

1. INTRODUCTION

1.1 Please give a brief outline of the legal system in Malaysia. Is it based on common-law, civil-law, or some other system?

Malaysia has a common law adversarial legal system based on precedents.

1.2 How are the courts organised in Malaysia?

There are three tiers of civil courts: the Subordinate Courts, the High Court and the Appellate Courts. The Subordinate Courts consist of the Magistrate Court and the Sessions Court, with a civil monetary jurisdictional limit of RM25,000 and RM250,000 respectively. Claims exceeding RM250,000 are heard by the High Court. The Appellate Courts consist of the Court of Appeal and the apex court, the Federal Court.

There are two separate court systems of co-ordinate jurisdiction operating in Malaysia, namely the High Court of Malaya and the High Court of Sabah and Sarawak, each covering its own territorial jurisdiction. The Islamic system runs parallel with the civil court system. The Islamic Court is known as the Syariah Court and its jurisdiction is limited to family disputes, estate claims and certain offences considered criminal under Islamic laws. As provided under the Federal Constitution, all parties to proceedings in the Syariah Court must be of the Muslim faith, although in practice, certain proceedings concerning conversion, apostasy and custody of children resulting from conversion of a spouse may also involve non-Muslim parties.

1.3 How are lawyers organized in Malaysia?

Malaysia has a fused legal profession and practitioners are known as "Advocates and Solicitors". There are two separate bodies of practitioners in Malaysia, divided based on territorial jurisdiction. There are "Advocates and Solicitors of the High Court of Malaya," who are entitled to practise in

Peninsular Malaysia, and “Advocates and Solicitors of the High Court of Sabah and Sarawak” who are entitled to practise in the two East Malaysian states of Sabah and Sarawak.

1.4 What type of legal fee arrangements are common in Malaysia?

Contingency or conditional fees and/or other fee arrangements based on the results of litigation/arbitration are prohibited by the Legal Profession Act 1976. Section 112(1)(b) of the Legal Profession Act provides that no advocate and solicitor shall enter into any agreement by which they are retained or employed to prosecute any suit or action or other contentious proceeding which stipulates for or contemplates payment only in the event of success of such suit, action or proceeding. This section contemplates the charging of such fees in both litigation and arbitration proceedings. An advocate or solicitor who is in breach of Section 112(1)(b) will be subject to disciplinary proceedings and if found guilty of misconduct by the Disciplinary Board, may be struck off the Roll or suspended from practice for a period not exceeding five years.

In addition the Solicitors’ Remuneration Order 1991 sets out scale fees chargeable in respect of categories of non-contentious matters such as land conveyancing, tenancies/leases, and security documentation transactions.

2. STRUCTURES FOR DOING BUSINESS

2.1 Is it necessary to set up a business organization in Malaysia to provide services or sell goods in Malaysia?

It is necessary to set up some form of business organization in order to provide services or sell goods in Malaysia. However, many foreign businesses access the Malaysian market by appointing a local third party contractor or distributor that is already registered to conduct business in Malaysia.

2.2 What forms of business organizations can be set up in Malaysia?

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

- a sole proprietorship;
- a partnership;
- a locally incorporated company; or
- branch of a foreign company.

A) Sole Proprietorship and Partnership

A sole proprietor, as well as a partner of a business, is personally liable for the debts of the business. Partners of a business may draw up partnership agreements or be governed by the *Partnership Act 1961*. All sole proprietorships and partnerships must be registered with the Companies Commission of Malaysia ("**CCM**") under the *Registration of Businesses Act 1956*.

No foreign individuals or companies (whether locally incorporated or foreign) can be registered as a sole proprietor with the CCM. The CCM as a matter of practice, does not permit companies (whether locally incorporated or foreign) or foreign individuals to be registered as partners in a partnership. The present laws of Malaysia do not permit partnerships with limited liability to be established, unless they are established in Labuan under the *Labuan Limited Partnerships and Limited Liability Partnerships Act 2010*.

B) Incorporated Company

Due to the limitations on registration as a sole proprietorship and a partnership, a foreign investor seeking to do business in Malaysia will usually do so by incorporating a company under the *Companies Act 1965* ("**Companies Act**") as a vehicle.

Any two or more persons may incorporate a company. Although there are three types of companies that may be formed, the most popular is a company limited by shares, where the personal liability of members is limited to the amount if any, unpaid on their shares. A company may be either a private or a public company.

A private company is one whose articles of association restrict the right of its members to transfer their shares, restrict membership to 50 and prohibit any invitation to the public to subscribe for its shares or debentures or to deposit money with it. A public company however, is generally one that desires to raise capital from the public. Such companies typically go on to seek listing of their shares on the Bursa Malaysia Securities Berhad ("**Bursa Malaysia**"), the Malaysian stock exchange.

Please see Paragraph 3.1 below.

C) Branch of a Foreign Company

Instead of forming a local company, a foreign company may choose to operate a branch in Malaysia by registering a branch of a foreign company under the Companies Act.

However, it should be noted that the *Guidelines on Foreign Participation in the Distributive Trade Services Malaysia* ("**Distributive Trade Guidelines**") issued by the Ministry of Domestic Trade Co-Operatives and Consumerism ("**MDTCC**") provides that distributive trade businesses with foreign equity must be locally incorporated under the Companies Act.

2.3 What is the process, time required and cost for setting up each?

A) Incorporated Company

Firstly, two individuals must be nominated to be promoters of the company. The promoters need not be Malaysian citizens nor are they required to have their principal or only place of residence within Malaysia. At least one of the promoters will eventually be nominated as a subscriber or first director of the local company, or both.

An application for availability of name must be submitted to CCM using Form 13A together with:

- (i) a fee of RM30.00 payable to the CCM;
- (ii) a photocopy of each of the identity cards (for Malaysians) or passports (for non-Malaysians) of the promoters of the local company; and
- (iii) a letter of consent for the company which owns the trademarks or bears the same name, for the use of the name.

The CCM will take approximately five working days to process the application for approval of name. Upon approval by the CCM for the use of name, all documents for incorporation must be lodged with the CCM within three months from the date of approval together with the appropriate registration fee based on the amount of the authorised share capital of the company. The incorporation documents to be lodged are as follows:

- (a) duly stamped and signed Memorandum & Articles;
- (b) Form 6 being the Statutory Declaration of Compliance by the secretar(ies) named in the Articles;
- (c) Form 48A being the Statutory Declaration By A Person Before Appointment As A Director or by a Promoter signed by all the initial directors and by the promoters (if they are not the initial directors) of the local company before:

- (i) a commissioner for oaths if signed within Malaysia; or
- (ii) a notary public or in the manner prescribed by the law of the place in which the Form 48A is being signed.

A copy of Form 48A is also required to be filed with the Director General of Insolvency of Malaysia.

At least one of the two promoters must be an initial subscriber or first director of the local company. In the case where the promoter is not an initial subscriber or first director, he must give notice in writing that he no longer wishes to be a promoter of the local company. Such notice must be lodged with the CCM together with the incorporation documents.

- (d) a copy of the approval letter from CCM and original Form 13A which was returned by the CCM together with his approval letter.

The registration fee payable to CCM for the incorporation of a local company under the Companies Act will be based on the authorised share capital of a company as follows:

Authorised Capital	RM
a) <RM100,000	1,000.00
b) >RM100,000 < RM500,000	3,000.00
c) >RM500,000 < RM1 Million	5,000.00
d) >RM1 Million < RM5 Million	8,000.00
e) >RM 5 Million < RM10 Million	10,000.00
f) >RM10 Million < RM25 Million	20,000.00
g) >RM25 Million < RM50 Million	40,000.00
h) >RM50 Million < RM100 Million	50,000.00
i) >RM100 Million	70,000.00

If the application is complete and the fees have been paid, the CCM will register the company, allocate a company number and issue a certificate of incorporation for the company. The issuance of a Certificate of Incorporation (Form 9) by the CCM takes approximately five working days from the date of lodging the incorporation documents.

In summary, the timing for incorporation of a local company (including the preparation of the documents) will take approximately 1 to 1½ months.

B) Branch of a Foreign Company

Firstly, an application for availability of name must be submitted to the CCM using Form 13A together with:

- (i) a fee of RM30.00 payable to the CCM; and
- (ii) a copy of the certificate of incorporation or registration of the foreign company (or equivalent);

The CCM will take approximately five working days to process the application for approval of name. Upon approval by the CCM for the use of name, all documents for registration must be lodged with the CCM within three months from the date of approval together with the appropriate registration fee based on the amount of the authorised share capital of the foreign company. The incorporation documents to be lodged are as follows:

- (i) A certified copy of the certificate of incorporation or registration of the foreign company in its place of origin or a document of similar effect.
- (ii) A certified copy of its charter/statute/memorandum and articles of association or other instrument constituting or defining its constitution.
- (iii) A list of its directors and their particulars in Form 79.
- (iv) Where the foreign company has directors resident in Malaysia who are members of the local board of the directors, a memorandum duly executed by or on behalf of the foreign company stating the powers of the local directors.
- (v) A memorandum of appointment or power of attorney under seal of the foreign company, executed on its behalf in such manner as to be binding on the company, stating the name and address of one or more persons resident in Malaysia, not including a foreign company, authorised to accept on its behalf service of process, and any notices required to be served on the company.
- (vi) Form 80 being the statutory declaration by an agent of a foreign company.
- (vii) Fees: The same registration fee payable to the CCM for the incorporation of a local company under the Companies Act as mentioned above.

