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RDS successfully hosted the launch of *“Shaping the Law – Commentaries on the Judgments of Justice Harmindar Singh Dhaliwal”* on 7 February 2026 at Hyatt Place Kuala Lumpur.

The event was officiated by the Chief Justice of Malaysia, YAA Datuk Seri Utama Wan Ahmad Farid Bin Wan Salleh, and was attended by members of the judiciary, legal practitioners, and invited guests from across the legal fraternity.

The programme commenced with the arrival of the Chief Justice, followed by a panel discussion titled *“Courts of Law, Courts of Justice?”*, which explored key issues relating to the administration of justice and the role of the courts. The discussion provided valuable insights into contemporary legal developments and judicial perspectives.

This was followed by a welcome address by En Rosli Dahlan, RDS Partner, who highlighted the significance of the publication in contributing to legal thought and practice. Dato’ S. Saravana Kumar, RDS Partner and Editor of the book, then delivered an introduction to the publication, outlining its objectives and the importance of documenting judicial reasoning.

Special remarks were subsequently delivered by Justice Tan Sri Datuk Harmindar Singh Dhaliwal, who shared reflections on his judicial tenure and the development of jurisprudence through his written judgments.

The highlight of the event was the official launch of the book by the Chief Justice of Malaysia, marking a significant contribution to Malaysian legal literature. The publication offers a curated collection of commentaries on selected judgments, providing practitioners and scholars with deeper insights into judicial reasoning and legal principles.

The event concluded with a musical performance and high tea reception, facilitating engagement and networking among attendees. This initiative reflects RDS continued commitment to advancing legal scholarship, promoting intellectual discourse, and supporting the development of the legal profession.

The keynote speech of the Chief Justice of Malaysia is published at next page of this magazine with his kind permission.

KEYNOTE SPEECH BY
THE RIGHT HONOURABLE
THE CHIEF JUSTICE OF MALAYSIA
**DATUK SERI UTAMA
WAN AHMAD FARID
BIN WAN SALLEH**
AT THE LAUNCH OF
"SHAPING THE LAW: COMMENTARIES
ON THE SELECTED JUDGMENTS OF JUSTICE
TAN SRI DATUK HARMINDAR SINGH
DHALIWAL"

Hyatt Place KL, Bukit Jalil
Saturday, 7th February 2026

Distinguished guests, ladies and gentlemen.

It is my profound privilege to stand before you today at the launch of this remarkable collection of commentaries on the judgments of Justice Tan Sri Datuk Harmindar Singh Dhaliwal.

We often speak of law as a system of rules and precedents, but law is far more than that. It is, as I wrote in my foreword, a living tapestry - woven thread by thread through reasoned judicial decisions. Each judgment, each carefully considered ruling, adds colour and texture to this tapestry. And few hands have woven more skilfully into our legal fabric than those of Justice Harmindar Singh.

What strikes me most forcefully about this collection is its extraordinary breadth. Twenty areas of law - from arbitration to constitutional law, from criminal procedure to family disputes, from company law to tort. This is not the work of a specialist who has mastered one narrow field. This is the achievement of a jurist who has brought wisdom and principled reasoning to every corner of our legal system.

Yet breadth alone is not what makes these judgments exceptional. It is the consistent thread of principle that runs through each decision. Whether Justice Harmindar Singh is addressing technical complexities or matters of grave human consequence, we see the same careful balance - between legal doctrine and human dignity, between jurisprudential rigor and practical justice.

Allow me to highlight one decision that exemplifies Justice Harmindar Singh's transformative impact on our law. In *Shahrudi Abidin v. Datuk Wira Abu Seman Yusop & Ors*, His Lordship revolutionised Malaysian preventive detention law. This was not judicial activism, nor was it the creation of law from whole cloth.



Rather, it was something far more valuable - the consolidation and strengthening of existing jurisprudence in service of constitutional protections.

In this corner, we had the executive - clinging to the ghost of Liversidge - essentially arguing that if they had followed the 'vibe' of the law, the court shouldn't be too bothered about the details. They treated the ouster clause like a 'Do Not Disturb' sign hung on the door of the Home Ministry.

