



LEXOLOGY

Getting The Deal Through

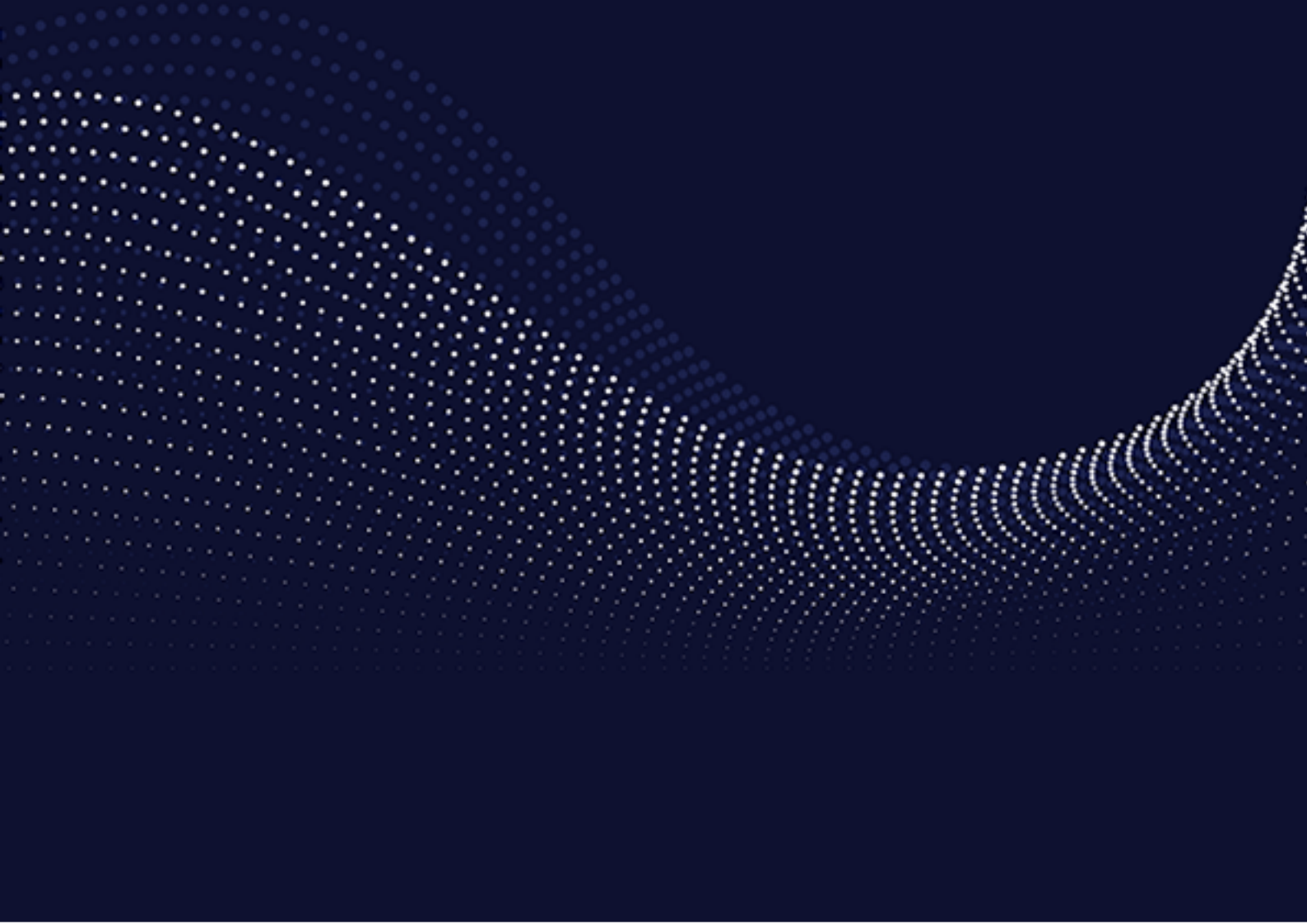
REAL ESTATE

Malaysia

Contributing Editors

Craig Brown and **Alex Rosenthal**

Dechert LLP



Real Estate

Contributing Editors

Craig Brown and Alex Rosenthal

Dechert LLP

Generated on: December 1, 2023

The information contained in this report is indicative only. Law Business Research is not responsible for any actions (or lack thereof) taken as a result of relying on or in any way using information contained in this report and in no event shall be liable for any damages resulting from reliance on or use of this information. Copyright 2006 - 2023 Law Business Research



Getting The Deal Through

Explore on **Lexology** [↗](#)

Contents

Real Estate

GENERAL

- Legal system
- Land records
- Registration and recording
- Foreign owners and tenants
- Exchange control
- Legal liability
- Protection against liability
- Choice of law
- Jurisdiction
- Commercial versus residential property
- Planning and land use
- Government appropriation of real estate
- Forfeiture
- Bankruptcy and insolvency

INVESTMENT VEHICLES

- Investment entities
- Foreign investors
- Organisational formalities

ACQUISITIONS AND LEASES

- Ownership and occupancy
- Pre-contract
- Contract of sale
- Environmental clean-up
- Lease covenants and representation
- Leases and real estate security instruments
- Delivery of security deposits
- Due diligence
- Structural and environmental reviews
- Review of leases
- Other agreements
- Closing preparations
- Closing formalities
- Contract breach
- Breach of lease terms

