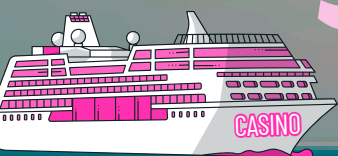


**Can you wash your Money\***  
**OFF THE SHORES OF MALAYSIA**  
**AND BRING IT BACK CLEAN?**

..... **\*IT'S NOT SO EASY**

**Launders your Money**



“A process of converting cash obtained from criminal activities..... giving it a legitimate appearance.

The ‘Lauderer’ cleans & disguises the criminal source of ‘dirty money’ & then reintroduces it into the financial system as legitimate....undetected.”

**Dirty Money**

**Placement**

**Layering**

**Integration**





**Layering:  
along and  
WINDY ROAD**

*How is it done?*

**Placement**

*Illicit money is firstly cut off from its criminal source. For example, when illegal monies are 'placed' into a bank....*

**Layering**

*Disguising the money by making multiple layers of transactions...from one payment to a company to another... then transferring money to a 3rd company... then off-shore bank accounts ... and... so it gets confusing and too difficult to trace the source of the dirty money. Pusing! Hiding money in a shell company or trusts or inflating a company's daily profits.*

**Integration**

*"Final stage is where the laundered proceeds are successfully reintegrated into the economy - appearing as legitimate funds.*

*Example: purchases of properties or high value goods or investments in business ventures."*

# WHAT IS MONEY LAUNDERING?

Written by: Nasyitah Ruzanna Abdul Raman | Partner

Money laundering is the process of concealing the source of money obtained from illicit activities, converting it from 'dirty' money to clean money, through a series of different methods, and introducing it back into the financial system as legitimate funds.

## DEVELOPMENT OF MONEY LAUNDERING OVER THE YEARS AND WAYS TO COMBAT FINANCIAL CRIME

In this era of digitalisation, money laundering appears to be getting harder to track and trace. Regulators and authorities are pressed with the responsibility to keep up with new and advanced methods of money laundering.

In the simplest of terms, money laundering is the process of concealing the source of money obtained from criminal activities and to give it a legitimate appearance.[1]

### How is money laundered?

People or organizations linked to criminal activities such as drug trafficking, corruption, or terrorism usually transact in huge amounts of cash and launder money to disguise financial assets to avoid suspicion and/or inquiries from financial institutions and authorities.

It is a serious financial crime that carries heavy penalties. There are three (3) steps used to disguise illegally gained money and make it legitimate.:

1. Placement: the illicit money is introduced into the financial system, usually by splitting it up into small, different deposits and investments.
2. Layering: the money is transferred and shuffled around to separate its ties to the perpetrators and obscuring its origins.
3. Integration: the money is circled back to the perpetrators as clean and legitimate income.

Money Laundering

**PROGRESSION OF MONEY LAUNDERING & NEW UNCONVENTIONAL METHODS TO BE AWARE OF**

Over the years, the modus operandi of criminals have evolved, posing a challenge for authorities to detect suspicious transactions. Criminals commonly utilise the following tactics/schemes, which is not an exhaustive list, as over time, there will be more ingenious ways or methods employed:

**Smurfing**

When large sums of money are split up into smaller portions by engaging associates, friends or relatives to receive / make deposits in smaller sums hoping to evade detection, and avoid setting off suspicious activity reporting thresholds.[3]

**Round-tripping**

When funds are sent on a “round-trip” to various individuals, accounts, companies, shell companies in the same / different country before the funds make its way back to the owner. This tactic creates a web of paths, therefore, making it difficult or complex for investigators to trace the funds to the original source.

**Shell companies / Off-Shore accounts**

These are corporations with no business operations or assets. Money-launderers typically use shell companies/off-shore accounts to evade taxes or hide ill-gotten monies. The usage of shell-companies/off-shore accounts makes it extremely difficult for authorities to trace the original source of the money the minute the money leaves a country. An off-shore account also provides individuals/entities with a great deal of privacy and confidentiality, and makes it more difficult for them to be seized by the local authorities. The largest offshore financial centers worldwide are The Cayman Islands, the Bahamas and Panama.

Only a Public Prosecutor has the power to prosecute money laundering criminal offences

Enforcement

*The Malaysian Anti-Corruption Commission (“MACC”) is empowered to enforce the recovery of stolen assets via AMLA*

**Scam / Fraud Initiatives**

There are many get-rich-quick schemes/investment schemes whereby individuals or companies are asked to deposit monies, only to find out later that these entities offering these investment schemes are not licensed to do so. The monies deposited are then later utilized to purchase luxury properties, cars, towards payment of credit card bills etc.

*In the era of digitalisation, and the advancement of technology and globalization, there are now new unconventional methods employed by criminals to launder and hide their illicit proceeds.*

**Cryptocurrency**

The emergence of digital currency such as bitcoin creates a new avenue for criminals to launder money. Scammers target victims on social media, through scam calls, whatsapp, dating websites and initiate relationships by gaining their trust. Victims are then lured into making a financial investment using cryptocurrency, which are operated through fraudulent investment platforms and applications. Over time, the victims are induced to make additional investments as the platform or application falsely shows significant gains in investments made. The realization hits later on when victims are not able to withdraw their monies from the platforms.



## The most notable Money Laundering case emerged from Malaysia

### - the 1MDB scandal -

At the height of the scandal, 1MDB was RM42 Billion in debt  
 ...Billions were deposited into bank accounts in Switzerland, Singapore, the USA and shell companies

The authorities and regulators are still trying to keep up with the evolution of money-laundering in the digital and virtual arena due to lack of stringent regulations.

#### **Non-fungible tokens ('NFTs') – for art**

The perks and upside of NFTs is that it can be traded with anonymity. Money launderers are now exploiting trading in digital art or music (rather than physical) as it can be done in the comfort of one's own home/office, without concern for geographical borders and without incurring potential financial, regulatory or investigative costs of a physical shipment.

#### **Instant Messaging Applications**

Many instant messaging applications such as Facebook and WeChat now offer peer-to-peer payment services. These platforms allow money launderers to transfer direct funds within encrypted texts, keeping conversations private even to hackers or government agencies.

#### **Online Marketplaces / Virtual Gaming**

Criminals have identified this platform as an opportunity to launder money by purchasing in-game assets with ill-gotten funds and then selling them on 3rd party platforms, converting them into clean money, or creating multiple accounts and transferring the virtual assets between them to create an obscure trail that is difficult to trace.

### **PUTTING AN END TO MONEY-LAUNDERING**

Many governments around the world are faced with this serious crime and are looking for effective ways to paralyse the operations of such criminal activities. In Malaysia, Bank Negara Malaysia ("BNM"), the central bank, is the competent authority empowered to receive and analyze reports drawn up by reporting institutions, give instructions to reporting institutions, send reports, information received or give recommendations to the relevant enforcement agency.

The enforcement agency, the Malaysian Anti-Corruption Commission ("MACC") is empowered to enforce the recovery of stolen assets via AMLA. The other enforcement agencies responsible for the investigation of money laundering activities include: the Royal Malaysian Customs, the Inland Revenue Board of Malaysia, the Securities Commission of Malaysia, the Companies Commission of Malaysia, the Labuan Financial Services Authority and the Ministry of Domestic Trade, Cooperative and Consumerism.

Only the Public Prosecutor has the power to prosecute money laundering criminal offences.

Know your client

## Watch out for

### Red Flags:

- Unusual transactions- large cash deposit or a sudden series of transactions which are not normal behaviour for customer or an inactive trading account.
- Suspicious behavior- Sudden numerous, repeated withdrawals - of unusually large amounts.
- Unverifiable information- Submission of false identity documents, or unable to give proof of source of income (SOI) or unusual concern for secrecy, like for IBCs.
- Dealing with High Risk Jurisdictions - Customer-Investor based in countries where production of drugs or drug trafficking is widespread.
- Behaviour of Employees of Reporting Institutions - Sudden Lavish lifestyles, unexpected increase in activity-performance

## In 2022: 250,000 suspicious transaction reports

In 2022, BNM's Financial Intelligence Unit (FIU) (which is tasked with receiving and analyzing information and sharing financial intelligence with relevant enforcement agencies) received approximately 250,000 suspicious transaction reports (STRs), which was a significant 30% increase from the year 2021.

The disclosure by BNM's FIU led to the arrest of 51 individuals, freezing and seizing of assets of more than RM570 million and revenue recovery of RM372 million.[4]

Lawyers and their legal firms are at great risk of being used for money laundering, and they may be unknowingly involved when their services are used for depositing, transferring or withdrawing funds. A perpetrator may seek legal services to appear legitimate in their illicit real estate, financial or corporate transactions. So, it is essential that lawyers and legal firms implement the correct procedures and understand their obligations under AML.

## How prevalent is money laundering in Malaysia?

Monies from money-laundering activities have been seen in Malaysia to be used towards purchase of properties, luxury vehicles and jewelleries, setting up of businesses, funding of political campaigns to name a few. Many have been investigated for receiving or depositing large sums of monies into their bank account from foreign parties.

'Layering' process: After a long and windy road .....buying luxury real estate, expensive paintings and even producing or funding a Hollywood film like "Wolf of Wall Street".

Interestingly, the most notable money laundering case emerged from Malaysia - the 1MDB scandal. 1Malaysia Development Bhd ("1MDB") is the country's state investment fund founded by former Prime Minister, Najib Razak, who chaired the advisory board until 2016.

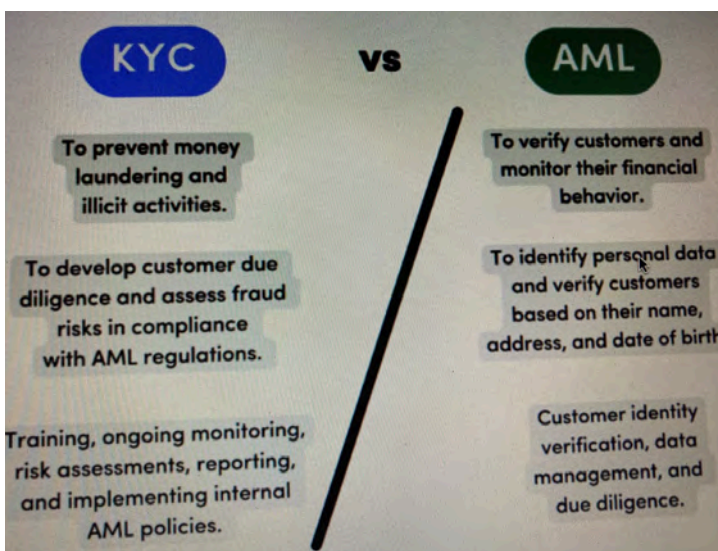
At the height of the scandal, 1MDB was RM42 billion in debt. It was uncovered that billions of dollars were borrowed via government bonds and deposited into bank accounts in Switzerland, Singapore and the USA and shell companies, many linked to Jho Low (a Malaysian businessman and financier who had close ties with Najib) which were later used to buy luxury real estate, expensive paintings and also to produce and fund a Hollywood film "Wolf of Wall Street".

Approximately US\$731 million appeared in the personal bank account of Najib Razak which was used to pay off politicians, his personal credit card bills and fund his wife's lavish lifestyle.[5] But, how was it structured? One strategy involved setting up bank accounts under fake company names which resemble closely to the real institutions.

Another strategy was to transfer funds to trust accounts in US law firms which are protected by client's confidentiality rules and are not often regulated. Thirdly, was through a process called layering, which is the movement of funds from one bank account to another continuously, adding layers of a complex web of transfers until the original source of funds is obscured.[6]

Whilst no banks or other regulated financial institutions (their directors, employees or officers) linked to 1MDB have been convicted of money laundering in Malaysia, in the US, former head of Goldman Sachs Malaysia, Roger Ng was committed to 10 years in prison.

