



Econas Resource To Energy Sdn Bhd Raises Funds:

ER2E

RM500.00 Million unrated Islamic Medium Term Notes

Messrs Abdul Raman Saad & Associates (“ARSA”) was recently given the opportunity to be involved as the solicitor for Econas Resource To Energy Sdn Bhd (“ER2E”) in respect of its establishment and issuance of a Sustainable and Responsible Investment (“SRI”) Sukuk. ER2E is a Malaysian incorporated joint venture company where its principal business activity includes (i) remediation activities and other waste management services, (ii) operation of waste transfer stations for hazardous waste and treatment and (iii) disposal of non-hazardous waste. The shareholders of ER2E are Perisind Samudra Sdn Bhd (“PSSB”) and Econas Sdn Bhd (“ESB”), which hold 90% and 10% shareholdings in ER2E respectively.

ER2E has on 7 March 2023 successfully established its inaugural RM500.00 Million unrated Islamic Medium Term Notes (“ASEAN Sustainability SRI Sukuk Murabahah”) Programme and made the following issuances under the ASEAN Sustainability SRI Sukuk Murabahah Programme:- [Cont. on Pg. 2]

We have News & Notes!

“ACUITAS”, in Latin, means having ‘Insight’ – in seeing the fine details, ‘Perception’ – in determining all aspects of an issue, ‘Acuteness’ – in vision, thought & ideas.

We hope this Newsletter gives you some insights, ideas and keeps you abreast of the latest legal news!

In this issue, we highlight a novel option for local municipalities in raising funds, another option for the early passing of inheritance for Muslims and some issues in IP registration.

We hope you are updated on some pressing issues and developments.

Karen Kraal, Editor, May 2023



Left to Right : Managing Director & founder of Econas Sdn Bhd and Director of ER2E – Khalid Bahsoon , Group Chief Executive Officer Bank Pembangunan Malaysia Berhad – Roni L. Abdul Wahab, Executive Chairman of Perisind Samudra Sdn Bhd & its group of companies and Director of ER2E – Dato’ Mohd Shafiee Mohd Sanip, Chief Executive Officer of AMInvestment Bank Berhad – Tracy Chen, Managing Director, Wholesale Banking of AmBank Group – Jamzidi Khalid, Executive Director, Perisind Samudra Sdn Bhd and Director of ER2E – Kasrul Nazrin Kasim



Left to Right : Director of Econas Sdn Bhd & ER2E – Lim Kwee Yong, Engineer of Econas Energy Sdn Bhd – Fung Wan Tian, Managing Director & founder of Econas Sdn Bhd and Director of ER2E – Khalid Bahsoon, Resident Partner & Head of Financial Services of ARSA – Sabreena Abdul Raman, Executive Chairman of Perisind Samudra Sdn Bhd & its group of companies and Director of ER2E – Dato’ Mohd Shafiee Mohd Sanip, Perisind Samudra Sdn Bhd & its group of companies, Head of Finance & Legal – Amiruddin Ramdan, Partner of Financial Services of ARSA – Nadiah Abdul Haleem Shah, Perisind Samudra Sdn Bhd and Director of ER2E – Kasrul Nazrin Kasim, Partner of Esher & Co – Kamlesh Menon and Senior Manager, Wholesale Banking Group Coverage, AmBank Group – Syed Ahmad Daniel Syed Haizair

Sukuk Murabahah Programme

Tranche No.:

ER2E

- a) Tranche 1- First Issuance (Danajamin Guaranteed)***
Issue Amount (RM): 76,800,000
- b) Tranche 2- First Issuance (Non Danajamin Guaranteed)***
Issue Amount (RM): 19,200,000

ECONAS cont. from Pg. 1

* Tranche 1- First Issuance (Danajamin Guaranteed) is guaranteed by a Kafalah agreement by Danajamin Nasional Berhad. Whereas Tranche 2 – First Issuance (Non Danajamin Guaranteed) is guaranteed by separate Kafalah agreements by a corporate guarantor namely, PSSB, which holds 90% shareholdings in ER2E; and 3 other individual guarantors who are all directors of ER2E (2 of the directors are the directors of PSSB and 1 director is a director of ESB) .
("Tranche 1- First Issuance (Danajamin Guaranteed)" and "Tranche 2 – First Issuance (Non Danajamin Guaranteed)" are collectively referred to as the "Issuance")

The abovementioned Issuance totaling RM96,000,000 will mature on 7 March 2035.

The proceeds derived from the Issuance will be utilised by ER2E to finance the mobilization of a resource recovery and disposal complex located in Pengerang, in the state of Johor, Malaysia and other related costs.

The ASEAN Sustainability SRI Sukuk Murabahah Programme will be in compliance with the Securities Commission of Malaysia's Sustainable and Responsible Investment (SRI) Sukuk Framework ("SC's SRI Sukuk Framework") pursuant to the SC's Guidelines on Unlisted Capital Market Products under the Lodge and Launch Framework (first issued on 9 March 2015 and revised on 28 October 2022 as amended from time to time) ("LOLA Guidelines"), ASEAN Sustainability Bond Standards ("ASEAN SUS"), ASEAN Green Bond Standards ("ASEAN GBS") and ASEAN Social Bond Standards ("ASEAN SBS") and other relevant international bond standards related to sustainability[1].

