



Corporate & Commercial Law Update

▶ EXCHANGE CONTROL

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▶ Exchange Control

Settlement of Goods and Services by Residents and Non-residents

With effect from August 18, 2010,

1. a resident is allowed to make payments to, or receive payments from, a non-resident in Ringgit, in addition to payments in foreign currency, as settlement for goods or services. This is provided that:
 - (a) any payment by the resident to the non-resident in Ringgit must be made to an External Account of the non-resident;
 - (b) any receipt from the non-resident in Ringgit must be undertaken through an External Account of the non-resident or an External Account of an appointed overseas branch of the banking group of a licensed onshore bank to facilitate the sale or purchase of Ringgit vis-à-vis foreign currency on spot or forward basis;
 - (c) any conversion of foreign currency into Ringgit or vice-versa for the settlement must be undertaken with a licensed onshore bank or an appointed overseas branch of the banking group of a licensed onshore bank; and
 - (d) any remittance abroad must be undertaken in foreign currency;
2. a resident is allowed to invoice in Ringgit its exports, or accept an invoice in Ringgit for its imports, of goods or services with a non-resident;
3. a non-resident is allowed to receive or make payment in Ringgit through its External Account as settlement for goods or services with a resident.

Borrowing in Foreign Currency by Residents

With effect from August 19, 2010, a resident company is allowed to borrow any amount in foreign currency from a non-resident non-bank related company.

However, where the non-resident non-bank related company is set up solely to obtain foreign currency loans from a non-resident financial institution, the amount of borrowing from the non-resident non-bank related company continues to be subject to the prevailing aggregate limit of RM100 million equivalent from non-residents.



Anticipatory Hedging by Residents

The limit which caps the amount of hedging by residents (with the licensed onshore banks and licensed International Islamic Banks) for anticipated current account transactions to the cumulative amount received or paid in the preceding 12 months is abolished with effect from August 18, 2010.

► The Offshore Companies Act 1990

The Offshore Companies Act 1990 (now called the “Labuan Companies Act 1990”) was amended with effect from February 11, 2010. Some major amendments are listed below.

1. A Labuan company is now permitted, subject to certain restrictions, to carry on business with a resident of Malaysia and may hold, in Ringgit, investments in a domestic company (ie a company incorporated under the Companies Act 1965).
2. Shares in a Labuan company have no par or nominal value.
3. A Labuan company may purchase its own shares, subject to certain restrictions.
4. Reduction of capital does not require a Court Order if the Directors make a solvency declaration and certain other conditions are met.
5. Redeemable preference shares may be redeemed out of the profits or, if the Directors make a solvency declaration, out of the capital of the Labuan company.
6. Members’ meetings may be held within Malaysia, or elsewhere, at more than one venue using any technology that allows all members a reasonable opportunity to participate in the meetings.
7. If an auditor in the course of performance of his duties as an auditor of a Labuan company is of the opinion that a serious offence involving fraud or dishonesty is being or has been committed against the Labuan company or the Act by the officers of the Labuan company, he shall forthwith report the matter in writing to the Labuan Financial Services Authority (the “Authority”).
8. Two or more Labuan companies may amalgamate and continue as a new Labuan company, if neither of the amalgamating Labuan companies is a licensed entity under the Labuan Financial Services and Securities Act 2010 or the Labuan Islamic Financial Services and Securities Act 2010. The proposal for amalgamation must be approved by the special resolution of each amalgamating company which must be preceded by solvency declarations by the directors of the amalgamating companies.

The amalgamation of two Labuan companies shall create a new legal entity which shall :

- (a) possess all the rights, privileges, immunities, powers and purposes as may be agreed by the amalgamating Labuan companies;
- (b) without further act or deed, be vested with all the property, real and personal, including subscriptions to the shares, causes of action and every other asset of each of amalgamating Labuan company; and



- (c) assume and be liable for all the liabilities, obligations and penalties of each of the amalgamating Labuan companies, and every action or proceeding, whether civil or criminal, then pending by or against each amalgamating Labuan company shall not abate or discontinue but may be enforced, prosecuted or settled as if the amalgamation had not occurred or may be continued in the name of the new legal entity formed by virtue of the amalgamation.

Upon registration of the memorandum and articles of association of the amalgamated Labuan company, the Authority shall issue a certificate certifying the amalgamation and that the amalgamated Labuan company is, from the date specified in the certificate, incorporated as a Labuan company. Such certificate shall be conclusive evidence that the assets of the Labuan companies being amalgamated are vested in the amalgamated Labuan company as at the date of registration. Where applicable, a copy of the certificate may be lodged with the relevant land office so that land belonging to any amalgamating Labuan company may be vested in the amalgamated Labuan company.

9. The concept of a “protected cell company” (“PCC”) is introduced to Labuan. This concept has been in use for some years now in other tax haven jurisdictions. A Labuan company may be incorporated as a PCC or may convert into a PCC. A PCC may establish one or more “cells” for the purpose of segregating and protecting cell assets and revenues. Correspondingly, the liabilities of each cell are also kept separate. The creation of a cell does not create, in respect of the cell, a legal person separate from the PCC.

- 9.1 The rights of the creditors of a PCC shall correspond with the liabilities provided for in the Act and no such creditor of a PCC shall have any rights other than the rights referred to in the Act. The following terms shall be implied in every transaction entered into by a PCC:

- (a) that no party shall, whether in any proceeding or by any other means, use any cell assets attributable to any cell of the PCC to satisfy a liability not attributable to that cell;
- (b) that if any party shall succeed by any means in using any cell assets attributable to any cell of the PCC to satisfy a liability not attributable to that cell, that party shall be liable to the PCC to pay a sum equal to the value of the benefit thereby obtained by him; and
- (c) that if any party shall succeed in seizing or attaching or otherwise levying execution against any cell assets attributable to any cell of the PCC to satisfy a liability not attributable to that cell, that party shall hold those assets or their proceeds in a fiduciary capacity for the PCC and shall keep those assets or proceeds separate and identifiable for that purpose.

- 9.2 Where a liability arises which is attributable to a particular cell of a PCC:

- (a) the cell assets attributable to that cell shall be used to satisfy the liability; and
- (b) a creditor in respect of that cell shall not be entitled to have recourse against the cell assets of any other cell or the general assets of the PCC.

- 9.3 A PCC must operate for the sole purpose of :

- (a) conducting Labuan insurance business or Labuan captive insurance business on such terms as provided under the Labuan Financial Services and Securities Act 2010 and Labuan general takaful business or Labuan captive takaful business on such terms as provided under the Labuan Islamic Financial Services and Securities Act 2010; or
- (b) conducting the business of a mutual fund under the Labuan Financial Services and Securities Act 2010 and the business of an Islamic mutual fund under the Labuan Islamic Financial Services and Securities Act 2010.