Law firms are at great risk of being used for money laundering....when their services are used for depositing, transferring or withdrawing funds.



SOURCE: <https://www.idenfy.com/blog/kyc-aml-compliance/#3-what-is-aml-compliance>

## Money Laundering: What laws are in place in Malaysia to combat financial crime?

Example: Simple ML:  
2 money launderers  
conspire to 'clean' their  
'dirty' money.

One puts a fake antique  
glass bowl up for sale  
on an online auction  
house - for a real HIGH  
price.

The 2nd launderer  
'buys' it by transferring  
'dirty' money from a  
shell company to the  
auctioneer's account.  
The auctioneer pays the  
1st launderer his sale  
price, minus his  
commission, and the 2  
launderers split the bulk  
of the now 'clean'  
money.

### Laws to combat financial crime

The Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ("AMLA") came into force in 2001 and governs the Anti-Money Laundering and Counter-Terrorism Financing regime. It has seen several amendments over the years, with the latest in 2017.

In 2020, 2 new policies were introduced by BNM, the central bank, obligating all companies regulated by BNM (financial and non-financial alike) to comply with the new requirements.

These new requirements aim to prevent institutions and/or businesses (also known as "reporting institutions") from being used as a channel for money laundering or terrorism financing activities.

"Reporting Institutions" include: Commercial Banks, Islamic Banks, Money Changers, Insurers, Insurance Brokers, Islamic Insurance (Takaful), Offshore Banks/Trusts/Insurers, Tabung Haji (Pilgrim's Fund), Development Banks, Cooperation Banks, Licensed Casinos.

### A reporting institution[7] is required to:

- Carry out risk assessments i.e. conduct customer due diligence, 'Know your Customer' ('KYC') which comprises Customer Identification Program, and Continuous Monitoring;
- Submit suspicious transaction reports and cash threshold reports for cash transactions of RM25,000 and above to BNM;
- Maintain and retain records of transactions;
- Implement AML/CFT compliance programmes reflective of that reporting institutions money laundering and terrorism financing risk exposure, size, nature and complexity.[8]

### These include, watching out for red flags, such as:

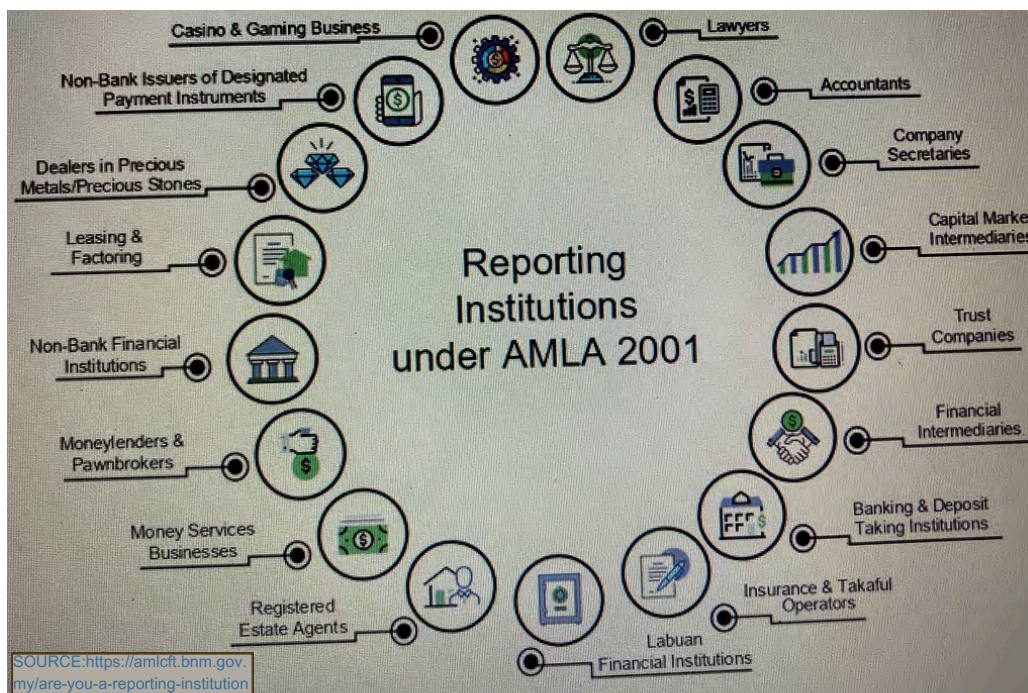
- Unusual transactions i.e. a large cash deposit or a series of transactions which are not normal customer behaviour for customer.
- Suspicious behavior. Sudden numerous withdrawals of unusual large amounts or transactions in risky schemes.
- Unverifiable information. Submission of false information, false identity documents, or unable to give proof of source of income (SOI).
- Sanctions and embargoes. Such as identifying a transaction involving a sanctioned or embargoed entity, including adverse media, and sanctions lists.

Every reporting institution must appoint a Compliance Officer who has the responsibility of ensuring that the said reporting institution complies with the AML/CFT requirements, implements proper AML/CFT policies, educate its staff on the AML/CFT measures, evaluate suspicious transactions before reporting to BNM.

On 5 April 2024, BNM issued a circular notifying all reporting institutions on the latest amendments to the Anti-Money Laundering & Anti-Terrorism Financing



Some 'Reporting Institutions' - required to undertake measures to prevent their institutions from being used as a vehicle for money laundering



(Declaration of Specified Entities and Reporting Requirements Order) 2014 (P.U.(A) 93/2014) made by the Minister of Home Affairs pursuant to sections 66B and 66D of the AMLA; and to direct all reporting institutions to undertake certain measures in relation to obligations under sections 66B and 66D of the AMLA, as well as any subsidiary legislation made by the Minister of Home Affairs under those provisions.

**To date, BNM has issued the following policy documents and guidelines to reporting institutions:**

- i. Anti-Money Laundering, Counter Financing of Terrorism, Countering Proliferation Financing and Targeted Financial Sanctions for Financial Institutions (*AML/CFT/CPF for TFS and FIs*) – which is applicable to banks, financial institutions/advisers and insurers.
- ii. Anti-Money Laundering, Counter Financing of Terrorism, Countering Proliferation Financing and Targeted Financial Sanctions for Designated Non-Financial Businesses and Professions (DNFBPs) and Non-Bank Financial Institutions (NBFIs) (*AML/CFT/CPF for DNFBPs and NBFIs*)

Although there may be strategies and a robust legal framework in place to combat money-laundering, the schemes are constantly evolving, and it is the governments' and financial institutions' duty to constantly monitor these patterns so that they are

ahead of the game. By understanding the methods and tactics criminals are now using to launder money, we hope the authorities, regulators and financial institutions will be better equipped to combat this crime.

Whilst it is essential that reporting institutions understand their obligations and conduct their civil duty by carrying out the required assessments and due diligence, it is also essential that reporting institutions understand the repercussions of failing to comply with the policy and guidelines as set out by BNM. The fight to combat dirty money will require a concerted and collective effort by not just the regulators, authorities and financial institutions but also from the press (investigative journalists), civil society and researchers all over the globe.

For more info, contact: [nasyitah@arsa.com.my](mailto:nasyitah@arsa.com.my)

**Endnotes/Footnotes**

- [1] <https://amlcft.bnm.gov.my/what-is-money-laundering>
  - [2] <https://www.redflagalert.com/articles/compliance/common-money-laundering-methods>
  - [3] <https://seon.io/resources/dictionary/smurfing/>
  - [4] <https://www.thestar.com.my/business/business-news/2023/07/25/bnm-receives-250000-suspicious-transaction-reports-in-2022---deputy-governor>
  - [5] <https://www.irishtimes.com/news/world/asia-pacific/1mdb-scandal-explained-a-tale-of-malaysia-s-missing-billions-1.4315604>
  - [6] <https://www.ft.com/video/2f99aac-9ec9-41c3-9cad-772d8a0afbe7>
  - [7] Reporting Institutions include: Commercial Banks, Islamic Banks, Money Changers, Insurers, Insurance Brokers, Islamic Insurance (Takaful), Offshore Banks/Trusts/Insurers, Tabung Haji (Pilgrim's Fund), Development Banks, Cooperation Banks, Licensed Casinos.
  - [8] <https://amlcft.bnm.gov.my/web/amlcft/are-you-a-reporting-institution#1>
- Foto : Cover[1] : [www.wallpaperflare.com](http://www.wallpaperflare.com)

Que sera, sera....whatever will be.... SHOULD BE.....  
**UNFILLED PROMISES: Ground-breaking case**  
**PROPERTY DEVELOPERS CAN NOW BE HELD LIABLE FOR UNFULFILLED PROMISES**

By: Sarifah Khalwa Yahya | **Partner** & Siti Noor Suhailah Jamil | **Associate**



ARTIST'S IMPRESSION?...OR  
 PROMISED HOME?

[1]&[2]

In the ground-breaking decision of *Toh Shu Hua & Ors v Wawasan Rajawali Sdn Bhd* [2023] 2 CLJ 310, the High Court directed a developer to pay RM50,000 damages to each of the 122 purchasers of apartments for failing to sufficiently fulfil its promises as represented in its brochures.

**HOLDING PROPERTY DEVELOPERS LIABLE FOR UNFULFILLED PROMISES**

In this recent case, '#Toh's Case', the High Court highlighted the developer's responsibility to fulfill promises made to the purchasers, during the marketing of the project.

**Facts of the Case**

It was a claim brought by 122 plaintiffs against the defendants for the purchase of apartment units in the Eclipse Residence project (the "project") developed by the first defendant. One of the issues brought by the plaintiffs concerned loss suffered by the plaintiffs as a result of misrepresentation by the defendants as to the 'nature of the project'. The first defendant promised the plaintiffs that this project would be a complete township in which the plaintiffs could 'enjoy work, play, and recreate in one area' - with the phrase used in the brochures: "Your world in one place".

The plaintiffs were misled into buying the apartments in this project by the way the project was marketed by the first defendant; the promises were not fulfilled and 'unlikely to be fulfilled in the near future because the project did not even resemble the lifestyle offered or as pictured in the marketing of the project since - the first defendant failed to complete the amenities promised'.



## *...unfulfilled promises: “Your world in one place”*

The above scenario led to the plaintiffs’ claim of Misrepresentation as provided for under Section 18 of the Contracts Act 1950, as follows:-

(a) the positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true;

(b) any breach of duty which, without an intent to deceive, gives an advantage to the person committing it, or anyone claiming under him, by misleading another to his prejudice, or to the prejudice of anyone claiming under him; and

(c) *causing, however innocently, a party to an agreement to make a mistake as to the substance of the thing which is the subject of the agreement.*

### The High Court’s Decision

The High Court held that the ‘positive assertions’ of a complete township offered by the developer to convince the purchasers to purchase the apartments in the project were made through brochures published to the market and also by the sales pitch of the sales person. Ergo, it is reasonable to conclude that each of the plaintiffs was induced into purchasing the properties based on the defendant’s sales strategies. As a result, the High Court was of the opinion that the defendants did perpetuate a misrepresentation on the purchasers of the apartments in this project.

### Remarks

#### Principle of ‘Unfulfilled promises’ or ‘Misrepresentation’

What we can conclude from the case is that the ‘Unfulfilled Promises’ can amount to an act of “Misrepresentation” committed by a sales agent *vis a vis* a purchaser. It is a basic principle of law that for misrepresentation to operate there must be a false pre-contractual statement that *induces a contract* or other transaction(s), in which, in this case, the false pre-contractual statements were made through brochures published to the market and also by the sales pitch of the sales person.