The ASEAN Sustainability SRI Sukuk Murabahah Programme was lodged with the SC on 10 November 2022.

In connection with the issuance of the ASEAN Sustainability SRI Sukuk Murabahah, ER2E had formed its Sustainability Framework for the ASEAN Sustainability SRI Sukuk Murabahah Programme ("ER2E's Sustainability Framework"). RAM Sustainability Sdn Bhd ("RAM Sustainability") as external reviewer had reviewed ER2E's Sustainability Framework and opined that it meets the requirements of the SC's SRI Sukuk Framework, the ASEAN GBS, ASEAN SBS, ASEAN SUS, International Capital Markets Association ("ICMA") Green Bonds Principles, ICMA's Social Bond Principles and ICMA's Sustainability Bonds Guidelines[2].

The Parties involved in the establishment of the ASEAN Sustainability SRI Sukuk Murabahah Programme and Issuance include the following:-

- (i) Issuer: Econas Resource To Energy Sdn Bhd
- (ii) Principal Adviser ("PA") / Lead Arranger ("LA")/Lead Manager/ Facility Agent/ Security Agent:AmInvestment Bank Berhad
- (iii) Sukuk Trustee: AmanahRaya Trustees Berhad
- (iv) Financial Guarantor: Danajamin Nasional Berhad ("Danajamin")
- (v) Shariah Adviser: AmBank Islamic Berhad
- (vi) Solicitors for the PA/LA & Danajamin-Messrs Rahmat Lim & Partners
- (vii) Solicitors for the Issuer, PSSB and 3 Individual Guarantors – Messrs Abdul Raman Saad & Associates

[1] ER2E's Lodgement Kit for the ASEAN Sustainability SRI Sukuk Murabahah Programmed lodged with the SC on 10 November 2022; [2] RAM Sustainability Sdn Bhd's Second Opinion Report

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Malaysian Bar
Circular No. 073/2023

Dated 13 Mar 2023

To Members of the Malaysian Bar

Update (13 Mar 2023) | Legal

Professional Privilege:

Director General of Inland Revenue v
Malaysian Bar

We refer to [Circular No 156/2021](#) dated 6 May 2021, wherein we updated Members on, inter alia, the application for leave to appeal to the Federal Court by the Director General of Inland Revenue ("DGIR"). As Members are aware, the High Court and Court of Appeal found in favour of the Malaysian Bar. The orders and judgments of the High Court and Court of Appeal can be found [here](#) (see pages 2 to 94).

On 23 Aug 2021, the Federal Court granted leave to the DGIR to appeal against the Court of Appeal's decision of 3 Mar 2021.

The Sabah Law Society and the Advocates Association of Sarawak subsequently applied to be admitted as amicus curiae and their applications were allowed by the Federal Court.

The Malaysian Bar's solicitors requested a panel of seven or nine Justices, and the Federal Court convened a bench of seven Federal Court Justices.

On 20 July 2022, the Federal Court heard and dismissed the DGIR's appeal, and affirmed the decision of the Court of Appeal. With this decision, Members are reminded that the terms of the High Court Order (now affirmed by the Court of Appeal and Federal Court), require Members to reject any request or demand of the Revenue for access to, or disclosure of all communications, books, objects, articles, materials, documents, things, matters or information passing between Members and client(s) or advice given to client(s), whether contained in any book, statement, account or other record of any description whatsoever, unless privilege is expressly waived by the client in writing.

The Order of the Federal Court dated 20 July 2022 can be viewed [here](#) (see pages 95 and 96), and the broad grounds of the Federal Court can be viewed [here](#) (see pages 97 to 100).

Thank you.
Anand Raj
Secretary
Malaysian Bar

Hibah - an Early Transfer of Assets



Hibah - A Secure Vehicle to be considered to correct foreseeable Hurdles in the Transfer of Property

The importance of Hibah should not be underestimated - for a couple of reasons:

- Property - owned by a Muslim - can be transferred during the lifetime of that owner and be securely received by the intended beneficiary - regardless of their religion - before the death of the owner, the donor.
- The importance of Hibah becomes even more emphasized when:
 - there are restrictions placed on the ownership of the property.
 - Donor has no residuary heirs (waris 'asobah) who can take up all or remainder shares of the property.

The following article outlines the simple structure in which such a property transfer can be made during the lifetime of a donor or a property owner, eliminating many unintended results.

Introduction - Hibah is a benevolent contract of an offer and acceptance (ijab and qabul) between the donor (wahib) and the donee (mawhub lahu), wherein the donor, by a verbal recitation and conduct, voluntarily transfers ownership and possession (qabd) of property (the Hibah property) to the donee without any consideration, and this transaction takes full effect during the lifetime of the donor.

That said, most literature written on Hibah concur that Hibah is an effective alternative instrument in managing the wealth of Muslims by expediting the distribution of property. Hibah is one of the most trusted methods in preventing any disputes that may occur among potential heirs or misinterpretation of a donor's intent after his demise. So long as the donor is alive, he has free rein as to how his estate will be distributed – and is not subjected to adherence to Faraidh, the Islamic system of estate distribution.

