
CHAMBERS GLOBAL PRACTICE GUIDES

Project Finance 2023

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Malaysia: Law & Practice

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Adnan, Sundra & Low



MALAYSIA



Law and Practice

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Adnan, Sundra & Low was established in August 1975 under the name of Mutalib Sundra & Low and has operated under its present name since June 1982. Adnan, Sundra & Low has grown to become one of the largest firms in Malaysia, having had the privilege to have worked on many complex and challenging transactions, including multiple award-winning deals and “first of their kind” transactions. The firm and lawyers regularly garner accolades for their exceptional work. Its ability to deliver practical legal advice and customised solutions has

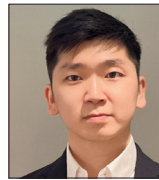
earned it many local and international awards, top-tier ranking in various publications and client plaudits. Throughout the firm’s history, it has carefully nurtured a culture of inclusive and collaborative business relationships to serve the individual needs of each client. Adnan, Sundra & Low employs a diverse team of lawyers who believe in compassionate leadership, and the value of experiences gained through mutual respect, honesty, innovation, teamwork and shared knowledge.

Authors



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1. Project Finance Panorama

1.1 Sponsors and Lenders

Typically, parent corporations and holding companies and depending on the nature of the project, joint ventures between corporations would act as sponsors. These would be companies which are well versed in the relevant industries relevant to the project.

As for lenders, both conventional and Islamic banks would act as lenders/financiers and depending on financing requirements, lenders may provide financing via syndication/club transactions in which case the lenders/financiers themselves or their related entities may also take up other roles including mandated lead arranger/lead manager/bookrunner.

1.2 Public-Private Partnership Transactions

The public-private partnership (PPP) structure involves the transfer from the Government of Malaysia (the “Government”) to the private sector the responsibility to finance and manage a package of capital investment and services including the construction, management, maintenance, refurbishment and replacement of pub-

lic sector assets such as buildings, infrastructure, equipment and other facilities.

The Guideline on Execution Framework for Public Private Partnership 3.0 (*Panduan Pelaksanaan Rangka Kerja Kerjasama Awam Swasta 3.0*) dated 9 June 2022 sets out and explains the strategy to enhance the execution element of the PPP and as reference for Unit *Kerjasama Awam Swasta* (UKAS) and the affected ministries/agencies.

UKAS is the “Public Private Partnership Unit” under the Prime Minister’s Department.

The PPP 3.0 framework will be implemented through four strategies, being:

- enhancing the PPP policy;
- enhancing the service institution and empowering UKAS;
- enhancing existing financing and exploring new financing elements; and
- implementing various approaches for PPP execution.

Generally, all PPP projects involve the execution of a privatisation agreement or concession agreement between the Government and the

concession company. The standard clauses in the privatisation agreement or concession agreement require the concession company to obtain written approval from the Government through UKAS for any change of shareholding in the concession company.

Other challenges would include lengthy negotiation in relation to the project documents as well as lead time for amendments should it be required.

1.3 Structuring the Deal

Some of the main issues to be considered when structuring the deal are set out below.

Type of Financing Required

These types include main project finance, ancillary facilities such as bank guarantee facilities, revolving credit for working capital, equity financing. These would be applicable for the financiers to decide the type of financing which they wish to participate in. While the financiers providing the main project finance will often also take up the ancillary facilities, this may not always be the case and in certain cases the sponsors may also procure equity financing to manage their finances or other commercial reasons. The main project finance may be structured as a bilateral, syndication or club transaction and may also be underwritten should there be a need. Where there is a combination of conventional and Islamic financiers, the club transaction would be undertaken as Islamic financiers would have different funding requirements and be required to complete the underlying Shariah compliant transaction which would not be able to be in a syndication with conventional financiers. The ancillary facilities would typically be bilateral financing transactions with one or more financiers for each facility.

Security Package and Entitlement of Financiers (Sharing)

For the main project finance, where it is in the form of a syndication or club, the financiers would usually be represented by a facility agent (in respect of the facility) and a security agent (in respect of the security). The security agent will hold all security in trust on behalf of the financiers and will act in accordance with the financiers' instructions (usually with a majority financiers concept introduced and entitled persons to give an enforcement notice). Financiers of the ancillary facilities would typically share the security provided under the main project finance on a *pari passu* basis and a security sharing/intercreditor agreement would be entered into between the parties to set out the terms, rights and entitlements of each party. Where there is equity financing, the sponsor would usually procure this on the back of its own financial credit and any of its other assets, and would not be able to rely on the project as there would be equity to finance ratio requirements at the project finance level.