### 1. Effect of the Agreement Entered under Misrepresentation

The Court will safeguard the interest of the purchaser, as the ‘weaker party’, in which the purchaser, who, suffering the breach by way of misrepresentation, has two options, either to rescind the contract or insist the contract be performed by the Housing Developer and the purchaser will be put in a position he would be in if what the representation made were true. The effect of an agreement entered under misrepresentation is as stated in **section 19 of the Contracts Act 1950**, which states:

*(1) When consent to an agreement is caused by coercion, fraud, or misrepresentation, the agreement is a contract voidable at the option of the party whose consent was so caused.*

*(2) A party to a contract, whose consent was caused by fraud or misrepresentation, may, if he thinks fit, insist that the contract shall be performed, and that he shall be put in the position in which he would have been if the representations made had been true.*

*Exception – If such consent was caused by misrepresentation or by silence, fraudulent within the meaning of s. 17, the contract, nevertheless, is not voidable, if the party whose consent was so caused had the means of discovering the truth with ordinary diligence.*

***for misrepresentation ... there must be a false pre-contractual statement that induces a contract***

## ‘unfulfilled promises’

Explanation – A fraud or misrepresentation which did not cause the consent to a contract of the party on whom the fraud was practiced, or to whom the misrepresentation was made, does not render a contract voidable.

### 2. Invitation to Treat and Exclusion Clauses

The developer cannot ‘run away’ from his promises by stating that the brochure and/or the representation were merely an invitation to treat. In this case, the High Court rejected the developer’s contention that the brochures were merely an invitation to treat because it was worded in ‘the form of promises’. The Court was also reluctant to accept the developer’s assertions that the brochure had an exclusion clause that safeguarded the developer from any discrepancies in the project’s description since the exclusion clause was in ‘fine minute wordings at the bottom of the page’. In this case, the High Court emphasized the importance of delivering and fulfilling what was promised in the developer’s marketing materials - as any untrue promise could result in a claim of Misrepresentation by the purchaser against the developer.

### 3. Loss of Enjoyment

The purchaser could also claim for loss of enjoyment due to the failure of the developer to fulfill the promises. The High Court ruled that the plaintiffs suffered ‘loss of enjoyment of the use of the apartments to work, play and recreate all in one place, in a manner promised to them’ and they were, therefore, entitled to reasonable monetary compensation that should not burden the defendant. The High Court awarded the plaintiffs RM50,000 each for the loss of enjoyment on the promise of the first defendant.

### Conclusion/Personal Opinion on the Case

This case illustrates that the Court will take steps to protect purchasers from any act of Misrepresentation in inducing a potential purchaser to enter into a contract of sale. Aside from the sale and purchase agreement, the Court will also examine brochures and any other representations to get to the truth of the transaction. Developers must be cautious when making loose promises as they may be held accountable for what their sales agents represent or promise to potential purchasers. As the learned Judge said: “It is clear that what was pictured in the brochures was not even remotely visible at present.” Any false or misleading representation, may give rise to Misrepresentation so the developer must ensure that representations made to purchasers are indeed something that they can actually fulfill.

Key points to note: the Court recognized intangible losses and may give an order for the developer to compensate the Purchaser for the disappointment and inconvenience caused by unmet expectation.

... also, the importance of delivering and fulfilling what was promised in the developer’s marketing materials as any deviation may result in claims of Misrepresentation against the developer.

For further info, contact: [sarifakhhalwa@arsa.com.my](mailto:sarifakhhalwa@arsa.com.my)  
[suhailah@arsa.com.my](mailto:suhailah@arsa.com.my)

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## LEGAL UPDATES

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### AMENDMENTS TO CAPITAL GAINS TAX (CGT)

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#### **Capital Gains Tax (CGT) on companies, limited liability partnerships, cooperatives and trust bodies**

The new capital gains tax (CGT) of 10% on net gains and imposed on disposal of unlisted shares by companies (private & public companies), limited liability partnerships, cooperatives and trust bodies, came into effect on 1st March 2024.

#### Exemptions:

- i) gains on disposal in relation to restructuring within the same group;
- ii) initial public offerings approved by Bursa Malaysia;
- iii) venture capital companies (subject to conditions to be stipulated).

For shares acquired before 1 March 2024, the disposer can choose to pay CGT of 2% on the gross disposal value or 10% on the net gain on disposal.

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## ARSA ANNOUNCEMENT

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### **New ARSA Partners with effect from 1 January 2024**

1. Pn Rohana Ngah  
Partner  
Litigation and Alternative Dispute Resolution
  
2. Pn Sarifah Khalwa Yahya  
Partner  
Head of Project and Retail Banking



# Sexual Harassment @ the workplace

By: Anis Amirah Amran | Associate

Sexual harassment @ the workplace remains a grave concern considering the number of hours an employee spends at the office: the average working hours in 2022 was 44.7 hours per week.

It is thus imperative & necessary that the workplace is rid of any form of sexual harassment for all employees, male or female.

The number of reported cases of sexual harassment received by Yayasan Kebajikan Negara for 5 months, from May to October 2023, were 1,213 incidents and out of these 1,213 reports, 351 reports were made by male victims.

Unfortunately this does not reflect the true numbers because sexual harassment is still believed to be under-reported due to its taboo-like and sensitive nature.

'Awareness' of what it actually looks like is yet another issue, as not many victims seem to know its definition or where to go in search of redress, let alone seek compensation for sexual harassment.



[1]

## WHAT IS SEXUAL HARASSMENT?

Harassment, especially in the form of sexual harassment is not to be tolerated in any setting. 'Sexual harassment' is defined as:

"any unwanted conduct of a sexual nature, whether verbal, non-verbal, visual, gestural or physical, directed at a person which is offensive or humiliating or is a threat to his/her well-being, arising out of and in the course of his/her employment" under the Employment Act 1955 revised 1981. Sexual harassment comes in the form of verbal, non-verbal through gestures, visual, psychological or physical harassment and may occur anywhere.

Relevantly, the Public Services Commission (PSC) considers calling colleagues pet names such as "sayang" or "dear" as sexual harassment;

This is in addition to "sexting" which constitutes the act of sending, receiving, and/or forwarding sexually explicit messages/media via use of mobile phones.

The PSC has stated that the punishment for each offence will be determined by a disciplinary board under the Public Officers Regulations (Conduct and Discipline) 1993, and could take the form of a warning, fine, emolument disqualification, suspension, demotion or dismissal.

### Elements of sexual harassment:

The Federal Court in *Mohd Ridzwan Abdul Razak v Asmah Hj Mohd Nor* [2016] 4 MLRA 614 at 624 outlined the elements of sexual harassment namely:

- the occurrence of conduct that is sexual in nature; the conduct is unwanted; and
- the conduct is perceived as threatening the victim's ability to perform her job.

In this case, the Plaintiff, Mohd Ridzwan was the Defendant's superior at Lembaga Tabung Haji (TH).

**'Awareness' of what it actually looks like - is an issue, as not many victims seem to know its definition, where to go in search of redress & compensation**

In 2009, the Defendant lodged an official complaint against the Plaintiff to the CEO of TH for sexual harassment. The official complaint letter dated 29.07.2009 listed out that the Plaintiff had, among others:

uttered vulgar remarks, made dirty jokes that are sex-oriented in front of his subordinates, used dirty words in emails which the Defendant found disturbing, unethical and intolerable, the Plaintiff also offered the Defendant to be his second wife.

TH then set up a committee of inquiry on the complaint but there was insufficient evidence to warrant disciplinary action.

However, the Human Resources Department issued a strong administrative reprimand to the Plaintiff and the Defendant was allowed to be transferred to a different department.

The Plaintiff, enraged by the complaint, decided to sue the Defendant for Defamation two years later. However, the Defendant then counter-claimed against the Plaintiff for sexual harassment and sought for general, aggravated and exemplary damages. In her Statement of Defence, the Defendant further particularised the harassing words uttered by the Plaintiff as follows:-

a. *[the 'f-word'];*

b. *'Kalau cari husband cari yang beragama, bertanggungjawab, macam I, you kena buat sembahyang istikharah dan kalau you mimpi, you akan berjimak dengan orang tu;*

c. *'Ingat tak seorang Cina masa di bank dulu? Kalau you pergi meeting, you kena tebalkan muka, you kena ada strong "ball";*

## sexual harassment

### A Tribunal

Women's groups across Malaysia have lobbied, for 30 years, for the Anti-Sexual Harassment Act 2022. With this, comes a special Tribunal to handle complaints quickly & at minimal cost, for victims to obtain redress. This may include a public apology - to compensation for the harm suffered or to attend any rehabilitation program.

Ivy Josiah  
 former President &  
 Executive Director of  
 Women's Aid Organisation

d. *'Kalau you nak tahu "benda" lelaki tu berfungsi ke tak ikut orang-orang tua, ikat "benda" tu dekat tali. Tali tu sambungkan dengan buah kelapa. Kalau buah kelapa tu terangkat, maksudnya "benda" tu "good". Sexual graph of a person, men after 50 is no use. Kalau 20 it shoot up. 30 graf turun. When 40, it shoots up again';*

e. *[ the 'f-word'] was the Plaintiff's laptop password;*

f. *'ANOTHER SOB, TYPICAL HOMEBREED';*

g. *'I AM BEGINNING TO HATE VERY MUCH THESE HOMEBREED, WORST THAN KHINZIR';*

h. *'You nak kahwin dengan I tak, I banyak duit tau';*

i. *'Would you prefer married man'; and*

j. *'You ni selalu sangat sakit. You kena kahwin tau. You nak tak laki orang'."*

**The Federal Court found in favour of the Defendant and established the tort of sexual harassment in Malaysia.**

**Suriyadi Halim Omar, FCJ stated:**

"After mulling over the matter, we arrived at a decision to undertake some judicial activism exercise and decide that it is timely to import the tort of harassment into our legal and judicial system, with sexual harassment being part of it."

**The new Legislation 2022 is a big step forward – however, sexual harassment is not explicitly defined as an 'Offence'**

There are several legislations providing for anti-sexual harassment in Malaysia. Firstly, the Anti-Sexual Harassment Act was enacted in 2022 and gazetted on 18 October 2022 to provide rights of redress to victims of sexual harassment and for the establishment of a Tribunal for Anti-Sexual Harassment and provisions for other related matters. This Act was enacted pursuant to women organisations pushing for legislation that provided for anti-sexual harassment law in the workplace; unfortunately, it does not explicitly construe sexual harassment as an offence.

Nevertheless, the Act has established a tribunal to address complaints made by individuals. Where a complaint is already being addressed by the tribunal, courts would lack the jurisdiction to try the same. However, it does have its limitations on granting awards to an aggrieved complainant, for instance:



## Prevention is always the better option

The limit for compensation and/or damages is RM250,000.00 and appeals may be made to the High Court only when there are serious irregularities which has affected the decision made by the tribunal.

Second, the Penal Code, pursuant to Sections 354, 355, 377D and 509, also provides punishments for offences relating to molestation, assault or criminal force with intent to dishonour a person, outrage on decency, and the use of any word or gesture intended to insult the modesty of any person. Punishments for these offences may amount to imprisonment of up to 10 years, fine or both.

Third, the Employment Act 1955 includes procedures for making complaints of sexual harassment at the workplace and the mandatory duty of employers 'to enquire' under Section 81A to 81G. The Employment (Amendment) Act 2022 which came into force on 1 January 2023 mandates employers to take additional precautions to avoid sexual harassment at the workplace by prominently displaying a notice to promote awareness. The fine for failure to display such notice has been increased to RM50,000. However, enforcement on this has yet to be seen.



