



MIDA
MALAYSIAN INVESTMENT DEVELOPMENT AUTHORITY



UOB



Economic Opportunities in East Coast Region

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legal framework



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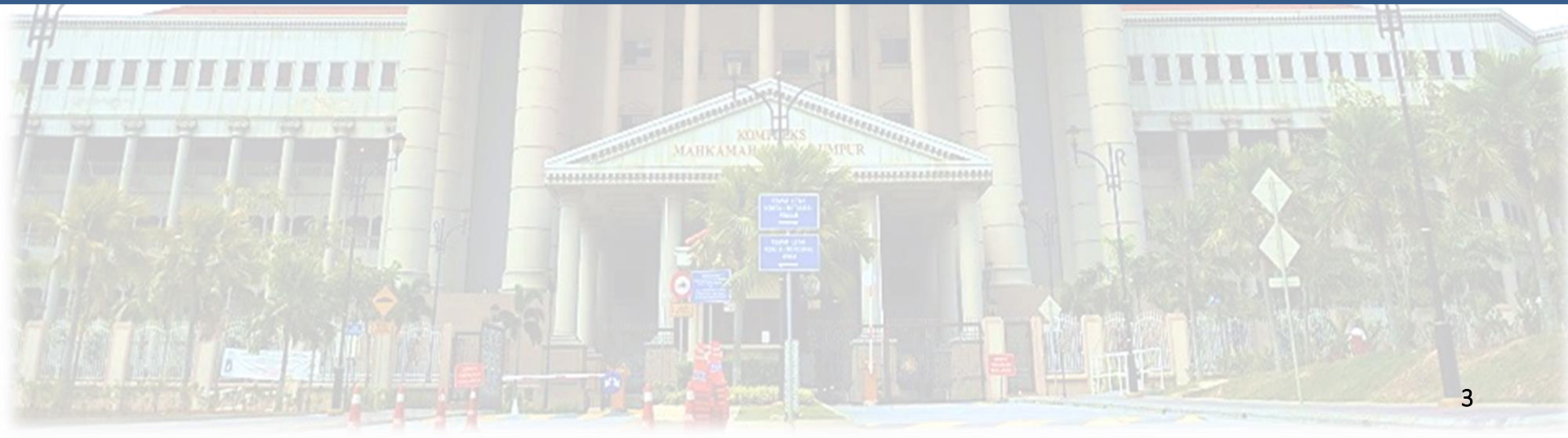
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1 | MALAYSIA LEGAL SYSTEM



INTRODUCTION TO THE COMMON LAW SYSTEM (1)

HISTORY OF COMMON LAW IN MALAYSIA

The application of English law in Malaysia were implemented via 3 statutes:

- Civil Law Ordinance 1956;
- Application of Laws Ordinance 1951 in Sabah;
- Application of Laws Ordinance 1949 in Sarawak.

Section 3(1) of Civil Law Act 1956 (Revised 1972) allowed the statutory application for English law in Malaysia which is premised on **common law** and **rules of equity**.

***Common law** refers to the law interpreted by judges known as judicial interpretation and based on juristic principles and jurisprudence.*

The practice of judges following precedents set by fellow judges would allow the laws to develop organically based on the accepted shared values and customs of society.

SOURCES OF MALAYSIAN BUSINESS LAWS

▪ Written Law

- The most important source of law includes :

(a) Federal Constitution, (b) Parliament and State laws and (c) Subsidiary legislation.

Any law made by Parliament or by State Constitution inconsistent with Federal Constitution is VOID.

▪ Unwritten Law

- Means laws not made by the formal legislative bodies which include :

(a) English & Commonwealth laws, (b) case law and (c) customs including native customs.

▪ **Islamic (Sharia') Laws** would govern the construction of business contracts and agreements.

advantages of the common law system

1. EFFECTIVE

Judges can effectively use the common law system to offer their opinion, expands on, and implements legislation which are often generic and broad. Judges examine specific facts in each case, administering the law in line with findings, and interpret the relevant legislation to **bring life and effectiveness** to those laws.

2. CONSISTENT

The doctrine of judicial precedent is a process where judges can elect to stand by decisions of previous cases which facts are similar. This in turn allows judges to **implement judicial decisions consistently and based on sound legal principles**.