Authorisation/Licensing/Approvals From Authorities

Where land is involved, the land would be subject to express conditions for land use. If the conditions are not appropriate for the project, approvals would be required from the land office to change the land use or in certain states temporary usage approvals have also been granted. For any construction, development orders and building approvals would be required in relation to the building/structure. These approvals would be required to be obtained prior to the commencement of construction as the conditions of the approval would need to be adhered to and a certificate of completion and compliance would be issued when the necessary certification is obtained. Depending on the industry, additional

licences may also be required. For example, for power generation, a generation licence is required from the Energy Commission of Malaysia to generate electricity.

Insurances Available

A typical risk mitigation approach would be insurance. An insurance adviser may be appointed to provide their assessment on the insurance required for the project. From the construction stage up to operation, different insurances may be applicable, including construction all risk, public liability, workmen compensation and operations and machinery, etc.

Cashflow of the Project

The cashflow of the project is essential for the commercial viability and funding structure of the project. For greenfield projects in particular, the sponsor and the project company would need to ensure that there is sufficient financial service to cover all financing payments up to the completion of the project where the project would generate cashflow to support the financing. Certain financing structures would also contain a cost overrun undertaking from the sponsor to fill up any gaps between the financing and the project cost.

1.4 Active Industries and Sectors

We can expect the renewable energy sector continue to strive in the coming year with solar, hydro, biogas as well as other new solutions and resources (including waste to energy project) being in the spotlight. This is supported by the Malaysia Renewable Energy Roadmap (MyRER).

The MyRER has been formulated to support Malaysia's vision to achieve 31% renewable energy (RE) share in the national installed capacity mix by 2025. Furthermore, the MyRER designs a pathway to enhance decarbonisa-

tion of the electricity sector through 2035. The MyRER strategic framework builds upon four technology-specific pillars above and supported by four cross-technology enabling initiatives:

- leveraging future-proofing of the electricity market for RE opportunities;
- improving access to financing;
- shaping human capital and infrastructure; and
- increasing system flexibility.

The government has further committed to increase RE capacity to 70% in 2050, to be in line with the national climate aspiration of achieving net zero greenhouse gases earliest by 2050.

Data centre projects are also expected to be fast growing and a focal point in the coming year. Malaysia is seeing accelerated data centre capacity plant-up and is expected to see a raft of new and emerging investments with over 800-megawatt (MW) capacity projected to come on stream in phases over the next five years due to lower land and energy costs. Amongst the states, Johor is expected to be a focal point, with at least six projects that are targeted to launch in 2024.

Various infrastructure and utility projects are also ongoing, including, amongst the major projects:

- the Mass Rapid Transit 3 ("MRT3");
- the Light Rail Transit 3 ("LRT3");
- the Johor-Singapore Rapid Transit System;
- the Pan Borneo Highways; and
- the Central Spine Road.

2. Guarantees and Security

2.1 Assets Available as Collateral to Lenders

Typical Available Assets

Land/lease

Often viewed by financiers as the main security, the charge over project land or leases governed under the National Land Code (2020) (NLC) provides registrable interest to the chargee. Amongst the rights of the chargee are the entitlement to the custody of issue documents of title or duplicate leases under S244 of the NLC, the right to inspect under S250 of the NLC and application to the court for sale under S256 of the NLC. In addition to the powers and rights under the NLC, a charge annexure would be entered between the land owner and the chargee to set out additional terms governing the charge, including positive and negative covenants and rights of the chargee.

Shares

Pledge or charge of shares is also a common security to have control over a company. Typically the shares of the project company would be charge of the financiers. As part of the share charge, the share certificates would be required to be deposited with the chargee, usually along with a “blank” transfer form executed by the shareholder to enable transfer upon enforcement. At times, the project company’s constitution is also amended to recognise the charge. Under the share charge, all rights and entitlements over the shares are charged to the chargee, including dividends and voting rights, although commercially, parties may agree to allow the shareholder to exercise the voting rights prior to an event of default. A power of attorney would also be granted by the shareholder to undertake all necessary action and execute instruments in its name in favour of the chargee.

Project documents

Another main security for project financing would be the assignment and charge of the project documents. All the rights, interest, titles and benefits under the project documents would be assigned to the financiers and the proceeds charged thereunder. If consent is required for the assignment, the consent of the counterparty should be obtained upfront or otherwise the agreement will be evidenced in the acknowledgement of the notice of assignment. Usually the contract proceeds would be required to be channelled into a designated account charged to the financiers in accordance with the instructions as provided in the notice of assignment. Upon enforcement, the assignee will be entitled to step into the shoes of the assignor and enforce the project documents, either in the name of the assignor or in its own name and a power of attorney would be granted in favour of the assignee.