[2]

It's any unwanted conduct of a sexual nature, whether verbal, non-verbal, visual, gestural or physical, offensive or humiliating or a threat to an Employee's well-being, arising out of & in the course of Employment.

### **Duty of Employers to conduct Inquiry**

Under the Employment Act 1955,

- Employers are under an obligation to conduct an inquiry into a complaint of sexual harassment;
- If the employer refuses to make an inquiry into the complaint, the employer must provide its reasons for the refusal within thirty (30) days from the date the complaint was received;
- Should the employer fail to do this, the complainant may refer to the Director General of Labor who will then proceed to assess the complaint and direct the employer to inquire into said complaint;
- The Director General may also, upon the assessment, make a decision that sexual harassment has been proven and therefore, the complainant may terminate their employment contract without notice and other benefits provided under the Employment Act and/or their employment contract.

The procedure in making a complaint may differ from each place of work and employees should refer to their human resource department for the formal procedure to adhere to should any incident occur.

## *Employers are under an obligation to conduct an inquiry into a complaint of sexual harassment*

This complaint procedure can usually be found in the Employee Handbook or the Code of Conduct. The Employment Act further provides that employers should display a notice to promote awareness on sexual harassment in the workplace.

Fourth, the Industrial Relations Act 1967 provides for reinstatement or compensation where a victim has been dismissed unfairly or they have resigned as a result of sexual harassment. Therefore, where an employee has resigned or dismissed by an employer on the basis of sexual harassment, the law protects the former employee and offers either for the employee's reinstatement or compensation, if the claim is proven.

Fifth, albeit not being a statute enacted by the Parliament, the Code of Practice on the Prevention and Eradication of Sexual Harassment in the Workplace was introduced by the Ministry of Human Resources in 1999.

The Federal Court in Mohd Ridzwan Abdul Razak highlighted how the Code was merely a guideline and had no binding effect on the courts in Malaysia. Therefore, litigants cannot fully rely on the Code and will have to look into the legislations enacted by Parliament or case precedents.

Certain industries may also provide for rules concerning sexual harassment. The Bar Council, in relation to the legal profession, for example, enacted Ruling 14.29 that sexual harassment constitutes a "misconduct" under section 94(3) of the Legal Profession Act 1976 ("the LPA"). So, sexual harassment, once proven, will now amount to a misconduct under the LPA, lawyers will face disciplinary action before the Advocates and Solicitors Disciplinary Board ("ASDB"). This is a step in the right direction for legal practitioners.

These legislations may serve as an avenue for redress for victims and encourage the creation of a healthy work environment.

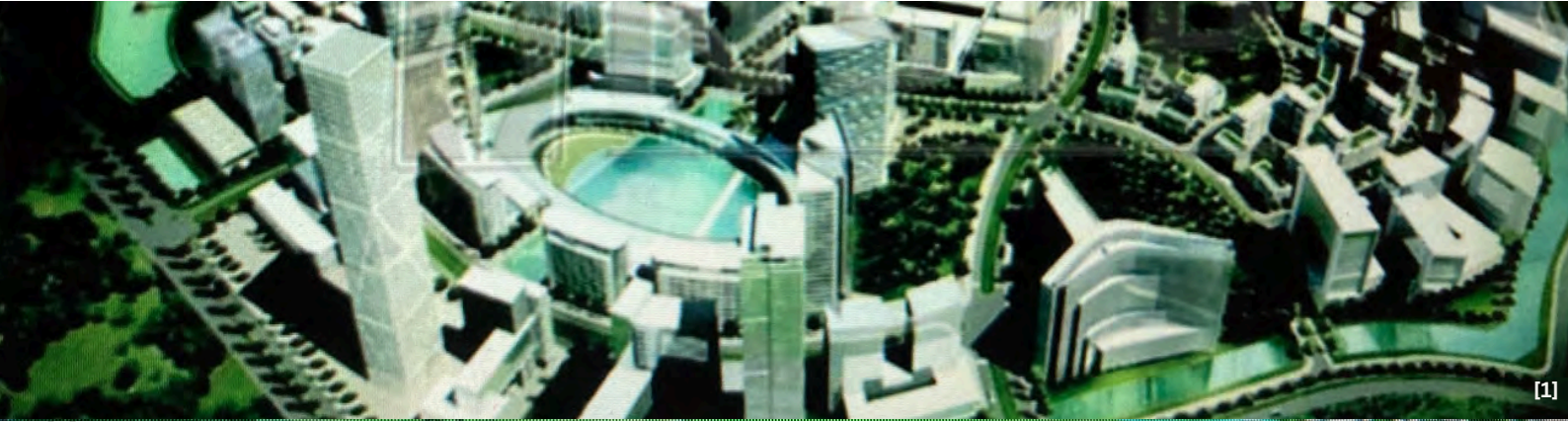
Prevention is always the better option thus, employers should always be on the look out for any irregular or irrational behavior among employees that may contribute to an environment that fosters/condones this unwanted-behavior.

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**The new Legislation 2022 is a big step forward – but however good it is, ‘sexual harassment’ is, nevertheless, not explicitly defined as an ‘Offence’.**

# ‘TURBO-CHARGING’ - MADANI



[1]

BY:

DATUK DR ABDUL RAMAN SAAD |  
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## Turbo-charging the Semiconductor and Data Center industries - for foreign investment in Malaysia

By year's end 2023, Malaysia achieved gross domestic product (GDP) growth of 3.7 % ...'only' which was, unfortunately, below the official forecast of 4.00% to 5.00%.

Further, the manufacturing sector stagnated at 0.7%, contributing only 22.7% of the GDP when compared to the previous years' target of 23.4% - mainly due to low domestic and international demand for products/goods.

Additionally, low-income groups curbed spending - due to an average of 2% increase in prices of consumer goods, contributing to the slow demand. On the global front, the slow demand for semiconductor devices in the last 2 years was a result of oversupply issues of semiconductor devices worldwide, compounded by low demand of Malaysia's integrated circuits, broadcasting equipment, refined petroleum, petroleum gas, palm oil, crude petroleum by China, Japan, Singapore, Europe and USA due to those countries facing slow economic growth.[1]

Many cheaper, well-equipped, manufacturing hubs have popped up across our ASEAN neighborhood, giving Malaysia a tough fight just to keep up and on par. Again, a few factors have added to their comparative advantage in term of operational cost and trade costs. These countries have become relatively more dynamic and attractive, as alternative hubs. Vietnam, for instance, has become the 'electronics hub', while Thailand is known as the 'automotive hub'.[2]

Last year, Malaysia felt the headwinds, flying smack into its economic trajectory. However sideways the country stumbled, the question arises: Can the troubled regional tensions, nevertheless, cause it to emerge as the more stable bet to invest and, further, can it fall back on its 'First Mover Advantage'... having been one of the first on the scene in the semiconductor industry... way back ....in 1996?



# Madani - enabling more resilience, competition & agility

## A Fresh Start

After the new government, led by Prime Minister Anwar Ibrahim took over on 24 November 2022 – immediate far-reaching, broad measures were introduced. – Instead of an ‘Industrial Master Plan’, the government announced a revamped program to ‘re-industrialize’ the manufacturing sector, to spur intensive growth by providing better incentives to foreign investors, while enhancing the participation of domestic investment. The old program was re-designed and ‘re-branded’ with the launching of ‘Madani Economy’ (“Madani”) under the ‘New Industrial Master Plan 2030 – NIMP2030’.[3]

## Madani NIMP 2030 — re-inventing the master plans

### What is Madani?

*Madani* is different from past master plans as it involves the restructuring of the national economy to enable it to become more resilient, competitive and agile in the coming few years.

Under NIMP 2030, the government is targeting the creation of 3.3 million high-value jobs by 2030. A Special Act to regulate a minimum salary of RM4,000.00 monthly for TVET graduates[4] is being planned but continuing with the existing policy of minimum wage of RM1,500.00 monthly. Among the challenges is the transforming of the economy into a more complex and a high-value one with technological adaption and in enhancing digitalization, improving the quality of human capital, workforce and talent, while enhancing market efficiency.

The technical skill talent among Malaysia’s workforce, particularly in the semi-conductor industry, is far superior because Malaysia has

*‘The old program  
was re-designed  
and ‘re-branded’*

had a head-start indulging in the said industry for more than 40 years. This is in comparison to the same skill set, workforce talent in similar industries that are available in Vietnam, Indonesia and Thailand.

This article will focus on Madani’s efforts to bolster the country’s semiconductor and data center industries.

## Semiconductor industry

After more than 40 years in the electrical & electronics (E&E) industry, Malaysia has achieved success as a semiconductor hub. Based on its E&E Road-Map 2021-2030, Malaysia[5] is relatively strong in the mid-stream semiconductor value chain of assembly, testing and packaging. The local E&E sector which comprises electronic components, chip (also “integrated circuit” or “semiconductor”), consumer electronics, industrial electronics and electrical products contributed about 7% to GDP of Malaysia.[6]

UMC Berhad is one of the leading Malaysian companies providing high-end engineering and manufacturing services- including precision sheet metal fabrication and value-added assembly services to the semiconductor industry. In addition to that, UMC Berhad provides functional and reliability test equipment. Another Malaysian company of international standing is Vitrox Corporation Bhd (Vitrox) which builds automated vision inspection equipment.[7]

Foreign companies operating in Malaysia are encouraged to build local content so that local SMEs would also be part of the supply chain.

Another factor advantageous to Malaysia is, in effect, the destabilization of the Taiwan Straits-where China is targeting political control over Taiwan, which is one of the world's biggest chip manufacturers.

The newly inaugurated President of Taiwan, Lai Ching-Te of Democratic Progressive Party (DPP) is not welcomed news in China because of his policy of maintaining the independence status quo of Taiwan. This could further worsen relations with China and result in many companies, currently operating in Taiwan, to consider relocation to other safe countries.[13]

Adding to this, the cost of energy in Taiwan is high when compared to Malaysia and the semiconductor industry requires high utilization of electrical power. Finally, Taiwan may increase the cost of energy tariffs even further. Taiwan Power Co., being the sole electricity utility provider in Taiwan is in precarious financial circumstances with a reported loss of NT\$198.5 billion (USD\$6.3 Billion) last year. This is another factor that makes Taiwan less attractive as a manufacturing hub - for the world's biggest chipmakers[14], that is.

Therefore, the special incentives under Madani NIMP, read together with the unfavorable investment climate in Taiwan, could spur foreign companies operating in Taiwan to move some of their operations to Malaysia.

Similarly, companies in China that service the US markets could also relocate some operations to Malaysia - so they continue to service the US market.

With the above favourable factors, a special task force under Madani NIMP has been established for Malaysia to strike back to reinstall itself as the 'Silicon Valley of the East' once again after it was displaced by Taiwan and South Korea.[15]

## Data Centers in Malaysia

The birth of Malaysia as a rising data center hub started when the government launched Multimedia Super Corridor ('MSC', later known as 'MSC Malaysia') in the mid 1996 as a Special Economic Zone and high-technology business district.

Under the leadership of Dr. Mahathir Mohammad, the then Prime Minister, MSC Malaysia was envisioned as a pivotal initiative to propel Malaysia into the 21st century.[16] Offering temporary tax breaks and cutting-edge facilities such as high-speed Internet access and proximity to Kuala Lumpur International Airport, MSC Malaysia was aimed to attract both local and foreign companies.[17]

Ever since its establishment, 28 years ago, MSC Malaysia has been a sought-after designation for companies seeking to establish their presence in Malaysia's burgeoning digital landscape. With over 4,726 MSC status companies, the program offered a slew of benefits, including exemption from Malaysian income tax and streamlined immigration processes for key personnel.[18] Notable pioneers such as Telekom, Intel, and Oracle were among the first to be awarded MSC status, laying the groundwork for subsequent waves of high-tech entrants.