A Case Study - The Advantage for a Wife, when her Husband dies with Hibah:

Scenario: The husband was a Muslim muallaf (a person converted to Islam) who died intestate leaving a Muslim wife. They had no children. The only estate was a house, in which his wife was residing. According to faraidh, his wife would only be entitled to one-quarter share of the house. Further, having no residuary heirs to inherit the remainder three-quarter share, this portion would be taken over by Baitulmal, the Public Treasury of Islamic state.

One must fully appreciate that: Had there been no Hibah proved, the wife would have been faced with the unfortunate prospect of losing the property. In this instance, Hibah was proved by the wife and the property was thankfully transferred to her. **Cont. on Pg. 6**

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Whether a Local Authority under the Local Government Act 1976 can create a Special Purpose Vehicle ("SPV")

'SPV' - A Company for Issuance of Municipal Sukuk

Part 1 – Definition of a Local Authority and the Governing Laws

Similar to many countries, a local government system provides a significant impact and influence on the general public. In Malaysia, specifically Peninsular Malaysia, there are various sections or layers to the government body in which a local authority is the lowest in the hierarchy of the local government system. Hence, a local authority in Peninsular Malaysia refers to the division of the government which consists of the city or rural area or even a combination of both. The types of local authorities can be divided into three (3) separate categories which include:



Pasir Gudang

- 1) City Council (area consisting of not less than 500,000 people)
 - 2) Municipal (area consisting of not less than 150,000 people)
 - 3) District Council (area consisting of less than 150,000 people)
- In order to consistently regulate the local authorities in Peninsular Malaysia, the Local Government Act 1976 (Act 71) was introduced. Other enactments were also introduced including the Town and Planning Act 1976 and the Street Drainage and Building Act 1974 which are

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Options for Local Government Bodies in Fund Raising

A close review of the Federal Government's 2023 total Budget allocations of RM 388.1 Billion, will show that only 2.1 % of this amount or RM 8.15 Billion will be allocated, divided and juggled among all of the country's 13 States, for the running of the various State Governments and its Local Municipalities, with the unfortunate result that - many of these States, in particular, their Local Municipalities, will have limited or insufficient annual funds in the form of grants from the Federal government.

Because of this shortfall of budget allocation to State Govts, it is the Local Municipalities, in particular, which will feel this pinch the most and usually end up having to borrow funds from banks by using their Reserved Funds as collateral. This is an unfortunate trend because these Reserved Funds are, for the most part, kept in fixed deposits (FD) and breaking the term of the FD automatically leads to loss.

One area that ARSA has expertise in is its development of a sustainable model for raising funds for Local Government bodies - with the status of 'Majlis Perbandaran' or 'municipality': This model of raising funds is through the issuance of 'Sukuk' - a bond that is issued in compliance with Shari'ah principles.

For instance, in 2005, ARSA was counsel for PG Municipal Assets Berhad ('PGMAB') in its Islamic Municipal Bonds issuance of RM 80.00 Million under the Shariah principles of Mudharabah, which is a form of financing via profit arrangement, to raise funds for Pihak Berkuasa Tempatan Pasir Gudang ("PBT Pasir Gudang"), a local authority. PGMAB is an 'SPV' incorporated by this Pasir Gudang local authority. (See earlier article "Whether a Local Authority under the Local Government Act 1976 can create a Special Purpose Vehicle ("SPV")").

It is particularly notable that the P.G. area comprises a large number of industrial properties and estates ("Industrial Estates"), operating within its municipality area of administration.

This fact alone makes it an ideally located municipal area to issue such a bond, for the simple reason that Industrial Estates, per se, are subject to higher assessment rates payable - when compared to residential dwellers - which pay lower assessment rates: thus, in this instance, for PGMAB, it was an efficient revenue collection source which was used to repay amounts due under the said bond.

Therefore, it is no surprise that PBT Pasir Gudang issuance was a success and this structure could be replicated in other municipalities with similar scenario. It could be used as a template or, at least, an option for local municipalities to help them in balancing their otherwise 'tight' budget, while collecting higher assessment rates from Industrial Estates in their administrative area.

By: Nadiah Abdul Haleem Shah

'Does a local authority have the power, by law, to incorporate a company in Malaysia?'

The Local Government Act 1976 states that a Local Authority, i.e. a City Council, Municipal or District Council is a body corporate - and therefore, it can "do and perform such acts and things as bodies corporate may by law do and perform."

Cont. from Pg. 4

aligned with the intentions of providing a more comprehensive structure of the laws, rules and regulations governing local authorities. However, it is pertinent to note that the main law governing any local authority is the Local Government Act 1976 which covers the functions, powers, and enforcements of all local authorities in the states of Peninsular Malaysia.



Pasar Gudang

- 3) proposed type of business;
- 4) address of registered office;
- 5) complete details of every person/body corporate who is/are to be members(s) of the company;
- 6) details of the director(s) of the company;
- 7) details of the secretary of the company;
- 8) details of class and number of shares to be taken by member(s) of the company; and

9) any other information as the Registrar may require.

Once SSM has processed all the information and documents required to incorporate the company, a notice of approval and registration is issued and a Certificate of Incorporation will be issued by SSM

upon request together with payment of the prescribed fee(s).