Accounts and cash deposit

Assignment and charge over accounts and cash deposit is one of the most common security and self-help remedies available to financiers as the designated accounts are usually opened with the financier bank where such option is possible. Depending on the type of account, they may be solely operated by the chargee, solely operated by the borrower or jointly operated by the chargee and the operator, but upon an event of default, the designated accounts would all be solely operated by the chargee. The notice of assignment for the designated account would provide for the operation mandate and the account bank would acknowledge the same. The usual designated accounts include a disbursement account, revenue account, finance service reserve account, operating account or maintenance reserve account, etc.

Plant/machinery

In addition to the land/lease charge, a specific debenture may also be created over the plant, machinery and any movable assets relating to the project. Typically in the form of a fixed charge, the specific debenture would create a charge over the project described generally and to the extent possible, make specific reference to the assets. The specific debenture may also contain the rights to appoint a receiver/manager to step in and manage the asset upon an event of default.

Insurances

Assignment and charge over insurances and insurance proceeds may also be created as security. The chargee would be required to be endorsed as a loss-payee and the insurance would also include certain termination/cancellation terms, ie, to notify the chargee before terminating the insurance or where there is a default in payment to allow for the chargee to take actions to maintain the insurance. These terms would be contained in the notice of assignment to the insurers and acknowledgement to be provided from the insurers;

Bank guarantees/performance bonds

Assignments and charges over the bank guarantees/ performance bonds provided in favour of the project company by contractors are also included as security. Project companies would consider negotiating the form of the guarantees/ performance bonds to be provided from the issuing banks to provide for the upfront consent of the assignment. Arrangements in relation to any payment thereunder to be made into the designated accounts would be provided in the notice of assignment and would be acknowledged by the issuing bank.

General debenture

Where the project company is a “special purpose vehicle”, the financiers would consider obtaining a general debenture, consisting of a fixed and floating charge over all present and future assets of the project company. Together with the debenture, the power to appoint a receiver/manager to step in and manage the asset upon an event of default is also provided. A power of attorney would also be granted by the project company to undertake all necessary action and execute instruments in its name in favour of the charge.

Formalities and Perfection

The security would be in the form of a charge/ assignment/pledge depending on the asset.

Pursuant to Section 352 of the Companies Act 2016 (“CA”), a company creating a charge (including a mortgage and any agreement to give or executed a charge or mortgage) will be required to lodge a prescribed form together with the applicable fee with the Companies Commission Malaysia (“CCM”). Where land is involved, a charge under the NLC would also be required to be registered with the applicable land office. Where assignment is involved, to perfect a legal assignment, under the Civil Law Act 1965, a notice is required to be served to the counterparty. Where powers of attorney are provided, the powers of attorney would be required to be registered with the High Court of Malaya pursuant to the Powers of Attorney Act 1949 (applicable for West Malaysia). Stamp duty would also be payable on the agreements pursuant to the Stamp Act 1949.

Liens can also be created in favour of a security agent, although are typically only invoked when a charge is not permitted at that point in time.

2.2 Charges or Interest Over All Present and Future Assets of a Company

A floating charge is recognised under Malaysian law over all present and future assets of a company. Typically, in the form of a debenture, fixed and floating charges would be created over all present and future assets depending on the nature of the assets and the floating charge would be crystallised upon certain events, typically an event of default. Along with such security, the right to appoint a receiver/manager would be granted to the debenture holder where a receiver/manager may be appointed to manage the assets for enforcement purposes. A power of attorney would also be granted by the chargor to undertake all necessary action and execute instruments in its name in favour of the debenture holder.

2.3 Registering Collateral Security Interests

The cost would include the cost for charge registration with the CCM, a registration fee to the land office in respect of land charges and a registration fee for powers of attorney with the High Court.

2.4 Granting a Valid Security Interest

Generally, it would not be necessary for each item to be individually identified. However, to the extent possible, specific or otherwise clear descriptions would avoid ambiguity. In relation to land security, the specific land details will be required to create the security. Where a debenture is granted, the general descriptions of present and future assets, for example freehold or leasehold property, stocks, shares, bonds and securities of any kind, uncalled capital and all patents, patent applications, inventions, trademarks, trade names, registered designs, copyrights and goodwill in connection with all

businesses would be described as the assets charged under the debenture.

