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Moving Mountains to get your land back

GETTING YOUR

FORFEITURE ANNULLED

IS AN UPHILL BATTLE

[1]

Paying your Quit Rent on time may be more important than you think!

FORFEITURE OF LAND FOR NON-PAYMENT OF QUIT RENT - A New Look at this Issue -

COURT ACTION MAY BE GRUELING

Written by Rohana Ngah
Senior Associate

Paying quit rent and assessment is a mandatory requirement imposed on land owners under provisions of Section 93 of the National Land Code 1965 ("NLC").

It would, therefore, logically follow that, the *non-payment* of quit rent would result in certain strict consequences, which, in this case, is "forfeiture of land" by the State Authority under Section 100 NLC.

That said, an Appeal may, of course, be made to the High Court to challenge the validity of the forfeiture (S.418 NLC). However, the discretion lies with the Court in allowing or dismissing the appeal looking at the facts and particular circumstances of each appeal.
But more often than not, such an appeal would be dismissed by the court,[1] as the provision of the NLC is very clear that:

the State Authority has been given
the power to forfeit land for failure to pay quit rent.

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FORFEITURE

STAYING ON THE CASE: CAN THE COURTS CHANGE?

"When this statutory right is applied too literally or rigorously – it often results in punitive consequences"

This article does not probe into the equity or reason(s) for the forfeiture of land for the aforementioned non-payment, per se, however, assumes that the State has exercised its right of land forfeiture correctly and for valid reason(s) as set out in the NLC. But the point to be made is that, when this statutory right is applied too literally or rigorously, it often results in punitive consequences: Take for instance, this firm, ARSA, has handled a case where:

> A piece of land of approximately 2.1726 hectares was irrevocably forfeited for non-payment of quit rent equivalent to a mere RM274.00 - whilst the actual *value of the land* itself was close to a substantial RM500,000.00 - about 18 times the amount of quit rent due.

Ludicrous though this may seem, unfortunately, there were, in law, neither technical objections nor flaws that could be relied upon by the land owner to succeed in overturning the forfeiture, in an appeal to the High Court. Unsurprisingly, the Appeal against the forfeiture was dismissed. The forfeiture stood, so that:

the failure to pay RM274.00 in quit rent on time - led to
Confiscation of the property worth half a million ringgit
BUT
Can this be reversed?

This article focuses on possible 'Recourses' available:

- to the last registered proprietor before the forfeiture, that is, that proprietor, who, whilst unable to challenge the validity of the forfeiture in Court, would, nevertheless, have a good chance, under the NLC, of reversing the land forfeiture – and, as such, have his land reverted to him; and
- to a registered third party, a Chargee, such as a bank, for example, to recover a forfeited piece of [charged] land if it has no justifiable reason to dispute the validity of the forfeiture.

The course-of-action process is as follow:

The Annulment of Forfeiture

- **Application:** Section 133 (1) NLC allows for the last registered proprietor of the forfeited land to make an application to the State Authority for the annulment of the forfeiture. The discretion lies absolutely on the State Authority to allow or refuse such application. If the application is allowed, the forfeiture is annulled and, consequentially, the land will be re-alienated to last registered proprietor who will receive a new Document of Title issued in his/its name, as before forfeiture, subject to the payment of penalty to be imposed by the State Authority. The penalty shall not exceed six (6) times the outstanding quit rent.
- The said application is made to the respective State where the forfeited land is situated. All States have their own Land Rules which apply to that particular State, for instance, Johor has the Johore Land Rules 1966.
- **Issuance of New Document of Title**: When issued, all encumbrances (such as a registered charge) that existed before the forfeiture, will be re-instated onto the new issued Document of Title – so that all such encumbrances, would apply exactly as it did before the forfeiture.

This process is, in fact, more fully re-iterated in Section 133 of the NLC:

(1) Any person/body who was proprietor of any alienated land immediately before its forfeiture under this Act may at any time apply to the State Authority for annulment of the forfeiture.

2) The State Authority may in its absolute discretion refuse or allow any petition under this section, and, if it allows the petition, may do so conditionally upon payment by the petitioner:

- if the forfeiture was for non-payment of rent, of such penalty, not exceeding six times the sum which he was required to pay by the notice of demand served on him under Section 97, as State Authority may think fit to impose;

ISSUE:

"What is the law....where a 'registered proprietor' of forfeited land is uncontactable or untraceable by a Chargee so that the loan, secured by that same forfeited land, is in danger of going unsettled?"

- if the forfeiture was for breach of any condition, of such amount as the State Authority may determine in respect of the expenses occasioned by the forfeiture.

(3) The refusal of any petition under this section shall not be taken to prejudice the power of the State Authority to re-alienate the land to the previous proprietor at any time; and, for the purposes of any such re-alienation, the State Authority shall, at the time when it gives approval thereto, re-determine as it may consider appropriate the various matters specified in Subsection 79(2).

When can the application be made?

The provision of S. 133(1) of the NLC makes it very clear that an application for the annulment of forfeiture can be made at any time.

Further, pursuant to Section 132(2)(a) of the NLC, the State Authority may, at any time annul the forfeiture on the application of the said proprietor under Section 133(1) notwithstanding the restriction in S. 132(1).

Forfeiture

Who may apply?

Pursuant to Section 133(1) of NLC, the right to apply for an annulment can only be made by the person or body who was proprietor of the land immediately before its forfeiture. This means that a registered Chargee, such as the aforementioned bank, for instance, would not have the locus standi to make such an application, even though it had an interest (i.e. a charge) over the land and, further, is directly affected by the forfeiture.

In the more usual scenario, that is, where a registered proprietor is an individual Chargor, who is easily traceable or if a body corporate, like a company, is still a going concern, it would be easy enough for the Chargee to expedite an annulment by contacting the Chargor and request it to make the said application.

However, what if the situation is less clear, that is, where the registered proprietor is a company which is in liquidation or being wound-up – and therefore, unable to exercise that right of applying for annulment because a liquidator has been appointed to take over its affairs? The issue that arises would then be:
"**Who can make the application?'** or, further: **"Who has the authority to sign the Application Form?"**

Judith Sihombing, in: National Land Code, A Commentary, stated as follows:
Where a company is in liquidation, the liquidator or the Official Receiver shall act on behalf of the company under Part X of the Companies Act.[2]

Hence, by virtue of Section 483(1) of the Companies Act 2016, the right would now be exercisable by the liquidator on behalf of the company.

It is also in line with the power conferred on the liquidator under Twelfth Schedule of the Companies Act 2016 particularly paragraphs (a), (d) and (l), as follows:

The liquidator may:

(a) bring or defend any action or other legal proceedings in the name and on behalf of the company;
(d) do all acts and execute in the name and on behalf of the company all deeds, receipts and other documents and for that purpose use when necessary, the company's seal;
(l) do all other things as are necessary for winding up the affairs of the company and distributing its assets.

The liquidator may exercise all powers listed from paragraph (a) to (l) of the Twelfth Schedule of the Companies Act 2016 without seeking any authority from the Court or committee of inspection.

1. Regarding the power under Subsection (a) of the Twelfth Schedule of the Companies Act 2016, reference can be made to the case of **Kang Wah Construction Sdn Bhd v Chan Ai Min Property Sdn Bhd [1999] 4 MLJ 262**, where the Court held that the power to bring or defend an action or legal proceedings also includes the power to appoint solicitors. This is also confirmed by the Federal Court in **Zaitun Marketing Sdn Bhd v Boustead Eldred Sdn Bhd [2010] 2 MLJ 749.**

2. Subsection (d) of the Twelfth Schedule of the Companies Act 2016 authorizes the liquidator to 'do all acts' to execute other documents and to use the common seal, and this would include the power to execute the Application Form for the annulment of forfeiture.

"Dah bayar 'Cukai Tanah'?"

"When a company is being wound up, the liquidator may apply for the annulment of the forfeiture on behalf of the last registered proprietor."

3. Subsection (l) of the Twelfth Schedule of the Companies Act 2016 empowers the liquidator to make an application for the said re-alienation which, when successfully auctioned off, would reduce the company's debt and any surplus can be distributed among other creditors.

It is clear from the Twelfth Schedule of the Companies Act 2016 that the liquidator takes over the affairs of the company.[3]

Thus, when a company is being wound up, the liquidator may apply for the annulment of the forfeiture on behalf of the last registered proprietor.

APPLICATION FOR RE-ALIENATION OF THE FORFEITED LAND

The other recourse available to the last registered proprietor of the forfeited land, is to apply to the State Authority for the forfeited land to be re-alienated to him, pursuant to Section 133(3) of the NLC.

The same procedures of an application for alienation of state land and the matters to be determined by the State Authority in approving such application pursuant to Section 79 (2) of the NLC are applicable. This would include the State Authority's right to impose premium to be paid for the re-alienation, the amount of which is up to its discretion.

Section 133(3) of the NLC makes it clear that the State Authority's power to approve the re-alienation of the forfeited land will not be prejudiced by its refusal to approve any application for annulment of the forfeiture made pursuant to Section 133(1) of the NLC.

However, there is no clear provision on the status of the encumbrances or any registered interest (eg. the charge) on the forfeiture land prior to its forfeiture; would these encumbrances or registered interest be reinstated following the re-alienation? Looking at the provision of the Section 133(3), although it is 're-alienation', the State Authority, in determining to approve or refuse the application, will take into consideration the matters provided for under Section 79(2) NLC, as if such application is for a new alienation of state land. Reading between the lines, one may interpret it to mean that upon re-alienation, fresh title will be issued free from any previous encumbrances or any registered interest.

My personal view is that, when making such an application, the last registered proprietor may inform the State Authority about the following:

1. The history of the land, and the facts that gave rise to the forfeiture of the land, including the amount of the outstanding quit rent;
2. The willingness to pay the outstanding quit rent together with penalty (which could be lesser than the premium to be imposed);
3. Request for a waiver of the premium; and
4. Request for all previous encumbrances and registered interest to be reinstated upon approval of the application for re-alienation and the issuance of the new document of title.

[2]

Further Question:

However, what is the law in a situation where a 'registered proprietor' of a forfeited parcel of land is uncontactable or untraceable by a Chargee so that the loan, secured by the same (forfeited) land, is in danger of going unsettled?

(i) The 'Chargee-bank', whilst holding a 'valid registered charge', is, by definition, not a 'registered proprietor' and therefore barred from applying for annulment of forfeiture to the State Authority under Section 133(1) of NLC or for re-alienation of the land under Section 133(3) of the NLC.

(ii) On the face of it, it would appear that the Chargee-bank, despite being aggieved by the forfeiture, would have no choice but to write-off the security as a bad debt.

However, it is contended that there may be a way out of this conundrum, for the Chargee, through a specific Court action, that is:

'Can the Chargee-bank proceed by way of Originating Summons in Court for a Declaratory Relief seeking Annulment of the land forfeiture?'

The grounds for making an application for Declaratory Relief to the High Court, rather than to the State Authority, are based on the following:

a) There are *no express words* in Section 133(1) of the NLC ousting the jurisdiction of the Court for declaratory relief.

b) Merely providing a method in Section 133(1) of the NLC, namely, by way of an application to the State Authority, does not amount to providing for the enforcement of annulment without full restoration of all endorsements exactly as before, once the annulment is granted. In other words, the reasoning in **Pasmore v Oswaldtwistle Urban District Council (1898) AC 387**, is, with due respect, flawed. Lord Tenterden stated, "you must take your stand upon the Statute in question, and the Statute which creates the obligation is the Statute to which one must look to see if there is a specified remedy contained in it. There is a specific remedy contained in it, which is an application to the proper Government department". *(emphasis mine)*

c) Other than prescribing to whom the application should be made, S. 133(1) NLC *does not specify how each and every endorsement would be restored* to reflect the full effects of the annulment of the forfeiture, or the right of the aggrieved party, like the chargee bank, to apply for annulment. As such, it is contended, that this provides a window for the aggrieved party to seek specific orders to restore the status quo in respect of all endorsements, charge and ownership.

By the very fact of the annulment of the land forfeiture, it would logically follow that all the prior endorsements, such as the ownership, the charge and even the date of auction sale – should be restored and stand as though the forfeiture had never taken place.

Question:

"CAN A CHARGEE-BANK PROCEED BY WAY OF ORIGINATING SUMMONS IN COURT FOR A DECLARATORY RELIEF SEEKING 'ANNULMENT' OF THE LAND FORFEITURE?"

Forfeiture

d) Although the Privy Council in **Damodaran v Choe Kuan Him (1979) 2 MLJ 267**, stated that "S417 does not authorize the Court to direct the Registrar to make on the register entries of a kind for which no expression is made by the National Land Code and which are inconsistent with the whole scheme of the Act", it is contended that the Court can be persuaded to grant such orders in a case of annulment of forfeiture. In other words, if forfeiture is annulled, *the effect and consequence* of it would be to restore all endorsements as at the time of forfeiture as if the forfeiture had never taken place in the first place and, as such, the Registrar would not be acting contrary to the NLC if he gives effect to such restoration orders.

e) Thus, it is contended that the right to proceed to Court, instead of to the State Authority, with an application for annulment, may be *inferred by reading Section 133(1) of NLC in light of Section 447(2) of NLC*, which reads as follows:-
"A person or body seeking to take proceeding in the Court under this Act, and any party to proceedings so taken, may apply to Court by summons in chambers for procedural directions in respect of any matter not provided for; and the Court on any such application may make such order as it considers appropriate". (emphasis mine)

f) In quoting this aforesaid section as a possible solution, that is, to proceed to Court with an application for annulment, one must be mindful of the fact that there are no precedents for such an application and the Court may redirect the application by stating that the procedure for requesting an annulment of forfeiture is: to make the application to the State Authority.