But then stepped in Justice Harmindar Singh Dhaliwal.

If Lord Atkin was the man who refused to believe in Humpty Dumpty's dictionary, Justice Harmindar was the man who reminded the executive that a 'Get Out of Jail Free' card only works in Monopoly, not in Constitutional law.

The ratio of his decision was a masterclass in judicial housekeeping. He ruled that once a person is deprived of their liberty, the burden of proof doesn't just sit with the executive; it camps out on their doorstep. He made it clear that while the Minister might hold the keys to the cell, the Judiciary holds the measuring tape for the door.

Justice Harmindar effectively told the executive: "You can build your walls of secrecy as high as you like, but if the foundations of your procedure aren't level, the Court isn't here to admire the view - we're here to condemn the building - not because of want of CPC - but because it should not have been there in the 1st place'.

It turns out that eighty years after Atkin's lonely dissent, the 'Man on the Clapham Omnibus' has finally caught a flight to Kuala Lumpur. And he's still demanding to see the receipts.

By integrating public and private law remedies, by placing the evidentiary burden squarely on the state, by restricting ouster clauses to preserve judicial oversight, Justice Harmindar Singh reinforced the fundamental principle that our Constitution exists to protect the citizen, not to shield the state from accountability. This is purposive interpretation at its finest interpretation that honours both the letter and the spirit of our fundamental law.

But what truly distinguishes Justice Harmindar Singh's work is something that cannot be captured in legal citations or doctrinal analysis alone. It is his profound understanding that law exists not for its own sake, but in service of society's broader interests. His judgments reveal a jurist deeply attuned to how legal principles operate in the everyday lives of our citizens.

When ordinary Malaysians come before our courts - whether in disputes over property, in criminal trials, in family matters, or in constitutional challenges - they deserve judges who bring not only learning and logic, but also wisdom and empathy. Justice Harmindar Singh has exemplified these qualities throughout his distinguished career.



This collection serves multiple vital purposes. For practitioners, it is an invaluable guide to principled legal reasoning across diverse fields. For scholars, it offers insight into the development of Malaysian jurisprudence during a critical period in our nation's legal evolution. For students, it demonstrates what excellent judicial decision-making looks like in practice. For the aspiring judges, these are how good judgments should be written.

But perhaps most importantly, this book ensures that Justice Harmindar Singh's wisdom will continue to guide future generations. A jurist's legacy is measured not by the number of cases decided, but by enduring contributions to legal principle and justice. By that measure, the legacy we celebrate today is both substantial and lasting.

I commend this collection to all who seek to understand how law shapes society and how judicial wisdom contributes to the common good. I thank the editors and commentators whose scholarly work has made this volume possible. And I congratulate Justice Harmindar Singh on a judicial career that has truly enriched Malaysian jurisprudence.

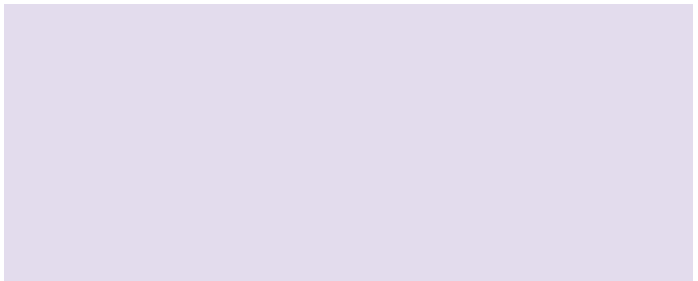
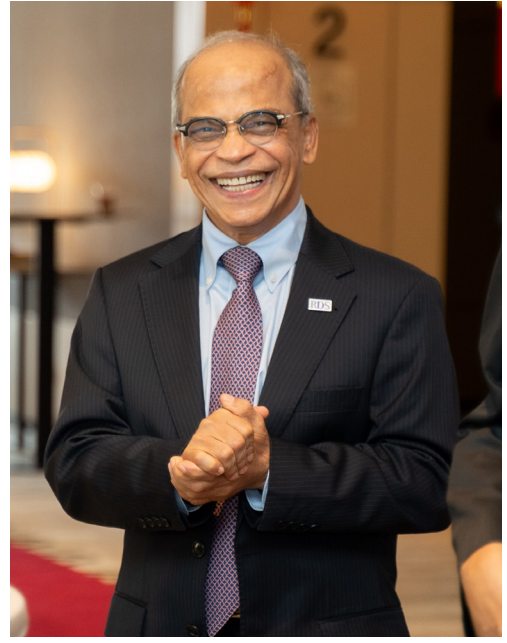
In closing, I would like to extend my gratitude to Sweet & Maxwell for their exceptional work in publishing this book. Their meticulous editorial standards and dedication to legal scholarship have long served our legal community with distinction. I trust they will continue to advance legal knowledge and provide invaluable resources to practitioners, academics, and students for years to come.