Part 3 – Incorporation of a Specialist Purpose Vehicle Company ("SPV") by a Local Authority in Malaysia (SPV for Issuance of Sukuk)

In determining the meaning of a local authority and the brief details of setting up a company have been covered in Parts 1 and 2 above, the correlating issue between the two parts can now be evaluated, which is, as the main title of this article above suggests, 'Does a local authority have the power, by law, to incorporate a company in Malaysia?' In order to ascertain a comprehensive answer to this question, firstly, it must be understood that a local authority, though not incorporated via the procedures provided by SSM, is recognized,

by law, as a body corporate as stated in Section 13 of the Local Government Act 1976:-

"Every local authority shall be a body corporate and shall have perpetual succession and a common seal, which may be altered from time to time, and may sue and be sued, acquire, hold and sell property and generally do and perform such acts and things as bodies corporate may by law do and perform."

In reference to the above cited legislation, it is clear that the Local Government Act 1976 illustrates that a local authority, whether it be a City Council, Municipal or District Council, to be a body corporate in its own right. This means that the law recognises any designated local authority to "do and perform such acts and things as bodies corporate may by law do and perform." As it is also common knowledge that a body corporate or a company has the power to set-up wholly owned subsidiaries. It can be deduced that Section 13 of the Local Government Act 1976 would allow local authorities, who are considered a body corporate, to have all rights and powers that a body corporate has, including setting up and owning a company under Malaysian law.

In furtherance of the above, for the purpose of the topic of this article, the incorporation of the company or more specifically, an SPV, is for the purpose of issuance of 'Sukuk', which is a type of Islamic financial certificate

Part 2 – Incorporation of a Company in Malaysia

Establishing a company, specifically a private limited company, is the most common type of business entity in Malaysia. An incorporation of a company or a body corporate can be set up relatively quickly in Malaysia via registration at Companies Commission of Malaysia/Suruhanjaya Syarikat Malaysia or more commonly referred to as "SSM". Any private person or body corporate can set up a company in Malaysia as long as the criteria required by SSM are met, such as a successful application and reservation of a company name, as well as preparing and providing the adequate particulars and documentations required under Section 14 (1) of the Companies Act 2016 which may include, amongst others:-

- 1) name of proposed company;
- 2) status of private or public company;

Cont. on Pg. 11

HIBAH- How It Works

5 Pillars of Hibah

Continued from Pg. 3

(1) Donor (Wahib)

A donor must be Muslim, male or female, and have full ownership and control over the Hibah property and, as such, be able to voluntarily transfer ownership of his/her property to the donee.

(2) Donee (Mawhub Lahu)

Any person with legal capacity as an adult or, if a donee has no legal capacity, for instance, a minor, or is of unsound mind, a legal guardian must be appointed.

(3) Hibah property (Mawhub)

The property must be fully owned by the donor, legally tradable and have tangible value from a shariah perspective, and be in existence during aqad hibah, that is, at the time of Hibah transfer.

(4) Sighah (Aqad Hibah)

Pronouncement of an offer and acceptance (ijab and qabul) of Hibah must be clear, specific and unequivocal. It can be oral or in writing or established by the conduct of both parties.

(5) Possession (Qabd)

Possession of the Hibah property by the donee must be either physical or by constructive possession. Upon transfer of possession, the Hibah is completed and, thereafter, the donee must have full ownership and control over the Hibah property.

In the case of **Siti Khatijah Ismail lwn Zainab @ Esah Hamid & Yang Lain** [2017] 3 LNS 8, the Syariah Court of Appeal dismissed the appeal by the Appellant and found that Hibah made by her deceased father was void. The court held that despite the fact that the Appellant possessed the grant title of the Hibah property, it was, nevertheless, insufficient to prove that the condition of qabd had been fulfilled. The Appellant failed to prove that she had made some effort to manage the land. The court further held that the Appellant had to prove that the deceased father had waived his rights over the land and had given permission to the Appellant to carry out all transactions (tasarruf) on the land.



Comparison between Hibah and Wasiyyah

(1) Hibah can be granted by the donor to any person, that is, to either the heirs of the donor or non-heirs of the donor. Furthermore, the donee of the Hibah is not confined to Muslims recipients only but includes persons of any religion and the number of donees receiving Hibah is up to the discretion of the donor and subject only to restrictions or conditions imposed on the Hibah property itself.

This is in contrast to wasiyyah in which the property can be bequeathed to non-heirs only.

(2) Allocation of Hibah to a donee(s) is unlimited so that the amount of Hibah property which may be granted has no limit.

By contrast, for wasiyyah, the amount of the property that can be bequeathed to non-heirs must not exceed 1/3 of the net estate of the deceased, the testator.

(3) The execution process of Hibah is much simpler and faster provided that the name of the donor on the Hibah property has been transferred to the donee during the lifetime of the donor. Wasiyyah, on the other hand, requires a beneficiary to go through an often lengthy process of inheritance, with proceedings heard either in the High Court, Small Estate or Amanah Raya Berhad, since wasiyyah is only carried out upon the demise of a testator, al-musi.

Since Hibah is made during the lifetime of the donor, no consent is required from all potential heirs of the donor for Hibah to be successfully executed and this particular feature of Hibah is of more practical importance to a donor who may have a large number of family members. By contrast, however, wasiyyah made to beneficiaries comprising more than 1/3 of the estate of the deceased/testator, is subject to the consent of all beneficiaries before execution.