3. EVOLVES

Since it is hard for Parliament to legislate for each possible problem and practical scenario, the common law system **can develop and examine responses to situations in real life**.

INTRODUCTION TO CONTRACT LAW

BASIC PRINCIPLES

Contract law aims to help the contracting parties to create a **legally binding agreement** which is intended to create a **legal obligation between two parties or more**.

An agreement is normally constituted by one party making an offer and the other party accepting that offer known commonly as **offer and acceptance**

The legislation of contract law in Malaysia includes :

- **Contracts Act 1950 (Act 136) (Revised 1974),**
- **Specific Relief 1950 (Act 137),**
- **Civil Law Act 1956 (Act 67),**
- **Electronic Commerce Act 2006 (Act 658)**

ELEMENTS OF CONTRACT

Offer can be money or other valuable thing promised by one party in exchange for the performance by the other party

Acceptance means one person's compliance with the terms of an offer made by another.

Intention to create legal relations means a serious intention to enter into contract.

Consideration means an exchange of promises between the promisor and promisee.

Certainty of the offer which has to be precise and definite subject to acceptance.

Capacity to contract means parties must be legally able to contract ie. Maturity; not mentally incapacitated, not bankrupt/insolvent

EXAMPLES OF CONTRACT

Commercial agreements :

- Sale of goods
- Provision of services
- Trading and supply

Technical Agreements

- Engineering contracts
- IT & Infrastructure
- Standard Forms contracts

Acquisition Agreements

- Sale and Purchase
- Sale of Assets and Business

Marketing Agreements

- Advertising & sales agreements

Strategic Cooperation Agreements

- Framework Agreement
- Teaming Agreement
- MOUs
- Partnership Agreements

POINTS TO NOTE

*Investment is intended to achieve a beneficial and profitable outcome in a **win-win situation**.*

1. Legal agreements are important to ensure the contracting parties set down their **intentions** into a legally enforceable **document in writing** with **clear remedies** and **recourse for damages** in the event of any breach of the related agreement(s).
2. Each agreement in any commercial, business or investment venture has to be adjusted to its own specifics and complexity since not all agreements are the same. The investment contracts should reflect the bargaining power of both sides under the circumstances of the projects.
3. **As such, the determination of law applicable to the contract** and the **method of dispute resolution** are often considered the most sensitive legal issues.
4. The investor's priority will be the choice of a legal order that provides a stable and predictable legal environment of a forum for dispute resolution that will preclude bias or political influences against the investors.

2 | INVESTMENT LAWS & POLICIES

Overview of the regulatory authorities and Malaysian investment laws policy makers :



- It is the national legislature of Malaysia, based on the Westminster system.
- The bicameral parliament consists of the Dewan Rakyat (House of Representatives) and the Dewan Negara (Senate).
- The Yang di-Pertuan Agong (King) as the Head of State is the third component of Parliament.



- It is a statutory body in operations since 26 January 1959.
- Bank Negara Malaysia is governed by the Central Bank of Malaysia Act 2009.
- Its role is to promote monetary and financial stability. This is aimed at providing a conducive environment for the sustainable growth of the Malaysian economy.



MINISTRY OF INTERNATIONAL TRADE AND INDUSTRY

- Main objective is to plan, design and implement the Basics of Foreign Trade and Industry chambers to achieve National Economic Policy and Vision 2020.
- Performs many functions including planning, formulating and implementing investment policies
- Spur Industrial development and international trade and to promote bilateral and multilateral trade relations.



- Ministry responsible for government expenditure and revenue raising and to develop economic policy and prepare the Malaysian federal budget. It also oversees financial legislation and regulation.



- MIDA's function is to branch foreign investment into the manufacturing and service sectors in Malaysia.
- It is the primary government agency for the development and coordination of industrial development
- First point of contact for investors who wish to set up production projects and support services in Malaysia.
- Incorporated under the Malaysian Investment Developmental Authority (Incorporation) Act 1965



- is a statutory body formed that regulates corporate and business affairs in Malaysia.
- Main purpose is to serve as an agency to incorporate companies and register businesses and to provide company and business information to the public

Malaysia has its' own set of investment laws including :

- laws governing investment in particular industries such as **Industrial Coordination Act 1975 (Act 156)** (governs manufacturing investments)
- laws of general application such as **Environmental Quality Act 1974 (Act 127)**
- **Promotion of Investments Act 1986 (Act 327)** deals exclusively with investment incentives.

