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IN ASSOCIATION WITH ALLEN & GLEDHILL LLP (SINGAPORE)

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A summary of developments in the law

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Corporate / M&A

The Malaysian Code on Take-Overs and Mergers 2016

The new Malaysian Code on Take-Overs and Mergers 2016 ("**2016 Code**") and the Rules on Take-Overs, Mergers and Compulsory Acquisitions ("**Rules**") came into force on 15 August 2016, replacing the Malaysian Code on Take-Overs and Mergers 2010 ("**2010 Code**") and the practice notes to the 2010 Code.

The 2016 Code and the Rules must be read together with the Capital Markets and Services Act 2007 ("**CMSA**"), in particular sections 216 to 225 found in Division 2 of Part VI of the CMSA. This Division was also the subject of recent amendments, which came into force on 15 September 2015.

Introduction of the 2016 Code and the Rules

The 2016 Code is a short form document which sets out the general principles to be complied with by all persons engaged in any take-over or merger transaction, and as to when the so-called "creeping rules" apply. The Rules, on the other hand, contain the operative provisions and requirements for take-overs and mergers transactions.

The Rules were issued pursuant to section 377 of the CMSA, and may be revoked, varied or amended in whole or in part by the Securities Commission ("**SC**") from time to time so as to ensure that the Malaysian take-over regulations are in line with the developments in the take-over regimes in other jurisdictions. Any non-compliance with the Rules may attract penalties under the CMSA.

Set out below are 10 key points in relation to the 2016 Code and the Rules.

1. Companies to which the 2016 Code applies

The 2016 Code applies to (a) any offeree which is a Malaysian public company (whether or not it is listed on any stock exchange); (b) a foreign company that is listed in Malaysia; and (c) a real estate investment trust and business trust that is listed in Malaysia (in each case, an "**offeree**" or "**target company**"). Insofar as public companies are concerned, the 2016 Code only applies to public companies listed on any stock exchange, and unlisted public companies with more than 50 shareholders and net assets of RM15 million or more.

2. Schemes of arrangement

Take-overs by way of schemes of arrangement were brought within the definition of a take-over offer, pursuant to the 2010 amendments to the CMSA and the 2010 Code. Under the 2010 Code however, a scheme of arrangement was treated as an alternative route for implementation of a take-over offer only where the offeror and its persons acting in concert ("**PACs**") collectively held more than 50% of the voting shares of the target company. This was the threshold that had to be met before exemptions could be sought from the SC from certain requirements under the 2010 Code. One significant change in the new take-over regime is that this 50% requirement is no longer in place.

This is consistent with the approach taken in other jurisdictions such as Hong Kong and Singapore. This does not mean, however, that there are no safeguards for the protection of minority shareholders. A scheme of arrangement will need to be approved by at least a majority in number of shareholders and 75% in value of the votes attached to the shares of non-interested shareholders. Additionally, the value of votes cast against the resolution to approve the scheme must be not more than 10% of the votes attached to all disinterested shares.

3. Favourable deals

As it is a key principle that all shareholders of an offeree must be treated equally in relation to a take-over offer, and have equal opportunities to participate in benefits accruing from the take-over offer (including in respect of the premium payable for control), favourable deals (being arrangements by an offeror and its PACs with selected shareholders of the target company containing favourable conditions which are not extended to all the shareholders of the target company during the take-over offer or when such offer is reasonably contemplated or for six months after the close of the offer) are prohibited unless otherwise approved by the SC in writing.

The Rules clarify that the “no favourable deal” rule does not apply to joint offerors (where two or more persons come together and the facts show that they can be considered a joint offeror), and if one offeror (or more) is already a shareholder in the offeree. In such cases, the joint offerors may make arrangements amongst themselves as to the future membership, control and management of the business being acquired. The factors which the SC will consider in determining whether a person is considered a joint offeror include:

(a) the proportion of equity share capital of the offer vehicle which the person will own after completion of the acquisition;

(b) whether the person will be able to exert a significant influence over the future management and direction of the offer vehicle;

(c) the contribution the person is making to the consortium;

(d) whether the person will be able to influence significantly the conduct of the offer; and

(e) whether there are arrangements in place to enable the person to exit from his investment in the offer vehicle within a short time or at a time when other equity investors cannot.

These factors are based on the principles and factors set out in the UK Takeover Panel’s statement in relation to the acquisition of the Canary Wharf Group plc.

In the case of management incentives, the Rules state that the SC will normally require (a) the independent adviser to publicly state in its opinion that the arrangement is fair and reasonable, and (b) shareholders’ approval if the arrangement is unusual or of significant value. This approach to management incentives is generally similar to that adopted in Hong Kong, Singapore and the United Kingdom. This is particularly helpful in the case of a private equity buyer who wishes to incentivise management to stay post-offer.

4. Upstream acquisitions / Chain principle

A mandatory offer may also be triggered if a person acquires an upstream entity which controls the downstream entity where (a) the holding in the downstream company is significant relative to the upstream entity, or (b) securing control of the downstream company might reasonably be a significant purpose of acquiring “statutory control”.

It should be noted that the Rules have now introduced a definition of “statutory control”, that is, a holding of more than 50% of the voting shares or voting rights in a company. The Rules clearly state that a mandatory offer requirement applies when there is an acquisition of more than 50% of the upstream company (as opposed to the previous requirement, which was triggered when a person “intends to obtain or has obtained control in an upstream entity”).