FINANCING

- Secured lending

Leasehold financing
Form of security
Valuation
Legal requirements
Loan interest rates
Loan default and enforcement
Loan deficiency claims
Protection of collateral
Recourse
Cash management and reserves
Credit enhancements
Loan covenants
Financial covenants
Secured movable (personal) property
Single purpose entity (SPE)

UPDATE AND TRENDS

International and national regulation

Contributors

Malaysia

SKRINE

SKRINE

Lee Ai Hsian

lee.aihsian@skrine.com

Jesy Ooi

jesy.ooi@skrine.com

Engy Tan

engy.tan@skrine.com

Francine Ariel Paul

francine@skrine.com

Javene Fan Pooi Ling

javene@skrine.com

GENERAL

Legal system

How would you explain your jurisdiction's legal system to an investor?

As a former British colony, Malaysia's legal system is, to a large extent, based on English common law. In the absence of domestic law on a particular area, English common law and rules of equity would apply.

In certain circumstances, Malaysian courts would grant an anti-suit injunction to prohibit a party from bringing an action. Such powers are often granted to prevent multiplicity of judicial proceedings.

Oral contracts made by the free consent of parties competent to contract for a lawful consideration and with a lawful object, are effective and enforceable unless they are required by law to be in writing. Generally, no evidence of any oral agreement or statement shall be admitted as between parties to any such written agreement for the purpose of contradicting, varying, adding to, or subtracting from its terms. However, there are several exceptions to this rule. For instance, oral evidence may be admitted for the purpose of proving the existence of any separate oral agreement constituting a condition precedent to a contract, grant or disposition of property.

The principal legislation for real estate within Peninsular Malaysia and the Federal Territories is the National Land Code (Act 828) (NLC). The respective state within Peninsular Malaysia is empowered to make rules for carrying out the NLC's objects and purposes. There are also state laws governing Malay reserved lands, customary lands and padi lands.

Land records

Does your jurisdiction have a system for registration or recording of ownership, leasehold and security interests in real estate? Must interests be registered or recorded?

Under the NLC, all lands are vested in the state and can be alienated upon application to the state authority. Such alienation only takes effect upon registration of a register document of title (RDT), which is conclusive proprietorship evidence. The subsequent property transfer, lease (being a rental for more than three years), charge and easement needs to be effected by the NLC-prescribed instrument and registered with the relevant land registry or office. Upon registration, the title or interest is indefeasible save for instances specified in the NLC such as fraud or misrepresentation. The title or interest acquired by a purchaser (other than the immediate purchaser in such instances) in good faith and for valuable consideration is not affected.

Despite no registration:

- beneficial interests can be created in property by way of equitable trust. A vendor who receives the full purchase price holds his proprietary interest as his purchaser's constructive trustee until RDT's registration of the transfer. The purchaser may also enter a private caveat over the property, thus prohibiting the registration of other instruments of dealing presented thereafter;

- a tenancy exempt from registration which is for three years or less can be protected by an endorsement on the RDT; and
- a third party with whom an issue document of title (IDT) or duplicate lease is deposited becomes entitled to a lien over the property or lease upon entry of a lienholder's caveat.

Registration and recording

What are the legal requirements for registration or recording conveyances, leases and real estate security interests?

The transfers, leases and charge over lands shall be in the NLC-prescribed forms, executed and attested in accordance with the NLC. Presentation for registration of such forms remains by way of lodging the physical copy together with the original IDT and other requisite documents at the Registry.

Each state may impose additional requirements. The State of Malacca Registry requires a transferee company's secretary to confirm on the company shareholding. If the property to be transferred is valued at 5 million ringgit and above, the State of Selangor Registry requires biometric fingerprint verification of the transfer instrument's signatories.

The amount of registration fees payable to each land registry or office (Registry) is also different. The purchaser customarily bears the registration fee for the transfer instrument and the state authority's approval for foreigner's acquisition (foreign consent) (if applicable), whereas the seller usually bears the registration fee to withdraw his encumbrances and the state authority's consent due to restriction in interest (RIT) in the IDT (if applicable). Presentation beyond 90 days (depending on the Registry) is subject to penalty.

A transfer instrument is subject to stamp duties payable by the purchaser at the applicable rate prescribed under the Stamp Act 1949 and which will be ascertained based on the property value. A property sale with gains is subject to real property gains tax (RPGT) payable by the seller, unless exempted under the Real Property Gains Tax Act 1976 or falling within the purview of income tax. The applicable RPGT rate depends on the type of seller and the year of disposal. The stamp duties and RPGT shall be paid within the prescribed period to avoid incurring penalty.

Foreign owners and tenants

What are the requirements for non-resident entities and individuals to own or lease real estate in your jurisdiction? What other factors should a foreign investor take into account in considering an investment in your jurisdiction?

Each state imposes a minimum purchase price for different types of property to be acquired by a non-resident. The non-resident should first check such price for the type of his intended property.

The NLC also requires a non-resident who intends to own or lease property or endorse his tenancy on the register document of title to obtain the state authority's approval for a foreigner's acquisition, lease or conveyance.

Exchange control

If a non-resident invests in a property in your jurisdiction, are there exchange control issues?

