of privately placed corporate bonds in the domestic market and offer of corporate bonds in the international market, Decree No. 153/2020/ND-CP and Decree No. 65/2022/ND-CP. The notable contents include:

- (i) Payment of principal and interest for bonds issued in the domestic market can be made by other assets in case the bond issuer is unable to fully and timely pay the bond principal and interest in accordance with the following principles: (x) the payment must comply with the civil laws, laws on conditional business lines (if applicable), and other relevant laws; (y) the payment must be accepted by the bondholder; (z) the bond issuers must make relevant extraordinary information disclosure about the payment and bear full responsibility for the legal status of the assets used for payment.
- (ii) Decree 08 allows bond issuers to extend the maturity term of the bonds by no more than two years, subject to approval of bondholders representing 65% or more of the total number of bonds of the same type in circulation. Having said that, bond issuers still must fulfill their obligations under the issuance plan announced to bond holders who disapprove the extension.
- (iii) Decree 08 suspends, up to the end of 31 December 2023, the effect of some regulations under Decree No. 153 and Decree No. 65 on (a) determination of professional securities investors being individuals, (b) bond distribution deadlines, and (c) results of bond issuer credit ratings. Accordingly these conditions do not apply to a bond issuances until the end of this year.

#### 2. Establishment and operation of Vietnam Competition Commission

The long-waited guidance on functions, tasks, powers and organizational structure and members of the Vietnam Competition Commission ("VCC") was recently issued under Decree 03/2023/ND-CP dated 10 February 2023, which shall come into effect on 01 April 2023, and Decisions 310/QD-TTg, 311/QD-TTg, and 312/QD-TTg all dated 29 March 2023. The below are some notable points:

- (i) Function and power: VCC is an authority under the Ministry of Industry and Trade ("MOIT"), conducting competition proceedings; managing economic concentration, including merger filings; deciding on exemptions from prohibited competition restriction agreements; settling complaints in connection with the competition cases; imposing administrative sanctions; and other functions and tasks in connection with State competition management, which are currently handled by the Vietnam Competition and Consumer Authority in practice.
- (ii) Organization structure: There are 03 divisions supporting VCC to implement its functions and powers, which are (i) agencies investigating competition cases, including sub-divisions as decided by Minister of MOIT; (ii) secretariats of councils dealing with competition cases; and (iii) a competition supervision board.
- (iii) Members: VCC comprises a maximum of 15 members, including (i) chairman, (ii) one or several vice chairmen and (iii) other members. At present, Mr. Le Trieu Dung, former Director General of Trade Remedies Authority (under MOIT) is appointed as Chairman of VCC, and 07 other members were selected from other State authorities and agencies.

# 3. Draft Decree amending and supplementing a number of articles of Decree 01/2014/ND-CP dated 03 January 2014 of Government on foreign investor buying shares of Vietnamese credit institutions ("Draft Decree")

Currently, Decree 01/2014/ND-CP stipulates that the total share ownership of foreign investors must not exceed 30% of the charter capital of a Vietnamese commercial bank except for statutorily special cases decided by the Prime Minister. However, to facilitate the development of banks which are requested to acquire another bank with bad financial and operational condition, the Draft Decree proposes to increase the total share ownership limit of foreign investors within such threshold must be approved by the Government. In Vietnam, in case a bank faces difficulties in its operation and subject to special control of the State Bank, it may be compulsorily transferred to another wealthy and healthy bank.

India Authors: Taeko Suzuki and Makoto Sugitani

#### 1. Competition Act

The Indian legislature passed the Competition (Amendment) Bill, 2023 on April 4, 2023, which amends the Competition Act, 2002 ("Act"). The bill aims to solve some critical concerns of the Indian government on both the merger control and enforcement fronts. Some of the key features are:

- (i) <u>Deal value thresholds introduced</u>: While the Act previously prescribed thresholds for combination based on assets and turnover, this amendment introduced an additional threshold. Any transaction, in connection with acquisition of any control, shares, voting rights or assets of an enterprise, merger or amalgamation that exceeds INR 20 (twenty) billion (approximately USD 252 (two hundred and fifty two) million) must be notified to the Competition Commission of India ("CCI"), provided that the enterprise which is being acquired, taken control of, merged or amalgamated has such substantial business operations in India.
- (ii) <u>Combination review period reduced</u>: The review period for CCI to assess the notified combination has been reduced from 210 (two hundred and ten) days to 150 (one hundred and fifty) days.
- (iii) <u>Settlement and commitment mechanisms introduced</u>: Any enterprise which is alleged of any anti-competitive agreements or abuse of dominant position may apply for a settlement or commitment to the CCI. The scope of this regime is limited to these cases, and will not be applied to cartel proceedings. Commitments are to be considered between the commencement of an investigation and its completion, and settlements are to be considered between investigation report issuance and CCI's final order.
- (iv) <u>Penalty on global turnover</u>: Currently, where CCI finds anti-competitive agreements or abuse of dominant position, it may impose a penalty which shall be not more than 10 (ten) per cent of the turnover average for the last 3 (three) preceding financial years in the relevant market (i.e., where the regulation violations occurred). In 2017, the Supreme Court in the case of *Excel Crop Care* v. *Competition Commission of India* ruled that turnover means the relevant turnover (of the infringing product or service). The bill reversed this position by clarifying it means global turnover derived from all the products and services.

#### 2. Labour Law

On February 22, 2023, the legislature of the State of Karnataka passed the Factories (Karnataka Amendment) Bill, 2023. This amendment allows the manufacturing sector to increase production capacities. Some of the key amendments are: (i) increasing daily work hours from 9 (nine) hours to 12 (twelve) hours; (ii) increasing the total number of hours of overtime work across 3 (three) months from 75 (seventy five) hours to 145 (one hundred and forty five) hours; (iii) enabling women to work in a factory during the "night time" shift, which is from 7 P.M. to 6 A.M., subject to a number of conditions.

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