In addition, the Rules introduce a safe harbour for listed upstream companies. Under section 2 of the CMSA, “listed” in relation to a security or a corporation, as the case may be, means the security, or the securities of that corporation (as applicable), have gained admission to be quoted on a stock market of an approved stock exchange. At present, there is only one approved stock exchange, i.e. Bursa Malaysia Securities Berhad, the Malaysian stock exchange. Where a major shareholder of a listed upstream company has a holding of more than 50% of the voting shares or rights in the upstream company (without being required to extend a mandatory offer in respect of that company), that shareholder need not make a mandatory offer for the downstream companies throughout the chain of control.

5. Creeping threshold - Netting off

The 2016 Code and the Rules allow acquisitions and disposals to be netted off in the computation of the 2% creeping acquisition limit. In essence, a person is required to make a mandatory offer if the person and its PAC hold between 33% and 50%, and acquire more than 2%, of the voting shares or voting rights of a company in any six-month period. To illustrate this, if a person acquires shares representing 1.9%, but subsequently disposed of shares representing 0.4%, in a company, that person would be allowed to acquire further shares of up to 0.5% in the relevant company without triggering a mandatory offer. Without such a netting off rule, such person would only have been able to acquire up to 0.1% of the shares of the company without the mandatory offer requirement applying.

As shareholdings may increase or decrease through acquisitions or disposals, such 2% threshold must be calculated by reference to the greater of (i) 33%, or (ii) in respect of a person and the PACs holding more than 33%, its lowest percentage holding of voting shares or voting rights in the previous six-month period.

6. Offer price

As was the case under the 2010 Code, in a mandatory offer the offer price must not be less than the highest price paid or agreed to be paid by the offeror or any PAC for any voting shares or voting rights to which the take-over offer relates, within six months before the beginning of the offer period. Where the mandatory offer requirement arises from an arrangement, agreement or understanding to control between PACs, the offer price must be the higher of (a) the highest price paid by the offeror or its PAC for the voting shares or voting rights of the target in the six months before triggering the mandatory offer obligation, or

(b) the volume weighted average traded price of the target for the last 20 market days prior to the triggering of the mandatory offer obligation ("**VWAP**"), whichever is the higher. The SC has the discretion to disregard any unusually high or low trading prices within the relevant period, when determining the VWAP. Further, in relation to the VWAP, where there has been no transaction for the voting shares or voting rights of the target in the last six months prior to a take-over offer, an offeror will be required to provide the basis for the offer price, and prior consultation with the SC will be required.

In a voluntary take-over offer, the offer price must not be less than the highest price paid or agreed to be paid by the offeror or PACs, during the offer period and within three months before the start of the offer period, for any voting shares or voting rights in the target company.

7. Restrictions following lapse or withdrawal of offers

It remains the position under the 2016 Code that an offeror and its PAC may not, within 12 months from the date of the announcement that the take-over offer has been withdrawn, lapsed or failed, make another take-over offer for the offeree.

The 2016 Code does, however, allow the SC to grant an exemption from this restriction, and the notes under the Rules provide that an exemption may be granted if: (a) the new offer is recommended by the independent board of the offeree company; (b) the new offer follows the announcement by a third party of a firm intention to make an offer for the offeree company; (c) the new offer follows the announcement by the offeree company of a whitewash proposal or a reverse take-over which has not failed or lapsed or been withdrawn; or (d) the SC determines that there has been a material change of circumstance.

8. Compulsory acquisition

Prior to the 2015 amendments to the CMSA, an offeror which satisfied the requirements under the CMSA in relation to a compulsory acquisition or squeeze-out could only compulsorily acquire ordinary shares of the offeree. As a result, even where an offeror was successful in acquiring all the ordinary shares of the offeree, such offeror could not forcibly acquire convertible securities which were convertible into unlisted securities where the holders of such securities had not accepted the offer for their convertible securities.

Following the 2015 amendments to the CMSA, an offeror may, subject to fulfilment of the prescribed conditions, now compulsorily acquire convertible securities which are convertible into new voting shares of the offeree. In line with this, the definition of "dissenting shareholder" has been expanded to include holders of convertible securities and as such, holders of convertible securities may avail themselves of the rights accorded to minority shareholders under the CMSA.

Under the 2010 Code, compulsory acquisitions could only be undertaken in respect of voting shares in the offeree. This has now changed and the Rules allow for convertible securities, for example warrants, to be compulsorily acquired if acceptances of the take-over offer by 90% of the holders of all the warrants are secured.

9. Options and derivatives

The 2010 Code did not deal with the holding of long term options or derivatives, although it provided that an acquisition of options could give rise to a mandatory offer obligation where the relationship and arrangements between the parties concerned were such that the voting rights of those shares had passed to the person acquiring the option.

Under the new Rules, however, an acquisition of options or derivatives which gives the holder a long economic exposure to the price of the securities may give rise to a mandatory offer obligation. Any person who would acquire control or trigger the creeping threshold as a result of acquiring such options or derivatives must consult the SC to determine if an offer is required. In determining if an offer is required, the SC will consider, amongst other things, the time when the option or derivative was entered into, the consideration paid for the option or derivative, and the relationship and arrangements between the parties to the option or derivative.

In the premises, a person intending to write a swap or derivative where the referenced shares are listed shares should first consult with the SC where the holding of interests under the swap or derivative, when aggregated with the person's holding of shares, might trigger a mandatory offer requirement.

10. Auction procedure in competitive situations

An auction procedure has been introduced for cases where a competing take-over offer continues to exist in the later stages of the offer period. The SC will require revised offers to be announced in accordance with the auction procedure, the terms of which will be determined by the SC and will normally follow the procedure set out in the Schedule to the Rules. Nonetheless, the SC may consider applying any alternative procedure as agreed between competing offerors and the offeree board. Under any auction procedure, the SC may set a deadline by which any revised offer must be made.