As Malaysia's focus shifted towards driving its digital economy, the allure of the country as a prime destination for high-tech firms continued to grow. Esteemed names like Microsoft, IBM, Fujitsu, and Panasonic joined the fray, drawn by Malaysia's strategic positioning and supportive infrastructure. Reflecting this evolution, the MSC was rebranded as "Malaysia Digital".

The Malaysia data centre market size is expected to reach a value of \$2.252 billion USD by 2028

Under NIMP 2030, the government is targeting the creation of 3.3 million high-value jobs by 2030.

‘One unexpected factor that has become ‘advantageous’ to Malaysia is the destabilization of the Taiwan Straits - where China is targeting political control over Taiwan, which is one of the world’s biggest chip manufacturers.’



21  
Sedenak Tech Park: In construction

from \$1.31 billion USD in 2022, growing at a Compound Annual Growth Rate (CAGR) of 9.41% during 2022 to 2028.[19]

In light of the exponential growth in 5G and telecommunications, the demand for data centers in Malaysia is also set to surge in coverage to address the shortcomings in 5G spectra propagation.[20]

This upward trend aligns with Malaysia's ambitious vision of positioning itself as a key player known as the “Asian Digital Tiger” in the digital arena by 2025. Significantly, the active involvement of both local and international investors has contributed to the development of two primary data centers regions, which are Kuala Lumpur and Johor.[21]

**Johor’s strategic location vis a vis Singapore – more competitive offers, land rates & electricity tariffs**

Due to the exponential growth of digital economy that requires adoption of cloud computing, artificial intelligence (AI), e-commerce, the Internet of Things (IoT), edge computing and 5G, Malaysia is in an advantageous position to expand its data center hub to Johor because of its close proximity to Singapore.

Its strategic location has been the focal point of developers and providers of data storage facilities. It is estimated that in 2024, Johor will benefit RM17 billion of investment on data centers to speed up the growth of the digitalized economy.[22] One of the main reasons for this is because in 2019, Singapore imposed a moratorium on building new data centre facilities over sustainability concerns. Although, the moratorium was relaxed in 2022, stringent conditions were, nevertheless, imposed including a 60 MW cap to enable it to meet its carbon goals.

**Energy:** Data centre facilities require high utilization of energy and that is another factor that draws investors into Johor because electricity tariffs in Malaysia is the third lowest in the region. Additionally, land cost is much cheaper than in Singapore.[23]

As of January 2023, Malaysia boasts one of the region's highest rates of internet penetration, standing impressively at 96.8%, with over 33 million internet users with Johor, in particular, emerges as a key player in the swiftly growing data center market.[24] Currently, Johor boasts 33MW of live and pipeline capacity.[25]

A prime illustration of the burgeoning data center market in Johor is exemplified by the YTL Green Data Centre Park.[26] This RM1.5 billion project serves as a hallmark of the industry's future growth.



# INCENTIVES: GRANTS OR TAX INCENTIVES TO SMEs

*...relocating to Malaysia ...during the geopolitical uncertainty & the trade war....*



Singaporean Internet technology firm Sea is set to anchor the development, leveraging its expertise to provide green energy solutions and state-of-the-art facilities.[27]

Vitrox is now a world-leading vision inspection company with its business spanning over 44 countries serving customers from OSAT (outsourced semiconductor assembly and test) and also serving around 300-plus Tier 1 and Tier 2 EMS (electronics manufacturing service)[8], CM (contract manufacturing) and IDM(integrated device manufacturer) companies including Motorola and Intel.[9]

[3]

## Data Center Industry Incentives:

*Malaysia Digital (MD) status companies enjoy exemptions from foreign equity restrictions, allowances to employ foreign knowledge workers, income tax exemptions, investment tax allowances, and exemptions on import duties for multimedia equipment.*

It is important for this sector to move up the value chain to increase Malaysia’s export revenue amongst others by providing what is known as the new buzzword in the semiconductor industry called “advanced packaging”. Dr Martin Ng Chin Liang, UMC Berhad Deputy CEO said in an interview: “Advanced packaging essentially involves embedding the integrated circuit into packaging. In today’s context, the development of artificial intelligence (AI) chips relies heavily on advanced packaging. This implies that the capabilities of test equipment must be highly advanced.”[10]

The global chip sales, used primarily for telecommunication, computing, household appliances, banking, security, healthcare and transportation including electric vehicles, are expected to grow rapidly in the next two years owing to structural increases in demand from increasing digitalization.[11]

A sum of RM8.2 Billion known as NIMP Strategic Co-Investment Fund (CoSIF) has been allocated by the government to support Mission-Based Projects including semiconductor and data centre industries.[12]

The government encourages foreign companies operating in Malaysia to build local content so that local small medium enterprises (SMEs) would also be part of the supply chain. At the same time, the government will provide incentives in the form of grants or tax incentives to SMEs to develop the competency to build the supply chain to support foreign companies.

The fund is also available to Malaysian-controlled companies currently operating in Taiwan, China and other countries who plan to expand their base in their home grown country i.e. Malaysia.

## Madani - comprehensive legislations and targeted tax incentives

At present, China is no longer a low-cost centre for the sector whilst labor and operations costs in Malaysia have remained reasonable and competitive. These factors might also be amongst the driving force for consideration to companies planning on relocating to Malaysia.

Malaysia is in a strategic location to capitalize on the geopolitical uncertainty and the trade war between China and USA.

### **Legislations and Tax Incentives for Semiconductor and Data Center Industries**

Malaysia is strategically advancing its semiconductor and data center industries through comprehensive legislations and targeted tax incentives.

Key legislation, including the Income Tax Act 1967, Customs Act 1967, Sales Tax Act 1972, Excise Act 1976, Promotion of Investment Acts 1986 and Free Zones Act 1990, provide the legal framework for these incentives.

Through these legislations, companies exploring opportunities in the manufacturing sector, particularly semiconductor production, can benefit from two primary incentives which are Pioneer Status and Investment Tax Allowance. Pioneer Status offers a tax exemption on 70% of statutory income for five years, commencing from production day.[28] Alternatively, Investment Tax Allowance provides a tax deduction equivalent to 60% of qualifying capital expenditure over a five-year period.[29] Notably, these incentives have attracted significant foreign investment, with companies such as Nexperia, Infineon, Intel, and Lam expanding operations in Malaysia.

Similarly, the data center industry benefits from key incentives which are the Malaysia Digital (MD) status and the Digital Ecosystem Acceleration (DESAC) Scheme. MD status companies enjoy exemptions from foreign equity restrictions, allowances to employ foreign knowledge workers, income tax exemptions, investment tax allowances, and exemptions on import duties for multimedia equipment.[30] Meanwhile, the DESAC Scheme supports both Digital Technology Providers (DTP) and Digital Infrastructure Providers (DIP), offering income tax rates ranging from 0% to 10% for up to 10 years for DTPs and a 100% investment tax allowance on capital expenditure for qualifying activities for DIPs.[31]

Underpinning these incentives are Malaysia's Investment Promotion Agencies such as the Malaysia Investment Development Authority, which offer attractive tax benefits such as exemptions or reductions in income tax, import duties, and sales taxes for qualified operators in both industries.[32] Additionally, special tax incentives under initiatives like National Economic Recovery Plan (PENJANA)[33] further encourage companies to relocate operations to Malaysia and invest in selected service sectors.

The commitment of governmental bodies, industry stakeholders, and investments in research, infrastructure, and skills development prove Malaysia's dedication to nurturing both semiconductor and data center industries. Datuk Seri Tengku Zafrul Abdul Aziz, the Minister of Investment, Trade, and Industry, recently highlighted the government's comprehensive plan to cover every aspect of the semiconductor ecosystem, including and importantly incentives for companies involved.[34]

## Madani

### Conclusion:

With the latest incentives under Madani NIMP 2030 and the present political stability in Malaysia coupled with the 'cheap Ringgit' based on the present exchange rate against USD and the depreciation of Ringgit against the neighboring countries' currencies i.e. like Singapore, Thailand, Vietnam and Indonesia Rupiah, it is timely for foreign investors to re-focus on Malaysia - as an investment destination. Reflecting on its past track record, offering friendly investment climate with its transparent laws and regulations, free trade agreements and the present government focusing on strengthening governance, together with her favorable tax incentives, Malaysia is still a haven for investment in the Asean region.

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## UNDERSTANDING HIBAH OF 'CHARGED PROPERTY'

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### Is there a way to transfer Charged Property under the rules of Land Law & Hibah?

Very few lucky individuals inherit a house - wholesale. While others, are fortunate enough to fully pay-off the mortgage on their property, in their lifetime. In both instances, if these Property Owners are Muslim, they are able to transfer the property via HIBAH\* - an Islamic inheritance system- to any person, male or female, Muslim or non-Muslim - during such donors' lifetime- on one major condition: **That they fully-own the house, without any strings attached.**

These are the happy scenarios.

However, there is a third group of Muslim property-owners who for one reason or another, will never be able to pay off the mortgage *in their lifetime* that is - and, so: *Does it mean that they will never be able to transfer their property, via Hibah, to a person of their choosing?*

If they want to transfer their property to someone of their individual choice, they have no real choice but to try to transfer their property via HIBAH - even though the property is still charged to a bank at the time of the transfer. In other words:

If a donor transfers charged property via Hibah to a beneficiary - will such a transfer be struck down as invalid under the strict rules of the National Land Code 1965 ('NLC 1965')? Is there another way or a way around this statutory law in Malaysia?

Here are the main issues in a nutshell:

- Under the rules of Faraid: No property can be exclusively inherited by a wife(s) or daughter(s), after a property owner has passed away.
- Property can only be exclusively owned by a wife &/or daughter before the death of a property owner, via Hibah.
- In a transfer of property under NLC 1965, where a bank has a lien (a charge) over the house - any transfer is invalid - until the financing facility is fully paid-off.
- Under the rules of Hibah, among others, a property owner must have full ownership over the property - to make a transfer.
- It therefore begs the question: Is there a way in which Hibah-charged-property can be validly transferred - under rules of Hibah or NLC 1965?
- What if the Chargee agrees with the transfer?
- **OR - WHAT IF there is an insurance to protect the Chargee?**

*With the soaring prices of property, it has become practically impossible for many to purchase a house without getting a financing facility & using that same house as collateral.*



## Hibah of Charged Property - Is this possible?

In recent times, with the soaring prices of property, it has become practically impossible for many to purchase a house without getting a financing facility and using that same house as collateral.

Using the house as collateral has become normal procedure to get approval. But after that, no sale or transfer can be made until the financing facility is fully-paid.

By extension, the issue of inheritance (of the property) becomes important where a Muslim property owner is, either:

- (i) not expected to live long enough to fully pay-off the financing facility;
- or
- (ii) will never be able to pay-off the financing facility 'in his lifetime'.

In these two instances, it may well be the wish of such an owner to transfer the said ownership to his wife(s), daughter(s) or any other third party he chooses via HIBAH, that is, and, of course, while he is still alive. This is where he might run into a problem.

Under Faraid, no property can be exclusively inherited by a wife(s) or daughter(s) or, indeed, a third party Muslim or non-muslim, male or female, who is not listed in Faraid.