2.5 Restrictions on the Grant of Security or Guarantees

In respect of land, state authority consent may be required to create security and where reserve land is involved, it would be subject to the restrictions applicable to such reserve land. In respect of licences, typically security interest would be restricted. In the event any project company is a person connected with a director of a shareholder as provided in the CA, a shareholder may be restricted under the CA from providing security or guarantees in relation to a financing, unless the project company is a subsidiary or where the shareholder is an exempt private company (a private company; where beneficial interest of shares in the company are not held directly or indirectly by any corporation, ie, no corporate shareholder; and which has not more than 20 members, none of whom is a corporation).

2.6 Absence of Other Liens

A search can be conducted with the CCM for the registered charges of a company and in respect of lands, land searches can also be conducted with the relevant land authorities. The charge forms lodged with the CCM may also be extracted from the system to identify the specific charges which were created. In relation to lands, the title deed will also record any dealings and interest registered on the title.

2.7 Releasing Forms of Security

Typically, a deed of discharge/release/reassignment/revocation will be prepared depending on the type of security. In relation to the CCM charge, a prescribed discharge form will also be required. As for land charges, a prescribed discharge form is also required to be registered with the relevant land office. The discharge

documents would attract stamp duty. Discharge forms to be lodged with the CCM and registered with the land office would need to be presented within the time frame as ascribed under the CA and NLC respectively and accompanied by the requisite registration fee.

3. Enforcement

3.1 Enforcement of Collateral by Secured Lender

Typically, the enforcement process will commence upon a declaration of an event of default. Security over accounts, shares and cash would be “self-help” security and the security agent may enforce them without an order of the court. For land security, an order for sale may be applied from the court to place the land for sale under auction. Where a debenture is provided, the security agent may appoint receivers and managers to step in and liquidate the assets of the company. The security agent may also commence winding up proceedings against the company for the outstanding loans and guarantor (where the guarantor refuses to honour its obligations under the guarantee). In relation to project documents, the rights entitled to the security agent would only be limited to the original rights of the security provider.

3.2 Foreign Law

A choice of foreign law will be upheld in Malaysia provided that parties cannot through a choice of a foreign law avoid the mandatory provisions of domestic law. Submission to a foreign jurisdiction is also allowable, however the courts may consider having jurisdiction if the party challenging the jurisdiction clause is able to show exceptional circumstances amounting to a strong cause warranting a refusal.

3.3 Judgments of Foreign Courts

Judgments from reciprocating countries may be registered and enforced under the Reciprocal Enforcement of Judgments Act 1958 (“REJA”) provided they fulfil the requirements under the REJA. That being said, a foreign judgment which falls outside the REJA may still be enforced by the Malaysian courts through principles for the recognition of foreign judgments under common law.

Registration under REJA would need to comply with the following requirements:

- it is final and conclusive. A judgment shall be deemed to be final and conclusive, notwithstanding that an appeal may be pending against it or that it may still be subject to appeal, in the courts of the country of the original court;
- there is a sum of money payable under the judgment which has not been wholly satisfied, not just in respect of taxes or charges similar to taxes or a fine or penalty;
- it is a judgment given by a reciprocating country under REJA;
- it was issued or pronounced within the prior six years by the original court;
- it has not been satisfied in full by the judgment debtor; and
- it is capable of being enforced or executed in the original court.

3.4 A Foreign Lender’s Ability to Enforce

Provided that any relevant approvals for granting the loan were obtained, there should not be any restrictions on enforcement by a foreign lender.

4. Foreign Investment

4.1 Restrictions on Foreign Lenders Granting Loans

A resident is not allowed to borrow in Ringgit from foreign lenders and a resident is allowed to borrow in a foreign currency up to MYR100 million equivalent in aggregate from foreign lenders. Approval from the Central Bank of Malaysia would be required if the borrowing exceeds the limit.

4.2 Restrictions on the Granting of Security or Guarantees to Foreign Lenders

Provided that it is within the above-mentioned limit and if applicable, the approval for borrowing from a foreign lender is obtained, the granting of security and obtaining guarantee would be allowed.

4.3 Foreign Investment Regime

Generally, Malaysia is a foreign investment friendly jurisdiction. However, depending on the sector, there may be equity requirements which requires a minimum *bumiputera* (malay) shareholding.

4.4 Restrictions on Payments Abroad or Repatriation of Capital

There are no restrictions for non-residents to transfer profits, returns and divestment from investments in Malaysia abroad in all foreign currencies.

4.5 Offshore Foreign Currency Accounts

Offshore foreign currency accounts are permitted, provided that it is within the limit permitted by the Central Bank of Malaysia or otherwise approval from the Central Bank would be required.