The CCM will issue a certificate registration (Form 83) which shall be conclusive evidence that the requirements as to the registration of the foreign branch have been complied with.

Costs

The costs of incorporation of a company and registration of branch of a foreign company, as the case may be, will generally include the following:

- (a) Service providers' fees (either a law firm or a company secretarial firm) for incorporation – RM5,000 (excluding service tax);
- (b) disbursements for stamping fee, application fee for availability of name, register of members book, share certificates book, common seal and minutes book – approximately RM2,000 (please note that disbursements will be lower for branch companies, as there are less requirements for such books);
- (c) registration fees payable to CCM for incorporation of a company and registration of a branch office will vary depending on the authorised capital of the company.

2.4 Are there any fetters on the business activities that can be carried on by business organizations in Malaysia?

In Malaysia, a two-pronged approach is used to regulate investment i.e. (i) policy; and (ii) legislation. Equity restrictions on foreign investment in Malaysia are usually imposed through legislation, conditions contained in licences or guidelines issued by the regulatory authorities. In addition, there may also be requirements where only locally incorporated companies may carry on certain type of businesses. For example, only locally incorporated companies may carry on wholesale and retail trade in Malaysia, and companies wishing to carry on hypermarket businesses must have at least 30% of their equity held by Bumiputera interests. Please refer to Paragraph 5 below for further details.

2.5 What are the ongoing obligations in relation to each of the forms of business organizations?

A) Incorporated Company

The provisions under the Companies Act must be complied with by a company incorporated under the Companies Act, including but not limited to:

- (i) having a registered office to which all communications and notices may be addressed and which shall be open and accessible to the public for not less than 3 hours during ordinary business hours on each day, except Saturdays, weekly and public holidays.

This may also be the address of the Company Secretary's office;

- (ii) having at least two directors (whether Malaysian or foreign) who have their principal places of residence in Malaysia. A person who is in Malaysia for a period or periods of 182 days or more in a year will fulfill the requirements of a resident director;
- (iii) having a local Company Secretary, who is usually an individual engaged from a professional services firm;
- (iv) holding its annual general meeting ("AGM") at least once in every calendar year, and not more than 15 months after the last preceding AGM;
- (v) presenting its annual audited profit and loss account at its AGM for its members' approval at least once in every calendar year at intervals of not more than 15 months;
- (vi) lodging its annual return with the CCM made up to the date of the AGM in the preceding year within 14 days after the AGM;
- (vii) keeping accounting and other records that will sufficiently explain the transactions and financial position of the company;
- (viii) keeping proper books and minutes of all proceedings of general meetings and meetings of all its directors and managers;
- (ix) lodging the required statutory forms and documents with the CCM, for example, change of directors, notice of increase in share capital, change in the interest of the substantial shareholder, etc.

B) Branch of a Foreign Company

A branch office of a foreign company can be registered with the CCM provided that the charter, memorandum and articles of association or other instruments constituting or defining the constitution of the foreign company and the laws governing the foreign company in its country of incorporation will not prohibit or restrict the establishment of the branch office in Malaysia. The branch office will be entitled to carry on its business activities according to the objects and powers provided under its constitution.

The provisions under the Companies Act applicable to a branch office must be complied with

by a branch office of a foreign company registered in Malaysia, including but not limited to:

- (a) having a registered office to which all communications and notices may be addressed;
- (b) having an agent who is a person resident in Malaysia for the purpose of accepting service of process or any notices required to be served on the foreign company. An agent may be either a natural person (a Malaysian or foreigner) or a corporation but must not be a foreign corporation. An agent shall, until he ceases to be an agent, in accordance with the procedure of the Companies Act:
 - (i) continue to be an agent of the foreign company;
 - (ii) be answerable for the performance of all such acts, matters and things, as are required to be done by the foreign company by or under the Companies Act; and
 - (iii) be personally liable for all penalties imposed on the foreign company for any contravention under the Companies Act, unless he proves to the satisfaction of the Court that he should not be so liable;

A summary of the statutory compliance required of a branch office under the Companies Act is set out below. A branch office is required:

- (a) to lodge its annual returns made up to the date of the AGM within one month of that date;
- (b) to lodge notices of change in (i) memorandum or articles, (ii) directors, (iii) agent, (iv) registered office in Malaysia or place of incorporation, (v) name of company, (vi) powers of any directors resident in Malaysia who are members of the local board of directors within one month of the change;
- (c) to lodge notice of increase in authorised share capital within one month of the increase;
- (d) to lodge notice of a scheme of arrangement with creditors within one month of the court order approving the scheme;
- (e) to lodge its balance sheet (accompanied by statutory declaration) and audited accounts;

- (f) to keep proper audited accounts (in respect of Malaysian operations);
- (g) to display the name of the company and the company number outside its registered office, every place of its business in Malaysia and on company documents;
- (h) to lodge notice of cessation of business within 7 days of cessation;
- (i) to lodge notice of commencement of liquidation proceedings within one month after commencement;
- (j) not to use any name other than that under which it is registered;
- (k) to maintain a branch register of shares if it has members who are resident in Malaysia and who have applied for registration in its branch register.

3. CORPORATIONS

3.1 What are the different types of companies recognised in Malaysia?

A minimum of two persons are required to incorporate a company, which may be of three types:

- (i) **Company limited by shares:** this is the most popular, where the company is formed on the principle of having the liability of its members limited by the memorandum of association to the amount (if any) unpaid on their shares.
- (ii) **Company limited by guarantee:** the company is formed on the principle that the members' liability is limited by the memorandum to a nominated amount that the members respectively undertake to contribute to the assets of the company in the event of its being wound up.
- (iii) **Unlimited Company:** the company is formed on the principle that the members have no limit placed on their liability. Its members are liable for the debts of the company without limit if the company has insufficient assets to meet its debts during a winding-up.

A limited company may be either:

- (i) a private limited company, with the description "Sendirian Berhad" or "Sdn. Bhd." (or "Private Limited") following its name. The memorandum and articles of a private company:

- (a) restrict the right of its members to transfer shares in the company;
 - (b) limit its membership to 50;
 - (c) prohibit invitations to the public to subscribe for any shares or debentures in the company; and
 - (d) prohibit any invitation to the public to deposit money with the company for fixed periods or payable at call.
- (ii) a public limited company, with the description "Berhad" or "Bhd" (or "Limited") following its name. It generally desires to raise capital from the public by their subscription for its shares. Where a public company applies to Bursa Malaysia for permission to have its shares quoted on the Main Market or the Alternative Market, it must satisfy the *Capital Markets & Services Act 2007* ("CMSA"), listing requirements of Bursa Malaysia for Main Market¹ or Alternative Market (collectively "Listing Requirements") and the policies and guidelines issued by the Securities Commission of Malaysia ("SC").

3.2 What is the process for incorporation of a company?

Please see Paragraph 2.3 above setting out the procedure for incorporation.

In preparation for the incorporation of a company, the following requirements need to be fulfilled:

(a) Initial Subscribers

A company must be incorporated with a minimum initial issued share capital of 2 shares. For example, RM2.00 comprising 2 ordinary shares of RM1.00 each.

Any person can be a subscriber. The subscribers can either be individuals or corporations and need not be Malaysian citizens nor have their principal place of residence in Malaysia. However, an individual cannot be the sole or only shareholder of a company in Malaysia. Only a corporation may be the sole shareholder of a company.

(b) First Directors

At least two directors with their principal or only place of residence within Malaysia must be nominated to be the first directors of the company. No person other than a natural person of full age shall be a director of a company and a corporation is prohibited from being a director

¹ This memorandum seeks to discuss only provisions under the Main Market Listing Requirements.

of a company. There is no requirement that the directors be Malaysian citizens, and there is also no shareholding qualification for a person to act as a director.

(c) Company Secretary

At least one company secretary who has his or her principal or only place of residence within Malaysia must be appointed. A company secretary is an officer of the company. The responsibilities of a company secretary include keeping company secretarial records, for example, the register books, Memorandum and Articles of Association, etc. and lodging of statutory forms with the CCM as required under the Companies Act.

The company secretary is an individual who may be appointed from a professional company secretarial firm. There will be annual fees payable to the company secretary for its professional services.

(d) Memorandum of Association and Articles of Association

The Memorandum of Association and the Articles of Association are two distinct documents though often printed within the same cover. The Memorandum is the principal document constituting the company; its name, objects, powers, functions, liability, etc. whilst the Articles are the regulations governing the internal management of the company; election of directors, procedures at meetings, quorum, notices etc. If the provisions of the two documents conflict in any way, the Memorandum will prevail. The initial subscribers will have to sign the Memorandum & Articles.