Therefore, this issue of Inheritance becomes crucial in the following context:

- Upon the demise of the property owner, the house becomes part of his estate - after the estate pays off the banking facility. After this, the estate will be distributed among the deceased's heirs according to Faraid;
- However, if his next-of-kin are a wife(s) and daughter(s), a wife(s) is entitled to 1/8 share of the house and daughter(s) is entitled to 1/2 share and neither wife(s) nor daughter(s) are entitled to a remaining share of the

house because according to Faraid rules only males can inherit the remaining share of the Estate. That said, if the deceased has no sons, then his siblings, as heirs, are entitled to the remaining share of the house;

- Finally, in the worse case scenario, if there are no siblings, then, under Faraid, Baitulmal (Islamic Treasury Institution) is entitled to the remaining share of the house.- So, the house will be shared between Baitulmal with 3/8 shares, a wife with 1/8 share and daughter(s) with 4/8 shares.

Naturally, this is not the outcome an owner would like, especially after working so hard, for a lifetime, to pay off the monthly installments of a financing facility. In fact, would anyone be willing to have his house shared with an 'outsider' upon one's demise? The answer is clear. It is, therefore, important to study this issue.

### HIBAH OF CHARGED PROPERTY

- no mention of 3rd procedure

Property can be charged to the bank by registration of Form 16A of NLC 1965 or property assigned to the bank by Deed of Assignment. There is, however, no mention of a third procedure: 'Hibah charged property'.

One of the main pillars of Hibah, is "mawhub", that is, Hibah property whereby the Hibah property must be fully-owned by the donor. As soon as this is established, the donor-landowner can give his property to anyone he likes.

By contrast, 'Hibah of charged property' involves two Islamic financial concepts, namely the concept of Hibah (gift) and the concept of "al-rahn" (charge).

The concept of al-rahn or charge is when a debtor places something of value as collateral to a creditor as security for the repayment of the debt.

## HIBAH OF CHARGED LAND

*Under the rules of Faraid: No property can be exclusively inherited by a wife(s) or daughter(s), after a property owner has passed away.*

In Quran, Allah S.W.T says:

(Translation)

"If you are on a journey and a scribe cannot be found, then a security can be taken. If you trust one another, then 'there is no need for a security, but' the debtor should honour this trust 'by repaying the debt'—and let them fear Allah, their Lord. And do not conceal the testimony, for whoever conceals it, their hearts are indeed sinful. And Allah 'fully' knows what you do."

(Surah al-Baqarah: verse 283)

This Islamic banking concept of 'charge' - based on trust between fellow men - is encouraged in Islamic financial system for the 'benefit of the community', particularly for those with low income so as to facilitate their access to financial facilities in the purchase of bigger assets such as a house.

So, the question arises: by charging a house to the bank, does the charged property no longer belong to the owner?

The answer is no, because, just like an 'ordinary charge' the owner remains the legal owner of the charged property, and the bank is merely registered as the chargee of the property, with beneficial interest on the property. However, the owner's right of tasarruf or conducting transaction(s) - over the property is restricted by the existence of the charge, in that, the property may not be transferred to any person without the consent of the chargee or unless and until the property has been fully redeemed by the owner.

**Therefore, since the owner does not have full right of 'tasarruf', can the property be the subject matter of Hibah?**

ISLAMIC SCHOLARS' VIEWS AND LEGAL CASES ON HIBAH OF CHARGED PROPERTY ("HARTANAH DALAM GADAIAN")

Scholars, Mazhab Shafi'i and Hanbali on: the act of 'Acceptance' of a gift by the donee:

According to Mazhab Shafi'i and Hanbali, one of the pillars of hibah is 'qabd' (acceptance of hibah property), and, in its absence, hibah is not valid.

Hibah of charged property makes it impossible for the donee to accept the property because the donor's right of tasarruf (transaction) over the property is restricted due to the charge on the property. Additionally, the charge on the property means the donor only has partial ownership of the property (milk al-naqis), which contradicts the pillar of hibah which requires full ownership of the property by a donor. Hence, scholars Mazhab Shafi'i and Hanbali view the Hibah of charged property as invalid.

In the case of Sabedah Binti Abdullah lwn. Tiga yang lain (05100-044-0082-2007), the Syariah High Court of Seremban dismissed the plaintiff's application for the validity of hibah. The court found that one of the rukun hibah was not fulfilled, as at the time of the

## Hibah of charged property:

**The charge agreement does not invalidate the hibah, but consent of the chargee is a condition to the validity of the hibah.**

Property can be charged to the bank by registration of Form 16A of NLC 1965..... property assigned to the bank by Deed of Assignment. There is, however, no mention of a third procedure: 'Hibah of charged property'.

'aqad hibah', one of the hibah property was still under repayment to Felda.

Therefore, the court held that the hibah was invalid because the property was not fully owned by the donor at the time of the aqad hibah.

### **Consent of the Chargee**

i.e. in one case: Maybank indirectly approved hibah of charged land

Scholars, Mazhab Hanafi and Maliki say that Hibah of charged property is permissible because the status of the hibah is considered 'mawquf' (suspended) until the consent of the chargee is obtained. This consent can be obtained either at the time of or after the aqad hibah is completed.

According to this opinion, notwithstanding the hibah of the charged property, the charge agreement remains valid and effective. Thus, the charge agreement does not invalidate the hibah, **but the consent of the chargee is a condition to the validity of the hibah.**

In the case of **Shahirah Aimi binti Shahrudin v Siti Hawa Binti Abu Talib dan Shamimi Aqilah binti Shahrudin (05000-044-0002-2014)**, the Syariah Court of Appeal held that the hibah from the deceased to the appellant was valid, even though the hibah property was still charged to Maybank at the time of the aqad hibah. The court's decision was based on the grounds that the appellant had obtained consent from the chargee, Maybank, for the property to be given to the appellant by way of hibah.

*Translation:*

"Even though the deceased died on December 14, 2009, the agreement still binds whoever replaces the deceased to the house. In this case the appellant is the successor of the deceased and has acted as the person to whom the house was granted. The appellant has dealt with the bank to settle the outstanding debt. As a collateral holder, the bank has the authority to cancel the hibah made by the deceased based on the concept of 'qabilah lilibthal' but the bank did not do so but received RM50,000.00 from the appellant to settle the debt. The bank's actions are indirectly a form of recognition of the position of the appellant who took over the burden and liability of the house. There is no evidence of the bank trying to take over the house and cancel the hibah made. Therefore, the bank indirectly approves the hibah made by the deceased."

*Hibah of charged property makes it impossible for the donee to accept the property because the donor's right of tasarruf (transaction) over the property is restricted due to the charge on the property.*

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## HIBAH OF CHARGED PROPERTY

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### WHAT IS “TAKAFUL”?

#### Takaful compensation will fully settle the remaining facility of the Charge

#### FATWA ON HIBAH - ONLY IN SELANGOR

According to the Government of Selangor Gazette published on 8th April 2021, hibah of the charged property is deemed valid:

- if the hibah property (mawhub) is protected by ‘takaful’ (insurance) such as Mortgage Reducing Term Takaful (MRTT) and Mortgage Level Term Takaful (MLTT), or
- if the consent of the chargee is obtained.

However, this fatwa applies specifically to the hibah property located within the state of Selangor.

In brief, MRTT and MLTT are takaful schemes contributed by the borrower to protect the entire facility amount and term in the event of a calamity or the demise of the borrower. For instance, if the borrower passes away, the takaful compensation will fully settle the remaining facility to the bank, who is also the chargee.

#### WRITER’S VIEW

Nowadays, it has become customary (‘uruf) for people to purchase a house/property by obtaining a facility from the bank instead of using cash and for the bank to secure the facility with takaful or insurance (MRTT/MLTT /MRTA).

It is time for our legislative body to consider ‘uruf’ and the opinions of Mazhab Hanafi and Maliki to enact laws to allow Hibah of charged property based on the principle of maslahah [PUBLIC INTEREST] for the community, as has been done in Selangor.

Mazhab Hanafi and Maliki are of the view that as long as the interest of the chargee is protected, the Hibah of charged property should be considered valid. The chargee may, subject to the provisions of the laws governing land, contemplate granting approval and consent to the donor/chargor to execute Hibah of the charged property, especially in the following circumstances:

- (i) If the facility is fully protected by MRTT/MLTT;
- (ii) If the facility involves a third-party charge from the chargor/donor, and the borrower of the facility is the recipient of the Hibah.

POV:

*‘As long as the interest of the chargee is protected, the Hibah of charged property should be considered valid.’*



## Hibah of Charged Land

# WRITER'S POV: THERE IS A PRESSING NEED FOR LEGISLATIVE CONSIDERATION

Returning to the case scenario mentioned in the earlier paragraph, one may execute hibah on charged property to your only daughter or wife and seek consent from the chargee bank. You may need to justify to the chargee bank that hibah of the charged property would, at all material times, protect the interests of the bank and bank and bank/chargee's right over the property will never be affected.

Alternatively, if you are unable to execute the hibah of charged property due to the refusal of the chargee to grant consent, you may consider subscribing to a hibah takaful plan. Briefly, hibah takaful is offered by takaful (insurance) companies as a method of disbursing takaful benefits upon the demise of the takaful policyholder. Through hibah takaful, the distribution of takaful benefits is given to the nominated beneficiary stated in the hibah policy, following the death of the policy holder. Upon disbursement of the takaful benefits, it would enable the donee to receive instant cash to redeem the remaining portion of the property, if it is shared with individuals other than immediate family members.

### *Conclusion*

In conclusion, while the question of Hibah of charged property involves varying perspectives from different Islamic Scholars, there is a pressing need for legislative consideration. Aligning with the views of Mazhab Hanafi and Maliki, allowing Hibah of charged property with the chargee's consent, especially when the facility is safeguarded by takaful or insurance (MRTT/MLTT /MRTA), can address the challenges faced by the property owners and their heirs. A thoughtful legal framework, akin to the Selangor fatwa on Hibah, can ensure a balanced approach that upholds the interests of both property owners and financial institutions in the realm of the charged property transactions.

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#### REFERENCE

- (i) Section 16A of National Land Code 1965
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- (iii) Sabedah Binti Abdullah lwn. Tiga yang lain (05100-044-0082-2007)
- (iv) Shahirah Aimi Binti Shahrudin v Siti Hawa Binti Abu Talib dan Shamimi Aqilah Binti Shahrudin (05000-044-0002-2014)
- (v) Warta Kerajaan Selangor bertarikh 8 April 2021
- (vi) Perlaksanaan Hibah Harta Bercagar dalam Industri Perancangan dan Pengurusan Harta Orang Islam written by Noor Lizza Mohamed Said and Wan Amirul Adli Wan Ayub
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## Opinion: Gaza - Security Council

### Security Council permanent members hold key to Israel compliance

By: Professor Dato' Dr. Rahmat bin Mohamad

The world rejoiced at the adoption of Resolution 2728 on a Gaza ceasefire by the United Nations Security Council. But Israel has refused to comply with the resolution.

The Israeli government has said that it will continue with military action until all hostages are returned. There are also claims that the resolution is not binding on Israel, thereby giving it the license to continue military action in Gaza.

Israel refuses to recognise the legitimacy of the council and the International Court of Justice (ICJ) rules-based mechanisms.

Israel has not complied with any resolutions adopted by the council. It ignores the recent ruling of the ICJ to stop military attacks and the legal duty on the provision of humanitarian aid for Palestinians in Gaza.

The UN Charter empowers the council to decide on measures to maintain or restore international peace and security (under articles 41 or 42 of Chapter VII).

Collective sanction is allowed under Article 41, which may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio and other means of communication, and the severance of diplomatic relations.