In the case of **Muhammad Awang & Yang Lain lwn. Awang Deraman & Yang Lain** [2001] 1 MSLR 1, the court dismissed the appellants' appeal to annul the Hibah made by their deceased father to the respondents. The court held that Hibah by a deceased father during his lifetime to some of his children was valid even without the consent of other children because Hibah can be made to any person as long as that person has the legal capacity to receive Hibah.

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WHAT IS INTELLECTUAL PROPERTY - or "IP"?

IP as Collateral?

IP consists of a new idea, original expression, distinctive name and appearance that make a product unique and valuable.

Most people often do not realize that the relationship between IP and commerce bears a symbiotic relationship.

Although IP is important, as it provides the legal recognition of property rights in information, innovation and invention, the actual value of these rights may be effectively realized only if the owners of these rights are able to exploit and commercialize their property. One such method of commercializing IP is by

Collateralizing such assets in order to Raise Financing.

With the Internet technology explosion and its accessibility globally, many products can be sold through commerce. Hence, there are several reasons why IP is important to commerce and, likewise, commerce to IP.



By: Datuk Dr Abdul Raman Saad

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Intellectual Property or "IP", as commonly called, is a term that refers to industrial property and to copyright and other related rights. Industrial property comprises the protection of copyrights, patents, trademarks, industrial designs and geographical indications. It also includes the protection of utility models, trade dress and layout-designs or topographies of integrated circuits, where such protection exists, including protection against unfair competition and protection of undisclosed information/trade secrets. Realistically, IP is a type of property or asset, just as valuable (or more valuable) than physical or real property. Basically, IP is an intangible asset that is the product of the human intellect in the usage of knowledge.

The law also recognizes the rights to any intellectual creation that belongs to the owners. The creator of an IP owns it in a similar way as one who has physical possession of it, where he can exercise control over its use, exploit it and commercialize it to obtain reward from others who use it.

One must not confuse between owning an IP and owning the physical embodiment of the IP. As an example, where one purchases a book, one has the physical possession of the said book only, but not the IP right to its full contents. In other words, the copyright of the book rests entirely with the author. Photocopying the contents of the book is an infringement of copyright.

Generally, while we acknowledge that the author of a copyright work, the inventor of any invention or the creator of a design, are the owners of such intellectual creations, such rights are, however, subject to the terms of agreement between the author, inventor or creator and any third parties. This includes such works that are made in the course of employment.

The issue of ownership and title is often more complex where more than one person or company creates the IP through a joint effort. In this light, where the IP is used as collateral for raising finance it is all the more important to determine the issue of ownership at the outset.

Relationship between IP and Commerce:

- The Collateralization of Assets to Raise Financing

IP consists of a new idea, original expression, distinctive name, and appearance that make a product unique and valuable. IP is often traded (or "licensed") in its own right without trading in the value of an underlying product or service, by means of patent or other IP licenses from one rights-owner to another. With the Internet technology explosion and its accessibility globally, many products can be sold through commerce. Hence, there are several reasons why IP is important to commerce and, likewise, commerce to IP.

Most people often do not realize that the relationship between IP and commerce bears a symbiotic relationship.

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COLLATERALIZING INTELLECTUAL PROPERTY BY FINANCIAL INSTITUTIONS

Continued from Page 7

Although IP is important, as it provides the legal recognition of property rights in information, innovation and invention, the actual value of these rights may effectively be realized only if the owners of these rights are able to exploit and commercialize their property. One such method of commercializing IP is by collateralizing such assets in order to raise financing. Collateralizing IP is important as it may enable owners, among others, to further continue to develop their IP (Research & Development). However, the notion of collateralization of intangible property assets is not widely embraced by financial institutions due to the large risk that are associated with it in comparison to tangible property, e.g., land, equipment and machineries[i]. Among the reasons is the duration of IP ownership, the high risk in which technological IP deteriorates in value, determining an acceptable method of valuation on IP, the lack of liquidity in IP and, most importantly, the conflict of purpose and conflict of culture between IP and commercial lending law.

This article examines the possibility and methods of providing a security interest in IP for the purpose of using it as collateral in raising financing. The focus would be confined to Patents, Copyright and Trademarks. The legislation referred to herein would be that of Malaysia.

DISSECTING IP LAWS

If the conventional legal idea of “property” [ii]. as developed by Penner is taken, a property right can be defined as ‘the exclusive right of dominion over a resource, being a right which can be transferred in the market’. The basic philosophic tension between Lockean and Jeffersonian notion of “property” rights, where Locke believed that there was entitlement of “property” rights as a result of the infusion of labor, but Jefferson, on the other hand, believed that ideas and inventions are not well suited to exclusive property because sharing them does not diminish them, although he did allow that exclusive rights might be conferred in the profits incentive in their pursuit. [iii] IP rights should be accorded similarly as real property rights. To limit and restrict the lifespan of IP rights may hinder the growth of business in the

Information Age and the expansion of related commercial transactions.

Various property rights are established and codified under the Malaysia IP legislation (i.e. Patent Act, Copyright Act, and Trademarks Act). Most of these statutes grant the exclusive rights for, among others, exploitation, in the case of Patent, or a right to reproduce, in the case of Copyright.