A non-resident may pay to or receive payment in Malaysian ringgit for settlement of any Malaysia property. It may borrow in ringgit from a resident to finance construction or purchase of a residential or commercial property, or in foreign currency from a licensed bank in Malaysia or a non-resident.

Any repatriation of funds, including income earned or proceeds from divestment of such property, needs to be in a foreign currency.

Legal liability

What types of liability does an owner or tenant of, or a lender on, real estate face? Is there a standard of strict liability and can there be liability to subsequent owners and tenants including foreclosing lenders? What about tort liability?

Failure to pay the annual rent to the state authority on alienated land may give rise to forfeiture of the land by the land administrator. Every condition and RIT binds the owner and every other person having interest in property such as the lender (if registered as a chargee). Upon breach of any condition, the proprietor may be fined or be called upon to take remedial action. The land administrator may alternatively take temporary possession of the property or declare the property forfeit to the state authority.

Landowners may be held liable under various torts including negligence and the doctrine of *Rylands v Fletcher* for contamination which leaks or 'escapes' from their land. Under the Environmental Quality Act 1974 of Malaysia, landowners and/or occupiers of land may be held liable for pollution or environmentally hazardous substances from their property going into drains, inland waters, groundwater, the atmosphere or in the land itself if these emissions, discharges or deposits exceed the acceptable conditions set.

Under the Contaminated Land Management and Control Guidelines issued by the Department of Environment (DoE) (DoE Guidelines), the landowner is responsible to determine any subsurface contamination through an environmental site assessment (ESA), and if not caused by the current or historical onsite operations, to identify the polluter to be responsible to undertake subsequent remediation actions in respect of the contamination. If such polluter is no longer operating in Malaysia, the landowner will bear responsibility for said remediation.

The DoE Guidelines have not been enacted as law, but in practice, the standards referred to therein are used by the DoE as benchmarks.

Protection against liability

How can owners protect themselves from liability and what types of insurance can they obtain?

Landowners may obtain insurance policies for pollution incidents and other environmental issues.

Environmental liability may also be apportioned under the relevant transaction documents. If a business or activity carried out on the property requires compliance with various environmental requirements (ie, manufacturing), the purchaser typically requests the seller to warrant such compliance, as well as to provide specific indemnities for any actual or threatened pollution incident identified.

In general, landowners should perform an ESA on their properties prior to any sale or transfer so that they have baseline data which they may rely upon in the event of any third-party claims in the future alleging that a source of pollution is from their site.

Choice of law

How is the governing law of a transaction involving properties in two jurisdictions chosen? What are the conflict of laws rules in your jurisdiction? Are contractual choice of law provisions enforceable?

Transacting parties are free to contractually decide on the law governing the transaction. Save in certain circumstances, such as where the transaction in question involves immovable properties that are governed by Malaysian land law, Malaysian courts would generally respect contractual provisions in respect of the governing law.

If parties have not agreed to the law governing the transaction, the Malaysian courts would generally apply Malaysian law, subject to the principles of conflict of law, to ascertain the place most closely connected to the dispute or contract in question.

Jurisdiction

Which courts or other tribunals have subject-matter jurisdiction over real estate disputes? Which parties must be joined to a claim before it can proceed? What is required for out-of-jurisdiction service? Must a party be qualified to do business in your jurisdiction to enforce remedies in your jurisdiction?

Depending on the claim amount and the remedies prayed for, the Malaysian Magistrates' Court, Sessions Court and High Court, generally have the jurisdiction to try real estate actions or suits of civil nature. Alternatively, parties may refer their contractual dispute(s) to the arbitral tribunal if the relevant contract contains an arbitral award.

The defendant must be made as a party to the claim. Where a defendant is outside Malaysia, the plaintiff must make an application to the Malaysian courts for leave to serve the cause of papers out of jurisdiction. For leave to be granted, the plaintiff must show, among other things, that he or she has a good arguable case for the relief claimed, that the defendant is in

the particular jurisdiction outside Malaysia, and that Malaysia is the most appropriate forum to determine the dispute.

A party who intends to enforce a judgment in Malaysia need not be one who is qualified to do business in Malaysia.

Commercial versus residential property

How do the laws in your jurisdiction regarding real estate ownership, tenancy and financing, or the enforcement of those interests in real estate, differ between commercial and residential properties?

The NLC does not distinguish between commercial and residential properties regarding ownership, tenancy and financing or the enforcement of the relevant interests in lands. A foreigner however is not allowed to acquire certain types of properties depending on the respective state's requirement.

Planning and land use

How does your jurisdiction control or limit development, construction, or use of real estate or protect existing structures? Is there a planning process or zoning regime in place for real estate?

In Peninsular Malaysia, development is managed by the relevant local planning authority (LPA). Land use for development must conform with the local plan and land title. A landowner or developer may apply to the relevant land registry or office for land use conversion.

Planning permission from the LPA is required for development. If an area has no local plan, neighbouring landowners may object to applications for planning permission. The LPA's decision vis-à-vis planning permission may be appealed.

Where the development involves building construction, the local authority's permission is also required.

Under the Town and Country Planning Act 1976, use of land not in compliance with the local plan or developing without planning permission are offences. A person may be subject to a fine, imprisonment or both.

Government appropriation of real estate

Does your jurisdiction have a legal regime for compulsory purchase or condemnation of real estate? Do owners, tenants and lenders receive compensation for a compulsory appropriation?