In addition, the council may use an arms embargo to reduce the availability of weapons and thus force a peaceful solution. The council has several committees to monitor the effects of sanctions.

The next option is Article 42, which is more drastic and involves military action.

This can be implemented if the council considers measures in Article 41 are inadequate. It may conduct this action by air, sea or land.

These actions may include demonstrations and blockades.

The adoption of Resolution 2728 is a positive step as it allows the council to advance legal options to ensure Israel commits to a permanent ceasefire in Gaza.

The international community must continue to push for Israel's adherence to a permanent ceasefire, and must exert pressure in the General Assembly.

## Gaza

“What happens next will mainly depend on political will.”

The international community must continue to push for Israel's adherence to a permanent ceasefire, and must exert pressure in the General Assembly.

If Israel refuses to observe the ceasefire, the council can begin the imposition of collective sanctions.

What happens next will mainly depend on political will.

Member states must play their role to end the massacre in Palestine. We have witnessed pressure by the international community to put an end to Israel's genocidal actions.

For instance, in the genocide case against Israel at the ICJ, a large number of states did participate in the oral hearing on the ICJ Advisory Opinion on the legality of the occupation and the policies and practices of Israelis in the occupied Palestinian territories.

And a report titled "Anatomy of Genocide" by the UN special rapporteur on human rights in the occupied Palestinian territories, Francesca Albanese, has had a great impact.

In conclusion, the adoption of Resolution 2728 is a significant milestone in the pursuit of justice and an end to genocide against Palestinians.

However, the realization of this hope hinges on the willingness of the five permanent members of the council to follow the conscience of the global community and unite to ensure Israel complies.

It is imperative that nations uphold the principles of justice and protect the rights of all people, ensuring a future free from oppression and violence.

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## LEGAL UPDATES

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# AN OVERVIEW OF THE INSOLVENCY (AMENDMENT) ACT 2023

Written by: Rohana Ngah | [Partner](#)  
Nurus Shafwa Fauzan | [Associate](#)

### **Giving Bankrupts a tangible ‘second chance’**

The legislative landscape of bankruptcy administration in Malaysia has undergone a transformative shift with the introduction of the Insolvency (Amendment) Act 2023 (“Amendment Act”) on 6th October 2023 under the ‘Second Chance Policy’. These amendments were introduced to facilitate the discharge of bankrupt individuals within targeted categories, with a view to getting them back on their feet and resuming a contributory role in society.

At its core, the Amendment Act underscores the government's commitment to giving bankrupts a tangible ‘second chance’, as it were, at leading a productive life, which will indirectly contribute to the economic development of the country.

Rather than retaining a punitive approach – which was found to be debilitating, holding bankrupts down, with oftentimes insurmountable terms – the amendments (“Amendments”) to the Insolvency Act 1967 (“1967 Act”) bring substantial changes, demonstrating a balanced understanding of the challenges faced by both debtors and creditors.

Simultaneous with the Amendments, The Insolvency (Amendment) Rules 2023 (“Amendment Rules”), came into force to amend the Insolvency Rules 2017 (“2017 Rules”), reflecting the overall changes.



## Two New Categories to Discharge Bankrupts from Bankruptcy - Here, no Objections may be raised against a Discharge.

The following is a brief description of the Amendments:

### 1. Broadening Categories to Discharge Bankrupts from Bankruptcy.

Section 33B of the 1967 Act undergoes a substantial overhaul, broadening the criteria of 'discharge from bankruptcy' by a *certificate issued by the Director General of Insolvency* ("DGI"). The two (2) additional categories, (e) and (f), below, inserted into subsection 33B (2A), of the 1967 Act, are:

- (i) Bankrupts who are incapable of managing their own personal affairs due to mental disorders, as certified by any government hospital psychiatrist; and
- (ii) Bankrupts aged 70 and above, who are deemed, to be incapable of contributing to administration of their estate. The Malaysian Department of Insolvency ('MDI') data indicates that 19,913 bankrupts aged 70+ may qualify for discharge with DGI's certification.[2]

Of note: No objection may be raised by creditors against a discharge under these 2 new categories.[3] They align with the optimal use of public funds for more efficient bankruptcy administration.

The changes via Sec. 8 apply retrospectively to those adjudged bankrupt before the coming into force of the Amendment Act.

**DISCHARGE OF A BANKRUPT- the 4 Existing Categories:**  
 a). Adjudged Bankrupt-due to being a social guarantor;  
 b). Bankrupt - with registered disability under Persons with Disabilities Act 2008;  
 c). Deceased Bankrupt;  
 d). Bankrupt has serious illness certified by a Government Medical Officer.

### 2. Automatic Bankruptcy Discharge and Suspension

Automatic Discharge. A significant amendment in Section 33C(1)(a) of 1967 Act, governing the conditions for automatic discharge from bankruptcy is notably:

The previous requirement of achieving a 'targeted contribution of provable debt' is replaced with a flexible provision, so that:

Before the Amendments, a bankrupt's discharge, per se, was contingent upon:

- (i) the elapse of three years from the submission of their statement of affairs; and
- (ii) subject to, among other conditions, the fulfilment of the specified target contribution of provable debt, as determined by the DGI.

Not surprisingly, Dato' Sri Azalina Binti Othman Said, Minister in the Prime Minister's Department (Law and Institutional Reform) said, when announcing the changes, that no cases of discharge have been successfully recorded due to the difficulty in meeting the initial condition of achieving targeted contribution of a bankrupt's provable debt.[4]

Consequently, the new changes via Sec. 9 of the Amendment Act facilitates an 'automatic discharge' from bankruptcy:

upon the expiration of three years from the date of the submission of the statement of affairs, provided that the following conditions are met:

- (i) the bankrupt has paid the sum of money determined by the DGI,, 'having regard to the financial ability of the bankrupt'; and

## LEGAL UPDATES

### *What is Bankruptcy?*

*Bankruptcy is a legal proceeding where a debtor is declared a 'bankrupt' by court order - based on a creditor's petition or a debtor's petition. All the bankrupt's unsecured assets will be measured & evaluated, then be vested on the Director General of Insolvency (DGI), who has the power to sell off all these assets to settle the bankrupts' debts.*

- (ii) the bankrupt has complied with the requirement to render an account of moneys and property to the DGI, under his duties as a bankrupt..

prejudice the administration of the bankrupt's estate; or

- (iii) the bankrupt has failed to co-operate in the administration of estate.

#### Suspension of Automatic Discharge.

That said, the amendment takes into account creditors' interests by allowing for creditors to object to an automatic discharge, by making an application to court for an order to suspend the discharge, within 21 days from the date of the notice of automatic discharge. Objections may only be based on the following grounds:

- (i) that the bankrupt has committed any offence under the 1967 Act or under Penal Code with respect to:
- Section 421 of Penal Code (dishonest or fraudulent removal or concealment of property to prevent distribution among creditors);
  - Section 422 of Penal Code (dishonestly or fraudulently preventing from being made available for his creditors a debt or demand due to the offender);
  - Section 423 of Penal code (dishonest or fraudulent execution of deed of transfer containing a false statement of consideration); or
  - Section 424 of Penal Code (dishonest or fraudulent removal or concealment of consideration);
- (ii) that the automatic discharge would

The DGI is empowered to suspend such a discharge for a maximum period of two (2) years, if the bankrupt fails to comply with his duties and obligations under the 1967 Act, commencing on the expiry of 3 years from submission of the statement of affairs. It takes effect from the date of DGI's notice & served on all relevant creditors at least 6 months before expiry of the said 3-years.

### **3. Abolishing Mandatory 'First Creditors' Meeting'**

The mandatory requirement of holding the 'first meeting of creditors' promptly, following the issuance of a bankruptcy order, has been removed by an amendment to Section 15 of the 1967 Act. The primary purpose of this first meeting was to assess whether a composition or scheme of arrangement should be discussed and the approach to handling the bankrupt's assets.

The Amendment Act replaces this mandatory requirement with granting the Minister the discretionary authority to include any additional purpose like scheduling flexibility for meetings, especially where bankrupts or creditors are unable to attend, thus, saving costs.

## **‘Personal Loans’ were the main cause of Bankruptcy in the past 4 years - 49.14%. These comprise friendly loans, loans from Money Lenders & also banking institutions.**

As such, all mention of “*first* meeting of creditors” in the 1967 Act, is substituted with the phrase “meeting of creditors”.

### **4. Streamlining Creditors’ Meetings**

The Amendments extend to Schedule A of the 1967 Act, particularly in relation to the summoning of meetings of creditors. Paragraph 2 of Schedule A of the 1967 Act is substituted by a new provision outlining the individuals who will be summoned to attend a meeting of creditors, including:

- (i) in the case of a debtor's petition, the creditors mentioned in the bankrupt's statement of affairs, and the creditors who have filed proof of debts, and the bankrupt; or
- (ii) in the case of a creditor's petition, the petitioner, the creditors mentioned in the bankrupt's statement of affairs, creditors who have filed proof of debts and the bankrupt.

The DGI is vested with the sole authority to summon such meetings. Further, the DGI is obligated to convene a meeting of creditors when directed by the Court or upon a written request by at least one-fourth (25%) in value of the creditors or the consultative committee under Paragraph 5 of Schedule A of the 1967 Act, replacing the discretionary ‘*may at any time*’ provision. The notice period is not less than seven (7) days’ notice to each creditor.

Untuk ‘pelepasan automatik’ baru:

Bankrap telah membayar jumlah wang yang ditentukan oleh DGI, untuk tujuan mentadbir harta pusaka bankrap, ‘dengan mengambil kira kemampuan kewangan bankrap’ & memberikan akaun wang & harta kpd DGI.

With the Amendments:

- the requirement for Creditors to meet with the DGI has been abolished - so simplifying admin.
- to safeguard the welfare of the bankrupt, the Act also assesses the Value of Assets exempted from being divided by Creditors & the Value of the Case to be qualified for Summary Management. [6]

### **5. Redefining Remote Communication Technology**

Another insertion is the definition of ‘remote communication technology’ in Section 2 of the 1967 Act, which now encompasses live video links, live television links, or any other electronic means of communication.

Consequently, Schedule A of the 1967 Act has now vested the DGI with the power to convene a meeting of creditors utilizing remote communication technology if appropriate. Simultaneously, the amendments to Section 130 of the 1967 Act signify a departure from conventional notice-serving methods by introducing the option to serve notices via electronic communication where no special mode is prescribed.

### **6. DGI may prescribe Value on Properties Exempted from Creditor’s Distribution**

Section 48 of the 1967 Act, dealing with the *exemption of properties from creditors’ distribution*, is notable changed: Here, the previous fixed, threshold value of RM5,000.00 for tools of trade & personal necessities exempted under S. 48(1)(a)(ii) is amended, allowing the Minister to set the value, ‘as may be prescribed’, providing greater safeguard of essential assets of the bankrupt.



## LEGAL UPDATES

### Bankruptcy

Rule 179A of the amended 2017 Rules have specified the amounts prescribed by the Minister for property to be exempted from distribution to creditors as follows:

- (i) tools of the trade, if any, up to a value not exceeding RM20,000.00; and
- (ii) necessary wearing apparel, bedding, and similar essentials for the bankrupt, his wife, and children, with a total value not exceeding RM10,000.00.

#### 7. Value of Wage-Earner's Property & Income - for Summary Administration - is now Discretionary

Formerly, Section 106 of the 1967 Act stipulates that following a bankruptcy order, if the DGI reports to the Court that the assets (after deducting payments to secured creditors in respect of their securities) are unlikely to exceed RM10,000.00, the Court may order summary administration.:

- (i) The fixed value of RM10,000.00 is now replaced with the Minister's discretionary power to prescribe a new value.
- (ii) The value of assets prescribed by the Minister is fixed up to RM40,000.00 under the amended Rule 227A of the 2017 Rules.