Approval of New Investments in Malaysia

Domestic and foreign investments require government approval. For example, **Section 3 Industrial Coordination Act 1975** requires company seeking to engage in “manufacturing activity” to obtain a license. Licenses for **manufacturing sector** are issued by the **Malaysian Investment Developmental Authority (MIDA)**.

Investment in **services sector** also requires government approval regulated by sector specific legislation.

Businesses can apply directly to MIDA for the relevant license(s) while applications for permits and licenses are also dealt with by relevant line ministry of agency.

Example : foreign investments in financial services is regulated by **Financial Services Act 2013 (Act 758)** and regulated by **Bank Negara Malaysia**, while **Islamic financing and takaful operations** are regulated by **Islamic Financial Services Act 2013 (Act 759)** and regulated by **Bank Negara Malaysia**

The Promotion of Investments Act 1986 (Act 327) deals exclusively with investment incentives and is a **framework law**.

Empowers the Ministry of Industrial Trade and Industry (MITI) to determine the investment incentives for the prospective investors and types of investments.

Act 327 does not distinguish between foreign and domestic investors or investments. Minister is empowered to make rules defining the eligibility criteria for foreign and domestic investments. This include setting investment conditions to include local equity participation.

Act 327 also establishes different variants of investment **incentives** such as:

(a) Pioneer status , (b) investment tax allowance (c) Infrastructure Allowance, (d) Industrial Adjustment Allowance

Pioneer status entitles the investor to an income tax holiday for up to five years and extendable to another five years.

Investment tax allowance allows investors of offset certain classes of capital expenditure relating to investment against future income in any year during the five years following the year in which the expenditure was made.

However, the investor can opt for one over the other and are mutually exclusive.

3 | COMMON INVESTMENT VEHICLES

1) Sole proprietorship

- **Simplest and cheapest** business entity to establish.
- Only need to pay **an annual fee** to the SSM to keep the business renewed every year and is not required to submit audits or perform annual filling for business.
- However, since it is owned solely by individual, **liability is unlimited**. In event if the business is declared bankrupt, creditors will be able to sue the sole proprietor's owner for all the debts owned to respective merchants. Personal income, personal assets as well as employment income are all liable in this context.
- **Only Malaysian citizens or permanent residents are permitted** to register under this business entity.

2) Partnership

- Partnership comprises of a joint-entity holder between **2 to a maximum of 20 members**.
- Most **suitable for professional service** firms such as auditors and lawyers, bounded by **unlimited liability**.
- **In general, only Malaysian citizens of permanent residents are permitted** to register partnerships.

Limited Liability Partnership (LLP)

- Hybrid between a partnership and private limited company but with the advantages of a private limited company under the **LLP Act 2012**.
- It is a **body corporate** and a **separate legal entity** from its partners, perpetual successions.
- Capable of suing and being sued, acquiring, owning, holding and developing or disposing of property,
- LLP has fewer compliance requirements and not required to audit its accounts annually.

3) Private Limited Company (Sendirian Berhad or Sdn Bhd)

- A **separate legal entity** from its owners, which means this company is considered as a legal 'person' that can buy or sell property, present into legal contracts, sue or get sued in courts of law.
- Allows entrepreneur to separate finances and assets from the business while shareholders enjoy **limited liabilities** to the amount they invested and no more.
- **Foreigners are allowed to register with 100% foreign ownership**, but some industries will require 50% Malaysian ownership such as oil and gas, education, tourism, agriculture and banking.

4) Public Limited Company (Berhad)

- Similar to private limited companies except that its shares can be offered to the public for fixed periods and any other forms of subscription.
- Required **minimum 2 shareholders and more than 50 members** which are unlimited.
- This type of business entity usually involves the company being listed and is governed by the **Securities Commission of Malaysia**.
- Public listed companies are usually the preferred business model for large businesses.



4 | COMMON LEGAL ISSUES

What are the common legal issues?