The next step would be to determine the nature of ownership in specific IP and possible methods of collateralizing such a property.

Copyrights: Security Interests

S. 26(1) of the Copyright Act 1987 provides that copyright shall vest initially in the author of the work as the first owner. This ownership of a copyright may, however, reside not only in one person but in more than one person, as ‘co-owners’. Co-ownership may arise either because joint authors produced the work or because an interest in the copyright has been assigned to more than one person. The commonly held position is that co-owners hold copyright in the work as tenants-in-common entitled to it in equal shares.

Generally, as holders of separate and distinct interest in equal shares, tenants-in-common are entitled to enjoy the property and to sue for any infringement thereof independent of the other. However, in Malaysia, this rule appears to be slightly modified in so far as copyright works are concerned: The co-owner of a copyright is not entitled to do any of the restricted acts with respect to the work without the consent of the other co-owner(s).

The nature of co-ownership under Malaysian law may be gleaned from s 27 (4) of the Copyright Act. The subsection provides that an assignment or license granted by one copyright owner shall have the same effect as if the assignment or license had been granted by his co-owner or co-owners, and in the absence of any agreement among the co-owner(s) to the contrary, any fees received shall be divided equally between them. ‘Co-owner’, for the purpose of that subsection, refers to any authorship or an assignment of any joint interest. S 27 (4) also appears to suggest that co-owners hold the copyright as tenants-in-common

rather than as joint tenants. It is, however, not entirely clear whether a co-owner can sue another co-owner(s) independently, without joining the rest of the co-owners in the action. On the basis that words and expressions in the singular include the plural, and save as provided for under s 27 (4) of the Copyright Act, it would, therefore, follow that all references to a single “copyright owner” must also include ‘all co-owners’ with the result that one co-owner has no right to sue another co-owner independently of the other co-owners under Malaysian copyright law.

Copyright is considered to be personal property and movable and can be transferred by assignment, testamentary disposition (will), or by operation of law: Copyright Act s.27.

Copyright can be Split into Various Parts

The owner of a copyright may deal with or transmit some or all the rights under copyright for the whole or part of the period of copyright in a specified country or geographical area. The owner of the copyright in a musical work may license the performing right to one person and the broadcasting right to another. Copyright can thus be split into various parts among various persons in various parts of the world for various periods of time.

Copyright as Collateral?

Due to the absence of a central copyright registry in Malaysia, there is no one register which records all the dealings of copyright owners with respect to their copyright and this poses a problem, particularly, for financiers. **Cont. on Pg. 9**

Intellectual Property

Cont. from Pg. 8

This problem is exacerbated when the true ownership of the copyright holder must be determined in the case of joint-owners or in a complex relationship on work done in the course of an author's employment: s 26 (2) Copyright Act.

The element of "constructive notice" is necessary in structuring a funding when copyrights as intangible assets are pledged as collateral. The doctrine of "constructive notice" is a recognized practice by commercial lawyers where the doctrine imputes knowledge to a party who could have or ought to have made certain enquiries regarding the information that would have been apparent had the enquiries been made. The party is then subject to whatever interests are disclosed by such "proper and usual" inquiries[iv]. However, the absence of a copyright registry would create a pervasive problem in this whole area, where there may arise conflict of purpose and conflict of culture. There are many uncertainties in using copyright as collateral for financing that could result in qualified legal opinion to commercial lenders and bankers.

Because there is no registry for copyright, bankers may have to take precautionary measures as listed below when processing loan applications and assessing the security interest of copyright owners[v]:

- Conduct due diligence investigation regarding the

HIBAH - protects the distribution of wealth

Cont. from Pg. 6

4) The grant of Hibah can be tailored according to the economic needs of a donee. The donor can determine the allocation of the Hibah property to be given to a donee by taking into consideration the specific economic needs of the donee. This flexible nature of Hibah protects the interest of the donee especially if the donee is a minor.

(5) A divorce between a husband and wife does not affect the validity of Hibah made between them during the subsistence of the marriage. This item is specifically included to protect the welfare or interest of either party at the receiving end.

In the case of **Salmiah Che Hat Iwn Zakaria Hashim [1999] 1 MSLR 53**, the court reiterated: when a revocation of Hibah is permitted. It stated that, generally, a completed Hibah cannot be revoked except for a Hibah made by a father to his children, provided that the Hibah property is still in the possession of his children. The court refers to a hadith translation as follows:
"Tidak halal bagi seorang lelaki yang telah memberi satu pemberian atau telah menghibah satu hibah maka dia menarik balik apa yang diberi/dihibah, kecuali penarikan balik oleh bapa terhadap pemberian yang diberi kepada anaknya."
(Narrated by al-Tirmizi)

creation of copyright work;

- Review all authors' employment agreements in the course of apprenticeship or other related agreements involved in the creation of the works;
- Review all licenses granted relating to the work;

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6) A valid Hibah cannot be challenged by any party upon the death of the donor.

Hibah is not a way to evade faraidh

Faraidh is the distribution of estate to a deceased's heirs in which the portion given to the legal heirs is fixed and determined in the Quran. A clear distinction between faraidh and Hibah is: the former takes place upon the demise of the deceased testator, while the latter occurs during the lifetime of the donor.