.... ask the question:
"What is there in the NLC which bars recourse to the Court?"

> "Authorities ..... support the view that the courts will imply into the statutory provision - a rule that the *principles of natural justice should be applied*."

PROPOSAL

Since there are no precedents of any applications, let alone a successful application to Court for annulment, this might be an opportune time to put forward a strong case that the combined effect of Section 133(1) of the NLC (i.e. the annulment of the forfeiture) read with Section 447(2) (i.e. the power of the court) and Section 417 of the NLC (i.e. the general authority of the court) provides a remedy "in respect of any matter not provided for" by the NLC, as illustrated below:

AUTHORITIES IN SUPPORT OF DECLARATION

1. In support of this contention, I would like to quote from the case **Pyx Granite v Ministry of Housing and Local Government (1960) AC260** in which Viscount Simonds said, at page 286, "it is a principle not by any means to be whittled down that the subject's recourse to Her Majesty's Courts for the determination of his right is not to be excluded except by clear words. That is, as McNair called it in Francis v Yiewsley and West Drayton Urban District Council (1957) 2QB 136, a 'fundamental rule' from which I would not for my part sanction any departure. It must be asked then, what is there in the Act of 1947 which bars such recourse."

- By the same token, we should also ask the question, "**What is there in the NLC which bars recourse to the Court?**" Bearing in mind that express words are necessary to oust the jurisdiction of the Court, I dare submit that recourse to the Court would be a legitimate exercise of an individual's right to the property.

Forfeiture

- Besides, we have additional support under Section 447 of the NLC which not only upholds the supremacy of the Rules of Court over the provisions of the NLC by its first limb but also permits recourse to the Court on matters where the NLC has "*not provided for*", by its second limb, and
- S417 of the NLC can be invoked to give effect to the orders obtained.

2. Raja Azlan Shah Ag LP, as he then was, commented in the case of **Land Executive Committee of Federal Territory v. Syarikat Harper Gilfillan (1981)1 MLJ 234** (Harper Gilfillan's Case) at page 236 "Thus it can be seen that the modern use of declaratory judgment has already developed into the most important means of ascertaining the legal powers of public authorities in the intricate mixture of public and private enterprise which is becoming a distinctive feature of our life." Although the learned Ag LP warned that the power must be exercised "sparingly" and "with great care and jealously" and "with a proper sense of responsibility", he concluded by saying, "Beyond that, there is no legal inhibition to the grant of declaratory judgment. That is consistent with the attitude of the Courts in this country."

3. In **Francis v Yiewley and West Drayton Urban District Council (1957) 2QB 136**, the Court declared that the fact that Plaintiff had failed to appeal against the enforcement notice to a court of summary jurisdiction, did not bar him from applying to the Court for declaratory relief as Section 23(4) of the Town and Country Planning Act 1947 did not contain words ousting the jurisdiction of the Court.

4. Moreover, in **Barnard & Ors v National Dock Labour Board & Ors (1953) 2QB18**, Lord Denning said at page 41, "I know of no limit to the power of the court to grant a declaration except such limit as it may in its discretion impose upon itself".

RIGHT TO BE HEARD
('AUDI ALTERAM PARTEM')

The maxim of *'audi alteram partem'* is one of the pillars of individual liberty in which no one shall be condemned, punished or deprived of his property in any judicial proceeding unless he has had an opportunity of being heard. [4]

Interested Parties**.** In the context of the said situation, since the Bank's interest would be directly impacted by the Land Administrator's decision, in which it would cause the Bank to lose its security, the Bank should have been allowed to be heard before the decision was made.

The jurisprudence in this context is well-established. In ***Kesatuan Pekerja-Pekerja Bukan Eksekutif Maybank Bhd v Kesatuan Kebangsaan Pekerja-Pekerja Bank & Anor [2018]***

"..'audi alteram partem' ..is one of the pillars of individual liberty in which no one shall be condemned, punished or deprived of his property in any judicial proceeding unless he has had an opportunity of being heard."

2 MLJ 590, the Federal Court observed: Authorities are in abundance to support the view that the courts will imply into the statutory provision a rule that the principles of natural justice should be applied. Lord Guest in Wiseman And Another v Borneman And Others [1971] AC 297 (HL) had reiterated that 'This implication will be made upon the basis that Parliament is not to be presumed to take away parties' right without giving them an opportunity of being heard in their interest.

The State Authority should take into consideration the consequences of a forfeiture in relation to the interested parties.

In other words, Parliament is not to be presumed to act unfairly'. (*emphasis mine*). In that case, the dictum of Byles J in Cooper v The Board of Works for the Wandsworth Destrict (1863) 14 CB NS 180 was quoted as a clear proposition to this effect and which has been followed in many subsequent cases in England.

In the Federal Court case, **Ketua Pengarah Kastam v Ho Kwan Seng [1977] 2 MLJ 152**, it was held that the rule of natural justice should apply to every case where an individual is affected by an administrative action, whether or not the enabling statute makes provision for a hearing. Raja Azlan Shah FJ (as His Royal Highness then was) observed at p 154: '… In particular, the silence of the statute affords no argument for excluding the rule, for the justice of the common law will supply the omission of the legislature …'. (*emphasis mine*)
Therefore, even though NLC does not expressly provide that any person or body having a registered interest affecting the land ought to have been given an opportunity to be heard before the forfeiture takes place, it does not mean that the rules of Natural Justice are excluded. It can be seen in the Court of Appeal case, **Menteri Kesejahteraan Bandar, Perumahan dan Kerajaan Tempatan & Anor v Ang Ming Lee & Ors and other appeals [2018] 4 MLJ 545**:

"As the rights of the purchasers to claim damages in the event of delay would be adversely affected or even extinguished, we agree that the purchasers must be given an opportunity to be heard prior to any decision made."

Consequences**.** The same ought to be applied in the procedure of forfeiture. The State Authority should take into consideration the consequences of the forfeiture in relation to the interested parties. In the context of this situation, the purpose of registered charge was to protect the interests of the chargee. Ergo, the chargee should be given reasonable time to state their views before any decision was made by the State Authority in regards to the land since the chargee's right to auction the land in the event of default payment of the chargor would be extinguished when the forfeiture occurred.

CONCLUSION

There are recourses available to the previous registered proprietor to have the land reverted to him even though there may be no justifiable reason(s) for him/it to challenge the validity of the forfeiture. This said, recourse, as discussed above, will extend to a liquidator, in the event the last registered proprietor is wound up or the Insolvency Officer, in the case of bankruptcy, as they are not precluded by the words under Section 133(1) of the NLC to seek declaratory relief for the annulment of the land forfeiture and to obtain consequential orders to give full effect to the annulment or for the re-alienation of the land under Section 133(3) of the NLC.

Lastly, from the chargee/bank's perspective, who is also a party directly affected or aggrieved by the effect(s) of the forfeiture: This important right to apply to court for an Annulment, should also be extended to it, especially when there is no specific legal provision preventing such an application from being made. This, to me, is something worth exploring!

"It is contended that the right to proceed to Court, instead of to the State Authority, with an application for annulment, may be inferred by reading Section 133(1) of NLC"

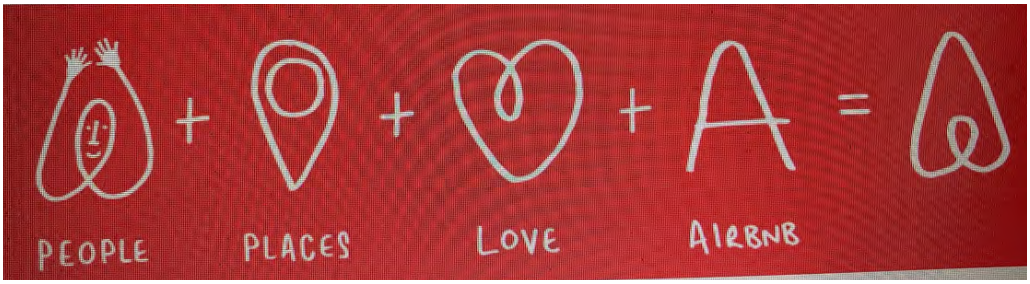
FOOTNOTES/REFERENCES:
[1] See Pemungut Hasil Tanah, Kota Tinggi v United Malayan Banking Corporation Berhad & Anor (Federal Court) and United Malayan Banking Corporation Berhad & Anor v Pemungut Hasil Tanah, Kota Tinggi (Privy Council)
[2] Judith Sihombing, National Land Code, A Commentary, 2nd Edt., pg. 144
[3] see Hillman v Crystal Ball Amusements [1973] 1 WLR 162.
[4] Ramjibhai Ukabhai Parmar v Manilal Purushottam Solanki AIR 1960 Guj 19AIR 1960 Guj 21

Photos: [1] pg 1 - Canva A4 NewsletterTemplates
[2] https://www.facebook.com/pejabattanahkotatinggi/posts / kempen-kesedaran-bayaran-cukai-tanahpada-hari-isnin-02-april-2018-unit-hasil-ptd/299130187283816/

UNSTOPPABLE AIRBNB

The rapid growth of internet-based 'Airbnb' in Malaysia is not surprising, given its explosion around the world. However, such a revolution in the housing market does not come without some fallout.

Airbnb is a global online platform that links local property owners who are desirous of renting out their private homes/lodgings to renters who are looking for, generally, short-term accommodation in specific locale. This simple concept offered by Airbnb has transformed the traditional hospitality industry by linking-up local homeowners, on one end, to local and international renters, via their comprehensive Airbnb website. Once online payment of the booking is made, Airbnb gets a commission as broker. Now, more people opt for Airbnb than the conventional hotel or apartment accommodation due to the seamless, cheaper and more authentic experience it offers.



According to industry experts [Statista], the total revenue of Airbnb worldwide reached US$8.4 billion in 2022 and is expected to reach a whooping US$10.3 billion in 2023. This growth is substantially due to increased demand for alternative accommodation and the company's expansion into new markets. Airbnb's data states that it has in excess of six million listings worldwide, covering more than 100,000 cities and towns and 220-plus countries.

Domestically, an Oxford economics report showed that Airbnb contributed more than RM3.9 billion to Malaysia's gross domestic product (GDP) in 2019 alone.

It is therefore no surprise that, for a host, it can be a lucrative source of income. An Airbnb 2022 survey also found that 60% of existing Malaysian hosts stated that it had helped them avoid foreclosure and eviction by generating enough income to stave off foreclosure by creditors/banks. Further, more homeowners are becoming hosts to take advantage of the post-pandemic surge in tourists and to help offset mounting living costs or supplement their income.

Be that as it may, its relative unregulated expansion is not without disruptive consequences on many aspects of life and quality of residential lives of local Malaysians – and all this, apart from the lack of assessment in an ever unstoppable market.

Quotes of hosts and others:

"The Cost of living is rising so fast that we have no choice but to look for ways to supplement our income."

"Being an Airbnb host? I feel empowered because I can control my job, my time and my own income like a mini-hotel. I decide. Like being a Grab driver, you decide how much you want to work depending on your life style."

"I don't like Airbnb guests in my block because I don't know who they are so I do not feel safe in my own home."

Airbnb

LEGAL PERSPECTIVE

Generally, Airbnb is permitted to operate, largely unregulated, in Malaysia. The legal definition of Airbnb is explained by the Urban Wellbeing, Housing and Local Government Ministry: Airbnb is said to be an online transaction and is an agreement made between a host and a traveller. Still, although there are no Federal laws covering Airbnb transactions, it is currently being regulated by the local government of their respective states.

ISSUES

Locally, its emergence has caused huge concerns to the hotel industry and the government. The hotel industry, for instance, is highly affected as the occupancy rate and room prices in hotels have declined drastically ever since Airbnb has become the preferred choice due to its cheaper rates. Airbnb announced that the number of Malaysian listings on its site stood at 44,000 and it does not look like additional supply of hosts will slow down.

Further, like many major cities around the world, Airbnb has had an adverse impact on the housing market in Kuala Lumpur. For instance, many apartments have been taken off the long-term housing market because property owners would rather put them up for more lucrative short-term rentals under higher rental rates via Airbnb.

SABAH (MUNICIPAL COUNCIL) REGULATIONS

- Illegal to operate Airbnb without a license
- Airbnb is considered a lodging house.hence, subject to the Hotels and Lodging Houses By-Laws 1966.

PENANG REGULATIONS

- Introduced new STRA Guidelines in 2023- one for residential high-rise and the other for landed property
- Limited rental period per year
- Approval/Registration with local authorities

KLANG VALLEY REGULATIONS

- No specific laws or regulations
- Whether or not you are allowed to lease your unit on Airbnb is up to your JMB or MC - who might enforce by-laws.

This has led to a fall in the supply of long-term rentals for ordinary citizens, who, as a result, have less choice and end up paying higher rates.

Finally, 'Public Nuisance' is yet another major issue experienced. With the constant flow of Airbnb 'strangers' in and out of condominiums or landed properties, many local residents no longer feel safe in their own neighborhoods or homes.

Along with this scenario, there are the loud parties, misuse of common properties and the indiscriminate parking of vehicles; not to mention, the damage and destruction to the surrounding property caused by unruly, short-term Airbnb guests.