An auction procedure was also adopted by Singapore's Securities Industry Council (SIC) in resolving the situation of two competing bids for a target company in 2013.

Conclusion

The changes brought about by the 2016 Code and the Rules are very much welcome as these have brought the take-over regime in Malaysia in line with both regional and international take-over practices.

Reference materials

The following materials are available from the SC website www.sc.com.my:

- Malaysian Code on Take-overs and Mergers 2016
- Rules on Take-Overs, Mergers and Compulsory Acquisitions
- SC press release on the rule book on the Rules on Take-overs, Mergers and Compulsory Acquisitions

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The Malaysian Companies Act 2016: A Brave New World?

On 15 September 2016, the Companies Bill 2015 was gazetted as the Companies Act 2016 ("**Companies Act 2016**" or "**Act**") and replaces the Companies Act 1965 in its entirety. The Companies Act 2016 has not yet come into force.

The Companies Act 2016 introduces a plethora of changes to existing company law to bring Malaysia in line with other developed jurisdictions. Ten of these key changes were highlighted in the Rahmat Lim & Partners Legal Bulletin (January 2014), based on a review of the draft Companies Bill 2013. In particular, we had noted that company administration is expected to become more efficient with the introduction of single-member and single-director companies, the abolition of the requirement for private limited companies to hold annual general meetings, the final abolition of the *ultra vires* doctrine by giving companies unlimited capacity, and the introduction of a single-document constitution.

This article discusses three key areas in which the Companies Act 2016 is likely to have a significant impact on the Malaysian corporate environment.

Corporate governance and minority protection

Under the Act, corporate governance will be simplified and strengthened at various levels. In general, penalties for breaches of provisions of the Act by directors and other officers of a company have been significantly increased, as compared to existing penalties under the Companies Act 1965. In addition, restrictions on improper use of company property or information, and on a company entering into related party transactions, have been extended to such officers.

The Act also expressly empowers members of a private limited company to remove a director by way of an ordinary resolution. This reverses the oft-criticised decision in *Tien Ik Sdn Bhd v Kuok Khoon Hwong Peter* [1992] 2 MLJ 689, which required that special notice of the meeting be given, and that the director in question be given a right to be heard.

The Act will also permit members of a private company to pass a written resolution when signed by the requisite majority, within a period of 28 days from the date of circulation of the resolution, instead of requiring unanimous approval. The required majority for an ordinary resolution is members holding more than 50% of the total voting rights and, for a special resolution, members holding at least 75% of the total voting rights.

Shares and capital maintenance

The Act introduces a "no par value" regime for shares. However, it is in the erosion of the capital maintenance doctrine that the Act is likely to have the most impact.

Under the Companies Act 1965, a company currently may not give any financial assistance whatsoever in the purchase or subscription of its own shares or the shares of its holding company. Upon the Act coming into f force, domestic Malaysian companies (as opposed to Labuan companies incorporated under the Labuan Companies Act 1990) will for the first time be able to provide limited financial assistance for the acquisition of their own or their holding companies' shares, provided that a "whitewash" procedure is complied with, and a members' special resolution is passed to approve such financial assistance. The Act also introduces an alternative procedure for capital reduction by members' special resolution without the necessity of an unwieldy application for court sanction.

In either case, the company will have to pass a "solvency test" as evidenced by a solvency statement from the directors, to the effect that upon conclusion of the relevant transaction, (a) there will be no grounds on which the company could be found to be unable to pay its debts; (b) it will be able to pay its debts as they become due within the next 12 months (i.e. cash-flow solvency); and (c) the assets of the company will be more than its liabilities (i.e. balance sheet solvency). The same test will also apply to the redemption of preference shares, and a similar requirement will apply to a share buyback. Requirements for the distribution of dividends have also been aligned with these changes. Directors will in future only be entitled to distribute dividends out of profits where they are satisfied that the company will, immediately after the distribution, satisfy the solvency test.

It remains to be seen whether these provisions will, in practice, be accepted as being sufficiently far-reaching. In particular, the utility of the "whitewash" provisions is somewhat limited by the fact that the aggregate amount of financial assistance that may be provided by a company may not exceed 10% of the aggregate amount received from the issue of shares and the reserves of the company, as per its most recent audited financial statements.

Insolvency and corporate rescue

Whilst the Act retains the concepts of company winding-up and schemes of arrangement, it also introduces two new mechanisms aimed at facilitating corporate rehabilitation.

Firstly, the Act introduces a judicial management procedure which allows a company or its creditors to obtain a court order to place the company under the management of a qualified insolvency practitioner. Upon an application for a judicial management order, a moratorium on legal proceedings against the company by its creditors will automatically apply, until the application is dismissed or an order is granted. A second moratorium will automatically apply for the period during which a judicial management order is in force. Such an order will remain in force for six months, unless earlier discharged, although the judicial manager may apply for an extension of time. An appointed judicial manager will be required, within 60 days (or such longer period as the courts may allow), to send to the creditors of the company a statement of his proposals for achieving the purposes for which the order was made, and to present a copy of this statement before a meeting of the company's creditors. If the proposals are approved by a majority of 75% in value of the creditors present and voting either in person or in proxy, the proposals will be binding on all creditors of the company.