(e) Authorised Share Capital

The minimum authorised share capital on incorporation of a local company is RM100,000. However, consideration should be given to other capital requirements, for e.g. MDTCC's requirement for companies carrying on distributive trade activities to have a minimum capital investment of RM1 million. Please see Paragraph 5 for further details.

3.3 How can a minority shareholder protect its interests?

It is usual to set out in a joint venture agreement a list of matters (commonly called Reserved Matters) which require the approval of the minority shareholders before they can be passed. A foreign investor who has a minority shareholding in the company can still effectively control the management and policies of the company by requiring that the Articles of Association provide that any decision, whether

at the Board or at the shareholders level, will require an affirmative vote of its appointee or itself.

The Companies Act also provides for recourse against oppression of the minority shareholders. Under Section 181 of the Companies Act, any shareholder of a company may apply to the court complaining that the company's affairs are being conducted "oppressively" or "in disregard" to his interest. The Companies Act provides the court with wide powers to remedy the acts and conduct complained of. If the Court comes to a finding that a company's affairs have been conducted oppressively and in disregard to a shareholder's interest, the Court has wide powers to remedy this, including making orders to –

- (a) direct or prohibit any act or cancel or vary any transaction or resolution;
- (b) regulate the conduct of the affairs of the company in future;
- (c) provide for the purchase of the shares or debentures of the company by other members or holders of debentures of the company or by the company itself;
- (d) in the case of a purchase of shares by the company provide for a reduction accordingly of the company's capital; or
- (e) provide that the company be wound up.

3.4 Are there any corporate governance norms?

The *Malaysia Code on Corporate Governance 2000 (revised in 2007)* sets out the principles of good corporate governance practice which companies listed on Bursa Malaysia are encouraged to practice.

Paragraph 15.26 of the Listing Requirements requires all listed companies to state in their annual report how they have applied the principles set out in the *Malaysian Code on Corporate Governance*, and give reasons for areas of non-compliance, and where applicable state the alternative practice adopted.

The Companies Act also contains provisions dealing with corporate governance and directors' duties. In addition, there are also corporate governance norms prescribed by Bank Negara Malaysia for licensed financial institutions to assist such licensed institutions and their stakeholders in instituting effective governance.

3.5 Are there any restrictions on a foreign-owned Malaysian company from raising capital/debt from Malaysian markets?

There is generally no restriction on a foreign-owned Malaysian company from raising capital/debt from Malaysian markets provided that it complies with the relevant provisions under the CMSA, Companies Act, Listing Requirements, the policies and guidelines issued by the SC and foreign exchange control requirements (where applicable).

3.6 Can a Malaysian company have foreign directors?

A Malaysian company may have foreign directors, provided that every company must have at least 2 directors (whether foreign or Malaysian) who shall both have their principal or only place of residence within Malaysia.

3.7 Are there any norms for the sharing of profits?

The usual way in which profits are shared is by way of declaration of dividends to shareholders, paid out of a company's profits. Profits must be available at the time that the dividends are declared. The power of a company to declare dividends is left to be decided by the articles of association, and may vary according to the particular class of shares of the company. The decision as to whether or not a company should declare a dividend is strictly and entirely a matter of internal management. The directors may recommend a particular rate of dividend, and the company in a general meeting will declare the dividend subject to the maximum recommended by the directors.

3.8 What type of shares can a company issue?

Companies can issue different types of shares with different rights attaching to each type of shares. Unless the company is an unlimited company, the memorandum of association will state the amount of share capital with which the company proposes to be registered, and type of classes of shares the share capital is to be divided into.

Examples include ordinary shares and preferences shares (cumulative or non-cumulative, participating, redeemable or convertible).

Where a company proposes to issue shares of a different class, it is good practice to set out the rights attaching to each class in the company's memorandum or articles, although this is not strictly required, except in relation to preference shares.

3.9 Are there any requirements in relation to the frequency and mode of holding board meetings?

There is no requirement under the Companies Act as to the frequency of holding board meetings. However, the *Malaysian Code on Corporate Governance* which applies to listed companies recommends that the board should meet regularly, with due notice of issues to be discussed. The board should record its deliberations, in terms of the issues discussed and the conclusions in discharging its duties and responsibilities. The board should disclose the number of board meetings held in a year and the details of attendance of each individual director in respect of the meeting held.

3.10 What responsibilities and liabilities do company directors have?

In addition to ensuring that the provisions under the Companies Act and other legislation relevant to a company's business and (in respect of listed companies) the Listing Requirements are complied with, the common law, the Companies Act and certain statutes imposes strict rules in relation to duties imposed on directors of Malaysian companies.

Directors are mainly responsible for the overall management of the company. When they exercise their powers, they must act honestly, with diligence and with reasonable skill. Each director has a fiduciary duty to the company and must not allow his/her personal interest to come into conflict with that duty.

When directors exercise their powers, it must be for the proper purpose and it must be exercised within the conferred discretion. In discharging the duties of his/her position, a director must act honestly and with the utmost good faith for the benefit of the company.

A director is prohibited from gaining any profit from the corporate assets, opportunities or information that may be obtained by virtue of his position.

A director is required under Section 132 of the Companies Act to perform his duties according to a reasonable standard of knowledge, skill and experience that is expected of him/her. In determining whether the director has sufficiently discharged his/her duties, the actual knowledge, skill and experience that the director has or held himself to have is taken into account.

4. LIQUIDATION

4.1 Please give a brief outline of the procedure involved in the winding-up or liquidation of a company in Malaysia. Are there any requirements specific to Malaysia?

There are 2 forms of winding-up or liquidation under the Companies Act, namely winding-up by the Court, and voluntary winding-up.

Winding-up by the Court is more of a situation where a company is “involuntarily” wound up by the Court on the petition of either a creditor, a shareholder, a liquidator, the Registrar of Companies or the Minister, usually on the grounds of inability to pay a debt, shareholder disputes, non-compliance with the statutory requirements or unlawful purposes. A Winding-Up Petition must be filed in Court, setting out the reasons for applying to wind-up the Company.

Voluntary winding-up is a managed form of liquidation by the shareholders to wind-up the affairs and to distribute the assets of the company.

If the company is solvent, the winding-up will be managed by the shareholders. Such a form of winding-up is known as a “members’ voluntary winding up”. In the case of a solvent winding-up, the majority of the directors of the company must sign a declaration of solvency to the effect that they have made an inquiry into the affairs of the company, and that at a meeting of directors, have formed the opinion that the company will be able to pay its debts in full within a period not exceeding 12 months after the commencement of the winding-up. A provisional liquidator, which can also be an officer of the company, must be appointed to undertake the liquidation.

If the company is insolvent, then the creditors will be the ones who are entitled to control the winding-up. This form of winding-up is known as a “creditors’ voluntary winding-up.” If the company is insolvent, and no declaration of insolvency can be made, then the company’s creditors will be entitled to appoint and control the liquidator. The company must call and convene the requisite creditors meetings and lay before the creditors a full statement of the company’s affairs, as well as disclose the circumstances leading up to the proposed winding-up. This will usually be a hostile affair if there are substantial debts due to the creditors, and the creditors are required to accept a substantial reduction of their claims. The provisional liquidator appointed for a creditors’ voluntary winding-up must be an approved (i.e. licenced) liquidator.

4.2 Please give a brief outline of the bankruptcy proceedings in Malaysia. Are there any requirements related to the filing specific to Malaysia?

Bankruptcy proceedings in Malaysia are governed by the Bankruptcy Act 1967. A bankruptcy proceeding is commenced by the presentation of a bankruptcy petition in Court. A creditor who wishes to file a bankruptcy in Malaysia must show that the debtor has a minimum debt of RM30,000 and is unable to pay this debt.

A person will be declared a bankrupt once the Receiving and Adjudication Order is made. When the Receiving and Adjudication Order has been made, the estate of the bankrupt vests with the Official Assignee and the bankrupt is obliged by law to report to the office of the Official Assignee, and must provide a full report and information relating to his financial affairs.

5. FOREIGN INVESTMENT REGULATIONS

5.1 What are the sources of law regulating foreign investment in Malaysia?

The main sources of rules regulating foreign investment in Malaysia are:

- (a) ministerial and other governmental guidelines and policies;
- (b) exchange control regulations; and
- (c) legislative enactments.

5.2 What are the various methods by which foreign investment in Malaysia is possible?

There are no specific methods by which foreign investments must be set up in Malaysia. In practical terms, foreigners desiring to carry on a business in Malaysia have the following options:

- register a branch office if the investor is a foreign company;
- incorporate a Malaysian company as its subsidiary;
- acquire all or a majority of the shares of an existing Malaysian company; or
- enter into a joint venture with a Malaysian company or individual, typically through holding shares in a newly-incorporated joint venture company.

In deciding to invest in Malaysia, foreign investors should also look towards applying to the Malaysian Investment Development Authority ("MIDA") for special status, such as multimedia super corridors,

operational headquarters, international procurement centres, regional distribution centres, international procurement centres, regional centres or representative offices. These special status companies are accorded tax incentives.