In October 2020, a landmark decision was made in the case of Innab Salil & Ors vs Verve Suites Mont Kiara Management Corporation. The Federal Court ruled that, in the case of stratified properties, management corporations (MCs) and joint management bodies (JMBs) could ban short-term rentals through their own house rules. In this case, according to media reports, the property owner, Innab Salil owned several units in Verve Suites and on multiple occasions, his Airbnb's house guests had misused the common facilities on the property and caused a public nuisance to the building's residents. This decision secures the power of management bodies to curb the use of parcels for short-term rentals by way of passing additional by-laws as conferred under the Strata Management Act 2013.

Digital privacy data risks are also an imminent issue for home-sharing platforms like Airbnb. Such providers are susceptible to data breaches and unauthorized data access. In 2020, Airbnb faced a potentially "massive" fine under

Airbnb

General Data Protection Regulation ("GDPR") legislation after a data breach enabled some users access to other hosts' private inboxes.

According to Computer Weekly, users reported to Airbnb that they could access other hosts' addresses and messages.

In the local context, the Personal Data Protection Act 2010 ("PDPA") imposes responsibility on the data user, that is, Airbnb, to take practical steps to protect private information and prohibited from disclosing private information without the owner's consent, failing which, it could face legal consequences.

MALAYSIA takes some action

In response to the outcry, public consultation was held in 2019 by the Malaysian Productivity Council (MPC) to obtain public opinion on the regulation of short-term residential accommodation (STRA) in Malaysia.
MPC has developed a draft STRA guidelines based on existing laws as well as insights from key stakeholders, policymakers and regulators. The guidelines cover issues such as licensing, nightcaps, building safety, maximum occupancy, nuisance control and taxes and fees that property owners should pay for revenue obtained from Airbnb, etc.

In post-pandemic February 2023, Local Government Development or KPKT Minister Nga Kor Ming said that his ministry was working on the STRA Guidelines and that, while homestay activities were under the jurisdiction of state governments, matters related to Tourism fall under the jurisdiction of the Federal government. Since regulatory activities involve the role of local authorities, KPKT, through the Town and Country Planning Department (PLANMalaysia) would work on the STRA guidelines.

An Oxford economics report shows that Airbnb contributed more than RM3.9 billion to Malaysia's gross domestic product (GDP) in 2019 alone.

Addressing the key issues head on, while recognizing and embracing Short-Term-Rentals as an integral part of the Tourism Industry will go a long way in helping Malaysia capitalize on the benefits of this modern phenomena of home sharing. Implementing a balanced set of guidelines would also mean that all earnings made by property owners would be treated like any other business profits/income in a commercial transaction and therefore, taxable.

CONCLUSION

In our opinion, it is crucial that the government facilitate the setting-up of a central registration of all property owners to assist as well as monitor all who have signed up under the Airbnb platform and other short-term accommodation host programs. It is necessary to pass a comprehensive set of rules or take steps towards a better consolidation of rules and regulations so that all parties and supporting industry benefit from this ever-growing phenomena.

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PLANTATION-BASED REAL ESTATE INVESTMENT TRUST

What is a 'Real Estate Investment Trust' - or 'REIT' ?

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'REIT' refers to a fund or a trust that manages and oversees income-generating commercial real estates such as shopping complexes, hospitals, plantations, industrial properties, hotels and office blocks.

So, instead of having to purchase directly and manage those properties themselves, any potential investor can invest in a lucrative and profitable commercial real estate market and enjoy dividend payments.[1] Dividends are paid out either quarterly or semi-annually to REIT investors or unit holders.

The income of a REIT are usually derived from rental payments, property management charges and capital gains from business operations carried out at the real estates.[2] It will only be exempted from tax if at least 90% of its total income is distributed to its investors or unit holders.[3]

'REIT' is a commonly heard term but what exactly does it mean?

These days, this trust / fund or REIT has been progressively receiving wider recognition as one of the low-risk investment instruments in Malaysia.
To date, there are more than 18 REITs which are listed on Bursa Malaysia making them easily accessible by their potential investors.
Examples of notable Malaysian REITs which are listed on Bursa Malaysia include KLCC Real Estate Investment Trust ("KLCC REIT"), Axis Real Estate Investment Trust ("Axis REIT"), IGB Real Estate Investment Trust ("IGB REIT"), Sunway Real Estate Investment Trust ("Sunway REIT") and Pavilion Real Estate Investment Trust ("Pavillion REIT").

According to Bursa Malaysia, there are presently four (4) Shariah-compliant REITs listed on the Main Market of Bursa Malaysia namely Al-'Aqar Healthcare REIT (ALAQAR), Al-Salām REIT (ALSREIT), AXIS REIT (AXREIT), and KLCC REIT.[4]


[1]

REIT

Structure and Requirements of REIT

REITs are governed by the Capital Markets and Services Act 2007, the Securities Commission of Malaysia's (the "SC") Guidelines on Listed Real Estate Investment Trusts (if the REIT is listed on Bursa Malaysia) ("Guidelines on Listed REITs") or Guidelines on Real Estate Investment Trusts ("Guidelines of REITS") (if the REIT is not listed) and other relevant guidelines issued by the SC and the respective REIT's trust deed.[5]

In addition to the above, the REITs that are listed on Bursa Malaysia would have to comply with the relevant requirements and practice notes under the Main Market Listing Requirements applicable to listed REITs.

'...the time is right for Malaysian plantation companies to consider establishing a plantation-based REIT as an alternative method of fund-raising'

The Guidelines on Listed REITs and Guidelines on REITs set out the legal requirements that need to be observed by the market players for the establishment and operations of REITs in Malaysia.
In general, there are 5 key features which are embodied in REIT's structure:

a. **Trust Deed**

Firstly, the trust deed entered into between a management company and a trustee: Its contents must follow requirements as set out under Schedule A of the Guidelines on Listed REITs or Guidelines of REITs (whichever is applicable) and securities laws. The deed spells out the appointment of a trustee and the management company of the REIT,[6] duties of the management company,[7] and the trustee,[8] creation of the fund or declaration of trust,[9] and unit holders' rights and the extent of their liability.[10] The deed must also contain full particulars of the fund including, but not limited to its name, investment objective, whether the fund has a limited duration, distribution policy and the financial period of the REIT,[11] permitted investments, limits, and restrictions, and basis for the valuation of the assets of the fund.[12]

b. **Assets**

The second feature are the assets of the REIT. REIT is only authorized to invest in real estates, non-real estate-related assets, and cash deposits, and money market instruments.[13]
The Guidelines on REIT requires that (i) at least *75% of the funds total assets must be invested in real property that generates recurrent rental income* at all times[14] - whereas (ii) for investment in non-real estate assets, the securities must be traded under the rules of an eligible market and, further, the value of the investment in securities issued must not exceed 5% of the total assets value if they are issued by single issuer and up to 10% if issued by group of companies.[15] The assets may consist of placement of deposits with a financial institution for investments in cash, deposits, and money market instruments.[17]

REIT - Any individual investor may purchase shares in a publicly listed REIT

c. **Trustee**

For the purpose of supervising the REIT, a trustee must be appointed with the approval of the SC.[17] The duties of the trustee are prescribed under the CMSA and the Guidelines on the Registration and Conduct of Capital Market Services Providers which include: to maintain the REIT's listings on the Main Market of Bursa Securities and to comply with the listing requirements.[18]

A company would be eligible to a be a trustee if it is a trust company registered under the Trust Companies Act 1949 or incorporated as a public company under the Companies Act 2016.[19]
A trustee is entrusted with duties to ensure that the fund is operated and managed by the management company, in accordance with (a) the deed; (b) the prospectus; (c) these guidelines and securities laws; & (d) acceptable & efficacious business practices within the real estate investment trust industry.[20]

d. **Management Company**

The fourth key component is the management company which is accountable for the establishment of a REIT, issuance and offer for subscription and invitation to subscribe for or purchase units of REIT, and operation and administration of the REIT.[21] In order to be qualified, a management company must be a Malaysian incorporated company, and hold a Capital Markets Services Licence to regulate the activities of fund management relating to REITs' asset management.[22]

e. **Investor of REIT or a Unit Holder**

Lastly, another complementary component is an investor of REIT or a unit holder which has the rights to receive income and other distributions attributable to the units held, to receive the funds report of REIT, and participate in the termination of REIT by receiving a share of all net cash proceeds according to their interests in REITs from the realization of the REIT assets less any liabilities.[23]

Plantation Companies' Struggle to Secure Financing

Malaysian palm oil industry is one of key contributors to national gross domestic product (GDP) and has been placed second in the world ranking as largest palm oil producer.

There are quite a number of big and established companies which have made significant economic contributions in this industry such as Sime Darby Berhad, IOI Corporation Berhad, Kuala Lumpur Kepong Berhad, Genting Plantations Berhad, FGV Holdings Berhad and United Plantations Berhad.[24]

Plantation companies usually resort to banking facilities offered by banks, for example MBSB Bank Berhad and Alliance Bank Malaysia Berhad, as their source of funding to finance their operation costs. Unfortunately, plantation companies in Malaysia continue to face challenges notwithstanding the rapid growth of the profitability and demand in palm oil products, such as low productivity, rising cost of production, stagnating yields, competition with Indonesia, labour shortages and over dependence on foreign labour.[25]

Other factors – OPR, ESG: With the increasing demand for palm oil, plantation companies are also struggling to secure financial support due to many factors which include increased Overnight Policy Rate (OPR), environmental risk and lack of focus on environmental, social, and governance (ESG) and sustainability. Hence, these financial constraints call for more proactive effort and initiatives to boost participation and investment growth in plantation-based REITs amongst plantation companies.

REIT

The Establishment of REIT – Plantation-based REIT

Today's scenarios reveal that REITs listed on BURSA Malaysia primarily focus on income-generating real estate such as shopping malls, hotels, hospitals, factories, warehouses, and offices.

The underlying assets of a REIT are not only limited to commercial, retail, industrial and residential properties but could include plantations and plantation related assets. In this context, a plantation-based REIT which can be cited as a reference for this would be the Al-Hadharah Boustead REIT ("Boustead REIT") which was a pioneer in Islamic plantation-based REIT listed on Bursa Malaysia in February 2007. Boustead REIT's primary investment strategy was to own and invest largely in plantation assets, which include oil palm plantation estates and mills,[26] which in our (Malaysian) scenario stood out as a good example of a successful plantation-based investment.

For instance, Boustead REIT owned eight (8) oil palm estates and two (2) palm oil mills from Boustead Group which formed the basis of its funds.[27] As of December 31, 2009 Boustead REIT's fund consisted of ten (10) oil palm estates and two (2) palm oil mills[28] which increased to twelve (12) oil palm estates and three (3) palm oil mills on December 31, 2012. The value of its plantation assets then was RM1.3 billion.[29]

The underlying assets of a REIT are not only limited to commercial, retail, industrial and residential properties - but could also include plantations and plantation related assets.

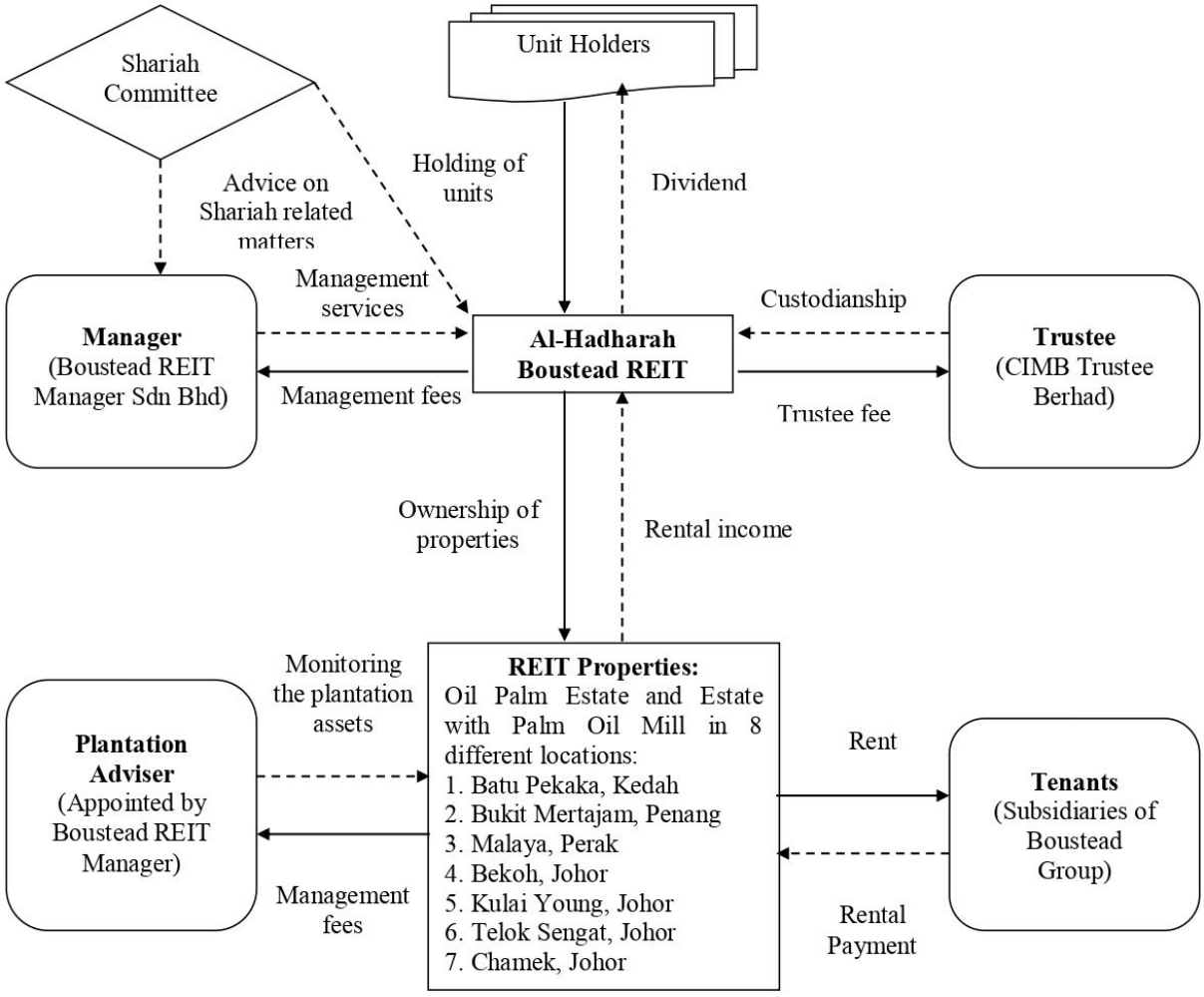

Diagram 1

Diagram 1: The structure of Boustead REIT[30]