5. Structuring and Documentation Considerations

5.1 Registering or Filing Financing of Project Agreements

Unless otherwise exempted, stamp duty would be payable on project documents. Where a power of attorney is granted, registration with the High Court of Malaya would be applicable. Depending on the type of project, a copy of the project document may be required to be submitted to the authorities, for example a copy of the power purchase agreement would be required to be provided to the Energy Commission of Malaysia.

5.2 Licence Requirements

Depending on the nature of the business and sector, as well as the type of natural resources, a licence may be required and there may be *bumiputera* equity requirements. Foreign ownership of land is subject to conditions under the National Land Code (2020) and the Guidelines On The Acquisition Of Properties by the Economic Planning Unit, Prime Minister's Department. Construction work would also require development orders and planning permission from the local authorities. In the power generation industry, a generation licence would be required to be obtained from the Energy Commission of Malaysia.

5.3 Agent and Trust Concepts

Agent and trust concepts are recognised in Malaysia. We are not aware of other alternative structure in the project finance space.

5.4 Competing Security Interests

Priority of security interest would largely depend on the timing of the creation as well as the lodgement of the security interest with the CCM in accordance with the CA and the land office.

Subordination and priority may be contractually agreed and subject to there being a valid and enforceable subordination agreement, the arrangement will survive the insolvency of a borrower.

5.5 Local Law Requirements

Depending on the type of project, *bumiputera* equity requirements may be required. The typical form of a project company would be a private limited company.

6. Bankruptcy and Insolvency

6.1 Company Reorganisation Procedures

The CA provides for procedures in relation to company reorganisation. Various corporate rescue mechanisms are provided thereunder, including corporate voluntary arrangements, judicial management and schemes of arrangement.

6.2 Impact of Insolvency Process

Upon an insolvency proceeding, a secured lender would have priority in relation to the secured assets. Where the security is exhausted, the lender would then be ranked *pari passu* with all other unsecured creditors of the borrower. A guarantee is an unsecured obligation, as such a claim under a guarantee would rank *pari passu* with the claims of all unsecured creditors of the guarantor.

6.3 Priority of Creditors

The secured creditors would rank ahead of the unsecured creditors in relation to the security created in their favour. Upon the security being exhausted, where there is still outstanding indebtedness, they would then rank *pari passu* with all other unsecured creditors in relation to any other assets of a company. The sharehold-

ers would rank below all other creditors and the preference shareholders would rank ahead of the ordinary shareholders.

6.4 Risk Areas for Lenders

Under Section 528 of the Companies Act 2016, every act or transfer, mortgage, delivery of goods, payment or other act relating to property made by or against the company which is unable to pay its debts as the debts become due in favour of any creditor, is considered fraudulent and void if the company is presented with a winding up petition within six months from the date of that act, transfer, delivery or payment, unless the act, transfer, delivery or payment is in favour of any person dealing for valuable consideration and without any actual notice of the contravention.

Upon the insolvency of the borrower, security provider or guarantor, the claim against any security provided would rank ahead of any unsecured creditor and a claim under a guarantee would be an unsecured claim and rank *pari passu* with all other unsecured creditors.

6.5 Entities Excluded From Bankruptcy Proceedings

There is no applicable information in this jurisdiction.

7. Insurance

7.1 Restrictions, Controls, Fees and/or Taxes on Insurance Policies

We are not aware of any restrictions, controls, fees and/or taxes on insurance policies other than the stamp duty payable on insurance policies and sales, and service tax chargeable on insurance premiums.

7.2 Foreign Creditors

Proceeds from insurance policies over project assets are payable to foreign creditors, provided that if any borrowing from foreign creditors exceeds the prudential limit allowable by the Central Bank of Malaysia, the requisite approval for the borrowing is obtained.

8. Tax

8.1 Withholding Tax

Interest paid to a non-resident payee is subject to withholding tax at 15% (or any other rate as prescribed under the Double Taxation Agreement between Malaysia and the country where the non-resident payee is tax resident).

8.2 Other Taxes, Duties, Charges

We are not aware of any other taxes, duties, charges or tax considerations are relevant to lenders making loans to entities incorporated other than income tax and withholding tax.

8.3 Limits to the Amount of Interest Charged

There are no laws limiting the amount of interest that can be charged other than late payment fees for Malaysian Islamic banks.

9. Applicable Law

9.1 Project Agreements

Typically, the project agreements would be governed by Malaysian law unless a foreign party is involved and requests another governing law, which in most cases is English law. It is the parties' commercial decision to agree on the same.

9.2 Financing Agreements

Typically, Malaysian law is used for financing agreements. However, when non-Malaysian assets are involved, the security documents may be governed by the relevant laws where the assets are situated.

9.3 Domestic Laws

Typically, land matters, energy resources and corporate are governed by domestic law.

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