5.3 What is the current foreign direct investment policy?

A) New Economic Policy

At the heart of the government's policy on investment was the New Economic Policy popularly known as the "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 which consists of Bumiputeras, non-Bumiputeras and foreign interests in the proportion of 30%, 40% and 30% respectively.

B) New Development Policy

Following the expiry of the NEP in 1990, the Government introduced the New Development Policy (NDP) in 1991 as the framework for economic policy between 1991 and 2000. While still holding the NEP's twin objectives of poverty eradication and ethnic redistribution of wealth, NDP places greater emphasis on redistribution through rapid growth.

C) Economic Planning Unit ("EPU") and the Foreign Investment Committee ("FIC")

The Economic Planning Unit of the Prime Minister's Department is the principal government agency responsible for the preparation of development plans for Malaysia. The Economic Planning Unit was established 1961 in formulating the development policies for the nation and the National Development Planning Committee under the EPU has been assigned the responsibility for the formulation, implementation, progress evaluation and revision of development plans.

Based on the objectives of the NEP, the Foreign Investment Committee was formed in 1974 under the wing of the EPU as part of the Malaysian Prime Minister's Department to regulate, *inter alia*, the acquisition of assets, mergers and takeovers in accordance with the guidelines and policies as laid down by the Malaysian Government.

In order to carry out the objectives of the new economic policies and framework by the Malaysian Government and in line with its functions to oversee the acquisition of interest, mergers, takeovers and properties by local and foreign interests, the FIC has since its

formation formulated certain policy guidelines in line with the economic developments and the prevailing decisions of the Malaysian Government.

The Guidelines issued by the FIC which were effective on 1 January 2008 were:-

- i) *Guideline on the Acquisition of Interest, Mergers and Takeovers By Local and Foreign Interests* (“FIC Acquisition Guidelines”); and
- ii) *Guideline on the Acquisition of Properties by Local and Foreign Interests* (“FIC Property Guidelines”).

Prior to 30 June 2009, any transactions to which the FIC Guidelines were applicable required the approval of the FIC, which is typically given subject to the equity and other conditions attached to the approval.

D) De-Regulation of the Guidelines issued by the FIC

As a major initiative to ease doing business in Malaysia and to make Malaysia more attractive as an investment destination, a complete deregulation of the investment guidelines administered by the FIC was announced by the Prime Minister of Malaysia during the Invest Malaysia Conference on 30 June 2009. As such, with effect from 30 June 2009:

- (i) the scope of the FIC with respect to property is rationalised and the FIC Property Guidelines are liberalised. The FIC Property Guidelines are replaced by the *Guideline on the Acquisition of Properties* (“EPU Guideline”). Please refer to Paragraph 5.7 below for discussion of the EPU Guideline; and
- (ii) the FIC Acquisition Guidelines are repealed and the FIC will no longer process any share transactions, nor impose equity conditions on such transactions. The national interest in terms of strategic sectors will continue to be safeguarded through sectoral regulators and companies in such sectors will continue to be subject to equity conditions imposed by their respective sector regulator.

5.4 What are the circumstances under which regulatory approval is required?

For every industry, there are respective sector regulations issued by the relevant governmental departments. This includes regulations that could impose restrictions on foreign ownership of equity of

the company and some which require that prior regulatory approval be obtained before the commencement of business operations.

As well as certain restrictions limiting the extent of foreign investment in certain sectors, there are also provisions requiring minimum "bumiputera" ownership. Bumiputera is a term widely used in Malaysia and embraces certain indigenous ethnic groups. Pro-Bumiputera policies exist to safeguard the interests of these indigenous groups.

The principal industries which are subject to restrictions on investment include:

- (a) Financial services;
- (b) Capital markets services;
- (c) Insurance and Takaful industry;
- (d) Petroleum industry;
- (e) Communications and multimedia;
- (f) Wholesale and distributive trade (in respect of hypermarket);
- (g) Education services;
- (h) Freight forwarding and shipping;
- (i) Water;
- (j) Energy supply; and
- (k) Professional services.

Non-compliance with foreign equity restrictions can result in one or more of the following sanctions:

- (a) revocation of licence of the company (usually after a right of hearing before the relevant regulatory authority);
- (b) criminal liability under the relevant legislation;
- (c) where there is no criminal sanction prescribed, the company or party which does not comply may be blacklisted by governmental agencies.

5.5 Can a foreign company set up a wholly-owned subsidiary in Malaysia?

There is no prohibition against a foreign company setting up a wholly-owned subsidiary in Malaysia. However, there are restrictions regarding the foreign ownership of equity in certain regulated industries. Please see Paragraph 5.4 above.

5.6 How long do regulatory approvals take?

This will vary on a case-by-case basis, and also depending on the relevant governmental departments.

5.7 Are there any restrictions on foreign ownership of land?

The information below is based on the applicable laws in West Malaysia only.

All lands are subject to three categories of land use: agriculture, building and industry.

In the case of land which is subject to the category of agriculture or building or to any condition requiring its use for any agricultural or building purpose, a dealing (e.g. transfer, charge and lease) can be effected in favor of a non-citizen of Malaysia or a foreign company only upon the prior written approval of the State Authority (Section 433B of the *National Land Code 1965* ("NLC")). However, this restriction does not apply in respect of industrial land.

A "Foreign company" is defined in Section 433A of the NLC to mean:

- (a) a foreign company as defined in sub-section (1) of section 4 of the Companies Act;
- (b) a company incorporated under the Companies Act with fifty per cent or more of its voting shares being held by a non-citizen, or by a foreign company referred to in paragraph (a), or by both, at the time of the proposed acquisition of any land or any interest in land or at the time of the execution of the instrument or deed in respect of any alienated land or any interest therein, as the case may be; or
- (c) a company incorporated under the Companies Act with fifty per cent or more of its voting shares being held by a company referred to in paragraph (b), or by a company referred to in paragraph (b) together with a non-citizen or a foreign company referred to in paragraph (a), at the time of the proposed acquisition of any land or any interest in land or at the time of the execution of the instrument or deed in respect of any alienated land or any interest therein, as the case may be.

Under the EPU Guideline, any acquisition of immovable property (except residential units) valued at RM20 million and above, where such direct or indirect acquisition results in:

- (i) dilution in the ownership thereof held by a Bumiputera interest and/or a government agency (direct acquisition of immovable property); or
- (ii) change of control of the company owned by a Bumiputera interest and/or a government

agency, having immovable property more than 50% of its total assets;

requires approval from the EPU. Such acquisition, if approved, is also subject to the conditions that the acquiring company is to have at least:

- (a) 30% Bumiputera interest shareholding; and
- (b) RM250,000 paid-up capital for the local company owned by a foreign interest.

A “Bumiputera interest” is defined in the EPU Guideline to mean “any interest, associated group of interests or parties acting in concert, which comprises:

- (a) A Bumiputera individual; and/or
- (b) A Bumiputera institution and trust agency; and/or
- (c) A local company or local institution whereby the parties as stated in item (a) and/or (b) hold more than 50% of the voting rights in that local company or local institution.”

Further, a foreign interest is only allowed to acquire immovable property (residential or otherwise) valued at RM500,000 and above.

A “Foreign interest” is defined in the EPU Guideline to mean “any interest, associated group of interests or parties acting in concert which comprises:

- (a) an individual who is not a Malaysian citizen; and/or
- (b) an individual who is a Permanent Resident; and/or
- (c) a foreign company or institution; and/or
- (d) a local company or local institution whereby the parties as stated in item (a) and/or (b) and/or (c) hold more than 50% of the voting rights in that local company or local institution.”

Although the EPU Guidelines are governmental guidelines which do not presently have the force of law as they are not legislation passed by Parliament or regulations under any existing laws and do not impose any statutory penalty for non-compliance, there are indirect sanctions that the EPU can impose. The EPU Guideline is enforced through the co-operation of certain government departments or agencies, and a breach of the EPU Guidelines could lead to indirect sanctions by the relevant authorities. For example, the land office/land registry will not register a property in favour of the foreign interest without the EPU approval or where the immovable property intended to be acquired by the foreign interest is valued at less than RM500,000. Another example is that the EPU could persuade local authorities (such as the immigration department for the application of work visas for expatriate employees, or the local town council) to “blacklist” such companies or parties who are not in

compliance with the guidelines, by refusing to grant licenses or permits that may be required under the Malaysian law for the operations of the company or its subsidiaries or in respect of their employees.

6. LABOUR

6.1 What are the principal regulations governing the rights and obligations of employees?

Employment relationships are regulated by the following legislation:

Employment Act 1955 (EA). This applies to Malaysian and foreign citizens employed in West Malaysia :

- with income up to and including RM1,500 (about US\$486) a month; or
- in certain categories of employment, such as manual labourers, supervisors of manual labourers, persons who maintain or operate mechanically-propelled vehicles, domestic servants and in certain positions in sea-going vessels.
- Equivalent legislation exists for employees in East Malaysia, although the provisions may differ.