May this book serve its intended purpose - to educate, to inspire, and to ensure that the principles of justice, so carefully articulated in these pages, continue to illuminate the path forward for our legal system.

It is now my honour to officially launch this book.

Thank you.





REVISITING THE DOCTRINE OF TOTAL FAILURE OF CONSIDERATION: THE FEDERAL COURT DECISION IN *LIM SWEE CHOO & ANOR V ONG KOH HOU @ WON KOK FONG AND ANOTHER APPEAL*

by Rosli Dahlan & Ho Yu Fei

The landscape of Malaysian restitutionary law has, for over a decade, been defined by a significant doctrinal knot. Following the Federal Court decision in *Berjaya Times Squares Sdn Bhd (formerly known as Berjaya Ditan Sdn Bhd) v M Concept Sdn Bhd* [2010] 1 MLJ 597, our jurisprudence grappled with a conflation of the statutory right to terminate a contract for breach and the equitable right to seek restitution for a total failure of consideration. This conceptual overlap created a legal conundrum where the distinct tests for repudiation and unjust enrichment were collapsed into a single and often confusing legal framework.

In *Lim Swee Choo & Another v Ong Koh Hou @ Won Kok Fong* [2025] 6 MLJ 327, the Federal Court was presented with a timely opportunity to confront this disarray. By expressly overruling *Berjaya Times Square*, the Federal Court made a deliberate effort to untangle the conceptual confusion surrounding the doctrine of total failure of consideration, restating the proper test and clarifying the relationship between rescission and restitution.

Background Facts

The Appellants entered into a Sale and Purchase Agreement (SPA) dated 23 June 2015 with DA Land Sdn Bhd (DA Land) for the purchase of four parcels of land in Rawang (Rawang 4) for a total consideration of RM23 million. At the material time, both parties were aware that one of the four parcels was subject to a private caveat lodged by a third party. Under the SPA, the obligation to procure the removal of the caveat and to deliver vacant possession free from encumbrances rested with DA Land.

On 20 October 2015, the Appellants executed an Assignment Agreement to assign all their rights, title and interests in Rawang 4 to the Respondents for a purchase price of RM25.5 million with the consent of DA Land. Pursuant to an undated Supplemental Assignment Agreement, the consideration was to be paid in the following manner:

- RM20 million (being the sum paid by the Appellants to DA Land under the SPA) was to be set off against an existing debt owed by the 1st Appellant to the Respondent;
- RM3 million was to be paid by the Respondent directly to the Appellants; and
- RM2.5 million shall be treated as the Appellants' investment in Rawang 4, representing 4.5% of the value of the lands.

(The Assignment Agreement and the Supplemental Assignment Agreement are collectively referred to as the "Assignment Agreements")

On 24 May 2016, the Respondent entered into a SPA with DA Land, which was backdated to 1 October 2015, for the repurchase of three parcels of Rawang 4 (excluding the parcel encumbered by the caveat) for a purchase price of RM84 million ("Rawang 3") without the Appellants' knowledge. In that transaction, the Respondent declared the RM25.5 million consideration under the Assignment Agreements, of which RM23 million had been paid by the Appellants to DA Land under the SPA, as the deposit payable to DA Land.