Allah s.w.t. ordered Muslims to distribute their estate by faraidh distribution mainly to avoid disputes between the heirs. However, if there is a consensus between the heirs on the distribution of an estate, the consensus prevails over the faraidh.



In addition to the above, Hibah property will be excluded from being part of the Donor's estate. Thus, upon his demise, the remainder of the estate, if any, will be distributed among the heirs by way of faraidh.

Therefore, Hibah is not a way to evade faraidh because Hibah and faraidh serve a different purpose and do not conflict in any way; in fact, they compliment each other.

Conclusion

Hibah is an efficient wealth management system and a valid Hibah can protect the distribution of wealth to a beneficiary from being disputed and defeated. In essence, the Hibah system of distribution may greatly assist to expedite the distribution of property to heirs and designated recipients, thereby minimizing the number of unclaimed estates because the distribution of Hibah property is managed during a lifetime of the donor, so that all inconsistencies or ambiguities can be resolved in good time.

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INTELLECTUAL PROPERTY

Possession of the Certificate of Registration of a Patent gives the Rights in the Patent to the Possessor

Continued from Pg. 9

- iv) Obtain appropriate warranties from the security provider;
- v) Conduct official search with the Companies Commission of Malaysia;
- vi) to determine the existence of company charges and encumbrances, if it involves a registered company as security provider/borrower, or if the security provider is an individual to conduct a bankruptcy search at the Insolvency Office to determine his current status;
- vi) Obtain a copy of the work; for software;
- vii) require the security provider to place commented source code in escrow and update the source code on a regular basis and obtain names and addresses of key programmers.

Patent: Security Interests

There is a Patent Registry in Malaysia. The duration of a patent is twenty (20) years, which takes effect from the date of filing the patent application. It can be argued that the date of patent takes effect only from the date of registration when the certificate of patent is issued and not from the date of filing. (Patents Act.1983). Whether security interests arise from the filing date or on the date the patent grant is issued is unclear in the Patent Act. One can argue that security interest in a pending patent may arise once the filing is satisfied and the security interest is attached to the patent after the certificate of grant is issued. But, if the date on the grant of patent shows that the security interest is created on the date the grant is issued, it is arguable to say that it is the date the security interest is created and not earlier. At the end of the day, it is best to look at the date of registration on dealings of the patent from the certificate issued to ascertain the date on which the security interest commences. Although the certificate of registration for a patent is not a document of title, it, nevertheless, gives the rights in the patent to the possessor. For a lawyer representing the bank, it is professionally prudent to advise the release of a loan based on the date shown on the certificate

of registration of the patent itself. Loans released before the creation of security interest in favor of the bank may expose the adviser to a negligence suit for advising release without collateral.

In order to create a valid and enforceable assignment of patent application, it must be in writing and comply with the requirements of s.39 of the Patents Act 1983 and s. 4 (3) of the Civil Law Act, 1956^[viii]. Legal title passes to the assignee on grant of the patent only after prescribed fee has been paid to the Registrar and recorded with the Registry. (S39 (3) (4) Patent Act, 1983).

Here, two issues come to the fore:

- (i) Requirement for registration of charges under 352 of Companies Act^[ix] for a company or corporation; and
- (ii) Charge/assignment of patent s.39 of Patent Act.

Let's say, **A**, a limited liability company obtains a loan from **B**, a bank, by charging the patent as security for the loan. Assuming a security interest in the patent is registered under the Companies Act, but not with the Patent Registry, does the subsequent purchaser who obtains the patent from **A** after conducting the search at the Patent Registry but not the Companies Registry, have priority in interest on the patent?

The requirements for registration of charges under 352 above are to notify the world at large on the dealings of the company. Failing to file the charge by the bank, within 30 days from the date of creation of the charge by the company would render the charge to be void against the liquidator and rank the bank as an unsecured creditor.

Firstly, a prudent purchaser relying on the "doctrine of constructive notice" would be required to conduct searches both at the Patent Registry and the Companies Registry, to find out the authenticity of the patent and dealings of the company as the patent owner is a limited liability company. The decision in *National Peregrine, Inc v Capitol Federal Savings & Loan Ass'n* (In re Peregrine Entertainment Ltd ^[x]) signifies the importance of a recordation scheme that best serves its purpose where parties can obtain all encumbrances by referring to a single, precisely defined recordation system.

In that case, the Federal Copyright laws of the U.S. ensure 'predictability and certainty of copyright ownership, promote national uniformity and avoid the practical difficulties of determining and enforcing an author's rights under the differing laws and in the separate courts of the various States.' In the above example, the subsequent purchaser has no basis in the priority claim over **B**, the banker, as the charge was filed with the Registry of Companies, unless he can prove that the patent is void/invalid.