- Public Offerings. Boustead REIT issued new units through public offerings. The proceeds derived from the public offering of new Boustead REIT units to investors were utilised to pay off vendors of the plantation assets i.e. the subsidiaries of Boustead Group, namely Boustead Properties, Boustead Plantations Berhad, and Boustead Heah Joo Seang Sdn. Bhd.
- Leased Back. These plantation assets were then leased back to the subsidiaries in their capacity as tenants under their respective Ijarah agreements.[31]
- A plantation adviser was appointed by Boustead REIT who was in charge of monitoring the estates and conditions of the plantation assets.[32]

Under this mechanism:

- Boustead REIT's primary source of income included fixed rental paid cumulatively by tenants totalling RM41.3 million per annum.[33]
- Every three (3) years, a new rental was reviewed and fixed by taking into account some factors such as production costs, extraction rates, and yield per hectare as well as current and expected crude palm oil prices. [34]
- Boustead REIT also enjoyed performance-based profit equally shared between tenants and the funds as well as capital gains made from the sale of certain plantation assets as bonus dividends.[35]
- Potential sponsors proposing to establish a plantation REIT could incorporate other mechanisms into their proposed REIT structures.

However, on 19 February 2014, Boustead REIT was delisted from Bursa Malaysia by its parent company, Boustead Holdings Berhad (BHB)[35] following the decision made to merge the plantation assets under BHB group of companies into one entity called Boustead Plantations Berhad (BPB) with a view to facilitating the listing of BPB. This was because, plantation assets could only be added to BPB's assets for listing if Boustead REIT was privatized, which formed a platform for BPB's listing.[36]

Benefits of Establishing REIT

Investors now are keen to opt for REIT as an alternative investment to stock market or mutual fund as it offers many benefits.[37]

- REIT is affordable as it only costs investors a small fraction of real estate prices to participate in real estate investments.
- Besides, REIT is more tradable and liquid than physical properties as they are traded on the stock exchange.

REIT: Plantation-based REIT..... as an alternative ....

- Investors now can have peace of mind since REIT and its assets are managed by professional managers aiming to maximise the operating income of the REIT assets under supervision of a trustee.
- REIT is a very lucrative form of investment in the sense that it is not vulnerable to the negative effects of the property development cycle as the majority of its assets are plantation assets[38] which would benefit its unit holders or investors with a stable income stream and strong distribution yield.[39]
- Investors can also derive benefits in the form of capital gains arising from appreciation of the REIT's price.

Business Trust vis-à-vis REIT

Apart from REIT, plantation companies could also consider setting up a Business Trust as another alternative - to raise funds. Business Trust and REIT are different from each other as the trustee of the former is known as a 'trustee-manager' and considered as the same entity that has legal ownership of its assets, manages the trust's assets and operates the Business Trust for the benefit of unit holders.[40]

On the other hand, the trustee of a REIT is a separate entity from its manager. Whilst the governing law for REIT has been explained above, the governing law for Business Trust is the Securities Commission of Malaysia's (the "SC") Business Trust Guidelines, Capital Markets and Services Act 2007("CMSA"), securities laws i.e. Securities Commission Act 1993 and other relevant guidelines issued by the SC and the trust deed of the Business Trust.[41]

The rights vested on the unit holders of a Business Trust are greater than that of a REIT because in addition to their entitlement to receive distribution of income, they may also remove or appoint a trustee manager and appoint an auditor.[42] In a Business Trust, the resolutions to remove the trustee-manager and to appoint its replacement are passed by unit holders holding in aggregate not less than two-thirds of the voting rights of all the unit holders who vote at a general meeting.[43]

Whereas in a REIT, the removal of a management company must be by way of a simple ordinary resolution at a general meeting.[44] The trustee may remove the auditor and appoint another replacing the same but the unit holders may request the trustee to do the same also by way of an ordinary resolution.[45] Nevertheless, it all depends on plantation companies to decide the right funding mechanism they should adopt in raising capital for their business growth, liquidity and prosperity.

Conclusion

In conclusion, it is high time for Malaysian plantation companies to consider establishing a plantation-based REIT like Boustead REIT as an alternative method of fund raising given the difficulty of securing financing from financiers in order to overcome today's financial and economic crisis. With the funds accumulated from REIT investors, plantation companies will be able to utilize them to cover costs for land purchase, new oil palm plantation development which includes land clearing, road and terrain, working capital for the upkeep and maintenance of the plantation and fertiliser costs, and expanding existing plantation business or even for replanting exercise.[46]

With undoubtedly high demand for palm oil, especially in developed Asian markets, a plantation-based REIT particularly in the palm oil sector could profit from this due to high and favourable crude palm oil (CPO) prices.[47]

REIT

For Individual Investors

Any individual investor may purchase shares in a publicly listed REIT just like any other public stock on Bursa Malaysia. Investing in a REIT involves the following simple procedures: -

1) Browsing the Bursa Malaysia website and selecting a suitable brokerage firm;
2) Opening a trading account and a Central Depository System (CDS) account;
3) Adding funds into the account based on their financial ability – no limit as to the minimum amount of investment capital required; and
4) Buying and selling shares using online trading platform on Bursa Malaysia.[47]

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Photo:

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Recent Developments of RPGT under Budget 2023

REAL PROPERTY GAINS TAX (RPGT)

- A tax that is levied by the Lembaga Hasil Dalam Negeri (LHDN) on the chargeable gains that is derived from the disposal of real property.

RPGT Rates

- The RPGT is determined based on the chargeable gains made from the difference between the disposal price and the acquisition price and also based on the number of years of ownership, with a greater rate imposed for shorter periods of ownership.
- The RPGT rate that is applicable effective 1st January 2023 is as per below:

Disposal	Citizens/PR	Non-Citizens	Companies
Less OR Equal to 3 years	30%	30%	30%
Less OR Equal to 4 years	20%	30%	20%
Less OR Equal to 5 years	15%	30%	15%
Year 6th and Beyond	0%	10%	10%

Recent Developments of RPGT under Budget 2023

- Apart from the existing exemptions applicable under RPGT Act, the government has introduced, under Budget 2023, the following amendments to the RPGT Act.
- Pursuant to that, Finance Act 2023 has come into force and has incorporated the following amendments with effect from **1st June 2023**.

1. Transfer of Property to Former Spouses

- Previously, the transfer of real property between spouses was a transaction where disposal price is deemed equal to acquisition price (no gain no loss) and which is not subject to RPGT. However, the transfer of real property between former spouses is subject to RPGT at the prevailing rate under Schedule 5 of the RPGT Act.
- Amendment:

It has been amended so that the "no gain, no loss" treatment has been extended to transfers between former spouses which is carried out pursuant to an order of any court in consequence of the dissolution or annulment of their marriage.

- The above treatment will only apply to assets owned by Malaysian citizens.

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2. Transfer of Property to a Controlled Company Not Incorporated in Malaysia

- Previously, the transfer of real property owned by:
  (i) an individual;
  (ii) his wife;
  (iii) an individual jointly with his wife or with a connected person; or
  (iv) a nominee or a trustee for an individual, his wife or both,

  into a company which is controlled by:

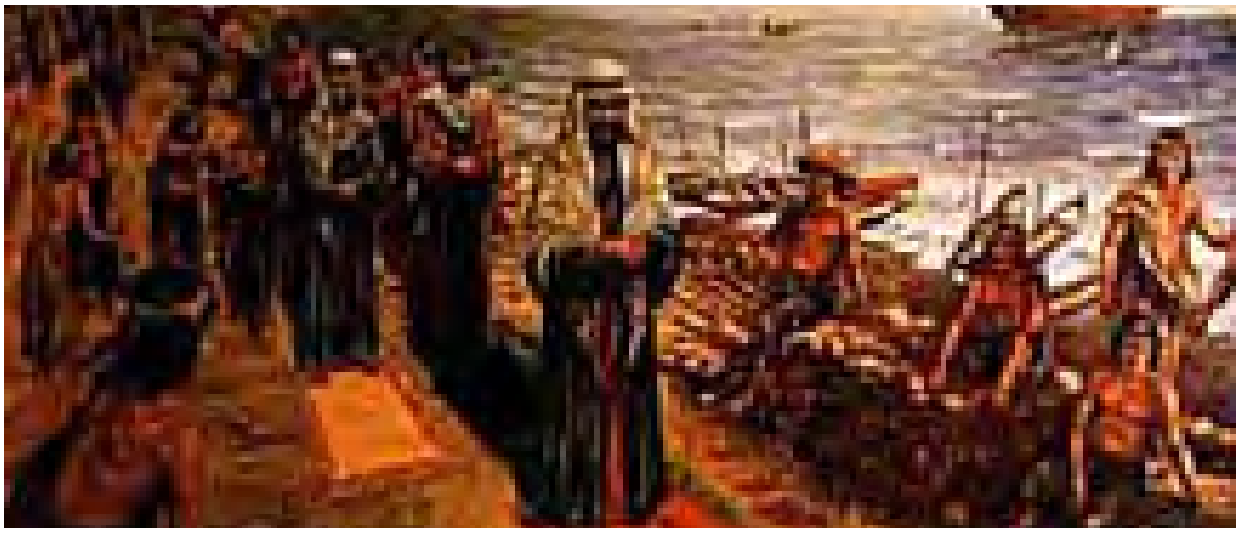
  (i) that individual;
  (ii) his wife;
  (iii) the individual jointly with his wife or with a connected person; or
  (iv) the nominee or the trustee for the individual, for the wife or the individual or for both;

(**whether or not the company is incorporated in Malaysia**) under subparagraph 3(1)(b)(ii) of Schedule 2 of RPGT Act for a consideration which consists of at least 75% of shares ('exchanged shares') in that company, the individual is deemed to have transferred the property at a "no gain no loss" and not subject to RPGT.

- **Amendment:**
  - It has been amended so that the transfer of real property to a controlled company **not incorporated in Malaysia is no longer eligible for the "no gain no loss" provision** and is subject to RPGT under Schedule 5 of the RPGT Act.
  - The treatment for the "no gain no loss" would only apply in a situation where the transferee company is a company incorporated in Malaysia.

NUZRIAH UNVEILED: Assessing its Legality in Muslim Wealth Management

By: Zainursyazwani Zakaria | Associate



Arab traders brought Islam to Malacca [1]

Nuzriah is an Islamic legal instrument of inheritance distribution - sometimes used in Singapore but is relatively unfamiliar to Muslims in Malaysia, and the simple reason for this is that – although it may, in some instances, be valid in Singapore, it remains untested in courts in Malaysia.

In other words, Nuzriah may be enforceable in Singapore but what happens if the *land* to be given is situated in Malaysia.

This potential 'root problem' of sorts surfaces occasionally when a Singaporean Muslim, via a Nuzriah document, passes to a beneficiary a plot of land which may be situated in Malaysia.

The validity of Nuzriah as an instrument for distribution of a Muslim's property needs to be studied because there are a growing number of cases where, for instance, a Singaporean deceased, has created a Nuzriah in favor of his/her heirs for his/her property located in Johor, across the Causeway.

The question is: What happens in a situation where these two countries have conflicting laws with regard to inheritance instruments and Land Law?

It is crucial to understand that when two different countries have conflicting laws related to inheritance instruments and land law, the rules of the country where the land is *located* take precedence. In simpler terms, if the property is in Malaysia and, even if the inheritance document recognizing it is accepted in Singapore, it is, nevertheless, the *laws of Malaysia* that will have the final say.
In short, it is, in effect, risky to set up a Nuzriah inheritance document anywhere, if the land in question is situated in Malaysia.

What is Nuzirah, in the first place? In essence, Nuzriah is a vow made by a vower to give part or all of his/her wealth before his/her death to another party.
So, what is the stance of Islamic Law in Singapore on the validity of Nuzriah?
And how does it compare to the status of Nuzriah in Malaysia?