Secondly, the Act introduces a procedure for corporate voluntary arrangements ("**CVA**"), by which a private limited company may present a proposal to its unsecured creditors for a voluntary arrangement with minimal intervention from the courts. Under this procedure, the directors of a company may initiate a CVA by submitting a proposal for voluntary arrangement to the company's creditors. A nominee appointed by the directors as a trustee or supervisor is then required to submit to the directors a statement indicating whether or not in his opinion the proposed CVA has a reasonable prospect of being approved and implemented, and whether the company is likely to have sufficient funds available for it during the proposed moratorium to enable the company to carry on its business. Upon the filing of such statement and other relevant documents with the courts, a moratorium will automatically commence and remain in force for a period of 28 days, during which period the nominee is required to summon separate meetings of the company and its creditors. A resolution approving the CVA at the meeting of the company may be passed by a simple majority, whereas the required majority to approve the CVA at the meeting of creditors is 75% of the total value of the creditors present and voting in person or by proxy. Once approved by the requisite majorities,

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the CVA will be binding on all creditors of the company. The initial moratorium period may be extended beyond the initial 28-day period, to not more than 60 days, if approved by a 75% majority in value of creditors and consented to by the nominee and members of the company.

Reference materials

To read our previous article on the Companies Act, please click **here** for the article entitled "*Proposed Companies Bill 2013: Modernising the Malaysian corporate legal landscape*" that was featured in the Rahmat Lim & Partners Legal Bulletin (January 2014).

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Financial Regulatory

BNM introduces the Financial Technology Regulatory Sandbox Framework

On 18 October 2016, the Central Bank of Malaysia, Bank Negara Malaysia ("**BNM**"), introduced the Financial Technology Regulatory Sandbox Framework ("**Framework**").

The Framework introduces a regulatory sandbox approach to facilitate the testing and operation of financial technology ("**FinTech**") initiatives within a live environment. The move is a welcome development which signals BNM's commitment to providing a regulatory environment conducive to the development and adoption of innovative FinTech solutions within the Malaysian financial services sector.

Under the Framework, financial institutions as well as FinTech companies may be granted certain regulatory flexibilities by BNM to experiment with FinTech solutions in a production or live environment. These flexibilities will, however, be accompanied by appropriate safeguards to manage risks and contain the consequences of failure as well as preserve financial stability and promote fair treatment to consumers.

The Framework took effect from 18 October 2016 and BNM is currently accepting applications under the Framework.

What is FinTech?

Generally, the term "FinTech" refers to the application of technology to finance. The Framework defines the term broadly as a "technological innovation to be utilized in the provision of financial services".

Often seen as a marriage of financial services and information technology, the impact of FinTech applications can be found in areas such as:

- alternative financing mechanisms and investment (e.g. via crowdfunding and peer-to-peer lending platforms);
- financial operations and risk management (e.g. the use of systems and applications by financial institutions to manage compliance risks);
- payments and infrastructure (e.g. Internet and mobile communications payments and infrastructure for securities trading and settlement);

- data security and monetisation (e.g. leveraging user data and "big data" to improve targeting of cross-sell offers to consumers); and

- customer interface, particularly in the online and mobile financial services space (e.g. biometric scanning technologies for the purpose of customer identification).

Eligibility criteria under the Framework

The Framework is applicable not only to financial institutions but to any "FinTech company" which collaborates with a financial institution or which intends to carry on certain types of licensed businesses under the Financial Services Act 2013, Islamic Financial Services Act 2013 and the Money Services Business Act 2011. Under the Framework, a "FinTech company" is defined to mean "a company that utilizes or plans to utilize FinTech but excludes a financial institution".

In considering an application to participate in the regulatory sandbox and the types and extent of regulatory flexibilities that may be accorded to the financial institutions or FinTech companies operating in the sandbox, BNM will take into account, among others:

- the potential benefits of the proposed product, service or solution;

- the potential risks and mitigating measures; and

- the integrity, capability and track record of the financial institutions or FinTech companies.

Importantly, the Framework emphasises that the regulatory sandbox cannot be used to circumvent existing laws and regulations. The sandbox is therefore not suitable for a proposed product, service or solution that is already appropriately addressed under existing laws and regulations. Insofar as such products, services or solutions are concerned, BNM will provide guidance and advice to the financial institutions or FinTech companies on the modifications that may be made to align their proposed business models or solutions with existing laws and regulations.

An applicant seeking approval from BNM to participate in a sandbox must demonstrate the following:

- the product, service or solution is genuinely innovative with clear potential to:

  - improve accessibility, efficiency, security and quality in the provision of financial services;

  - enhance the efficiency and effectiveness of Malaysian financial institutions' management of risks; or

  - address gaps in or open up new opportunities for financing or investments in the Malaysian economy;

- the applicant has conducted an adequate and appropriate assessment to demonstrate the usefulness and functionality of the product, service or solution and identified the associated risks;

- the applicant has the necessary resources to support testing in the sandbox. This includes the required resources and expertise to mitigate and control potential risks and losses arising from offering of the product, service or solution;

- the applicant has a realistic business plan to deploy the product, service or solution on a commercial scale in Malaysia after exit from the sandbox;

- the provision of the product, service or solution is either wholly or partly incompatible with laws, regulations or standards administered by BNM. In such cases, BNM may consider granting relevant regulatory facilities for the purpose of testing a proposed product, service or solution that possesses strong value propositions; and

- the applicant is led and managed by persons with credibility and integrity.

Applications from FinTech companies with the potential to create high value added jobs in Malaysia will be assessed more favourably by BNM.

Testing parameters and exit strategy

Applicants will be informed of their eligibility to participate in the sandbox within 15 working days of receipt of the application by BNM. This will then be followed by preparatory engagements between BNM and the successful applicant to work out the details of:

- the testing parameters, such as the scope and duration of the test, regulatory flexibilities requested and frequency of reporting;

- specific measures to determine the success or failure of the test at the end of the testing period;

- an exit strategy should the test fail or be discontinued; and

- a transition plan for the deployment of the product, service or solution on a commercial scale upon successful testing and exit from the sandbox.