The Land Acquisition Act 1960 governs the regime in Peninsular Malaysia. The Land Administrator would award compensation after enquiring into the market value of the scheduled land as at the date of the gazette declaring acquisition and the respective interests of persons claiming compensation. Compensation for any severance damage, any injurious affection damage and reasonable expenses for changing residence or place of business

can also be awarded. The value of land and building which had been increased due to unlawful use will be disregarded. The persons receiving compensation can be the owner, lessee, tenant, and chargee, but not a tenant at will. Parties who are dissatisfied with the Land Administrator's award can commence a land reference at the High Court.

Forfeiture

Are there any circumstances when real estate can be forfeited to or seized by the government for illegal activities or for any other legal reason without compensation?

A property may be forfeited:

- for non-payment of annual rent or breach of condition under the NLC; or
- if proved to be terrorist property, or the subject matter of an offence under the Dangerous Drugs (Forfeiture of Property) Act 1988 or the Malaysian Anti-Corruption Commission Act 2009.

Bankruptcy and insolvency

Briefly describe the bankruptcy and insolvency system in your jurisdiction.

A creditor may commence bankruptcy proceedings against an individual who is unable to pay a judgment debt of at least 100,000 ringgit while winding up proceedings may be commenced against a company who fails to pay a debt exceeding 50,000 ringgit.

An individual debtor may apply for a stay of the bankruptcy proceedings pending any appeal of the underlying judgment debt, whereas a company debtor may apply for a Fortuna injunction to prohibit the filing of a winding up petition.

Once a bankruptcy or winding-up order is granted, the debtor's assets will be assigned to the Director General of Insolvency (DGI) or taken over by the company's liquidator.

Depending on the terms of the underlying contract or security instrument, a seller or landlord creditor who holds security over asset(s) charged by the debtor may exercise its right to sell the same. Such seller or landlord is considered as a secured creditor. For creditors who do not hold any security against the debtor, they are considered as unsecured creditors and their debts (including liquidated damages arising from a termination of the underlying contract), if accepted by the DGI or liquidator, will be paid on a pari passu basis.

It is also open to companies under financial distress to restructure their debts under the various corporate rescue mechanisms and arrangements available under the Companies Act 2016.

INVESTMENT VEHICLES

Investment entities

What legal forms can investment entities take in your jurisdiction? Which entities are not required to pay tax for transactions that pass through them (pass-through entities) and what entities best shield ultimate owners from liability?

The possible vehicles for a foreign company to use to perform business in Malaysia include:

- a company incorporated under the Companies Act 2016 (CA), with separate legal personality (SLP) from its members although its corporate veil may be lifted in circumstances such as if it had been set up for fraudulent purposes;
- a foreign branch registered under the CA, which is an extension of its parent foreign company and has no SLP; or
- a limited liability partnership (LLP) registered under the Limited Liability Partnerships Act 2012 (LLPA) to carry on a professional practice and has SLP. A foreign LLP can also register under the LLPA in order to carry on business in Malaysia.

Pass-through entities are not subjected to corporate income tax and include:

- registered sole proprietorships and partnerships (excluding LLPs and foreign LLPs) set up by a foreigner with permanent resident (PR) status; and
- listed real estate investment trusts, whose total income for a year of assessment is exempt from tax if 90 per cent or more thereof is distributed to its unit holders.

Foreign investors

What forms of entity do foreign investors customarily use in your jurisdiction?

Foreign investors typically carry on business in Malaysia by incorporating a private company limited by shares under the CA. Such incorporation is generally straightforward and inexpensive. Many local regulators also require such incorporation as a pre-requisite to obtaining certain licences.

Organisational formalities

What are the organisational formalities for creating and maintaining the above entities? What requirements does your jurisdiction impose on a foreign entity? Does failure to comply incur monetary or other penalties? What are the tax consequences for a foreign investor in the use of any particular type of entity, and which type is most advantageous?

A foreign investor may under the CA:

- incorporate a company with at least one director (for private companies) and two directors (for public companies), and one Malaysian or PR secretary, with such director(s) and secretary in each case being ordinarily resident in Malaysia by having a principal place of residence in Malaysia;
-

purchase another incorporated shelf company and have its members and name of director(s) or secretary(ies) changed; or

- register a foreign branch with an agent appointed to answer for all requisite acts and be personally liable to all penalties imposed.

A company or foreign branch generally is subject to filing requirements including to lodge financial statements and annual return with the Companies Commission of Malaysia (CCM), failing which a fine may be imposed.

The tax rate on a resident company's chargeable income differs based on its capital sum. Certain payments such as royalties and service fee made to its foreign holding company may attract withholding tax. There is no such tax on remittance of a foreign branch's profits to its foreign company.

An LLP or foreign LLP needs to appoint at least one Malaysian or PR compliance officer ordinarily residing in Malaysia, from amongst its partners or persons qualified to act as secretaries under the CA, and annually lodge with the CCM a declaration by two partners on its ability to pay debts, failing which it is liable to a fine. An LLP or foreign LLP does not enjoy as much tax incentives as a resident company.

ACQUISITIONS AND LEASES

Ownership and occupancy

Describe the various categories of legal ownership, leasehold or other occupancy interests in real estate customarily used and recognised in your jurisdiction.