1. NO WRITTEN CONTRACT

- Commencing works purely on verbal or “gentlemen’s” agreement or letter of intent or mere handshake
- MOU not legally binding and cannot be enforced

2. AMBIGUOUS OR ‘OPEN-ENDED’ TERMS

- Not ascertaining with clarity the parties’ obligations or performances
- Not precisely identifying contract amount (whether to include inflation or increase in currency exchange, taxes, any other levy(ies) or costs not anticipated)
- Not defining with sufficient precision on manner of payments or payment milestones
- Not identifying definitively the scope of work (SOW) or areas of work

3. OVERCOMMITTING TO SECURE CONTRACT

- Contract or sales team/department overcommitting to secure contract
- Operations team not being able to commit to the obligations committed resulting in breach or collapse of contractual relationship

4. INEFFECTIVE MANAGEMENT OF CONTRACTS

- Contracts having too many differing or varying timelines making it unmanageable or difficult to manage various contracts
- Not assigning or having appropriate or qualified and trained personnel managing contracts
- Minimal to no communications at all between the various departments (eg. Legal, Contracts, Procurement, Finance, etc)

5. ‘BACK-TO-BACK’ CONTRACTS

- Sub-contractors unable to obtain payments despite works completely performed and completed
- Subject to abuse by certain parties

6. UNIVERSAL LANGUAGE IDEALLY

- Pivotal not to draft out terms of contracts in the Parties’ own language and thereafter translating into English
- This may result in very different meanings altogether and dilute the true spirit and intent of Parties

7. INDEMNITY

- Absence of indemnity clause arising either from breach(es) inviting LAD
- Not stating quantum or manner in which indemnity is to be calculated between Parties
- Not providing for circumstances or events in which Indemnity shall apply

8. INTELLECTUAL PROPERTY OR OWNERSHIP RIGHTS

- Failing to distinguish whether ownership or IP rights to the products, scripts, source codes, etc. created during the performance of contract belongs to whom.
- Absence of identifying ownership of products, scripts, source codes, etc. prior to entering into Contracts

9. INSURANCE COVERAGE – PUBLIC IDEMNITY

- Failing to provide provision compelling party to take up the relevant public indemnity insurance policies or coverage
- Failing to expressly provide the amount required to be insured under the public indemnity policies or coverage

10. CHOICE OF LAW - LEGAL JURISDICTION

- Not spelling out which laws are applicable
- Not expressly stating which jurisdiction such dispute(s) is/are to be held eg. which country or forum to be held

11. TERMINATION OR EVENT OF BREACHES

- Not providing with clarity termination period
- Not incorporating with precision manner of termination arising from potential breach(es)
- Absence of mechanism to address breach(es) which may result in termination

12. CONFIDENTIALITY & NON-SOLICITATION

- Failing to identify in the Contract information which may be confidential in nature in the absence of any NDA
- Failing to list down specifically list of information or materials etc. considered confidential
- Not expressly prohibiting solicitation of officers or skilled employees by the other Party

5 | DISPUTE RESOLUTION MECHANISM

What are the available recourses ?

A. CIVIL DISPUTES

- Civil disputes are non-criminal in nature
- Examples of civil disputes are disputes relating to employment, contracts, personal injuries, trespass, landlord-tenant etc.

B. COURTS

- Civil Courts in Malaysia in which civil action can be instituted in a court of law are as follows:-
 - **Small claims tribunal** → MYR 1 - MYR 5,000
 - **Magistrates Court** → MYR 5,001 – MYR 100,000
 - **Sessions Court** → MYR 100,001 – 1,000,000
→ unlimited - motor vehicle accident
 - **High Court** → MYR 1,000,001 and above
 - **Court of Appeal** → only hears appeals & is the
2nd highest court in Malaysia
 - **Federal Court** → hears only novel issues of law & is
the highest court in Malaysia

i. CREATION OF COURTS

- Small claims tribunal, Magistrates Court and Sessions Court are known as the subordinate courts or lower courts created by the Subordinate Courts Act, 1948 (“**SCA 1948**”)
- High Courts are established by Article 121 of the Federal Constitution (“**FC**”) and its powers are governed by the Courts of Judicature Act, 1964 (“**CJA 1964**”)

ii. DIVISION OF COURTS

- Courts in Malaysia, particularly the High Courts are divided into several divisions such as commercial, civil, winding up and insolvency.
- There are also special courts created specifically to deal with specific areas of disputes such as the construction courts, the intellectual property courts and admiralty courts to name a few.