The participant may begin testing the product, service or solution upon obtaining BNM's approval. The initial testing period must not exceed 12 months. Applicants may, however, apply for an extension of the testing period, subject to BNM's approval. Upon completion of the testing phase, BNM will decide whether to allow the product, service or solution to be introduced in the market on a wider scale.

Reporting requirements

Participants of the sandbox are required to submit interim reports to BNM on the progress of the testing. Upon the completion of the testing, a final report is required to be submitted to BNM, which should include the outcome, key performance indicators and findings of the test and an account of the list of fraud incidents and resolution of customer complaints. In the event of a failed test, the final report should include lessons learnt from the test.

Conclusion

The introduction of the Framework in Malaysia shows that the rapid development of FinTech locally and regionally has, in common with other jurisdictions such as the UK, Singapore and Australia, attracted the interest of the financial services regulator. Indeed, the introduction of the FinTech regulatory sandbox is the first major step taken by the Financial Technology Enabler Group ("**FTEG**") following its establishment on 2 June 2016. The FTEG is a cross-functional group under BNM which acts as the dedicated contact point for FinTech related matters. Its main aim is to formulate and enhance regulatory policies to facilitate the adoption of FinTech in the Malaysian financial services industry.

The challenge lies in resolving the tension between having a flexible, forward-looking regulatory framework that promotes innovation and does not stifle small start-ups and which does not compromise on systemic stability and consumer protection. The regulatory approach taken by BNM under the Framework, which emphasises close engagement and collaboration between the applicant and BNM, is a good starting point to integrating FinTech initiatives into the Malaysian financial services sector in a risk-adjusted manner. It is to be hoped that this change in the regulatory landscape will lead to greater innovation by FinTech companies and financial institutions in the Malaysian financial services space and increase the general acceptance and trust of consumers in respect of these new products and services.

Reference materials

The following materials are available on the BNM website www.bnm.gov.my:

- Media release
- Financial Technology Regulatory Sandbox Framework
- Application form

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BNM introduces new Foreign Exchange Administration Rules to develop the onshore financial market

On 2 December 2016, the Central Bank of Malaysia, Bank Negara Malaysia ("**BNM**"), announced several new measures intended to enhance the liquidity of the foreign exchange market. These measures were introduced by way of a Supplementary Notice to the existing Foreign Exchange Administration Rules issued by BNM on 30 June 2013 ("**Supplementary Notice**"). The Supplementary Notice took effect from 5 December 2016.

The Supplementary Notice was introduced on the heels of BNM's recent press release issued on 13 November 2016 in which BNM announced that it was taking measures to reinforce existing rules prohibiting the facilitation of offshore trading in Ringgit such as Ringgit non-deliverable forwards ("**NDFs**").

Prohibiting facilitation of NDF related transactions

BNM's press release of 13 November 2016 underscored the existing position that the Ringgit remains a non-internationalised currency. Market participants and Malaysian licensed banks were reminded to ensure compliance with existing foreign exchange rules and not to facilitate any foreign exchange transactions that could be related to offshore Ringgit NDF market activities.

Further to the press release, BNM issued a direction on 17 November 2016 ("**Direction**") to licensed onshore banks to obtain an undertaking from their offshore counterparts to cease trading in the NDF markets and a declaration that onshore foreign exchange transactions involving Ringgit did not involve any offshore trading of Ringgit and Ringgit derivatives. In addition, under the Direction, licensed onshore banks are required to undertake customer due diligence to ensure that a non-resident counterpart is not involved in offshore trading of foreign exchange derivatives involving Ringgit.

Measures to enhance the foreign exchange market

The major measures announced by BNM on 2 December 2016 and implemented by way of the Supplementary Notice include the following.

Liberalisation and deregulation of the onshore Ringgit hedging market

In order to provide greater flexibility to market participants to manage foreign exchange risks, residents (including resident fund managers) may now freely and actively hedge their foreign currency exposure for USD/MYR and CNH/MYR currency pairs with a licensed onshore bank up to a limit of MYR6 million per client per bank, subject to a one-time declaration of non-participation in speculative activity.

Further, both resident and non-resident fund managers may now manage their foreign exchange exposure up to 25% of their invested assets, subject to registration with BNM.

To enhance accessibility of foreign investors and companies to the onshore foreign exchange market, offshore non-resident financial institutions may now participate in the Appointed Overseas Office ("**AOO**") framework, which will provide for additional flexibility in respect of Ringgit transactions. Previously, the concept of an appointed overseas office able to undertake limited transactions in Ringgit was limited to the overseas parent company, subsidiary company, sister company, head office or branch of a licensed onshore bank (excluding a licensed international Islamic bank).

Following the issuance of the Supplementary Notice, BNM announced on 6 December 2016 that the AOO framework, which was first introduced in 2007, has now been expanded to include non-resident financial institutions outside the banking groups of licensed onshore banks. Under the expanded AOO framework, a non-resident financial institution appointed by a licensed onshore bank may undertake back-to-back transactions to facilitate settlement of trade and Ringgit assets between a non-resident and resident, including foreign exchange hedging for current and financial accounts based on commitments, opening of Ringgit accounts (book keeping) and extension of Ringgit trade financing, subject to approval from BNM.

Streamlining treatment for investment in foreign currency assets

Resident entities with domestic Ringgit borrowing may invest in foreign currency assets both onshore and abroad up to the prudential limit of MYR50 million, whilst residents without domestic Ringgit borrowing may continue to invest in foreign currency assets both onshore and abroad up to any amount.