Industrial Relations Act 1967 (IRA). This applies to Malaysian and foreign citizens employed in Malaysia and governs:

- relations between employers and employees (including trade unions); and
- prevention and settlement of disputes.

Trade Unions Act 1959. This applies to both foreign and Malaysian employees. It regulates the registration and constitution of trade unions and their rights and liabilities.

Employees Provident Fund Act 1991 (EPF). This applies to employers and to Malaysian and foreign citizens employed in Malaysia. Employers and most employees must contribute to a provident fund; contributions by foreign employees and domestic servants are voluntary. Money can be withdrawn from the fund towards certain stipulated expenses or when the employee reaches the age of 55.

Employees' Social Security Act 1969 (SOCSO). This provides social security for all employees whose gross monthly income is below RM3,000. Once an employee is a registered contributor, he will not cease to be entitled to SOCSO contributions only by reason of his salary exceeding RM3,000 a month.

An employer cannot contract out of the obligations imposed by the EA, EPF and SOCSO. Regardless of any choice of law clause, in adjudicating an unjust dismissal case, the Industrial Court is likely to refuse to be guided by the laws of another jurisdiction that are less favourable to the employee than the IRA.

6.2 Are there any maximum working hours prescribed for employees?

Under the EA, the prescribed maximum working hours are 48 hours. Employees may be asked to work overtime, but subject to a maximum of 104 overtime hours per month.

6.3 How can the services of an employee be terminated?

The IRA provides for, among other things, the security of employment contracts.

An employee can only be dismissed for just cause or excuse, such as:

- Poor performance.
- Redundancy.
- Misconduct.

The burden is on the employer to prove that the dismissal was with just cause or excuse. If an employee is dismissed without just cause or excuse, he can seek either:

- Reinstatement and back wages (the wages he would have earned had he not been dismissed).
- Back wages plus compensation in lieu of reinstatement of one month's salary for each year of service.

Back wages are limited to 24 months' wages.

Redundancies are regulated by the Code of Conduct for Industrial Harmony 1975 (1975 Code). Selections for redundancy must be in accordance with the last-in first-out principle, and every effort must be made to offer the employees alternative employment. Employees who are dismissed on the ground of redundancy are entitled to termination notice (as prescribed in their contracts) and fair severance benefit, which in the case of employees who fall within the EA must be no less than the minimum termination notice period and termination benefit prescribed by the EA.

6.4 Are there mandatory requirements for grant of leave or public holidays?

Under the EA, an employee is entitled to 10 days' public holiday. Employees may be required to work during public holidays but must be paid overtime wages.

The prescribed leave entitlement for employees under the EA is as follows –

- For an employee who has worked less than 2 years - 8 days
- For an employee who has worked between 2 to 5 years – 12 days
- For an employee who has worked more than 5 years – 16 days

6.5 Can employment contracts contain restrictive covenants such as non-compete clauses?

Non-competition clauses are unenforceable by law in Malaysia. An employer may, however, impose certain forms of restrictive covenants such as non-solicitation or confidentiality covenants (subject always to the reasonableness test) on employees.

6.6 Can the employment contract compel employees to work for an establishment for a minimum period of time?

An employment contract may stipulate a specific or minimum term/period of employment, but if an employee breaches such a term, it is unlikely that the court will order specific performance of the covenant to compel the employee to work for the employer. The employer will likely only be entitled to claim damages for losses or damages suffered, if any, for such a breach.

6.7 Are women employees entitled to maternity leave?

Yes, the EA stipulates that women employees are entitled to two (2) months' maternity leave.

6.8 Are male employees entitled to paternity leave?

No, there is no statutory requirement to compel employers to grant paternity leave.

6.9 What are the requirements for the issuance of shares by a Malaysian company to its employees/directors?

A company intending to issue shares to its employees/directors under an Employees' Share Option Scheme (ESOS) must comply with the requirements set out for such an exercise under the Listing Requirements of Bursa Malaysia, SC's Guidelines on Due Diligence Conduct for Corporate Proposals and under the Companies Act.

These include :-

- (a) Obtaining the approval of Bursa Malaysia;
- (b) Drafting and preparing the by-laws for the scheme;
- (c) Obtaining the approval of shareholders in a general meeting, both for the scheme, and for the issuance of the new shares;
- (d) Conducting a due diligence exercise as prescribed by SC.

6.10 Can employees of a Malaysian company be granted employee stock options in a foreign company?

There is no prohibition on such schemes in Malaysia.

6.11 Are employee stock options eligible for favorable tax treatment?

No.

7. INTELLECTUAL PROPERTY

7.1 What types of intellectual property rights are protected in Malaysia?

The following are intellectual property rights protected in Malaysia :-

- Patents

The owner of a patent has the exclusive right to exploit the patented invention and transfer, assign or license the patent.

A patent must be registered with the Registrar of Patents (*Patents Act 1983*). Patents granted

after 1 August 2001 are protected for 20 years from the date of filing of an application for registration. Malaysia has acceded to the Patent Cooperation Treaty (PCT), which became effective on 16 August 2006. The PCT provides a unified procedure for filing patent applications to protect inventions globally.

- Trademarks

The owner of a registered trademark has the exclusive right to:

- a) use the trademark in relation to the goods or services for which it is registered;
- b) prevent others from using an identical or similar mark in a way that is likely to deceive or confuse potential customers.

A trademark can be protected by registration with the Registrar of Trade Marks (*Trade Marks Act 1976*). Protection lasts for ten years from the date of registration. This can be extended indefinitely for additional ten-year periods by paying the requisite renewal fees. Registered and unregistered trademarks can also be protected using the common law right of passing off, which protects the goodwill and get-up connected to a trademark.

- Registered designs

The owner of a registered design has the exclusive right to:

- a) produce, sell, hire or import any article that incorporates the design;
- b) prevent third parties from, among other things, applying or imitating the design in relation to any article without permission.

A design must be registered with the Registrar of Industrial Designs (*Industrial Designs Act 1996*). Protection lasts for five years from the date of filing of an application for registration. This period of protection can be extended for two further periods of 5 years each.

- Copyright

Copyright protection arises automatically on creation of the work. Malaysia is party to the Berne Convention for the Protection of Literary and Artistic Works 1971, which gives citizens of participating countries the same rights in all relevant countries.

Protection for literary, musical or artistic works lasts for the life of the author plus 50 years.

Protection for films, sound recordings, broadcasts and performances lasts for 50 years from the beginning of the calendar year after which the work was first published or performed.

- Confidential information

Confidentiality is breached by disclosure, or threatened disclosure, of the confidential information. An action for breach of confidence can be made under contract, tort and equity law.

Confidential information can, in theory, be protected indefinitely. However the length of protection can be restricted to a reasonable period by the courts or a defined period by contract.

7.2 Are there any international treaties regarding intellectual property to which Malaysia is not a party?

Malaysia is a member of the following international treaties administered by WIPO:

- (a) Berne Convention
- (b) Nice Agreement
- (c) Paris Convention
- (d) Patent Cooperation Treaty
- (e) Vienna Agreement
- (f) WIPO Convention

Presently, Malaysia is not a member of any of the other international treaties regarding intellectual property besides the ones listed above.

7.3 Are there any regulations or guidelines by public institutions, such as the Fair Trade Commission or some other competition authority, in regard to intellectual property licenses?

There is no regulation or guideline which specifically relates to intellectual property licenses. However, it should be noted that matters relating to the grant of franchises are governed by the Franchise Act 1998.

8. EXCHANGE CONTROL

8.1 Are there any restrictions on the amount of local currency that may be brought into or taken out of Malaysia?

The central bank of Malaysia, known as Bank Negara Malaysia is the monetary authority in Malaysia. It has wide powers to supervise and control the activities of commercial banks and all other financial institutions and also to regulate the financial industry. Bank Negara Malaysia is also the Controller of Foreign Exchange (“Controller”), the exchange control authority.

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 the financial and economic stability of the country. All rules are applied uniformly to transactions carried out with all countries, with the exception of Israel, for which special restrictions apply.

Malaysia’s policy of continual liberalisation of these regulations means that the Central Bank of Malaysia, also known as Bank Negara Malaysia, will make changes as appropriate, in accordance with circumstances. It is vital to make reference to Bank Negara’s recent measures in order to ascertain the current position and policies in place.

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

Residents comprise:

- Citizens of Malaysia (excluding persons who have obtained permanent resident status of a territory outside Malaysia and are residing abroad);
- Non-citizens who have obtained permanent resident status in Malaysia and are residing permanently in Malaysia; or
- Persons, whether a body corporate or unincorporated, registered or approved by any authority in Malaysia.

Non-residents comprise:

- Persons other than residents;
- Overseas branches, overseas subsidiaries, overseas regional offices, sales offices and representative offices of resident companies;
- Embassies, Consulates, High Commissions, supranational or international organisations

recognised by the Government of Malaysia; or

- Malaysian citizens who have obtained permanent status of a territory outside Malaysia and are residing outside Malaysia.

Non-residents are free to invest in Malaysia in any form. There is no restriction on the repatriation of capital, profits, and income earned from Malaysia, including salaries, wages, royalties, commissions, dividends, interest, fees or rental arising from investments in Malaysia.