By:
Datuk Dr Abdul Raman Saad

Footnotes:

- [i] Basle Committee Report II March 2003
- [ii] Penner, The Idea of Property Law 1997
- [iii] Howard P.Knopf, Security Interests In Intellectual Property: An International Comparative Approach p. 24. See <http://www.lcc.gc.ca/en/themes/er/fsi/knopf/knopf>
- [iv] Knopf,Howard, Security Interests In Intellectual Property: An International Comparative Approach. See <http://www.lcc.gc.ca>
- [v] Swinson, John, Security Interests in Intellectual Property, p 147 (Securities over Personal Property, Wappet and Allan, Butterworths 1999). For security issues relating to software, see Pollard, "Aspects of Lenders' Security Over Computer Software Copyright" (1995) 6 AIPJ 80
- [vi] CCM - Companies Commission of Malaysia was established under the Companies Commission of Malaysia Act 2001 that is responsible to keep record and administer records of companies empowered under the Companies Act of Malaysia, 2016 (Act 777) Regulations & Rules (as at 15th October 2021).

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'Does a Local Authority have the Power, by Law, to Incorporate a Company in Malaysia?'



Pasir Gudang Industrial Estate

Continued from Pg. 5

that is Shariah-compliant, comparable to a bond as its conventional counterpart. As the main reason for the question of incorporation of company herein arises due to the Sukuk requirement of incorporating an SPV, Section 41 of the Local Government Act 1976 can be closely examined in which it states:-

“(1) Subject to any other written law, a local authority may, by resolution and with the consent of the State Authority, from time to time raise by way of loans such amounts of money upon such conditions as the State Authority shall approve...”

The above section states that a local authority, as per any private entity or body corporate (as long as their

articles/constitutions allow), has the authority to obtain financing for the purpose of the business or transactions that are within the purview of powers conferred on a local authority by the relevant laws and of course, subject to the approval of the State Authority. Relating this Section 41 to the previous Section 13, both of the Local Authority Act 1976, it can be concluded that as Section 13 of the Local Authority Act 1976 grants the recognition that a local authority is a body corporate and is able to carry out and perform actions as any body corporate may do, by law, and Section 41 of the Local Authority Act 1976 also allows a local authority to raise a loan,

if in any case, a local authority wishes to obtain financial assistance via a Sukuk issuance, then a local authority shall be able to perform all requirements necessary for the issuance of the said Sukuk, including the need to incorporate an SPV. As the SPV is a pre-requirement for a Sukuk transaction, as long as the State Authority approves of the Sukuk transaction as well as the local authority abiding by Section 41 of the Local Government Act 1976 and other relevant laws, incorporating an SPV is in line with the intentions of obtaining financial assistance while being within the ambits of powers via Section 13 of the Local Government Act 1976.

Cont. on Pg.12

**Intellectual Property
- Footnotes -**

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[vii] Swinson, John, Security Interests in Intellectual Property, p 147 (Securities over Personal Property, Wappet and Allan, Butterworths 1999), For security issues relating to software, see Pollard, "Aspects of Lenders" Security Over Computer Software Copyright" (1995) 6 AIPJ 80

[viii] s. 4 (3) Civil Law Act, 1956 states that .any absolute assignment by writing, under the hand of the assignor, not purporting to be by way of charge only, of any debt or other legal chose in action, of which express notice in writing has been given to the debtor, trustee or other person from whom the assignor would have been entitled to receive or claim the debt or chose in action, shall be and be deemed to have been effectual in law, subject to all equities which would have been entitled to priority over the right of the assignee under the law as it existed to priority over the right of the assignee under the laws it existed in the State before the date of the coming into force of this Act, to pass and transfer the legal right to the debt or chose in action from the date of the notice and all legal and other remedies for the same and the power to give a good discharge for the same without the concurrence of the assignor.

[ix] Malaysia Companies Act 2016, s.352.

(1) states that subject towhere a charge to which this subsection applies is created by a company, there shall be lodged with the Registrar for registration within thirty days after the creation of the charge a statement of the prescribed particulars, and if this subsection is not complied with in relation to the charge, the charge shall, so far as any security on the company's property or undertaking is

'Does a Local Authority have the Power, by Law, to Incorporate a Company in Malaysia?'

Cont. from Pg. 11

Part 4 – Current Practices and Possible Future Development

Taking into consideration the information provided above in Parts 1, 2 and 3, it is still worth noting that the concept of obtaining financing through Sukuk and the need for incorporation of SPV is relatively rare amongst local authorities, in comparison to obtaining financing via a conventional bank loan. Although there is a previous case in which a local authority had obtained financing via a Sukuk issuance in the past, the concept of Sukuk amongst local authorities is still relatively uncommon, hence, case laws or preceding discussions or judgments on any issues or barriers that local authorities may face are not widespread

and has not yet become common knowledge to the public.

Having said that, it is still pertinent to highlight that since there is no exact or specific provision of law in the Local Government Act 1976 that negates the local authority's ability to incorporate a company, and only sections that seem to be supporting the ability of a local authority to do so are available. As discussed above, it is probable that in the near future, Sukuk issuance will be more fairly common as an alternative mode of funding for local authorities due to the benefits and features that Sukuk may provide compared to a standard and traditional financing from a financial institution.

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thereby conferred, be void against the liquidator and any creditor of the company.(2). Nothing in subsection (2) shall prejudice any contract to obligation for repayment of the money secured by a charge and when a charge becomes void under this subsection the money secured

thereby shall immediately become payable. (3). The charges to which this subsection applies are: -(j) a charge on goodwill, on a patent or license under a patent, on a trademark, or on a copyright or a license under a copyright; [x] US Circuit District, Cal. 1990 116 B.R. 194

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