Incentives and treatment of export proceeds

In an effort to strengthen the weakening Ringgit, exporters are now required to convert 75% of their proceeds into Ringgit. Previously, exporters were required to bring their proceeds back to Malaysia within three months of completing a transaction. The exporters were, however, allowed to hold the proceeds in foreign currency.

Under the new rules, exporters may only retain up to 25% of their export proceeds in foreign currency. Payment by residents for settlement of domestic trade in goods and services must now be made fully in Ringgit. As an incentive, BNM has announced that companies may place the proceeds of exports in local banks and earn a higher rate of return at 3.25% per annum via special deposit facilities. The facilities will be offered until 31 December 2017, subject to further review.

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Reference materials

The following materials are available on the BNM website www.bnm.gov.my:

- Press release by BNM: Prohibiting facilitation of NDF related transactions dated 13 November 2016
- Press release by Financial Markets Committee: Initiative to develop the onshore financial market dated 2 December 2016
- Press release by Financial Markets Committee: Appointed Overseas Office Framework dated 6 December 2016
- Supplementary Notice on Foreign Exchange Administration Rules - Measures to promote the development of Malaysian financial market
- Overview of the Financial Markets Committee

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Intellectual Property

Malaysian Federal Court holds that person who first uses trade mark is common law owner of trade mark

Mesuma Sports Sdn. Bhd. v Majlis Sukan Negara, Malaysia; Pendaftar Cap Dagangan Malaysia (Interested Party) [2015] 9 CLJ 125

The Malaysian Federal Court in the case of *Mesuma Sports Sdn. Bhd. v Majlis Sukan Negara, Malaysia; Pendaftar Cap Dagangan Malaysia (Interested Party)* has held that the person who first uses a trade mark would be the common law owner of that trade mark and such common law ownership would entitle that person to file for a trade mark application under section 25(1) of the Malaysian Trade Marks Act 1976. In so holding, the Federal Court has drawn a clear distinction between the creator of a trade mark and the first user of that trade mark, whereby it is the first user and not the creator who would be recognised as the common law owner of the trade mark and the *bona fide* applicant of the ensuing trade mark application.

The Federal Court also confirmed that a contract manufacturer who merely affixes a trade mark upon goods made to a principal's order could not claim proprietorship over such a trade mark. The contract manufacturer's act of manufacturing the goods under such circumstances did not bestow upon it the right to claim proprietorship over a trade mark.

Background facts

The appellant is a supplier of sporting apparel and sporting goods whilst the respondent is a statutory body whose main responsibility is the promotion of sports in Malaysia.

In 2005, the Malaysian Ministry of Youth and Sports ("**Ministry**") with the cooperation of the respondent organised a competition to design a new motif and colour for sports attire to be worn by all Malaysian athletes representing Malaysia in sports events nationally and internationally. The tiger stripes design was selected as the winning design in this competition. Following from this decision, the Ministry entrusted the respondent with all responsibilities over the rights, ownership and management of the winning tiger stripes design.

In 2005 itself, the respondent appointed a manufacturer by the name of Antioni to produce and supply sports attire bearing the tiger stripes design.

Shortly thereafter in 2006, the respondent appointed the appellant as a contract supplier to produce sports attire bearing the tiger stripes design to be worn by Malaysian athletes.

In 2009, whilst the appellant was still supplying sports attire to the respondent, the appellant applied for trade mark registrations in respect of the tiger stripes design in Classes 18 and 25. The tiger stripes design applications were accepted and registered in 2011 under the appellant's name.

In 2010, the respondent filed for registration for the same tiger stripes design as a trade mark which was objected to by the Registrar of Trade Marks. Upon discovering the appellant's trade mark registrations of the tiger stripes design, the respondent filed an action against the appellant for, *inter alia,* passing off and rectification of both the appellant's registered trade marks in Classes 18 and 25. The respondent also sued for copyright infringement and industrial design infringement but did not pursue these causes of action during the High Court trial.

Findings of the High Court

The High Court held that the respondent was entitled to rightful proprietorship and use of the tiger stripes design as the respondent and the Ministry were the first to conceive and use the design. Accordingly, the High Court made an order that the two trade mark registrations for the tiger stripes design be expunged.

Findings of the Court of Appeal

The High Court decision was unanimously affirmed by the Court of Appeal. In dismissing the appellant's appeal and holding that the High Court was correct in expunging the appellant's trade marks from the Register of Trade Marks, the Court of Appeal likewise found that the respondent was the owner and first user of the tiger stripes design.

Findings of the Federal Court

At the Federal Court, although the appellant once again failed to succeed, the Federal Court in finding for the respondent departed from the reasoning of both the Court of Appeal and the High Court regarding the basis for trade mark proprietorship.

The principal question of law posed by the appellant to the Federal Court was:

> *"Whether a claim for common law ownership over an indicator as a trade mark or source identifier could be answered by asking who designed or re-conceptualised the said indicator or source identifier; rather than by asking who was first in time to use said indicator or source identifier as a trade mark in a trade mark sense in the course of trade."*

The Federal Court disagreed with the respondent's contention that the appellant's trade mark registrations were wrongly made or entered without sufficient cause in the Register of Trade Marks due to the fact that the appellant was never the creator or designer and hence was not the lawful common law proprietor of the tiger stripes design. The Federal Court did not equate creation of a trade mark with common law ownership and proceeded to analyse the laws pertaining to proprietorship of a trade mark as follows.