Individuals are allowed to bring in and take out ringgit notes up to USD10,000 equivalent, and applications need to be to the Controller for import and export of ringgit exceeding USD10,000.

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

A non-resident may open and maintain any number of External Accounts with any onshore financial institutions. An External Account is a ringgit account belonging to a non-resident or where the beneficiary of the funds in the account is a non-resident. The ringgit funds in an External Account can be used for payments to residents for any purposes except for the:

- Lending in ringgit to residents other than as permitted by the Controller; and
- Payment on behalf of a third party.

There is no restriction on the amount of ringgit funds to be retained in the External Accounts. Funds in the External Account can be converted into foreign currency with the licensed onshore banks and repatriated at any time.

Please see Paragraph 8.3 below.

8.2 Are there any restrictions on the amount of foreign currency that may be brought into or taken out of Malaysia?

There is no limit on the amount of foreign currency notes that could be brought into Malaysia, but individual are only allowed to take out foreign currency notes and traveller's cheques up to the amount of the foreign currency that they brought into Malaysia.

There is no restriction for a non-resident to open and maintain any number of foreign currency accounts with licensed onshore banks in Malaysia. There is no restriction on the amount to be

retained in the accounts. Funds in the accounts may be used for any purpose and may be converted into ringgit with licensed onshore banks or may be repatriated at any time.

Please see Paragraph 8.3 below.

8.3 Are there any restrictions on the inflow or outflow of foreign exchange?

There are instances where a foreign exchange transaction would require the prior approval of the Controller or where notification must be made to the Controller. Set out below are some of the applicable foreign exchange rules.

A) Restrictions in relation to the extension of credit facilities to resident companies

There are generally no restrictions in relation to ringgit and foreign currency borrowings by resident companies except for:-

- (i) Ringgit borrowings from a non-resident non-bank parent company are only allowed to finance real sector activities in Malaysia;
- (ii) Ringgit borrowings from other non-resident non-bank companies or individuals up to RM1 million for use in Malaysia;
- (iii) Foreign currency borrowings from non-residents (other than non-resident non-bank related companies) including through the issuance of foreign currency-denominated bonds onshore and offshore, up to RM100 million equivalent in aggregate on a corporate group basis.

B) Restrictions in relation to the extension of credit facilities to non-resident companies

Non-resident companies can borrow any amount in ringgit, only for the purposes of:

- (i) financing activities in the real sector in Malaysia;
- (ii) refinancing the purchase or construction of residential and commercial property in Malaysia, except for the purchase of land only;
- (iii) margin financing for securities traded on Bursa Malaysia; and
- (iv) settlement of goods and services in ringgit with residents (trade financing facilities)

There is no restriction on the amount of foreign currency borrowings from licensed_onshore banks, licensed International Islamic Banks and resident companies with no domestic ringgit borrowing. However, the amount is limited to RM 50 million equivalent in aggregate per

calendar year on a corporate group basis if the resident company has domestic ringgit borrowing.

9. M&A

9.1 What are the various methods of mergers and acquisitions available to Malaysian companies?

There is no provision under Malaysia law for mergers in the sense of combining two legal entities into one new entity. Mergers and acquisitions in Malaysia are usually carried out either by way of acquisitions of shares in target companies or acquisitions of businesses or assets of companies.

Mergers and acquisitions in Malaysia are generally governed by the Companies Act, CMSA, the *Malaysian Code on Takeovers and Mergers 2010* (and accompanying Practice Notes) ("the Code") and if the companies involved are listed on Bursa Malaysia, the listing requirements of Bursa Malaysia. The SC and Bursa Malaysia (if listed) are the principal regulatory authorities in the context of mergers and acquisitions.

The main means of obtaining control of a public company in Malaysia are either:

by making a general takeover offer (whether mandatory, voluntary or partial) to the target's shareholders; or

through a scheme of arrangement between the target and its shareholders or any class of them (section 176 of the Companies Act) ("Section 176 Scheme"). A Section 176 Scheme requires the consent of a majority in number of the shareholders having 75% in value of the target's shares as well as the approval of the court. Once these approvals are obtained, the court order is binding on the rest of the target's shareholders.

9.2 What is the process and timing for each method?

A) Take-over Offer

The Code and *Guidelines on Contents of Applications relating to Take-overs and Mergers* (issued by the SC) came into force on 15 December 2010, replacing the *Malaysian Code on Take-Overs and Mergers 1998* and the practice notes that interpreted the 1998 Code respectively, whilst the *Guidelines on Take-over Applications* replaces the *Guidelines on Offer Documentation and the Format and Contents of Applications*.

Day 1	<p>Bidder publishes a press notice in at least three main newspapers, one of which shall be in the national language and one in the English language, and sends written notice of the takeover offer to:</p> <p>the board of directors of the target or its advisers; Bursa Malaysia (if securities of the target are listed); and the SC.</p> <p>The bidder must also make an immediate announcement of the takeover offer if the bidder's securities are listed.</p>
Day 2 (within 24 hours of the receipt of the written notice)	Target's board of directors must inform Bursa Malaysia (if listed). Publication of a press notice in at least three main newspapers by the target.
Day 4.	Bidder submits a draft offer document to SC for approval.
Day 7	Target's board of directors posts a written notice to shareholders on the offer.
Day 21 (P)	Bidder posts the offer document (as approved by SC) to the target's board of directors and shareholders.
By day 31 (P + 10) (P = date of posting of offer document)	<p>Target's board of directors' comments, opinion and information on the offer in a form of circular (with the approval of SC) posted to shareholders.</p> <p>Independent advice circular posted (subject to SC's approval) by the appointed independent adviser to the target's board of directors and shareholders.</p>
Day 42 (P + 21)	Earliest date for closing the offer.
Day 60 (P+39)	Target's board of directors announces material information relating to trading results, profit or dividend forecasts, and asset valuation.
Day 67 (P + 46)	Last date to revise the offer.
Day 81 (P + 60)	<p>Last date for fulfilling all conditions of the offer.</p> <p>Last day for acceptance of offer if it has become or is declared unconditional as to acceptances before day 67 (P + 46) or the offer has already become or been declared unconditional as at the date of the posting of the offer document (P).</p> <p>Earliest date to close the offer if the offer is revised on the last possible date (day 67 or (P + 46)).</p>
Day 95 (P + 74)	Last day for acceptance if the offer has become or is declared unconditional as to acceptances after day 67 (P + 46).

If a competing offer made during the offer period of an existing offer may result in an extension of the offer period of the existing offer or a revision of the existing offer, the offer document of the existing offer is deemed to have been posted on the date of posting of the competing takeover offer document. The bidder will not be permitted to revise the existing offer after 46 days from the date of posting of the competing offer document.

B) Scheme of Arrangement

There is no fixed timing for a Scheme of Arrangement. Generally, a company which intends to propose a compromise or arrangement with its creditors and/or members will, upon finalization of such plans, apply to the Court to hold a Court Convened Meeting of such creditors and/or

members to enable a vote to be taken of such a compromise or arrangement. Such a Court Convened Meeting is generally held within one (1) month of the Court Order given to convene the meeting, but may be adjourned if approved by the creditors/members. If the compromise or arrangement is approved by the creditors/members, then a Petition must be filed in Court to obtain the Court's sanction of the scheme of arrangement.

Shareholders' Approval

A shareholders' approval is required under Section 132C of the Companies Act if a company intends to carry into effect any arrangement or transaction for the acquisition or disposal of an undertaking or property of a 'substantial value' or constitutes a "substantial portion". Section 132C(1B) provides that an undertaking or property shall be considered to be of a substantial value or constitutes a substantial portion if:

- (a) its value exceeds 25% of the total assets of the company;
- (b) the net profits (after deducting all charges except taxation and excluding extraordinary items) attributed to it amounts to more than 25% of the total net profit of the company; or
- (c) its value exceeds 25% of the issued share capital of the company,

whichever is the highest.

In respect of listed entities, the term substantial value or substantial portion would follow the same value prescribed by the provisions under the Listing Requirements. Please refer to Paragraph 9.4 below.

Failure to obtain the shareholders' approval would deem the transaction void under Section 132C except in favour of any person dealing with the company for valuable consideration and without actual notice of the contravention.

A shareholders' approval is required under Section 132E of the Companies Act if a company intends to carry into effect any arrangement or transaction where a director or a substantial shareholder of the company or its holding company, or a person connected with such a director or substantial shareholder:

- (a) acquires or is to acquire shares or non-cash assets of the requisite value, from the company; or
- (b) disposes of or is to dispose of shares or non-cash assets of the requisite value, to the company.

An unlisted share is of the requisite value if at the time of the transaction:

- (a) its value exceeds RM250,000; or
- (b) if its value does not exceed RM250,000 but exceeds 10% of the company's asset value provided it is not less than RM10,000.

In respect of listed entities, the requisite value will follow the same value prescribed by the provisions under the Listing Requirements. Please refer to Paragraph 9.4 below.