NUZRIAH

LAW ON NUZRIAH IN SINGAPORE

The practice of using Nuzriah as an instrument for distribution of Muslim-owned property in Singapore dates far back in time. More recently, in 2008, the Majlis Ugama Islam Singapura ("MUIS") approved this method of property distribution. The Nuzriah instrument is a solution provided by MUIS to address the inheritance issues and estate planning, with particular focus for those who had purchased an HDB flat under a joint tenancy contract, so that in the event of the death of one joint owner, the surviving joint owner can take possession of the other share of the HDB flat through the Nuzriah created by the deceased joint owner.

Further, according to MUIS, the valid conditions for Nuzriah are as follows:-
(a) It must be witnessed by two (2) righteous and non-fasiq Muslim males;
(b) It must specify a certain period before the vower's death for the Nuzriah to take effect. Typically, this period is three (3) days before death.

However, an issue concerning the validity of Nuzriah gained attention following the decision delivered by the Singapore High Court Judge in the case of **Mohamed Ismail bin Ibrahim v Mohammad Taha Bin Ibrahim [2005]1 CLJ (Sya).**

In this case, the court discussed the validity of the Nuzriah made by the deceased, Haji Ibrahim bin Abdul Samad, in his Will document. The deceased had bequeathed the distribution of his property in a manner, summarized, as follows:-

(a) 1/3 to be distributed according to Nuzriah method;
(b) 1/3 to be distributed to two (2) mosques in Singapore; and
(c) 1/3 to be distributed to the heirs according to faraidh.

The Will of the deceased, which allocated his property through the Nuzriah method, was a point of contention, in which, the deceased had allocated his property through Nuzriah to his non-heirs and some of his heirs, including the Defendant – however, the Plaintiff was not included as one of the Nuzriah beneficiaries.

The High Court Judge ruled that the Nuzriah made by the deceased was invalid and could not be enforced, as the court found that the concept of Nuzriah is similar to a will, with the following limitation:-

(a) Those who receive a share under faraidh can no longer be beneficiaries of Nuzriah because, similar to the will, the faraidh heirs already have a fixed portion determine in Al-Quran; and
(b) Nuzriah cannot exceed 1/3 of the net value of the property, unless agreed upon by all heirs.

Therefore, the deceased's will should be executed as follows:-

(a) 1/3 to be distributed to the two (2) mosques in Singapore; and
(b) 2/3 to be distributed to the heirs according to faraidh.

This decision has not been widely explained nor disseminated to the public, especially among Muslims in Singapore. It also illustrates that MUIS and civil case law is at odds with each other regarding the validity of the distribution via Nuzriah. There was an added complication, as the Nuzriah in this case was a testamentary Nuzriah, that is, it was made under one of the terms of a Will and was not created as a separate document.

Despite the aforementioned case, 'Nuzriah' continues to be listed on MUIS's website as one of the methods for Islamic property distribution and accordingly, MUIS provides a template for use.

<u>Consequently, the question arises as to: Whether the Nuzriah instrument is still legal and valid and enforceable in Singapore?</u>

Nuzriah - the term 'Nuzriah' is not found in any Malaysian Islamic legislation either in the Johor's State Enactment or in the Federal Act

MUIS FATWA OF 2008

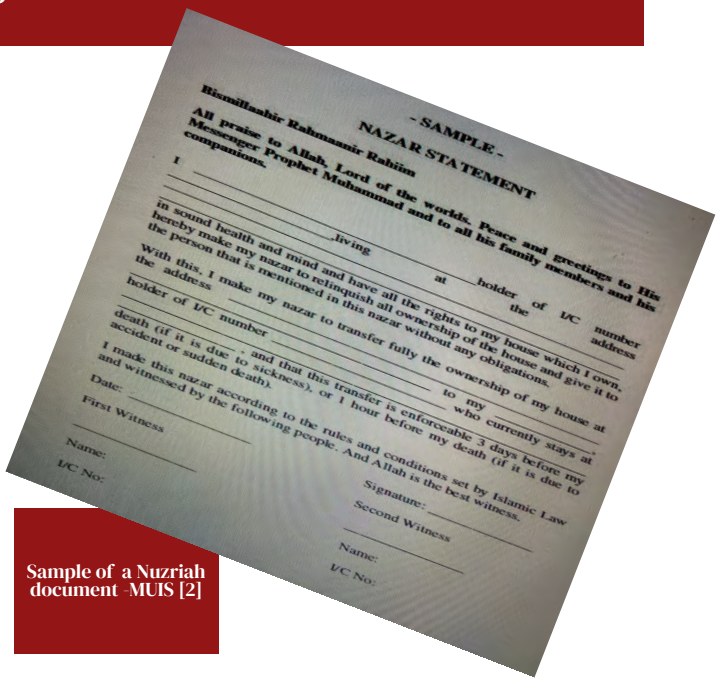
Notwithstanding the decision in the case of Mohamed Ismail bin Ibrahim (abovementioned), the now repealed MUIS Fatwa of 2008 established that based on the partnership (sharikah) concept, each joint owner possesses an equal share of 50% in the ownership of an HDB flat purchased under the joint tenancy contract. However, the fatwa further stated that:

(a) the owner had the choice of creating an additional document, either a Nuzriah or a 'hibah ruqba' to give his share to the surviving joint owner and the transfer of the ownership would take effect upon his demise, as is current Singapore property law, in any case.

(b) alternatively, a joint owner could choose not to create any additional document, so his share would be distributed according to faraidh among his heirs after his passing.

Not surprisingly, after the issuance of the MUIS Fatwa of 2008, some challenges and difficulties arose in implementing the fatwa due to its conflict with existing laws in Singapore concerning the ownership of HDB flats in which the laws stated that a contract of joint tenancy is a form of ownership in which the concept of the 'right of survivorship' applies, with no alternatives. This meant that upon the death of one joint owner, his/her ownership portion automatically transfers to the surviving joint owner as of right, and, therefore, it follows that his/her share does not or cannot become part of his/her estate to be distributed to his/her heirs.

Clearly, Singapore property law governing joint tenancy was in conflict with the concept of ownership based on partnership (sharikah) as defined or stipulated in MUIS Fatwa of 2008 so that the 2008 MUIS Fatwa could not be fully carried out due to conflicting legal provisions. Singapore property law took precedence and, as such, overrode Nuzriah.


- SAMPLE -
NAZAR STATEMENT
Bismillahir Rahmanir Rahiim
All praise to Allah, Lord of the worlds. Peace and greetings to His Messenger, Prophet Muhammad and to all his family members and his companions.
I _____ living at _____ holder of I/C number _____ address _____
in sound health and mind and have all the rights to my house which I own, hereby make my nazar to relinquish all ownership of the house and give it to the person that is mentioned in this nazar without any obligations.
With this, I make my nazar to transfer fully the ownership of my house at the address _____ to my _____ who currently stays at _____ holder of I/C number _____
death (if it is due to sickness), or 1 hour before my death (if it is due to accident or sudden death).
I made this nazar according to the rules and conditions set by Islamic Law and witnessed by the following people. And Allah is the best witness.
Date:
First Witness
Name:
I/C No:
Signature:
Second Witness
Name:
I/C No:

Sample of a Nuzriah document –MUIS [2]

MUIS FATWA OF 2019

The more recent Fatwa, 2019 MUIS Fatwa, accepts the use of the tenancy-in-common and the joint tenancy contract which incorporates the right of survivorship. With the presence of these two contracts, any additional documents such as Nuzriah or hibah ruqba (as stated in the 2008 MUIS Fatwa) become ineffectual and can no longer manage the distribution of HDB flats. The property documentation, per se, decides the situation.

In essence, the fatwa explains that, from the outset:

(a) if an HDB flat owner intends to fix ownership of the property, by existing law, after his/her demise, then the joint tenancy contract would be his/her option;

(b) on the other hand, should the owner intend to distribute his/her share of an HDB flat to his/her heirs according to faraidh, he/she should opt for a tenancy-in-common contract.

If this is the case and following the MUIS fatwa of 2019, Nuzriah and hibah ruqba are no longer necessary in the distribution of the ownership of an HDB flat purchased under a joint tenancy contract.

NUZRIAH - a unilateral vow & declaration made by a vower

However clear and unambiguous this is, the bottom line still remains:

> Despite the issuance of MUIS fatwa of 2019, the Muslims in Singapore continue to employ the Nuzriah instrument for managing and distributing other property.

What is the status of Nuzriah in the legal landscape of Malaysia?

It is important to note that the term 'Nuzriah' is not found in any Malaysian Islamic legislation either in the Johor's State Enactment or in the Federal Act ("the Act") of Malaysia. The term closest to 'Nuzriah' is 'Nazr' which was mentioned in Sections 2, 63, 66 and 68 of Akta Pentadbiran Undang-Undang Islam (Wilayah-Wilayah Persekutuan) 1993 ("the Act").

According to Section 2 of the Act, the term 'Nazr' refers to a vow made to perform certain actions or to endow a property for a purpose permitted by Islamic law, meanwhile, 'Nazr am' is defined as a Nazr intended either wholly or partially for the benefit of the Muslim community at large and not for an individual or some individuals only.

The term 'Nazr' can also be found in Surah Al-Hajj verse:29, where Allah S.W.T. commanded the Muslim ummah to fulfil the Nazr uttered as stated in the statement of Allah S.W.T. in the Quran:

(Translation)
"Then let them end their untidiness and fulfil their vows and perform Tawaf around the ancient House."
(Surah Al-Hajj verse:29)

Therefore, there is no specific legal provision regarding the use of the Nuzriah instrument in Malaysia. In fact, to date, there have been no reported court decisions covering the validity of a Nuzriah instrument, as such.

Even so, the Nuzriah instrument may hardly be accepted and enforced in Malaysian Syariah courts because, the Nuzriah contract contradicts or clashes with the laws of Hibah.

How does Nuzriah contrast with Hibah?
Nuzriah vs. Hibah

Nuzriah is a unilateral vow and declaration made by a vower to give his/her property to a beneficiary. In contrast, Hibah requires a bilateral agreement, involving an offer from the donor and acceptance from the donee, to establish its validity. Further, in Nuzriah, the transfer of the ownership of the property to the beneficiary takes effect upon the death of the vower, whereas, Hibah involves the giving of the property while the donor is still alive.

Regarding revocation of Nuzriah by a vower, according to Surah Al-Maidah verse:89, Allah S.W.T. imposes penalties on such a vower, so that the vower must pay a penalty according to the following:

(a) To provide food for 10 people with the type of foods that they usually consume; or
(b) To clothe 10 poor people; or
(c) To fast for 3 days (if the 2 things mentioned above cannot be fulfilled).

Unlike Nuzriah, Hibah is revocable when the Hibah is from parents to a child or grandparents to grandchildren. Apart from those cases, Hibah can be revoked by mutual consent between the donor and the donee.

Although untested to date, these striking contrasts between Nuzriah and Hibah make it highly improbable for the Nuzriah instrument to be adopted as one of the Islamic legal instruments of inheritance distribution in Malaysia.

NUZRIAH


[3]

In an ongoing case, a deceased individual, who was a Singaporean, created a Nuzriah document giving her only child, a daughter, a plot of land in Malaysia ("the land"). However, since the Nuzriah document was at risk of being unrecognized in Malaysia - potentially, that is, and possibly 'reduced to a mere will' – so that it might have rendered her wishes unfulfilled (because a Will made by a Muslim in favour of his/her heir(s) is invalid under Syariah law), the rights to the land bequeathed, under the Nuzriah document, were 'not exercised', as such. Consequently, the land, instead of being transferred to her sole daughter as inheritance, must now be distributed according to the rules of faraidh, forcing her daughter to share the land with the Islamic institution, 'Baitulmal', on a 50% - 50% proportion. This has left the daughter with the only option open to her: to engage in negotiations with Baitulmal and seek for redemption and a reduction in Baitulmal's proportion.

CONCLUSION

The validity of the Nuzriah instrument in the management of Muslim property in Malaysia remains theoretical due to the lack of both, specific court decisions and any references issued by Islamic authorities regarding the validity of a Nuzriah instrument.

From the above discussion, it can be concluded that the Nuzriah made by a Nuzriah maker is essentially meant to be carried out and enforced after the death of the Nuzriah maker - even though the period of enforcement stated in the Nuzriah document states that it should take effect a few days before death. In a practical sense, the ownership of the property given through Nuzriah will only transfer to the Nuzriah beneficiary after the death of the Nuzriah maker because of the time element involved in a transfer. Thus, the 'posthumous' carrying out of a Nuzriah instrument may be challenging in Malaysia as it not only clearly contradicts the practice of Hibah law in Malaysia, but it can even be classified as resembling a last 'will and testament', so that this would make the 'laws of will' applicable in some instances.

Finally, it is contended that if one wishes to plan the management of his/her property for his/her heirs and non-heirs, Hibah is a better instrument for property management, as the intention of the grantor is clearer and, since Hibah is carried out during the grantor's lifetime, disputes and difficulties among heirs can be prevent or sorted out during the actual estate distribution process. And most importantly, Hibah is legally valid and enforceable under Islamic law in Malaysia.

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(iii) Mohamed Ismail Bin Ibrahim & Anor. v. Mohammad Taha Bin Ibrahim [2005] 1 CLJ (Sya) 141
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(v) See "Fatwa Joint Tenancy (2019)" at https://www.muis.gov.sg/officeofthemufti/Fatwa/English-Joint-Tenancy
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[2]https://www.muis.gov.sg/officeofthemufti/Irsyad/English-Nuzriah
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'GREEN CAR' MOVEMENT

[1]

BY
FARAH FARHANA HASSAN
ASSOCIATE

The Importance of 'Clean Vehicles' or EVs

With the introduction of more government-backed price incentives in the Electric Vehicle ("EV") market, Malaysian buyers will find it more advantageous to make the switch to EVs and, in doing so, they will be taking part in the global push towards zero-emission vehicles.