The state authority may:

- alienate a state land to any owner in perpetuity or for not exceeding 99 years, and under a qualified title or final title (if the land has been surveyed by the state authority);
- lease any reserved land not exceeding 21 years (reserved land lease);
- issue a temporary occupation licence (TOL) no later than at the end of the calendar year in which it is to commence; or
- issue a permit not exceeding 21 years to erect a structure on or over a state land or reserved land as an adjunct to any structure on the adjoining land.

An owner is empowered to assign or transfer his property title (whether freehold or leasehold), and such ownership does not extinguish upon his death or bankruptcy. Any reserved land lease transfer may be restricted under the relevant agreement with the state authority, and TOL is not capable of assignment. Both reserved land lease and TOL also terminate on the lessee or holder's death or dissolution.

An easement can be registered with the relevant land registry or office using the National Land Code (Act 828) (NLC)-prescribed form. Other rights of way, air rights and access in respect of an alienated land may be created by contract with the landowner.

A condominium and its communal ownership usually fall under stratified scheme which is legally governed. A master lease for multiple properties is not common, save for between the same lessor and the same lessee for properties within the same building. Depending on the type and use of properties, the covenants required from the lessee or tenant may differ.

Pre-contract

What are the typical pre-contractual steps?

A pre-contract document typically in the form of letter of intent or offer, or term sheet or heads of term is common but not mandatory to set out the agreed salient terms and exclusive negotiation period. A document expressed to be subject to contract does not necessarily prevent the formation of a contract. The courts will look into certainty of the transacting parties, the subject properties and the essential terms, and whether any intention for a concluded contract.

A real estate agent (REA) may be engaged by a seller or purchaser. He shall not provide professional services where he has a personal or contemplated interest unless having disclosed this to all affected parties. A REA needs to complete the requisite course and test of professional competence, and be registered under the Register of Valuers, Appraisers, Estate Agents and Property Managers and issued with an authority to practise. Estate agency fees are legally regulated, for instance a maximum fee of 3 per cent in a property sale, while for a tenancy it is 1.25-months' gross rental .

Contract of sale

What are typical provisions in a contract of sale?

The typical down payment amount is 10 per cent of the sale price out of which a 1 per cent to 3 per cent earnest payment (depending on the sale price) is commonly required from a buyer to reserve the property pending execution of the sale contract. If there is any condition(s) precedent (CP) to be fulfilled, such payment is usually held by a stakeholder. Upon completion of the sale contract, the purchaser will be registered at the relevant land registry or office as the proprietor. If separate title has yet to be issued, the purchaser's interest in such sale will be evidenced by a stamped deed of assignment which will be notified to the developer.

A title search is usually done at the purchaser's cost. Customary seller's warranties include:

- seller is the legal and beneficial owner and has capacity to sell;
- there is no other subsisting sale or dealing which may affect his rights to sell;
- there is no claim by third party(ies) on the sale property; and
- not to permit further encumbrance upon execution of sale contract.

Any real property gains tax assessed for a property sale will be imposed on the seller, and the year of assessment is calendar year. The land's outgoings may be apportioned as at the full payment of the sale price or the delivery of possession. Risk of loss remains with the seller until such payment or delivery.

Environmental clean-up

Who takes responsibility for a future environmental clean-up? Are clauses regarding long-term environmental liability and indemnity that survive the term of a contract common? What are typical general covenants? What remedies do the seller and buyer have for breach?

Based on the Contaminated Land Management and Control Guidelines issued by the Department of Environment (DoE Guidelines), the current landowner is responsible for determining any subsurface contamination through an environmental site assessment (ESA) and thereafter undertaking subsequent remediation for the land clean-up unless they can identify the actual polluter to undertake the remediation themselves. However, under a sale and purchase agreement, if there is no contamination found at the closing through an ESA conducted by the current landowner, or if the purchaser does not require the same as a CP, then the maxim caveat emptor (let the buyer beware) applies and the responsibility for future environmental clean-up will fall on the purchaser. It is also not unusual for contracting parties to agree for the environmental warranties and indemnities to survive for a longer period than other warranty claims. Typically, there will be provisions for a clean-up by the landowner of any contamination found on the site as a CP, and indemnities for any claims arising from such contamination, in addition to usual provisions for termination for breach of warranties as to condition of the land.

Lease covenants and representation

What are typical representations made by sellers of property regarding existing leases? What are typical covenants made by sellers of property concerning leases between contract date and closing date? Do they cover brokerage agreements and do they survive after property sale is completed? Are estoppel certificates from tenants customarily required as a condition to the obligation of the buyer to close under a contract of sale?

Typical representations in a sale contract include:

- no variation (except as disclosed) nor default of the lease or tenancy agreement; and
- the lease or tenancy is in effect and enforceable.

Typical covenants in a sale contract include:

- not to terminate the lease or tenancy, or enter into any settlement with the lessee or tenant, without the buyer's approval;
- to execute and deliver to the buyer a transfer of the lease or novation of the tenancy; and
- to pay the security deposit and apportioned rental to the buyer on completion of the sale.

Leases and real estate security instruments

Is a lease generally subordinate to a security instrument pursuant to the provisions of the lease? What are the legal consequences of a lease being superior in priority to a security instrument upon foreclosure? Do lenders typically require subordination and non-disturbance agreements from tenants? Are ground (or head) leases treated differently from other commercial leases?