C. EMPLOYMENT COURTS / TRIBUNALS

- Where there is/are employment disputes, the action brought by employee may be referred to either **Labour Court** or **Industrial Court** by the Director General of Labour
- Labour court usually hears cases where employees’ salary is MYR 5,000 and below whereas Industrial Court hears cases of all employees regardless of their salaries.
- However Labour court also hears cases of employees whose salaries are RM 5,000 and above where it relates to complaints relating to non-payment of salary, bonuses etc.
- Industrial Court deals with more wider scope of matters i.e. cases of dismissal by employees or on trade disputes or disputes relating to collective agreements between trade unions and employers
- Laws regulating employees under MYR 2,000 and below are found in the Employment Act 1955 (“**EA 1955**”).
- Employees whose salaries are MYR 2,001-00 and above are not governed by EA 1955 but will fall back on the terms of their employment contract.
- EA 1955 is not applicable to those earning RM 2,001 and above. However, EA 1955 is still referred to by Industrial Courts where there is ambiguity.

D. OTHER TRIBUNAL COURTS

- Malaysia has other legal forums or tribunals created to hear and determine other complaints or disputes as well such as follows:-
 - ➔ **Consumer Claims Tribunal** – deals with customers’ complaints and rights under the **Consumer Protection Act 1999**
 - ➔ **Tribunal for Homebuyer Claims** – deals with complaints and dispute arising between purchasers of home or residential property and developers under the **Housing Development (Control and Licensing) Act, 1989**



6 | ALTERNATIVE DISPUTE RESOLUTIONS

Negotiation

Facilitation

Mediation

Med-Arb

Arbitration

Court

The most common forms of alternative dispute resolutions (“ADR”) in Malaysia are :
arbitration, mediation and adjudication

a. ARBITRATION

- governed by the **Arbitration Act 2005**
- voluntary NOT mandatory UNLESS there is an arbitration clause inserted in the contract
- Parties are required to agreed to a mutual arbitrator(s) and the number of arbitrators are dependent on the terms under the arbitration clause
- Proceedings are similar to a court of law but not as formal whereby arbitrator acts as a Judge
- Arbitrator will grant an Award to the successful party but its enforcements take effect upon registration at the Malaysian High Court
- Parties are free to decide on the rules to be applied such as UNCITRAL, AIAC, SIAC Rules and so forth

B. MEDIATION

- governed by the **Mediation Act 2012**
- voluntary NOT mandatory
- Parties are at liberty to appoint their own mediator
- Discussions and negotiations are facilitated by this mediator
- If both parties are unable to agree with a common or mutual mediator, parties can opt to refer the matter to the Malaysian Mediation Centre of the Bar Council (“MMC”) for a panel of approved mediator to be appointed
- However, no guarantees dispute can be resolved by mediator as mediator only to facilitate.
- If cannot reach settlement, then parties may proceed to litigate by way of arbitration or adjudication (as the case may be)
- **NOTE:** Mediation is also an option available in the Courts in Malaysia . Parties in the civil suit or action may request or Court itself may propose for mediation. Mediator may be a Judge or other officers of the Court.

C. ADJUDICATION

- governed by the **Construction Industry Payment and Adjudication Act 2012 (“CIPAA 2012”)**
- Came into force on 15th April, 2014
- For disputes relating to the construction industry only
- Not applicable if party terminated under contract
- This method only applicable where works are still ongoing and no issue of termination but for unpaid progressive payments
- voluntary NOT mandatory
- Parties may agree to a mutual adjudicator or the Director of the Asian International Arbitration Centre (“AIAC”) may appoint one
- If either or both parties do not agree with the adjudication decision, the case can be reopened by arbitration or litigation at the conclusion or termination of the construction contract.

We hope this presentation provides an overview of the common legal issues faced and our suggestions to overcome these issues when investing in Malaysia.

Viknesh & Yap in collaboration with our strategic international legal partners in China and India are committed to helping clients to solve their legal requirements and needs across borders.

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