There are exceptions to which Section 132E will apply, including circumstances of an acquisition or disposal of assets between wholly-owned subsidiaries and their holding companies.

Failure to obtain the shareholders' approval would deem the transaction void under Section 132E.

9.3 What are the criteria for determining which method is most suited to a particular case?

In deciding which method is most suited to a particular case, consideration should be given to the objectives of the parties, costs involved (including stamp duty) and financial, tax, market conditions and the regulatory approvals required.

9.4 What are the additional requirements, if any, if one of the companies involved in the restructuring is listed on one or more of the stock exchanges in Malaysia?

Companies listed on Bursa Malaysia are required to comply with the Listing Requirements, which include disclosure of relevant information and obtaining Bursa Malaysia's prior approval.

Chapter 9 of the Listing Requirements sets out the continuing disclosure requirements that must be complied with, amongst others, by a listed issuer, its directors or advisers. A listed issuer must make immediate public disclosure of any information, if it is reasonably expected to have a material effect on, *inter alia*:

- the price, value or market activity of any of the listed issuer's securities; or
- the decision of a holder of securities of the listed issuer or an investor in determining his choice of action.

This includes information which:-

- concerns the listed issuer's assets and liabilities, business, financial condition or prospects;
- relates to dealings with employees, suppliers, customers and others;
- relates to any event affecting the present or potential dilution of the rights or interests of the listed issuer's securities; or
- relates to any event materially affecting the size of the public holding of its securities.

A. Acquisitions and Disposals

Chapter 10 of the Listing Requirements sets out the requirements that must be complied with in respect of transactions entered into by a listed company or its subsidiaries. Part D of Chapter 10 of the Listing Requirements sets out the compliance requirements of the listed company when entering into transactions involving acquisition or disposal of assets, but excludes transactions of a revenue nature in the ordinary course of business or transactions entered into between a listed company and its wholly-owned subsidiaries:

- (a) For a transaction where any one of the percentage ratios is equal to or exceeds 5%, as soon as possible after the terms of the transaction have been agreed upon, the listed company must make an immediate announcement to Bursa Malaysia of such transaction, which announcement shall include the information set out in Appendix 10A.
- (b) For a transaction where any one of the percentage ratios is equal to or exceeds 25%, in addition to making an announcement (as set out in sub-paragraph(a) above), the listed company must obtain the approval of its shareholders in a general meeting of the transaction and ensure that the circular to the shareholders includes the information set out in Appendix 10B.

"percentage ratios" is defined under the Listing Requirements to mean the figures, expressed as a percentage, resulting from each of the following calculations:

- (i) the value of the assets which are the subject matter of the transaction, compared with the net assets of the listed issuer;
- (ii) net profits (after deducting all charges and taxation and excluding extraordinary items) attributable to the assets which are the subject matter of the transaction, compared with the net profits of the listed issuer;

- (iii) the aggregate value of the consideration given or received in relation to the transaction, compared with the net assets of the listed issuer;
- (iv) the equity share capital issued by the listed issuer as consideration for an acquisition, compared with the equity share capital previously in issue (excluding treasury shares);
- (v) the aggregate value of the consideration given or received in relation to the transaction, compared with the market value of all the ordinary shares of the listed issuer (excluding treasury shares);
- (vi) the total assets which are the subject matter of the transaction compared with the total assets of the listed issuer;
- (vii) in respect of joint ventures, business transactions or arrangements, the total project cost attributable to the listed issuer compared with the total assets of the listed issuer or in the case where a joint venture corporation is incorporated as a result of the joint venture, the total equity participation of the listed issuer in the joint venture corporation (based on the eventual issued capital of the joint venture corporation) compared with the net assets of the listed issuer. The value of the transaction should include shareholders' loans and guarantees to be given by the listed issuer; or
- (viii) the aggregate original cost of investment of the subject matter of the transaction divided by the net assets of the listed issuer, in the case of a disposal and where the acquisition of the subject matter took place within the last 5 years;

B. Related Party Transactions ("RPT")

Part E of the Listing Requirements sets out the requirements dealing with transactions entered into by a listed issuer or its subsidiaries which involves the interest, direct or indirect, of a related party.

- (a) Where any one of the percentage ratios of an RPT is 0.25% or more, a listed issuer is required to make an announcement to Bursa Malaysia as soon as possible after the terms of the transaction have been agreed upon. The announcement must include the information set out in Appendices 10A and 10C of Chapter 10 of the Listing Requirements.

- (b) Where any percentage ratio of an RPT is 5% or more, a listed issuer must, in addition to the obligations set out in Paragraph (a) above:
- (i) issue a circular to its shareholders which includes the information set out in Appendices 10B and 10D of Chapter 10 of the Listing Requirements;
 - (ii) obtain the approval of its shareholders in a general meeting for the RPT;
 - (iii) appoint an independent adviser before the terms of the transaction are agreed upon.

The listed issuer is required to submit the draft circular to the Exchange together with a checklist showing compliance with Appendix 10B and 10D.

The duties and responsibilities of the independent adviser are as follows:

- (a) to comment on whether the transaction is fair and reasonable so far as the shareholders are concerned and whether the transaction is detrimental to the minority shareholders;
- (b) to advise minority shareholders on whether they should vote in favour of the transaction;
- (c) to take all reasonable steps to satisfy itself that it has a reasonable basis to make the comments and advice in sub-paragraphs (a) and (b) above.

Where any percentage ratio of an RPT is 25% or more, a listed issuer must, in addition to the obligations set out in sub-paragraphs (a) and (b) above, appoint a main adviser before the terms of the transaction are agreed upon.

The duties and responsibilities of the main adviser are as follows:

- (i) to ensure that the transaction is carried out on fair and reasonable terms and conditions and not to the detriment of minority shareholders of the listed company and complies with the relevant laws, regulations or guidelines;
- (ii) to ensure full disclosure of all information required to be disclosed in the announcement and circular; and

- (iii) to confirm to Bursa Malaysia, after the transaction has been completed and all necessary approvals obtained, that it has discharged its responsibility with due care in regard to the transaction.

9.5 What are the regulations restricting the acquisition of a certain percentage of shares in a company and when do compulsory takeover regulations apply?

A. Mandatory General Offer

Section 9 of the Code provides that the obligation to make a mandatory bid arises when an acquirer:

- (a) has obtained control in a company; or
- (b) holds more than 33% but less than 50% of the voting shares of a company and such acquirer acquires in any period of six months more than 2% of the voting shares in a company.

An "acquirer" is defined in section 216(1) of the CMSA as:

- (a) a person who acquires or proposes to acquire control in a company, whether the acquisition is effected by the person or by an agent; or
- (b) two or more persons who, acting in concert with one another, acquire or propose to acquire control in a company, whether the acquisition is effected by the persons or by an agent.

In relation to an acquisition of shares, "control" is defined in section 216(1) of the CMSA as the acquisition or holding of, or entitlement to exercise or control the exercise of, voting shares or voting rights of more than 33%, or such other amount as may be prescribed by the Code in a company, howsoever effected.

The Practice Notes issued pursuant to the Code also set out various circumstances that can give rise to an obligation to make a mandatory offer. These include the following situations:

- (a) where a holder's shareholding in a company has been diluted as a result of the issue

of new voting shares by that company and any of the thresholds enumerated in section 9 of the Code are breached when the holder acquires additional voting shares in that company to restore its holding to the original level;

- (b) where a share buyback by a company results in a breach by a holder of any of the thresholds enumerated in section 9 of the Code in certain circumstances;
- (c) where any member of a group of persons acting in concert acquires voting shares such that it breaches any of the thresholds enumerated in section 9 of the Code, the obligation to make a mandatory offer will apply to all members of the group of persons acting in concert.

It is possible for a holder who has breached the thresholds set out in section 6(4) of the Code to apply to the SC for an exemption from the obligation to make a mandatory offer.

Where a person fails to comply with the takeovers disclosure regime under any of the provisions of Division 2 of Part VI of the CMSA or the Code or any rulings made under section 217(4) of the CMSA (including the Practice Notes) the SC may take one or more of the following actions:

- (i) direct the person to comply with, observe or give effect to the relevant provisions;
- (ii) impose a penalty not exceeding RM1.0 million, in proportion to the severity or gravity of the breach;
- (iii) reprimand the person in breach;
- (iv) direct the stock exchange to suspend the listing and trading of the securities of the defaulting listed corporation;
- (v) direct the stock exchange to deprive the defaulting person of access to the facilities of the exchange or prohibit them from engaging in transactions using such facilities;
- (vi) require the person to take such steps as the SC may direct to remedy the breach or mitigate the effect of the breach, including making restitution to any other person aggrieved by the breach.
- (vii) A person who submits any document or information which is false or misleading or

omits any material information or engages in deceptive or misleading conduct shall, upon conviction, be punished with a fine not exceeding RM3.0 million or imprisonment not exceeding 10 years, or both.