A lease generally is not subordinate to a registered charge. The owner of a charged land, however, is not capable of granting a lease without the registered chargee's consent. The interests of a registered lessee under the NLC are not distinguished between a ground lease and other commercial leases.

Delivery of security deposits

What steps are taken to ensure delivery of tenant security deposits to a buyer? How common are security deposits under a lease? Do leases customarily have periodic rent resets or reviews?

The seller usually covenants under the sale contract to remit the security deposits to his buyer on completion of the sale. If such deposits are in the form of letter of credit, the seller should cause the tenant to provide a new letter to the buyer.

Security deposits are common under a lease to secure the lessee's performance. It is also typical to have rent resets or reviews at such agreed interval.

Due diligence

What due diligence should be conducted before executing a contract? Is any due diligence customarily permitted or conducted after contract but before closing? What is the typical method of title searches and are they customary? How and to what extent may acquirers protect themselves against bad title? Discuss the priority among the various interests in the estate. Is it customary to obtain government confirmation, a zoning report or legal opinion regarding legal use and occupancy?

Depending on the complexity of the sale property, legal due diligence is usually completed before executing a property sale contract. A purchaser should conduct title search at the relevant land registry or office to verify, amongst others, the registered proprietorship, the category of land use and conditions of title, and any registered encumbrance. If separate title has yet to be issued, a purchaser should (1) review the previous contract of the landowner acquiring the property to determine, amongst others, if there is any surviving covenant or subsisting default by him, and (2) obtain the developer's written confirmation that the landowner is the beneficial owner and whether the property is assigned to any financier. Malaysia practises the Torrens System and registered title or interest enjoys indefeasibility unless in the cases spelt out in the NLC such as fraud or misrepresentation. Government confirmation or legal opinion regarding legal use and occupancy is not commonly obtained as any express condition of use of the land will be stated in its title and the implied condition

of use is under the NLC. For the zoning which is not stated therein, buyer will and should check with the relevant local authority.

Structural and environmental reviews

Is it customary to arrange an engineering or environmental review? What are the typical requirements of such reviews? Is it customary to get representations or an indemnity? Is environmental insurance available?

An environmental impact assessment is required under the Environmental Quality Act 1974 of Malaysia before carrying out any activity prescribed under the environmental laws as having a significant environmental impact (ie, agriculture and manufacturing activities with specified production values). Furthermore, under the DoE Guidelines, the current landowner is responsible for identifying any subsurface contamination through an ESA.

Please see above on ESAs.

Insurance policies for pollution incidents and other environmental issues are also available in Malaysia.

Review of leases

Do lawyers usually review leases or are they reviewed on the business side? What are the lease issues you point out to your clients?

Lease agreements are usually reviewed by lawyers. Issues normally highlighted are:

- if advising lessee – indemnities from lessor, consequence of termination, restriction on lessee's change of control, any lessor's right to sell without being subject to the lease, and the mechanism to determine renewed rent (if not fixed); and
- if advising lessor – whether the lease is subject to registered chargee's consent, and who is to carry out the lease registration.

Lenders in a retail and commercial property financing generally do not require subordination of property management agreements.

Other agreements

What other agreements does a lawyer customarily review?

Depending on the nature of and issues surrounding the subject property, lawyers will review agreements as to where the sale will be subject or which the buyer will assume such as service contracts, lease agreements and management agreements.

Closing preparations

How does a lawyer customarily prepare for a closing of an acquisition, leasing or financing?

The seller's lawyer will prepare to deliver title (if issued), the required closing documents under the sale contract and latest outgoing receipts to the buyer's lawyer. The common completion period is three months with an automatic one-month extension subject to interest. Apportionment of outgoing is on completion or possession.

If financing is involved, the financier's lawyer will advise on fulfilment of conditions for the loan disbursement towards settlement of the sale price within the completion period, including the differential sum settlement, and presentation for registration of the transfer and charge instruments (if property title is issued).

After execution of a lease agreement and fulfilment of any CPs therein, the lessee or lessor's lawyer will attend to stamping and presentation for registration of the lease instrument (if property title is issued).

If the contracting party is a corporate body, the constituent documents and resolutions will be checked to verify their authorisation to enter into the transaction and execute the transaction documents.

Closing formalities

Is the closing of the transfer, leasing or financing done in person with all parties present? Is it necessary for any agency or representative of the government or specially licensed agent to be in attendance to approve or verify and confirm the transaction?

Signing of the contract documents and closing need not be done with all parties present but they need to be witnessed or attested accordingly. The signing of land-related instrument for Malay reserved lands, has to be attested by a land administrator. The property transaction need not be verified or confirmed by a government agency or representative (except currently, the State of Selangor Registry requires biometric fingerprint verification of the transfer instrument's signatories if the property to be transferred is valued at 5 million ringgit or above) but the registrable instruments must be registered with the Registry.

Contract breach

What are the remedies for breach of a contract to sell or finance real estate?

The remedies for breach are usually provided under the sale or financing contracts. Typically, parties will agree, under the sale contract, on an agreed liquidated damages sum to be paid or forfeited by the non-defaulting party upon termination. Alternatively, the non-defaulting party may apply for specific performance of the contract, but such remedy is at the court's discretion.

If there is payment default under the financing contract, the registered chargee may apply for an order for sale under the NLC and enforce any other securities.