Additionally, the definition of a 'wage-earner', for summary administration, is revised under Section 107 of the 1967 Act.:

The fixed amounts of RM500.00 for salary and RM50.00 for other income are replaced with provisions empowering the Minister to prescribe new amounts. Rule 227B is, therefore, incorporated into 2017 Rules to address assessment of the income value of a wage-earner. In this regard, a wage-earner is defined as a person who is or has been employed on a salary or wage of an amount:

- (i) not exceeding RM2,000.00 per month excluding any temporary allowance; and
- (ii) if he has any other income exclusive of any pension he may receive, not exceeding RM500.00 per month and does not arise from any trade or business in the management of which he takes any part.

#### Quotes:

***Being declared a Bankrupt can have far reaching effects on the daily life & future of a Bankrupt & family.***

***He/she steps out of being a contributing part of the economy.***

#### Some Quotes from Bankrupts:

*"A lot of Restrictions were suddenly placed on me."*

*"My bank account was deactivated... I cannot own a business. With no business, it is difficult to recover."*

*"So many things are stacked up against you - It is a struggle getting back up."*

*"I cannot leave Malaysia for work or travel. My family is also stuck along with me."*

*"It makes me feel like a failure & have lost all my confidence ....There are lots of situations outside a debtor's control like:*

*"We took a strong hit with online shopping ... then Covid-19 pandemic hit..."*

*Recovering was a struggle with debt .... then a Bankruptcy petition was filed against me.... No chance or hope after that."*

## Kebankrapan

### 8. Retrospective Application

The Amendment Act is retrospective in application, as emphasized in the amended Sections 33B and 33C of the 1967 Act. The categories of prohibited objections and the loosened conditions for automatic discharge include individuals declared bankrupt before the coming into force of the Amendment Act.

The amendments to the 1967 Act follow extensive consultations with key stakeholders, such as the AG's Chambers, Federal Court Chief Registrar, Finance Ministry, BNM, Inland Revenue Department, EPF, Credit Counselling and Management Agency, Association of Banks in Malaysia[7] and led by Dato' Sri Azalina Binti Othman Said, Minister in the Prime Minister's Department (Law and Institutional Reform).

*Apakah sebab utama rakyat Malaysia diisytihar muflis?*

*Proses kebangkrapan bermula dengan petisyen yang difailkan oleh pemiutang atau penghutang. Semua aset penghutang diukur dan dinilai, dan aset itu boleh digunakan untuk membayar balik sebahagian daripada hutang tertunggak.*

### Conclusion

While the amendments primarily aim to provide bankrupts with a streamlined pathway towards discharge, the repercussions for creditors necessitate meticulous examination.

For instance, considering the DGI's discretionary power to ascertain the monetary amount for the administration of the estates of bankrupts for the purpose of automatic discharge of bankrupts: setting an unduly low threshold, for the automatic discharge, could pose a challenge for creditors in recovering the amount *subsequent* to the automatic discharge of bankrupts.

Conversely, establishing an excessively high sum might be too burdensome for bankrupts, and, as such, it is unlikely that the DGI would set an unduly high threshold as a bankrupt's financial ability will have to be closely considered.

*When a debtor, business or company is faced with overwhelming debt, it has the option of going for bankruptcy.*

The crux of the Amendments lies in the amended Section 33B and Section 33C of the 1967 Act: redefining criteria for discharge and inclusion of automatic discharge. The inclusion of new categories, such as individuals with mental disorders and those aged 70 and above, offers bankrupts a more accessible route to discharge.

From a creditor's perspective, this broadening of categories introduces a higher likelihood of discharges, potentially impacting his/her recovery of debt(s), which may be especially worrisome if the amount of debt is large. The removal of the rigid requirement of achieving a targeted contribution of provable debt under Section 33C of the 1967 Act may also pose challenges for creditors hoping for comprehensive recoveries.

It is noteworthy that Prime Minister Dato' Seri Anwar Ibrahim announced that an extension of the Second Chance Policy will be made in 2024, extending eligibility to individuals aged 40 and below, and proposing an increase in the minimum bankruptcy threshold to RM200,000.00.[8]

The Amendment Act represents a comprehensive evolution of bankruptcy administration. From redefining communication methods and reimagining creditors' meetings to revising discharge and value relating to summary administration.

The retrospective application ensures that ongoing cases benefit from these progressive changes, and - all in - marking a significant milestone in the ongoing evolution of insolvency laws in Malaysia.

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## A WALK IN A HIGH-TECH INDUSTRIAL PARK

### - Kulim Hi-Tech Industrial Park - features as a base model -

By: Lew Chung Han | Partner  
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The first  
industrial park  
in MY [1&2]

It was in 1996 when Malaysia started the development of its first fully integrated high-technology industrial park in Kedah known as

#### **Kulim High-Technology Park (KHTP)**

- 5,551 acres with its motto "Leading Global Science City". KHTP has become an ideal location for both local and multinational companies to set up their operations.

As of December 2023, 34 multinational businesses have established operations in KHTP, with Japan contributing the highest overall number of investors with 12 manufacturing companies in KHTP such as Fuji Electric, Ferrotec, Shinx, Toyo Memory and Menicon. [1]

Menteri Besar of Kedah, Datuk Seri Muhammad Sanusi Md Nor stated that KHTP retains its status as the state's investment magnet with a total accumulated investment of

**RM134.1 billion from 1996 to the first quarter of 2023.**[2]

Kedah State is one of the largest contributors to Malaysia's economic growth. For instance, from January to September 2023, Malaysia received total approved investments in the Manufacturing Sector amounting to RM99.8 billion of which Kedah state, as a whole, contributed RM21.0 billion and of which 72% came from KHTP alone with RM15.1 billion.[3]

Pursuant to the National Fourth Industrial Revolution, to optimize science and technology use, Malaysia has actively promoted the development of technological and communication centers in various regions throughout the country.[4] Apart from KHTP, there are several other High Technology Parks in Malaysia, for instance, Technology Park Malaysia Business Center, MRANTI Park, i-Park and Sedenak Tech Park.



**Malaysia has set up ‘high-tech parks’ since 1996, which has proved to be a more efficient, effective & modernized working environment.**

## Introduction of the High Tech Park

A ‘High-Tech Park’ characteristically contains advanced technological facilities and equipment with a tightly structured ecosystem of world-class information and communication technology (ICT) to facilitate interaction and collaboration between tech-savvy professionals, training hi-tech human resources, manufacturing and trading hi-tech products.[4] Malaysia, along with many developing countries have set up ‘high-tech parks’ as it has proved to be the best solution in providing a more efficient, effective and modernized working environment structured to meet the demands and expectations of the technological revolution.

In 2023, Malaysia had over 600 High-Technology Parks with world-class infrastructure and excellent connectivity.[5]

MIDA has embarked on a digitization initiative of three key certificates in the manufacturing sector: the Manufacturing Licence, Permit PDA Certificate, and Pioneer Status Certificate. The CEO of MIDA, Datuk Wira Arham Abdul Rahman, said that the implementation of an end-to-end automation application process will allow MIDA to respond to the investor needs more effectively, which will result in faster processing times and helpful facilitation that encourages investors to ease of doing business.[5]

Furthermore, in keeping with the government’s aim of achieving an emission reduction target of 45% by 2030, the SUNVIEW Group Bhd, an end-to-end solar photovoltaic (PV) system construction player in KHTP, has entered into a two-year strategic business alliance with KTPC from 8 March 2023 through its wholly-owned subsidiary, Fabulous Sunview Sdn Bhd. The scope of collaboration involves developing potential rooftop and large-scale solar photovoltaic (PV) projects at KHTP for the adoption of solar renewable energy. The effort to assist KHTP in

transitioning into the greenest industrial park will not just help in energy savings but also allow businesses in KHTP to adopt Environmental, Social and Governance (ESG) practices. As such, the KHTP will be able to be at the forefront of green energy industrial parks in Malaysia.[6]

‘High technology’ companies are also eligible for Pioneer Status or Investment Tax Allowance. ‘High technology’ refers to the companies that engaged in promoted activities or in the production of high technology-promoted products under the Promotion of Investment Act 1986. Pioneer Status (PS) is an incentive in the form of tax exemption of 100% of statutory income for a period of 5 years. For investment tax allowance (ITA), it is a tax incentive in the form of a tax deduction on qualifying expenditure incurred by High Technology companies that are eligible for an allowance of 60% on the qualifying capital expenditure incurred within 5 years from the first date the qualifying capital expenditure is incurred.[7]

## Benefits

Malaysia’s economy is growing significantly. For instance, in 2016, Malaysia’s total approved investment was only RM207.9 Billion, but in the first nine months of 2023, the country saw an increase in terms of total committed investments to RM225 Billion.[8]

Further to these figures, the introduction of high technology parks, per se, created more job opportunities since 1996, with the first HTP. State Industry and Investment, Science, Technology and Innovation and Higher Education, Datuk Dr Ku Abd Rahman Ku Ismail stated that the people of Kedah benefited immensely from KHTP with over 80% of jobs in the state’s manufacturing sector being filled up by local talent. As for last year, 90% of Kedahans filled 3,158 job vacancies from January to September. Last year, KHTP had a total of 34,000 workforce employed within its premises and from January to September 2023, KHTP created 48,496 new jobs[11] especially, in the technical and engineering field.

khtp

'High technology' companies are also eligible for Pioneer Status or Investment Tax Allowance.

Central to a successful HTP is a convenient environment for investors to work in, ensuring that they have access to all the necessary facilities to enhance production, efficiency, and productivity.[12] A good example is Ferrotec Holdings Corporation, which is headquartered in Tokyo on a technology core of FerroFluid magnetic liquid has invested over RM500 million in KHTP to start its first production of a new manufacturing facility in SEA. Mr. Takeru Yamamura, VP of Ferrotec Holdings Corporation and CEO of Ferrotec Manufacturing Malaysia Sdn. Bhd. said that the establishment of the Kedah plant will propel Ferrotec to a globally recognized international supplier in the Semiconductor Industry.[13] The plant, which will be undertaking electromechanical assembly and advanced material fabrication for semiconductor equipment, fits well within the ecosystem of KHTP and falls under KHTP's promoted high-technology industries.[14]

**Conclusion**

To summarize, with excellent infrastructure, quick intermodal logistics connectivity and abundant quality talent, High Technology Parks have become an ideal location for both local and multinational companies to set up their operation. For instance, in KHTP, the infrastructures provided are 5G enabled city, CCTV Command Center with 24 Hour CCTV Surveillance, Specialized Electricity Provider, Sterilisation Facilities, and Analytical Laboratory.[15] These facilities support a culture of creativity, productivity, and cooperation for the development and success of IT enterprises here.

Furthermore, the current government has also been practical and proactive in introducing investment incentives to attract more investors to set up companies in the High-Tech Parks. This is done in recognition of the realities of a rapidly changing global economy that is driven by innovation and technology. The actions taken by the government are creative endeavors to ensure the aim of the country to become a high-income, high-technology country is achievable.

With this winning concept, Malaysia should introduce many more new High Technology Industrial Parks. For example, the announcement of a new high-tech industrial area in Kerian, north of Perak in Budget 2024 by Menteri Besar of Perak, Datuk Seri Saarani Mohamad is expected to attract developers, and have spillover impact on the area. The new High Technology Parks in Malaysia may, in effect, guide Malaysia's technology sector to a more robust direction and drive the digital transformation, keeping up with the strong competition posed by most neighboring countries in this region.

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