The first limb of the question of law posed was whether a claim for common law ownership over an indicator as a trade mark could be answered by asking who designed or re-conceptualised the said indicator or source identifier. The Federal Court answered this question in the negative, and held that the fact that a creator or a designer had conceived a source identifier did not automatically give rise to common law trade mark ownership. Instead, the Federal Court reiterated the established legal position that for there to be a claim for ownership of a trade mark under common law and entitlement under section 25(1) of the Trade Marks Act 1976, first user of the indicator as a trade mark on goods or services must be established.

The second limb of the question of law posed was who was the first in time to use the said indicator as a trade mark in a trade mark sense in the course of trade. The Federal Court found that the respondent was the first to use the tiger stripes design trade mark under its contractual sponsorship arrangement with the appellant. The respondent was directly involved in business activities for commercialisation of the tiger stripes design through its contract suppliers and the appellant was no more than a contract manufacturer who affixed the tiger stripes design to the sports attire made to the respondent's order. The Federal Court thus held that the respondent had the necessary goodwill and was therefore the common law owner of the tiger stripes design trade mark.

Conclusion

The Federal Court has affirmed the well settled principles that he who first uses a trade mark owns the said mark under common law and that such common law ownership would in turn enable him to file for trade mark applications as a *bona fide* applicant, as expounded in the Malaysian High Court decisions of *Fazaruddin Ibrahim v Parkson Corporation Sdn Bhd* [1997] 2 CLJ 863 and *Syarikat Zamani Hj Tamin Sdn Bhd & Anor v Yong Sze Fun & Anor* [2006] 5 MLJ 262 and the Malaysian Court of Appeal decision of *Lim Yew Sing v Hummel International Sports & Leisure A/S* [1996] 3 MLJ 7.

The Federal Court has also clarified that contract manufacturers cannot acquire any trade mark ownership or proprietorship rights whether under common law or under the Trade Marks Act 1976.

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If you would like to discuss the impact of this case on your business, please contact:

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Publications

Getting the Deal Through: Agribusiness 2017 - Malaysian chapter

Partners Azman bin Othman Luk, Moy Pui Yee, Pauline Khor and Amelia Koo of Rahmat Lim & Partners contributed the Malaysian chapter to *Getting the Deal Through: Agribusiness 2017*. Topics covered in the chapter include land acquisition and use, government programmes in the agribusiness industry, food safety and certification programmes, animal safety and control of diseases, operations of business organisations, agricultural workers regulations in respect of immigration and health and safety, international trade, intellectual property, and environmental issues.

To read the article, please click **here**.

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Getting the Deal Through: Government Investigations 2017 - Malaysian chapter

Partner Chong Yee Leong of Rahmat Lim & Partners contributed the Malaysian chapter to *Getting the Deal Through: Government Investigations 2017*. Topics covered in the chapter include the relevant enforcement agencies and authorities, the requirements, triggers and procedures of an investigation, whistle-blowing regime, document preservation, notification of investors, and cooperation with enforcement agencies.

To read the article, please click **here**.

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Journal of International Arbitration: Non-discrimination between Foreign and Domestic Investment in ASEAN

Partner Chong Yee Leong of Rahmat Lim & Partners and Allen & Gledhill International Counsel Vivekananda N contributed this article to the *Journal of International Arbitration* published by Kluwer Law International. This article examines the legal instruments forming the foundation of ASEAN, particularly the ASEAN Comprehensive Investment Agreement (ACIA) 2009. The article examines ASEAN's instruments and vision in the context of an important international law protection granted to foreign investors: that against discrimination, embodied typically in national treatment and most favoured nation (MFN) standards of protection in international investment treaties. The article studies interpretations and understanding of these standards from other jurisdictions in arbitrations arising from similar bilateral and multilateral investment and trade agreements. It also studies the dispute resolution processes applicable to the ACIA, and how these standards can be and are being implemented in ASEAN today.

To read the article, please click **here**.

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Deals

RM9.83 billion disposal of energy assets to China General Nuclear Power Corporation Group

Rahmat Lim & Partners advised 1MDB on the disposal of all its energy assets by way of a sale of 100% of its shares in its subsidiaries, Edra Solar Sdn Bhd, Edra Energy Sdn Bhd, Powertek Energy Sdn Bhd, Jimah Teknik Sdn Bhd, Jimah O&M Sdn Bhd, Mastika Lagenda Sdn Bhd and Tiara Tanah Sdn Bhd (collectively "**Edra Operating Companies**"), to a subsidiary of China General Nuclear Power Corporation Group. The transaction is valued at RM9.83 billion.

This deal won M&A Deal of the Year (Premium) at the *Asian Legal Business* Malaysia Law Awards 2016.

Advising 1MDB were Partners Moy Pui Yee, Lee Yee Ling and Ang Sinn E of Rahmat Lim & Partners.

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Joint venture to acquire land, develop and operate a 5-star luxury resort hotel and villas over 9,900 acres in Desaru Coast, Johor, Malaysia

Rahmat Lim & Partners advised Minor Hotel Group ("**MHG**") on the joint venture between MHG and Destination Resorts and Hotels Sdn Bhd ("**DRH**"), a wholly owned subsidiary of Khazanah Nasional Berhad, to acquire land in Desaru Coast, Johor, Malaysia to be jointly developed into a 5-star luxury resort hotel and villas to be called "Anantara Desaru Resort and Villas". MHG and DRH will have a 60% and 40% interest in the joint venture company respectively.

Advising MHG were Partners Moy Pui Yee, Lee Yee Ling and Ang Sinn E of Rahmat Lim & Partners.