Breach of lease terms

What remedies are available to tenants and landlords for breach of the terms of the lease? Is there a customary procedure to evict a defaulting tenant and can a tenant claim damages from a landlord? Do general contract or special real estate rules apply? Are the remedies available to landlords different for commercial and residential leases?

The remedies for breach are usually provided under the lease or tenancy agreements (whether for commercial or residential property) which includes forfeiture of the security deposit if the tenant breaches, and the power of forfeiture under the NLC.

To distrain for arrears of rent, a landlord may apply to court for a warrant of distress directing a bailiff to distrain movable property found on the premises to realise the rent when they are sold. To recover possession from a tenant who continues to remain there, the owner must obtain a court order pursuant to the Specific Relief Act 1950.

FINANCING

Secured lending

Discuss the types of real estate security instruments available to lenders in your jurisdiction. Who are the typical providers of real estate financing in your country? Are there any restrictions on who may provide financing?

Lenders providing financing in Malaysia must be licensed by the Malaysian Ministry of Finance or approved by the Central Bank of Malaysia (BNM). The main providers of real estate financing are licensed onshore commercial banks.

Statutory land charge is the predominant form of security taken by a lender to acquire legal and proprietary rights in the land instead of just contractual rights. The registration details endorsed on both the issue document of title and the register document of title are conclusive under the National Land Code (Act 828) (NLC).

If the property is without title, the creation of security is by way of an assignment of the relevant purchaser's rights and interests under the principal property sale and purchase agreement in favour of the lender.

Borrowing companies may enter into a specific debenture over the relevant property as an alternative to a statutory land charge which cannot be created due to ongoing land processes.

Leasehold financing

Is financing available for ground (or head) leases in your jurisdiction? How does the financing differ from financing for land ownership transactions?

In lease financing, the lessee's rights and interests under the lease agreement will be assigned to the lenders. In head lease financing, the lenders would also require an

assignment cum novation provision in all sub-lease agreements and all rental proceeds thereunder will be assigned to the lenders as security.

Form of security

What is the method of creating and perfecting a security interest in real estate?

The methods for creating and perfecting a security interest in property are:

- property with title – by the registered owner or lessee creating a statutory land charge in favour of the lender under the NLC; or
- separate title has yet to be issued – by way of an assignment. Such security typically includes the granting of powers of attorney by the property purchaser to the lender, of which such instrument must be registered with the High Court.

The details of such charge or assignment must be lodged with the Companies Commission of Malaysia (CCM) within 30 days of the creation thereof by the charging or assigning company, failing which the security is void against its liquidator and creditors.

Valuation

Are third-party real estate appraisals required by lenders for their underwriting of loans? Are there government or industry standards for appraisals? Must appraisers have specific qualifications or required government or industry certifications? Who is required to order the appraisal?

Professional valuation on real estate security will be required by the lender from its approved third-party panel of valuers before loan disbursement to ascertain the market value as not less than that represented by the borrower. Such valuer or appraiser must be registered under the Register of Valuers, Appraisers, Estate Agents and Property Managers and issued with an authority to practise.

Legal requirements

What would be the ramifications of a lender from another jurisdiction making a loan secured by collateral in your jurisdiction? What is the form of lien documents in your jurisdiction? What other issues would you note for your clients?

Borrowing in foreign currency and the giving of financial guarantees or security as collateral to foreign lenders are both regulated by the BNM. Such borrowing up to the equivalent of 10 million ringgit by resident individual borrowers or 100 million ringgit by resident borrowing entities is permitted. The giving of such financial guarantee (which includes a security or charge over real estate) by a non-bank resident is allowed to secure a non-resident's borrowing, except where:

- such non-resident borrower is a special purpose vehicle; or
- the underlying borrowing is being utilised by the resident; or
- the resident has entered into a formal or informal arrangement to make repayment of the borrowing in foreign currency other than under a call-upon of a financial guarantee by the lender in the event of default.

The BNM's prior approval is required for any such borrowing in excess of the said threshold or the giving of such financial guarantee in the said exceptions.

Loan interest rates

How are interest rates on commercial and high-value property loans commonly set? What rate of interest is legally impermissible in your jurisdiction and what are the consequences if a loan exceeds the legally permissible rate?

The bank lending rate is set by the BNM which has issued guidelines to regulate the charging of default interest by local licensed financial institutions. These institutions are required under the guidelines to use the standardised base rate as the reference rate for the pricing of retail financing facilities irrespective of the type of property.

Loan default and enforcement

How are remedies against a debtor in default enforced in your jurisdiction? Is one action sufficient to realise all types of collateral? What is the time frame for foreclosure and in what circumstances can a lender bring a foreclosure proceeding? Are there restrictions on the types of legal actions that may be brought by lenders?

Remedies against a defaulting debtor depend on the terms of the security instruments which may include a lender's right to appoint a receiver and manager to deal with the secured assets and realise their value to repay the outstanding loan sum. Generally, enforcement actions must commence within six years from the accrual of the payment default to avoid being time-barred by the statutory limitation laws.

In Peninsular Malaysia, the property foreclosure process is prescribed in the NLC. Depending on the registration office of the property title, the lender as registered chargee may:

- registration at land registry – apply to the High Court for an order for sale by way of court auction; or
- registration at land office – submit an NLC-prescribed form and supporting documents to the relevant land administrator for an order for sale by way of public auction.