B) Compulsory Acquisition

A bidder may compulsorily acquire the shares if the bidder has received 90% acceptances (excluding the shares already held by the bidder and its nominee or related corporations) within four months after the making of the takeover offer. The right is exercisable by the bidder giving, within two months after the takeover offer has been so accepted, notice in the prescribed form to the shareholders. If the bidder does not receive 90% acceptances, the bidder may apply to the court for authority to compulsorily acquire the shares of the remaining shareholders.

9.6 Would the above forms of restructuring also be available to foreign companies?

In general, local legislation, regulations and practices (save only for matters specific to Malaysian incorporated companies) also apply to foreign companies.

9.7 Is there any legislation or other form of regulation which applies to restrict the potential anti-competitive results of a sale or acquisition of a business or company within Malaysia?

The Malaysian *Competition Act 2010* has been gazetted on 10 June 2010 but will only come into force on 1 January 2012. When the Competition Act comes into effect, it will apply to any commercial activities within and outside of Malaysia insofar as the activities have an effect on market competition in Malaysia.

10. TAX

10.1 What determines the extent of a company's liability to pay Malaysian income tax?

Generally, a company is subject to Malaysian tax on its income which has a Malaysian source.

Income tax in Malaysia is territorial, which means that tax is imposed only on income that has a

Malaysian source. It used to be the case that where the source was outside Malaysia, income was taxable in Malaysia if: -

- (i) it was remitted into Malaysia, and
- (ii) it was in the hands of persons who were resident in Malaysia.

With effect from the year of assessment 2004, income derived from overseas remitted to Malaysia by a Malaysian resident company (other than a company carrying on the business of banking, insurance, shipping and air transport) is exempt from income tax.

10.2 How is residence treated for tax purposes?

A person is a tax resident if he resides in Malaysia for more than 182 days regardless of citizenship and nationality. A company is a resident if its business is controlled and managed in Malaysia.

For resident companies, profits derived from or accruing in Malaysia are taxable. All income remitted from overseas to Malaysia and received in Malaysia is exempted from Tax.

10.3 What is the corporate tax rate and how is it applied?

The standard corporate tax rate in Malaysia is 25%.

Resident small- and medium-sized companies (i.e. companies capitalised at RM2.5 million or less and not part of a group having a company exceeding the above capitalisation threshold) are taxed at 20% on the first RM500,000, with the balance taxed at the 25% corporate tax rate.

10.4 What is the tax rate applicable to foreign companies on their income earned in Malaysia?

For non-resident companies, the income tax rates are as follows:

Business	25%
Royalties	10%
Rental or moveable properties	10%
Technical or management service fees	10%
Interest	15%
Income other than the above	10%

Where the recipient is a resident of a country which has a double tax treaty with Malaysia, the tax rates for specific sources of income may be reduced.

10.5 What other taxes are payable in Malaysia?

Stamp duty is a tax levied on a variety of written instruments specified in the First Schedule of Stamp Duty Act 1949. In general, stamp duty can be fixed or ad valorem, and is imposed on legal, commercial and financial instruments.

Sales tax must be paid on certain imported and locally manufactured goods as provided in the Sales Tax Act 1972. The general rate is 10%, but can vary depending on the category of products.

Excise duty must be paid on imported and locally manufactured goods as provided in the Excise Act 1976. Goods subject to duty, and the applicable rates, range from 10% to 100% depending on the category of products.

10.6 Is there a tax on dividends?

Dividends are taxed as the Malaysian paying company's income before being passed on to shareholders. All dividends are tax-free in the hands of the shareholders.

10.7 Are payments subject to withholding tax?

A withholding tax of 10% applies to royalties paid to a non-resident. This may be reduced under an applicable tax treaty.

A withholding tax of 15 % applies to interest paid to a non-resident. This may be reduced under an applicable tax treaty.

In addition, a withholding tax of 10% applies :

- to all payments made to a non-resident in respect of services under a contract (where a non-resident has stationed employees in Malaysia who are involved in the contract, a further 3% withholding tax must be deducted to account for any tax that may be payable by the employees for services rendered in Malaysia in relation to the contract);
- for income derived by non-residents in respect 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 persons;

- for income derived by non-residents in respect of technical advice, assistance or services rendered in connection with technical management or administration of any scientific, industrial or commercial undertaking, venture, project or scheme;
- for rental or payment made to a non-resident in return for the use of any moveable property.

There is no withholding tax on dividends paid by Malaysian companies.

10.8 Is capital gains tax payable in Malaysia?

Malaysia currently does not impose a capital gains tax for sale of equities.

From 1 Jan 2010, real property gains tax (RPGT) is chargeable at the rate of 5% on profits from real estate sales for all residents, citizens and non-residents/citizens for properties bought and sold within 5 years. After 5 years, RPGT is exempted.

11. DISPUTE RESOLUTION

11.1 Please give a brief outline of civil procedure in Malaysia.

A civil claim is commenced by the plaintiff paying the court fee and filing a formal claim in court. This can be by way of a writ of summons, an originating summons, an originating motion or a petition in the High Courts and by way of a summons in the subordinate courts. A copy of this claim must be served on the defendant.

A defendant who intends to defend a claim must file an appearance and enter a defence, failing which judgment in default may be entered. Further pleadings may then be exchanged, followed by discovery of documents and exchange of further evidence as described below. The matter will then be set down for trial.

11.2 How are foreign judgments enforced in Malaysia?

A foreign judgment has to be “acknowledged” or “recognised” by the Malaysian courts before it can be enforced. One way of doing so is by registering the foreign judgment in the Malaysian Courts through the Reciprocal Enforcement of Judgments Act 1958. A provision is made for registration for judgments

obtained in seven Commonwealth countries and territories including the UK and New Zealand. The Act gives effect to the foreign judgment as if the judgment has been obtained from a Court in Malaysia and gives the Malaysian Court control over the execution of the registered judgment as if it were its own judgment.

For countries which are not provided for under the Reciprocal Enforcement of Judgments Act 1958, the enforcement of the foreign judgment would follow common law. A new suit would have to be issued in a Malaysian court, possibly as an action in debt.

11.3 What are the alternative methods of dispute resolution available in Malaysia?

The Malaysian Mediation Centre (MMC) was established by the Malaysian Bar Council to provide an alternative for dispute resolution. The Centre currently deals with both civil and commercial matters and is looking to expand the range of its services.

An agreement is provided to the parties to appoint a suitable Mediator, and provides that the Mediation will be conducted under the Mediation Rules of the Centre. The Mediation Rules explain the entire mediation process, from the time of initiating mediation.

11.4 How are arbitral awards enforced in Malaysia?

The governing law for arbitration in Malaysia is the Arbitration Act 2005, which is based on the UNCITRAL Model Law on International Commercial Arbitration.

On an application in writing to the High Court made pursuant to Section 38 of the Arbitration Act, an award made in respect of a domestic arbitration or an award from a foreign state shall be recognised as binding and be enforced as a judgment in terms of the award or by action.

A “foreign state” means a state which is a party to the Convention on the Recognition of Foreign Arbitral Awards adopted by the United Nations Conference on International Commercial Arbitration in 1958.

Section 39 of the Arbitration Act further provides that the High Court may refuse to recognise or enforce an award, irrespective of the state in which it was made:

- (i) If the party against whom it is invoked can demonstrate one of the grounds for setting aside an award under Section 37 or where the award has not yet become binding on the parties or has

been set aside or suspended by a court of the country in which, or under the law of which, that award was made; or

- (ii) if the High Court finds that:
 - a) the subject matter of the dispute is not capable of settlement by arbitration under the laws of Malaysia; or
 - b) the award is in conflict with the public policy of Malaysia.

11.5 What are the grounds on which an arbitration award can be challenged in the courts in Malaysia?

Section 37 of the Arbitration Act covers the grounds whereby an award may be set aside by the High Court. These include situations where:

- (i) the party making the application can satisfy the court that:
 - a) a party to the arbitration agreement was under an incapacity;
 - b) the arbitration agreement is not valid under the law to which the parties have subjected it, or failing any indication thereon, under the laws of Malaysia;
 - c) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present its case;
 - d) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration;
 - e) the award contains decisions on matters beyond the scope of the submission to arbitration; or
 - f) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement between the parties, unless such agreement was in conflict with a provision of this Act from which the parties cannot derogate, or failing such agreement, was not in accordance with this Act; or
- (ii) the High Court finds that:
 - a) the subject-matter of the dispute is not capable of settlement by arbitration under the laws of Malaysia; or
 - b) the award is in conflict with the public policy of Malaysia, for example where the award was induced or affected by fraud or corruption, or where there is a breach of natural justice.

An application to the court to set aside, except in the case of an award induced or affected by fraud or corruption, must be made within 90 days from the date on which the party making the application received the award or any corrected or additional award as the case may be.

Section 42 of the Arbitration Act also provides that any party may, within 42 days of the publication and receipt of an award, refer to the High Court any question of law arising out of the award. The High Court may, on the determination of a reference, confirm, vary, remit (either in whole or in part) or set aside the award (either in whole or in part).

(As of March 1, 2011)

This article is intended to provide only general, non-specific legal information and does not purport to give a legal opinion or advice on specific facts.