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Issue of RM200 million Tier 2 Islamic subordinated bonds by OCBC Al-Amin Bank Berhad

Rahmat Lim & Partners advised OCBC Al-Amin Bank Berhad ("**OCBC**") on the issue of RM200 million Tier 2 subordinated bonds under the Shariah principle of Murabahah based on commodity trading (via a Tawarruq arrangement) for the purpose of, among others, redeeming its existing RM200 million redeemable Tier 2 Islamic subordinated sukuk issued by OCBC on 1 December 2008.

Advising OCBC was Partner Kelvin Loh of Rahmat Lim & Partners.

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Awards & Rankings

Rahmat Lim & Partners receives two Tier 1 rankings and ranked in six other practices in The Legal 500 Asia Pacific 2017

Rahmat Lim & Partners continues to be a Tier 1 firm in the area of Corporate and M&A and has moved up to Tier 1 in Real Estate and Construction in the 2017 edition of *The Legal 500 Asia Pacific.* The Firm is also recommended by the publication in the areas of Banking and Finance, Capital Markets, Dispute Resolution, Intellectual Property, Labour and Employment, Projects and Energy, and Real Estate and Construction. Partners Pauline Khor and Chen Lee Won are also named *Leading Individual* for their outstanding work in Intellectual Property and Corporate and M&A respectively.

For more information, please click **here**.

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Rahmat Lim & Partners voted Asian-MENA Counsel In-House Community Firm of the Year 2016 in Aviation

Rahmat Lim & Partners has been voted *Asian-MENA Counsel* In-House Community Firm of the Year 2016 in Aviation and received an honourable mention in the category Most Responsive Domestic Firm of the Year, Malaysia.

The results of the *Asian-MENA Counsel* awards are based entirely on the votes and testimonials of more than 1,000 senior in-house counsel.

In addition, Allen & Gledhill LLP, our associate firm in Singapore, has been voted *Asian-MENA Counsel* In-House Community Firm of the Year 2016 in eight categories, making them the top multiple category winner in Singapore.

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Rahmat Lim & Partners maintains ranking in IFLR1000 Guide to Energy and Infrastructure 2016

Rahmat Lim & Partners continues to maintain its rankings in Malaysia across all practice areas in the *IFLR1000* Guide to Energy and Infrastructure 2016, namely, Energy, Infrastructure, and Oil and Gas.

The guide also recognises four of our Partners as Leading Lawyers, namely, Allen Choong, Chong Boon Leong, Chong Yee Leong and Kamilah Kasim.

Our associate firm, Allen & Gledhill, was ranked Tier 1 in Singapore and Tier 2 in Laos in the same directory.

The rankings are based on information drawn from firm submissions, client feedback and peer feedback to identify and rank the top firms for Energy and Infrastructure across 110 jurisdictions.

For more information, please click **here**.

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Rahmat Lim & Partners ranked in the M&A Rankings Report 2016 by Asian Legal Business

Rahmat Lim & Partners has maintained its Tier 2 ranking in the Malaysia category of the M&A Rankings 2016 report released by *Asian Legal Business*.

Our associate firm in Singapore, Allen & Gledhill, has maintained its Tier 1 ranking in the Singapore Domestic category in the same report.

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Rahmat Lim & Partners Intellectual Property practice is ranked by Asian Legal Business

Rahmat Lim & Partners continues to be ranked in the Patents and Trademarks as well as Copyright categories in Malaysia in the Intellectual Property Rankings 2016 report released by *Asian Legal Business*. The rankings are based on information drawn from firm submissions, interviews, market suggestions and other editorial resources to identify and rank the top firms for intellectual property in Asia.

For more information, please click **here**.

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Rahmat Lim & Partners wins M&A Deal of the Year (Premium) at the ALB Malaysia Law Awards 2016

Rahmat Lim & Partners has been recognised by *Asian Legal Business* ("**ALB**") for our involvement in CGN's Acquisition of 1MDB's Power Business which was named M&A Deal of the Year (Premium) at the prestigious ALB Malaysia Law Awards 2016 held in InterContinental Hotel, Kuala Lumpur on 7 April 2016.

The winning deals were selected by ALB on the basis of complexity, innovation/improvement, breadth and significance/impact and third-party awards/recognition.

For more information on the ALB Malaysia Law Awards, please click **here**.

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Rahmat Lim & Partners Intellectual Property practice receives three Tier 1 rankings in Asia IP Profiles 2016

Rahmat Lim & Partners' Intellectual Property practice has been ranked Tier 1 in three categories in *Asia IP Profiles* 2016, namely, Trademark Contentious, Patent Contentious, and Copyright. This is the first time Rahmat Lim & Partners is ranked Tier 1 in the Copyright category.

Our Firm is also ranked Tier 2 in Trademark Prosecution and Patent Prosecution.

Our associate firm in Singapore, Allen & Gledhill, is ranked Tier 1 in four categories, namely, Trademark Contentious, Patent Contentious, Copyright, and Trademark Prosecution.

Asia IP Profiles is an independent editorial providing a comprehensive overview of the key markets and leading law firms in the region.

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Rahmat Lim & Partners
IN ASSOCIATION WITH ALLEN & GLEDHILL LLP (SINGAPORE)

Rahmat Lim & Partners Publications

The Editorial Team at Rahmat Lim & Partners hopes that you enjoy reading this publication. Rahmat Lim & Partners has produced this publication for our clients as part of our learning and knowledge-sharing culture.

If you find the information in this publication useful, we encourage you to explore our online library of legal publications and articles available on our website at www.rahmatlim.com. If you wish to be included in our client mailing list to receive our complimentary electronic publications, you may also do so via our website.

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