Loan deficiency claims

Are lenders entitled to recover a money judgment against the borrower or guarantor for any deficiency between the outstanding loan balance and the amount recovered in the foreclosure? Are there time limits on a lender seeking a deficiency judgment? Are there any limitations on the amount or method of calculation of the deficiency?

Secured lenders are entitled to recover from borrowers or guarantors such deficiency including any chargeable late payment interest by proving their debt like any other unsecured lenders. Recovery actions generally must commence within six years from the accrual of such deficiency. There are no limitations on the amount of deficiency or prescribed method to calculate the same.

Protection of collateral

What actions can a lender take to protect its collateral until it has possession of the property?

The lender of a defaulting company may appoint a receiver and manager (R&M) if empowered under the relevant security instrument. The appointed R&M will act within the scope of powers prescribed therein and/or under the Companies Act 2016, such as extending control over the secured assets and carrying out business dealings arising therefrom to maximise their realised value.

Under Malaysian company laws, a company may enter into a moratorium by way of an application to the court pre-insolvency. There are also claw-back provisions for setting aside of a company's pre-insolvency transactions which have the effect of favouring one creditor over other creditors on its winding-up.

Recourse

May security documents provide for recourse to all of the assets of the borrower? Is recourse typically limited to the collateral and does that have significance in a bankruptcy or insolvency filing? Is personal recourse to guarantors limited to actions such as bankruptcy filing, sale of the mortgaged or hypothecated property or additional financing encumbering the mortgaged or hypothecated property or ownership interests in the borrower?

Recourse of a lender is provided by the relevant laws and the terms of the security instrument with respect to its collateral.

A general debenture which creates a fixed and floating charge over all the borrowing company's available assets and undertakings will provide recourse to all such assets. The lender's right to appoint a receiver and manager to deal with such assets is derived from the security instrument and the Companies Act 2016.

The claims of unsecured lenders on the insolvency of a borrower or charging or guaranteeing company will rank after secured lenders who will have first priority in claims over the relevant secured assets and preferential lenders under the laws.

Cash management and reserves

Is it typical to require a cash management system and do lenders typically take reserves? For what purposes are reserves usually required?

No.

Credit enhancements

What other types of credit enhancements are common? What about forms of guarantee?

Credit enhancement by way of individual or corporate guarantee is common. There are no standard net worth or liquidity requirements for individual and corporate guarantors, respectively.

Loan covenants

What covenants are commonly required by the lender in loan documents?

Standard covenants apply to all asset classes, including:

- to obtain and maintain all requisite authorisations;
- to provide further security and negative pledge;
- not to incur further indebtedness;
- on pari-passu ranking of all unsecured liabilities;
- to notify the lender of events of default or material adverse change to the borrower's financial position;
- to maintain insurance over the borrower's assets;
- to comply with all applicable laws;
- not to part with assets of substantial value; and
- to perform all obligations contained in the loan agreements.

Financial covenants

What are typical financial covenants required by lenders?

The lenders typically require from a borrowing company:

- financial covenants, including financial reporting requirements, maintenance of minimum balance in debt service account and periodic appraisal of its financial performance; and
- if granted a loan on a clean basis, covenants to maintain a specific debt-to-equity ratio and debt service coverage ratio, and not to pay dividends or similar distributions unless these ratios are met.

Secured movable (personal) property

What are the requirements for creation and perfection of a security interest in movable (personal) property? Is a 'control' agreement necessary to perfect a security interest and, if so, what is required?

Different types of security interest entail different perfection formalities prescribed by the relevant laws. Typically, control provisions relating to a security interest are found in the relevant security instrument.

The creation of a security interest in movable (personal) property depends on the subject property. The instrument of security may be by a general or specific debenture, charge or assignment.

Under Malaysian law, an absolute legal assignment of rights must be in writing, and a written notice of such assignment must be given by the assignor to the counterparty for the lender as assignee to be entitled to make a direct claim to the counterparty in the event of the borrower's default.

The perfection of a security interest will generally also be subject to applicable stamping and registration requirements, including the lodgement with the Companies Commission of Malaysia and registration of the powers of attorney with the High Court.

Single purpose entity (SPE)

Do lenders require that each borrower be an SPE? What are the requirements to create and maintain an SPE? Is there a concept of an independent director of SPEs and, if so, what is the purpose? If the independent director is in place to prevent a bankruptcy or insolvency filing, has the concept been upheld?

Lenders do not generally require each borrower be an SPE. In project financing, however, a borrower is usually an SPE set up to hold project-related assets. Lenders commonly take security over the SPE shares by way of share charge to provide an alternative enforcement option. The concept of an independent director of SPEs to be appointed by lenders is not adopted.

UPDATE AND TRENDS

International and national regulation

Are there any emerging trends, international regulatory schemes, national government or regulatory changes, or other hot topics in real estate regulation in your jurisdiction?

Penang Island City Council has implemented guidelines on the operation of short-term rental accommodation in the State of Penang.

The Central Bank of Malaysia has announced the introduction of a standardised housing loan and home financing agreement for retail borrowers or customers.

** The authors would like to thank Janice Ooi, Tan Hui Wen, Rachel Chiah and Tiw Joe Yee for their contributions to this chapter.*