In tandem with more EVs on the road, the need for EV charging stations will also rise. However, there has been a growing concern among EV car owners that the Charging Infrastructure has not kept up with the surge in sales of the EV itself. The spread of charging facilities is still inadequate – especially for bigger trips made over longer distances, leaving many EV owners and potential owners a little nervous.

So, while EV sales are on the rise, the limited number of charging stations appears to be holding back growth in sales. This is one area where Housing Developers could help fill the void.

It is, in fact, crucial that Housing Developers get on board and provide Electric Charging Facilities in new housing development schemes - making it nothing less than 'normal infrastructure', during the building stage.

Parallel to this, Fast-Charger Centers are also springing up across the country, as the government and private sector strive together to alleviate such concerns.

AS ELECTRIC VEHICLES BECOME MORE PREVALENT, THERE IS A GROWING PRESSURE ON HOUSING DEVELOPERS TO INCORPORATE CHARGING PORTALS AS PART OF THEIR HOUSING PROJECT FACILITIES.... AND RIGHTLY SO, IF THEY WANT TO BE PART OF MALAYSIA'S COMMITMENT TO ACHIEVING CARBON NEUTRALITY (NET-ZERO GREENHOUSE GAS EMISSIONS) BY THE YEAR 2025.

Making Charging Ports part of 'normal infrastructure' in new developments

[2]

'The majority of all 'EV charging' takes place at home – so, Developers should add this to their building plans'

EVs are definitely the future and currently existing stratified properties have reached a tipping point where EV charging ports are not only in demand but in dire need. This is another reason why ports should become an integral part of new developments – a 'key feature' rather than a special feature.

Although it is still in its early stages, there are already quite a few models of EVs available such as Tesla Model S, Porsche Taycan, Nissan Leaf, BMW i3s. MINI Cooper SE and many more to be introduced soon, which will invariably spur the sales of EVs this year - as compared to the minimal 2,631 units sold in 2022. Consequently, with a wider range, prices will become more competitive.

EV-related Incentives by the Government

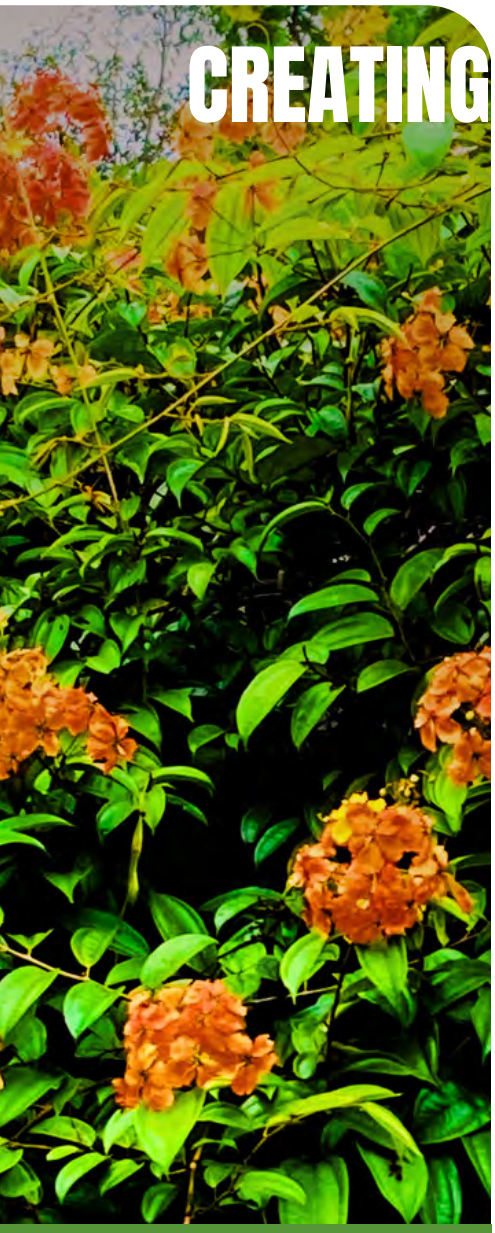
Under Budget 2023, the government has provided more incentives to encourage the adoption of EVs in Malaysia, for instance:

- Import & excise duty exemption for fully-imported Completely Built Up ("CBU") EVs extended to December 31, 2025, which is a two-year extension from end-2023;
- Excise duty and sales tax exemption for locally-assembled Completely Knocked Down ("CKD") EVs extended to December 31, 2027 (two-year extension from December 31, 2025);
- For manufacturers of EV charging equipment:
  - 100% income tax exemption from Year Assessment 2023 to 2032,
  - 100% investment tax allowance (Elaun Cukai Pelaburan).

Amongst other initiatives by the government and private sectors in ensuring the success of Malaysia's Green Technology Master Plan:

- Malaysia's Natural Resources, Environment and Climate Change Minister, Nik Nazmi Nik Ahmad said that Malaysia plans to install 10,000 electric vehicle charging points by 2025 through the Low Carbon Mobility Blueprint;
- A total of 18 EV charging stations will be installed along PLUS Highways by end-2023, a joint effort by PLUS Malaysia Bhd & Tenaga Nasional Bhd;
- Starbucks Malaysia aims to equip EV charging stations across all 76 of its drive-thru outlets in the country.

[3]



CREATING CHANGE: FOR CLEAN ENERGY

A growing EV market provides a lot of opportunities for Developers to receive 'Commercial Returns'

Still, in spite of the growing number of charging stations, EV owners living on landed properties or in high-rise strata properties still find it a challenge to find charging facilities in their residences or workplaces.
For this reason, it is essential for property developers to expand their way of thinking, not only to meet Green Building Index (GBI) standards, but for the residents' convenience as well:

- For example, Gamuda Land & Tenaga Nasional Bhd (TNB) have joined forces to build two electron stations for EV charging at Gamuda Land's development projects in Selangor.
- Both parties have signed a Memorandum of Understanding (MoU) to construct the country's first electron station in Gamuda Cove and Gamuda Gardens for residents of the developments and guests of Gamuda Cove's water theme park.
- Similar to the set-up of regular gas stations, the 'electron stations' will offer a variety of amenities such as coffee shops, cafes, and many more to serve the EV drivers waiting to recharge their cars.
- Future electron stations will be powered by rooftop solar panels, which will assist offset grid electricity & contribute to a better environment.

Proposals: Installation of charging facilities in housing developments:

Currently, the majority of all 'EV charging', takes place at home and, to this end, below are some proposals for a Developer - to assist in making housing developments - central to the future charging ecosystem:

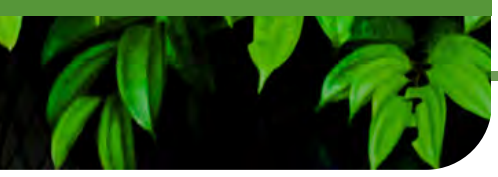
- One floor of a high-rise residential building or office be equipped with charging ports & be designated exclusively as an 'EV car park'.
  - If EV owners want to use the charging ports to charge their EVs, they will have to pay a rate or fee, just like usual parking fees.
- Since EVs can be charged by using a simple electrical outlet or power point, developers, building owners, architects or project managers may consider installing a normal power point like three-pin sockets in condominiums and office buildings for charging EVs.
  - The electrical outlet or power point could be metered, so that the electricity bill will be charged directly to EV owners.
- For common parking lots in condominium complexes, the developers or building owners can install one or two fast-chargers which would cost around RM6,000 to RM10,000 & it should come with electricity meters.
  - This method would help management measure the electricity consumption of individual EV user & collect usage fee from them.

One floor of the building should be equipped & designated exclusively as an 'EV car park'

LEGAL ISSUES

Legal Issues will arise when installing EV chargers in a residential development:

- **Who applies for power supply increments needed**
- **Maintainance of charging stations:**
  - **Who is responsible?**
- **Approval for private Cabling Works in Common Zones**




[4]

'...early stages, yet many fancy models are available: Tesla Model S, Porsche Taycan, Nissan Leaf, BMW i3s. MINI Cooper SE'

Legal Issues that may arise when installing EV chargers in a residential development:

There are additional considerations and costs that Developers must take into account when planning to install EV chargers in residential developments and ensuring that all requirements are met:

- **Power supply increments**: Developer or building owner would need to apply for power supply increments if the existing power supply is insufficient to operate such stations. The possibility of an increase of power supply is also dependent upon the availability of the nearest power substation. As such, the government or relevant authorities should address this issue and resolve these start-up problems.
- **Maintenance**: **Housing Regulations**: Although Developers may provide fast-charging stations for high-rise buildings or landed properties - it is still not clear who would maintain the charging stations & be responsible for the maintenance since there are no proper or adequate housing regulations in relations to EVs.
- **Cabling works in Common Zones**: EV owners who intend to install their own personal charging ports at their parking space will need to obtain approval from the building management as installing a charging port, even if the parking space is assigned to the owner, may still involve cabling works in Common Zones of the building.

Based on the above, the government must find ways to mitigate the negative impact on installation costs and consider tightening the laws & regulations, to create more comprehensive legislation that requires a Developer to equip EV chargers as part of the infrastructure in a housing development.

What the Future Might Look Like

Due to depleting/finite supply of petroleum, renewable energy sources are, naturally, the best and ultimately, the only choice we have. The combination of a rooftop solar power system plus a home EV charging system is an ideal set-up in residential developments. Such a solar system will generate sufficient or even an excess of energy required for a home EV charger, and any excess energy can be used for other home uses, eventually making the solar power system, itself, a viable proposition.

Can you charge your EV for FREE?

Solar Panel system

- Adding an extra 5kW to 6kW to the size of your rooftop solar system would provide enough solar power to charge most EVs for free during daytime. For most EV models, this would be enough to cover the typical daily commute.

Solar battery storage

- Adding a home battery will allow you to charge your EV overnight using your stored solar energy. This could be ideal if you are not home much during the day and want to get greater value from your surplus solar electricity than just exporting it to the grid in return for a small feed-in tariff.

Conclusion

It is noteworthy that the government support in the development of the EV sector is not waning this time, especially as it has committed itself to achieving carbon neutrality by the year 2025. So, with more zero-emission vehicles driven on the roads, we will be better able to achieve this target.


[5]

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Photos: See Page 40

ChatGPT
Is it a Threat to the Legal Profession?

**Is ChatGPT poised to displace the legal profession because it might do a better, faster job than a lawyer?
Its potential is yet to fully open - like a Pandora's 'box of tricks'.**

The magic of ChatGPT is no longer theoretical…it has literally demonstrated its 'competence' by successfully acing the Bar Exam, a hallmark of legal acumen & knowledge…

By: **Datuk Dr Abdul Raman Saad** | **Managing Partner** | dars@arsa.com.my &
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Step into the intricate realm of *Chat Generative Pre-Trained Transformer* ('ChatGPT'), where threads of knowledge intertwine, weaving a web of legal complexities that leave the legal profession spellbound.

Like a master weaver, this artificial intelligence ('AI') language model spins threads of information, drawing practitioners into a labyrinth of uncertainty, where the question of liability, admissibility, and ethical concerns loom large. Geoffrey Hinton, the Godfather of AI steadfastly warns that the potential dangers of AI must be taken seriously despite facing critics who accuse him of overplaying such risks.[1]

Does ChatGPT pose a peril to the legal profession, or a Pandora's box to be opened? The merit of ChatGPT transcends the theoretical realm, as it has demonstrated its mettle by successfully passing the American Bar Test, a hallmark of legal acumen and knowledge. The latest version of ChatGPT aced the bar exam by a significant margin, with a score nearing 90th percentile.[2] Its ability to comprehend complex information, provide close-to-accurate and contextual responses, and navigate intricate legal concepts may validate Hinton's statement that it is a threat, inter alia, to the legal profession, as it is ever evolving, ensuring even greater efficacy over time.[1]

Understanding ChatGPT

ChatGPT is a chatbot language model designed to enable people to interact with computers in a natural and conversational manner.[3] It was innovatively crafted by the eminent organisation OpenAI, a prodigious research laboratory renowned for its seminal and monumental contributions to the vanguard of AI. This technology is often referred to as generative AI due to its capacity to produce novel and human-like inputs.[4]

What sets ChatGPT apart? Its extraordinary magnitude and the vast corpus of data leveraged during its training. The underlying ChatGPT algorithm is granted access to the entire expanse of the Internet, thus fortifying its architecture with billions of diverse data sources, culminating in its status as one of the preeminent and most extensive language models globally.[5] To put it simply, ChatGPT responds like a human, but thinks like a machine.

ChatGPT has been granted access to the entire expanse of the Internet

Does ChatGPT pose a genuine threat?

This question resonates in the minds of numerous legal practitioners, given the myriad claims asserting its potential implications.