A dispute subsequently arose between the Respondent and DA Land where the learned High Court judge held that DA Land was entitled to terminate the SPA and forfeit the RM23 million deposit due to the Respondent's failure to pay the outstanding balance of RM61 million by the completion date and his failure to seek any extension of time.

In that suit, the High Court further found that the Respondent was an unlicensed moneylender and the supplementary agreements entered into between the Respondent and DA Land which formed part of the SPA were sham transactions tainted with illegality. The Respondent's appeal to the Court of Appeal was dismissed, and his subsequent application for leave to appeal to the Federal Court was also refused (Suit).

On 15 June 2020, the Appellants commenced the present proceedings seeking, inter alia, a declaration that the Respondent had breached the Assignment Agreements and claiming the outstanding sum of RM2.5 million as special damages. The Respondent, on the other hand, counterclaimed for the return of RM23 million.

The Parties' Contention

The Appellants' case rested upon the Respondent's purported breach of the Assignment Agreements by entering into a separate SPA with DA Land for the purchase of Rawang 3 at RM84 million without their knowledge. The Appellants argued that this unilateral act had caused the diminution of the Appellants' RM2.5 million investment in Rawang 4 given that the Respondent subsequently lost all rights, interest and title in Rawang 3 pursuant to the High Court's findings in the Suit.

The Respondent argued that he had been induced into executing the Assignment Agreements by the Appellants' failure to disclose a prior sale of one of the parcels within Rawang 4 to a third party. The Respondent claimed that such concealment

compelled him to sever his dealings with the Appellants and to independently enter into the RM84 million SPA with DA Land in order to safeguard his own interests.

The Respondent further contended that the SPA between the Appellants and DA Land was a sham transaction intended to disguise an illegal moneylending arrangement where Rawang 4 was used as a collateral for an unlawful loan of RM20 million. On this footing, the Respondent argued that the Appellants possessed no lawful or assignable rights under the SPA from the outset. Consequently, the Assignment Agreements, which were the products of the illegal moneylending transaction, were illegal and void.

High Court & Court Of Appeal Findings

The High Court dismissed both the Appellants' claim and the Respondent's counterclaim. Dissatisfied, both parties filed their respective appeals to the Court of Appeal. The Court of Appeal subsequently dismissed the Appellants' appeal while allowing the Respondent's appeal.

Read together, the decisions of the High Court and Court of Appeal established the following findings:

- a) The Appellants' SPA with DA Land dated 23 June 2015 and the Assignment Agreements executed between the Appellants and the Respondent were valid and binding as the Respondent failed to discharge his burden of proof to show that the said SPA and the Assignment Agreements were tainted by illegal moneylending activities; and
- b) Both courts relied heavily upon the precedents of *Berjaya Times Squares and Damansara Realty Bhd v Bungsar Hill Holdings Sdn Bhd & Anor* [2011] 6 MLJ 464 in dismissing the Appellants' claim against the Respondent on the basis of total failure of consideration given that the Respondent was no longer able to acquire the entirety of Rawang 4.

Leave Questions Before The Federal Court

The Federal Court granted leave to the Appellants to appeal on the following questions of law:

1. whether the Respondent could invoke the doctrine of total failure of consideration to recover RM23 million which sum had previously been adjudged irrecoverable as part of an illegal moneylending transaction where the Respondent was found to be an unlicensed moneylender?;
2. whether the doctrine of total failure of consideration could be invoked to recover RM23 million where the Respondent himself was found by the High Court to have caused the loss on which the Respondent had based his claim?;
3. whether the doctrine of total failure of consideration could be invoked in circumstances where there has been performance or part-performance of the

- contract and where the claimant has received benefit from the contract?;
4. whether the correct test of a total failure of consideration is as stated by the House of Lords in *Stocznia Gdanska SA v Latvian Shipping Co* and others [1998] 1 All ER 883, namely ‘whether the promisor has performed any part of the contractual duties in respect of which payment is due’ and not the test of ‘whether the party in default has failed to perform his promise in its entirety’ applied in *Berjaya Times Squares*?;
 5. whether the Federal Court in *Berjaya Times Square* is no longer a good law as it has wrongfully conflated the right of rescission of a contract with the right to seek restitution?; and
 6. whether the doctrine of total failure of consideration is inapplicable where there has only been a partial failure of performance, or where the claimant has derived some benefit from the contract, thereby confining the claimant to a remedy in damages rather than restitution, consistent with the cases of *Phang Quee v Virutthasalam & Ors* [1965] 2 MLJ 166 and *Baltic Shipping Co v Dillon* (1993) 111 ALR 289.