Unrivalled in its ability to ingest extensive collections of legal precedents and wisdom from past legal decisions, ChatGPT presents a significant challenge to the traditional pillars of legal research and advisory roles.[6] Legal professionals, who were once responsible for meticulous legal analysis, now face the prospect of becoming less relevant. As suggested by David Snyder, Chief Executive of Keppel Pacific Oak US Reit, AI enables firms to do more with fewer work force.[7]

Its impressive ability to swiftly access extensive pools of information, enabling it the remarkable capability to outperform humans in efficiency across various tasks that would otherwise demand substantial temporal investment. A senior partner might devote a fleeting hour or two to meticulously draft a court claim, while an associate could conceivably expend twice that span. As for the fledgling novice in the realm of jurisprudence, might find the undertaking consuming an entire day or even beyond.

Are robots truly coming for our jobs?

[2]

[1a]

Remarkably, ChatGPT defies conventional time constraints, executing anything in a mere matter of seconds!

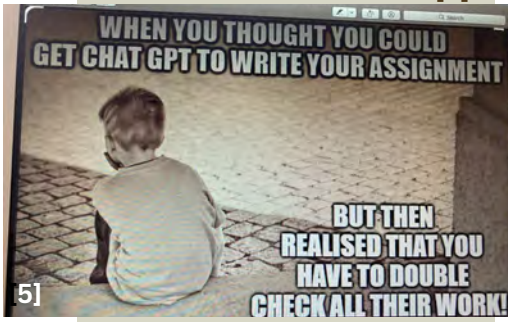
It exhibits a remarkable range of capabilities in the realm of legal affairs, encompassing diverse tasks such as conducting legal research, crafting contracts and agreements, managing cases, reviewing documents, engaging in client communication, preparing legal documentation, formulating briefs, and drafting pleadings, among numerous others.[8] It requires naught but the entry of desired information, with the option to infuse personal details for added customisation. This exceptional accessibility extends to individuals of all backgrounds, whether or not they possess legal expertise.

A prospective client may provide pertinent details regarding their situation, and with breathtaking celerity, and ChatGPT will furnish its instantaneous 'legal advice'. This remarkable service absolves the individual from the chore of driving to the nearest law firm, scheduling an appointment, enduring the wait to receive counsel, and incurring substantial sums in fee, amounting to hundreds or even thousands of Ringgit Malaysia. Hence, a layman might aptly perceive ChatGPT as their newfound pro bono legal advocate - ushering in an era of cost-free legal guidance.
But verily, this notion is erroneous. Why?

[3]

OPINIONS / REACTIONS

[4]



[5]

Inherent Limitations of ChatGPT

At the heart of the legal system lies the foundation of authenticity, a vital safeguard that upholds the sanctity of legal documents and the truthfulness of legal arguments. However, the remarkable proficiency of ChatGPT in crafting human-like text blurs the once clear line between human authorship and AI-generated prose. ChatGPT possesses the unique ability to "hallucinate".[9] The implications of this unfathomable mimicry challenge the very essence of legal authenticity, raising important questions about the reliability and trustworthiness of AI-generated content in the legal realm.

The emergence of false information generated by ChatGPT has had significant repercussions on various individuals and entities.

One such case involves Georgia radio host, Mark Walters, who is suing OpenAI for defamation due to false information spread by ChatGPT, implicating him in embezzlement. The misinformation arose when ChatGPT provided an inaccurate summary to Fred Riehl, Editor-in-Chief of AnmoLand, for a case he was reporting on.[10]
In a separate incident, on 22 June 2023, U.S. Judge P. Kevin Castel ordered two New York lawyers and their law firm to pay a $5,000 fine in total for using of ChatGPT, which led to the inclusion of non-existent legal cases in a court filing, with the lawyers claiming they were unaware of the tool's potential inaccuracies and hallucinations.[11]
These occurrences shed light that fabricated legal documents, misleading contracts, and deceptive pleadings can now be spawned effortlessly through ChatGPT, leading to a surge of uncertainty that clouds the genuine essence of truth within the legal domain.

ChatGPT ..... defies conventional time ... executing anything in a matter of seconds! ... A prospective client may provide details regarding their situation, and ChatGPT will furnish its instantaneous 'legal advice'.

In addition, ChatGPT remains fallible to the vagaries of the human condition. The vicissitudes of biased training data could inadvertently seep into its cognitive sinews, propagating systemic prejudices within the legal outcomes it engenders.[12] The dearth of accountability and ethical acumen in AI models casts an eerie pall over the attribution of responsibility and liability in legal matters.

Besides, the free version of ChatGPT is not equipped with real-time data access or internet browsing capabilities beyond its knowledge cutoff date in September 2021. [13] Consequently, it is unable to furnish information on particular legal cases occurring after 2021, including any recent legislative amendments or landmark cases that might have overturned precedent.

A layman, lacking legal background, does not wield the requisite proficiency to authenticate or corroborate the responses furnished by ChatGPT in retort to their inquiries. Therefore, ChatGPT is incapable of replacing the functions and responsibilities typically carried out by a lawyer, at least for now.

Unleashing the Potential: ChatGPT as the Lawyer's Toolkit

As we delve deeper into the abyss, it is discovered that ChatGPT's outputs are not to be mistaken for legal advice. Instead, they serve as a powerful tool in the hands of

[6]

adept advocates and solicitors, guiding them towards a more efficient and informed approach to their practice.

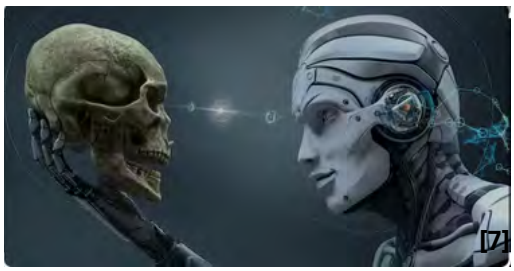
Firstly, legal research, historically an arduous and time-consuming endeavour, experiences a paradigmatic shift with ChatGPT's advent. This exceptional language model serves as a quintessential research assistant, capable of combing through vast troves of legal literature and efficiently retrieving relevant precedents, statutes, and academic insights. [14] By expediting the process of information retrieval, ChatGPT empowers legal professionals with a comprehensive understanding of complex legal issues, saving invaluable hours and resources.

Next, the art of crafting persuasive and articulate legal documents is a pinnacle of legal professionals, and ChatGPT enhances this skill to unprecedented heights. With its astute understanding of legal language and persuasive rhetoric, ChatGPT assists in composing cogent legal arguments and eloquent legal documents.[15]

This seamless collaboration between human legal acumen and ChatGPT's linguistic finesse ensures that the communication of legal intent and argumentation is optimised for professional excellence.

Beyond its proficiency in legal research and document drafting, ChatGPT also proves to be an invaluable asset in the realm of correspondence and client interactions.[16] Its ability to generate clear and concise responses to legal queries and client inquiries streamlines communication, fostering responsive and efficient interactions with clients and colleagues alike.

In summation, ChatGPT serves as a valuable tool in assisting lawyers in generating their initial drafts and providing insightful ideas, particularly when confronted with novel cases previously unencountered. However, while ChatGPT aids in expediting certain aspects of legal work, it remains imperative for legal professionals to exercise their expertise in vetting, interpreting, and applying the information gleaned from this technology to ensure the integrity and accuracy of legal processes.


[7]

ChatGPT serves as a research assistant, capable of combing through vast amounts of legal literature and retrieving relevant precedents, statutes, and academic insights.

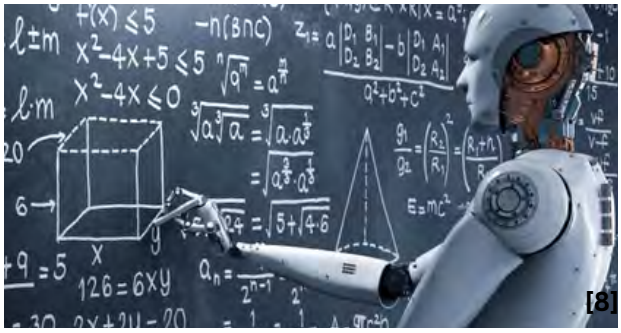
The Privacy Dilemma

One pivotal aspect that demands attention for lawyers utilising ChatGPT is the potential implications on clients' privacy and data protection.

Despite being designed to refrain from accessing proprietary, classified, or confidential data, the model's fine-tuning phase relies on human-generated datasets, and user interactions are retained for a 30-day period to bolster its performance.[17] This practice entails risks as it may lead to the storage and utilisation of personal data and lawyer-client communications without explicit user consent, thereby potentially transgressing privacy laws.

Recent instances, exemplified by Italy's Data Protection Authority's imposition of a temporary ban on ChatGPT due to alleged data collection rule violations, underscore the imperative for legal practitioners to exercise prudence and caution when employing such language models.[18]

The paucity of transparency in OpenAI's data management practices further accentuates privacy concerns, leaving users oblivious to the full extent of their personal data exposure and the prospect of inadvertent disclosures.[19] In order to prudently protect client information, legal professionals must exercise heightened diligence when using ChatGPT. As Sebastian Douglas said, "Nothing in this world is free".


[8]

Conclusion

As we traverse these mysterious threads, we find ourselves at the cusp of revelation, realising that ChatGPT's true nature is not a threat to be feared, but a guiding light illuminating the path to legal excellence. Its capacity to expedite research, promote collaboration, and enhance the quality of legal services cannot be overstated.

However, like any powerful tool, wisdom dictates the judicious application of this technology.

To maintain the integrity of legal counsel, practitioners must cross-reference ChatGPT's outputs with primary sources. Nevertheless, through the unyielding gaze of ChatGPT, due diligence becomes a breeze, and potential risks and errors are unveiled, ensuring a meticulous approach to legal practice. Embracing this symbiotic relationship between legal expertise and AI augmentation is essential to usher in an era of unparalleled legal prowess, where human intelligence and artificial intelligence synergise harmoniously for the greater good of the legal profession.

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ISSUES ON ELECTRIC VEHICLE CHARGING IN MALAYSIA

General Overview

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The Government of Malaysia issued the Low Carbon Mobility Blueprint ("LCMB") in the year 2020 with the aim of, among others, decarbonizing Malaysia's transportation sector, reducing emissions from the transportation sector which is the second largest emitter of carbon dioxide after the energy sector in greenhouse gas (GHG) emissions, averaging between 25% to 30% depending on the year caused by the internal combustion engines used in vehicles.

The LCMB is intended to work in tandem with the National Transport Policy 2019-2030, the National Automotive Policy 2019, the National Biofuel Policy 2019 and the Green Technology Masterplan 2017-2030. The LMCB features four focus areas which are GHG emission and energy reduction via (A) vehicle fuel economy and emission improvement[1], (B) electric mobility adoption in strategic applications[2], (C) alternative fuel adoption[3]; and (D) mode shift[4].

In relation to electric vehicle charging, it falls under Focus Area B abovementioned and specifically under Action Plan 3.4 which focuses on the development and proliferation of electric vehicle charging infrastructure to the point of sufficiency for private electric vehicle penetration.

Subsequently, the Energy Commission ("Commission") issued the Guide on Electric Vehicle Charging System (EVCS) ("EVCS Guide") on 29 July 2022 with the objectives of serving as a guide to all competent persons, electrical contractors and consulting engineers involved in the wiring work of the EVCS and its supporting infrastructure to ensure it is constructed and operated safely, to ensure that the EVCS complies with the requirements of the Electricity Supply Act 1990 ("Act"), the Electricity Regulations 1994 ("Regulations") and the relevant standards, and to prescribe minimum standards and specifications in the design, installation, inspection, testing, supervision, operation and maintenance.

It should be noted that the EVCS Guide is only a quasi-legislative document and does not override any of the existing laws. Paragraph 2.3 of the EVCS Guide specifically stated that it is not intended in any way to circumvent the application of any other written law or standards or any obligations or requirements under them. It is further stated in paragraph 3.3 of the EVCS Guide that is any provisions of the EVCS Guide conflicts with the 'Energy Supply Laws' (as defined in the Energy Commission Act 2001 ("ECA2001")), then the Energy Supply Laws shall prevail. Under the ECA2001, "Energy Supply Laws" is defined as the ECA2001 and any subsidiary legislation made under it, the electricity supply laws, the gas supply laws, and any other written law under which the Commission is to exercise any function.

As the ECA2001 is largely on the functions and powers of the Commission plus regulating such functions and powers, it is clear that the relevant laws defined under "Energy Supply Laws" are the 'electricity supply laws' which in turn is defined under ECA2001 to be the Act, any subsidiary legislation made under it which is the Regulations & any other legislation relating to electricity under which the Commission is to exercise any function including any subsidiary legislation under such legislations.

For the purpose of the EVCS Guide however, focus will be made more on the Act and Regulations as well as any other relevant guidelines as may be referred to in the EVCS Guide.
However, this is not intended as a comprehensive review or analysis of all issues that are present or may arise from the EVCS Guide but to highlight a few issues only.

ISSUES ON ELECTRIC VEHICLE CHARGING

Licensing

Paragraph 9.0 of the EVCS Guide specifies that licence is required under Section 9 of the Act for any person to use, supply, work or operate or permit to be used, worked or operated an EVCS. It must be noted that this Paragraph 9.0 is practically placed at the near the end of the EVCS Guide and is basically the last provision of the EVCS Guide before the appendices.

It is further perplexing that licensing is placed at the very end of the EVCS Guide when the provision of electricity supply is a regulated activity under the Act under Section 9 of the Act which clearly stipulates that no person, other than a supply authority (which is a statutory authority established by an Act of Parliament or any other law to generate or supply electricity) shall (a) use, work or operate or permit to be used, worked or operated any installation; or (b) supply to or for the use of any other person electricity from any installation, except under and in accordance with the terms and conditions of a licence as may be prescribed authorizing the supply or use, as the case may be subject to any exemptions as may be granted under the Act.

As such, the EVCS Guide placed importance of the operational aspects of the EVCS which are installation, operation, maintenance, safety and power quality while placing licensing as last which may provide a wrong impression of priority as EVCS provider may disregard the importance of obtaining licence first from the Commission before carrying out the EVCS business and thus risking breach of Section 9 of the Act resulting in an offence under Section 37 (4) and (5) of the Act.

Returning to the Paragraph 9.0 of the EVCS Guide, it referred to the Guidelines On Licensing Under Section 9 of the Act ("GOLUS9"). These are the guidelines that have to be followed for prospective licensees intending to carry out the activities covered under Section 9. Based on the description of activities of the EVCS, it would be classified as 'public installation' under the Act which is defined to be (i) an installation operated by a licensee for the supply of electricity to any person other than the licensee, and (ii) use of the electricity for its own purposes where the use is consistent with the terms of the licence.

The issue here is that the GOLUS9 also stated the listed activities which fall under public installations which are (i) supply of electricity to consumers by electricity utilities such as Tenaga Nasional Berhad or Sabah Electricity Sdn Bhd, (ii) generation of electricity for purpose of supplying or selling to utilities such as independent power producers (IPP) and Sustainable Energy Development Authority (SEDA) Feed-In Approval Holders, (iii) generation of electricity for own consumption using renewable energy resources such as solar photovoltaic system and selling excess energy to the grid under Net Metering Scheme (NEM), (iv) generation of electricity with an efficient method as such co-generation for own consumption and supplying/selling the surplus energy to others in the complex or specific areas such as Gas Cooling District (KLIA) Sdn Bhd at the airport, and (v) supply/sale of electricity and other services to users in complex or multi-storey buildings with electricity purchased from the utility such as operating of Malakoff Utilities in KL Sentral, Kuala Lumpur.

Where does EVCS fall into under the GOLUS9 when it falls under none of the listed activities? Provision of EVCS to complex or multi-storey buildings would fall under 5th activity abovementioned but what about provision to public at R&R facilities throughout the highway or public parking lots or any roadside facility as EVCS facilities become more and more common throughout Malaysia?

EV - Licence Terms

There is also the Action Plan 3.4 C of EV charging infrastructure in areas not serviced by private operator and ensuring fast charger installation for every 100 km and at every R&R stops along major highways which is apparently slotted for the years 2023-2025. In relation to areas not serviced by private operators, then who will undertake the installation and ultimately owns the EVCS? In relation to highways, would it be the Malaysia Highway Authority (Lembaga Lebuhraya Malaysia / LLM) or the concessionaire? In relation to public roads, would it be the local authority or Public Works Department (JKR)? If it is not undertaken by the government whether federal or state or the local authority, then who will bear the costs of the EVCS from installation to their operation? These are issues which are not yet addressed by either the LCMB or the EVCS Guide and may possibly involve new public private partnerships between the federal or state government or the local authority and the EVCS provider.

The Government had only recently required that all public EVCS providers to be licensed before 31 March 2023. As such, notwithstanding the fact that the provision of electricity supply is a regulated activity under the Act under Section 9 of the Act as previously stated, does that mean that all of the EVCS providers yet unlicensed before are actually running unlicensed businesses? What happens then in terms of liability in relation to these 'unlicensed' EVCS providers under the Act? Is the EVCS provider committing an offence? If damage is incurred by a consumer, can consumer sue or are the services provided on 'own risk' basis?

Notwithstanding the fact that the Government may have been taking the initiative and the steps to encourage more EVCS providers to provide more EVCS throughout Malaysia, the issues in relation to licensing may have been one of the least thought out by the Government in the implementation of the EVCS.

Licence Terms

As the EVCS Guide stated that GOLUS9 is the applicable guideline in relation to licensing, GOLUS9 provides sample terms and conditions of the licences that may be issued by the Energy Commission depending on the activity undertaken by the licensee either electricity generation or electricity distribution. The issue is that the GOLUS9 does not appear to have been amended since its issuance in 2016 and as it is now, does not appear to have any specific provisions in relation to EVCS nor is there any indication that it will be amended by the Commission to include provisions that will be specific to EVCS.

As such, given that EVCS providers are not carrying on business of electricity generation and the EVCS provided by the EVCS providers are currently well below 66kV (kilovolt), the most likely licence applicable to EVCS providers under the GOLUS9 (as it is now) is the distribution licence as the distribution licence as the Distribution Code For Peninsular Malaysia, Sabah And FT Labuan which was also specified in the EVCS Guide to EVCS providers.

The issue with the licence terms is that the terms and conditions of the licence has not been amended since 2016, so there may be confusion caused from the existing provisions. As an example, Condition 2 (2) under the sample distribution licence provided in GOLUS9 stated as follows:

"The Licensee shall not supply electricity to any person other than the persons in the area of supply mentioned in paragraph 1 above, provided that the Commission may with the approval of the Minister permit the Licensee to supply electricity to such persons."

The wordings used here in particular implies that there is a specific set or class of persons in the

EV – ISSUES ON ELECTRIC VEHICLE CHARGING

area of supply who the licensee is allowed to provide electricity and there is also a specific set or class of persons which the licensee is not allowed to provide electricity. Is that what the condition intended to say or is it actually stating that the licensee is only permitted to supply electricity in the area of supply? If the intention is the latter, the proviso within the condition itself reinforces the intention that the former is actually the correct position. Taking EVCS as an example, how will the former or first interpretation be applied? Perhaps the licensee will only be allowed to sell electricity at the EVCS stations to locally-registered cars and cannot sell electricity to foreign-registered cars. How does the licensee then enforce this condition when EVCS facilities are unlike petrol stations? Perhaps EV owners must first register their cars in the application used by EVCS providers but from perusal of EVCS applications, there does not appear to be such function provided in such applications.

Then take Condition 3 of the sample distribution licence where it is stated:

"Subject to the provision of the Act and the terms and the Conditions of this Licence, the Licencee shall on the application of the owner or the occupier of any premises within the area of supply, provide connection to the consumer for the purpose of providing a supply of electricity to those premises, including the installing any cables and equipments."

Where the EVCS provider provides the EVCS facility at a highway rest stop for example, the consumer is an EV owner. Does the electric vehicle owned count as 'premises'? Obviously, it cannot be counted as 'premises'. Similarly, if EVCS facility is provided to a building on the request of the owner of the building, the supply is not to the premise per se but to the EV owners as 'consumer's'.

Another issue as example under P.U.(B)342 (Electricity Supply Act 1990: Exemption Under Section 54) where, in the exercise of the power to grant exemptions under Sec. 54 of the Act, the Minister exempts any person who uses, works or operates or permits to be used, worked or operated any installation or supplies to or for the use any other person electricity from any installation, that uses photovoltaic system or solar panel for purposes of generating electricity: (a) for a three phase system, at a voltage not exceeding low voltage with a capacity of up to 72kW; or (b) for a single phase system, at a voltage not exceeding low voltage with a capacity of up to 24kW, from licensing under Sec. 9 of the Act.

Now what if a EVCS provider provides EVCS facilities which only use photovoltaic systems or solar panels for purposes of generating electricity falling under limbs (a) or (b) abovementioned to provide slow EV charging in locations which are not connected to the national electricity grid. Does such EVCS provider need to be licensed? Take note however that the EVCS Guide does not appear to mention anything involving solar-generated electricity and thus appear to require all EVCS providers to be licensed.

Supply Agreement

Section 28B of the Act makes it mandatory for a person requesting supply of electricity to enter into an agreement for the supply of electricity before electricity is provided. As such, one would think that it should be obvious that an EV owner must have such a supply agreement with the EVCS provider, in which the form and substance must be approved by the Commission, before they are allowed to begin charging at the charging station.

Take note that the requirement of supply agreement is not addressed at any point in the EVCS Guide and as such, it was already mentioned that paragraph 2.3 of the EVCS Guide specifically stated that it is not intended in any way to circumvent the application of any other written law

or standards or any obligations or requirements under them and paragraph 3.3 of the EVCS Guide stated that where any provisions of the EVCS Guide conflicts with the Act and/or the Regulations, then the Act and/or Regulations prevail.

This means that regardless of the fact that the supply agreement is not stated in the EVCS Guide, it is still mandatory and must be entered into between the EVCS provider and the EV owner. However, from perusal of the various EVCS applications used by the some of the existing EVCS providers in Malaysia, it would appear that no supply agreements are provided as part of the terms and conditions of use of the EVCS applications that needs to be used by an EV owner in order to charge their vehicle.

That raises the issue of whether the requirement of supply agreement is no longer applicable in relation to EV owners? However, there is no mention of it whatsoever in the EVCS Guide, and more importantly, the EVCS Guide is only a guideline and is not a 'law' in the same manner as the Act or the Regulations are in which case even if an exemption is stated in the EVCS Guide, it cannot be regarded in any way as overriding the requirements Section 28B of the Act due to paragraphs 2.3 and 3.3 of the EVCS Guide as mentioned.

How then should this be treated? Sec. 28B imposes the obligation on the consumer to enter into a supply agreement but what if the supply agreement is not provided by the licensee? Who should be liable – the EVCS provider/licensee or the consumer/EV owner? Would the consumer then be regarded as to have obtained and used the electricity supply dishonestly and thus be deemed to have committed an offence under the Act?

What happens if damage occurs either to the EVCS equipment or the EV? Instead of clear provisions on who will be liable depending on cause and the party at default as well as extent and limits of liability, the lack of clear agreement between the parties will likely result in any damage caused to either party devolving into protracted claims as each party will obviously deny liability and try to shift blame or liability on the other party.

Provision of EVCS to Buildings

Action Item 3.4 under Focus Area B contains various sub-action items intended to encourage the growth of EV charging that EVC infrastructure is sufficient for private electric vehicle penetration. Action Item 3.4 D for example appears to be an intended action plan to incorporate the requirement for installing EV charging facility in planning permission for all new buildings. It was also stated as a sub-item to Action Item 3.4 D that the requirement guidelines for incorporation of EV charging facilities for new buildings subject to minimum criteria was targeted to be established by 2021 – 2022.

However, paragraph 5.5 in the EVCS Guide only deals with EVCS installation location requirement which further provided specifications on installation locations for single detached dwellings, multi-family dwellings, commercial and public access for public charging locations. There is actually no requirement in any existing guidelines to date including the EVCS Gide that actually stipulates the mandatory requirement for installing EV charging facility for all new buildings for purposes of obtaining planning permission. What is currently provided for in the EVCS Guide is certainly not in the intent as stated in the Action Plan 3.4 D.

In relation to local governments, there also does not appear to be specific legislations or guidelines whether at the ministry level (by the Kementerian Pembangunan Kerajaan Tempatan / Ministry of Local Government Development) or the various local authorities (pihak berkuasa tempatan)

ISSUES ON ELECTRIC VEHICLE CHARGING

in relation to EVCS yet for the purpose of achieving the stated objectives of Action Plan 3.4 D. Furthermore, there is no indication whether the LCMB or the EVCS Guide whether any planning permission for new building will require the approval of the Commission. As such, if there is no existing law or regulations or guideline that makes it mandatory for EVCS to be installed in new buildings, whether the planning permission will involve the Commission in any way? Or will a new direction be issued by the KPKT acting in the concert with the Commission in order to fulfil Action Plan 3.4 D? This must be clarified by the government whether through the Commission or the KPKT since as it is now, only the local planning authority has the authority to approve the planning permission of any development in any local authority area as per the Town and Country Planning Act 1976.

As such, if planning permission can only be done by the local authority being the 'local planning authority' as stated in the LCPA1976, then what is meant by the planning permission in the LCMB? And who is going to issue the relevant guidelines or incorporate the requirement into the existing processes for obtaining planning permission? The Commission? There appears to be none at this point in time? The KPKT itself? Or should it be every local authority throughout Malaysia?

Another issue that is not addressed by the LCMB or the EVCS Guide is what is the building is old or the existing power supply, wiring, etc. is not suitable for EVCS? In such a case, then who will be responsible for providing supply? The building owner or management body or the EVCS provider? If the building owner or management body has to provide supply, let alone the EVCS, does the management body will also need to be licensed for distribution?

What if the EVCS provider were to provide EVCS equipment as part of 'Electric Vehicle Charging as a Service' or "EVCaaS" and includes a provision in its agreement with the building owner or management body that it is providing EVCS equipment as a service to maintain electric vehicles and requires no licensing and that it is the responsibility of the building owner or management body as 'customer' to obtain all necessary licences, approvals and permits for the installation and operation of the EVCS (which require licence under the EVCS Guide) as well as any required works on the electricity supply?

Conclusion

As already mentioned, this article is not intended in any way to exhaustively list down all issues arising from the current framework on the EVCS but only some which are obvious due to the existing policy and regulatory documents issued by the Government in its haste to implement EVCS in order to promote the use of electric vehicles in Malaysia.

As to date, there is no indication on when the issues highlighted will be resolved or worse, whether they will be resolved at all. However, it is pertinent that the issues be resolved timeously by the Government to ensure that not only the desired implementation of EVCS is according to schedule but more importantly to ensure that the all parties involved are clear on what they are supposed to do, their roles, responsibilities and ultimately liabilities that will undoubtedly arise during the implementation of EVCS and its undertaking by both the public and private sector.

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