Decision Of The Federal Court

Restatement Of The Law On Termination And Total Failure Of Consideration

In *Lim Swee Choo*, the Federal Court took a bold step of expressly overruling its earlier decision in *Berjaya Times Square* which had wrongfully conflated the right to terminate a contract for breach with the right to claim restitution. In restoring analytical clarity, the Federal Court held that:

“[74] *In our considered view, the right to terminate a contract for repudiation under s 40 does not depend on the question whether there is a total failure of consideration but rather the test is whether the actions of the party in default would lead a reasonable person to conclude that he no longer intends to be bound by the contract (Rasiah Munusamy v Lim Tan & Sons Sdn Bhd [1985] 2 MLJ 291 (SC)). To our mind, the notion of total failure of consideration should not inform the interpretation of s 40.*

[75] *Only after resolving the issue of termination under s 40 does it become relevant to consider whether the innocent party may bring an action in restitution for money had and received, and in this respect, whether there has been a total failure of consideration. It seems to us that the doctrine of total failure of consideration is confined to cases concerning the availability of restitutionary relief rather than being used to determine whether the innocent party has a right to terminate a contract for breach and for claim in damages for breach. Therefore, in our considered view, the cause of action in contract for fundamental breach giving rise to a right to terminate is separate and independent of the cause of action in restitution for the recovery of monies where there is a total failure of consideration.”*

In essence, the Federal Court reinstated that breach of contract or repudiation giving rise to the right to terminate is governed by its own test and set of principles that are entirely distinct from those of restitution based on unjust enrichment. The question of whether an innocent party may recover monies paid on the basis of a total failure of consideration arises only after the issue of termination has been determined.

Leave Questions 1 & 2

The Federal Court affirmed the concurrent findings of the High Court and Court of Appeal that the Respondent failed to prove that the Appellants' SPA with DA Land dated 23 June 2015 was an illegal moneylending transaction or that the Assignment Agreements were tainted by such illegality. As the agreements were valid and binding, the parties' rights and liabilities continued to be governed by their contractual terms, thereby leaving no room for restitutionary relief.

The Federal Court also found that the Respondent had entered into the Assignment Agreements with full knowledge of the existence of the private caveat. Accordingly, the Respondent could not rely on the private caveat as a pretext to circumvent the legal effect of the Assignment Agreements and to justify the subsequent execution of a separate SPA with DA Land.

The Respondent was thus precluded from invoking the doctrine of total failure of consideration to recover the RM23 million as that sum had previously been held to be non-recoverable in earlier proceedings where the Respondent was declared an unlicensed moneylender. Further, the Respondent is not entitled to pursue recovery on the same equitable principle where the Respondent was the party who had caused the loss on which his claim for total failure of consideration was founded.

For these reasons, the Federal Court answered Leave Questions 1 and 2 in the negative.

Leave Questions 3 & 6

The Federal Court reiterated the settled principle that there can be no refund of monies paid under a contract where there has not been a total failure of consideration. In *Lim Swee Choo*, there was no total failure of consideration as there had been performance or part performance by the Appellants of their contractual duties by assigning all their rights, title and interest in Rawang 4 and in the SPA to the Respondents with DA Land's knowledge and consent. The Respondent was said to have received the contractual benefit for which the RM25.5 million consideration was due.

The Federal Court further held that the Respondent had breached the Assignment Agreements by entering into the SPA with DA Land for Rawang 3 which was later found to be an illegal moneylending transaction and which, in turn, resulted in the Respondent losing all rights, interest and title to the lands in Rawang 3. The Respondent's breach had deprived the Appellants of the RM2.5 million investment benefit forming part of their consideration under the Assignment Agreements.

Any purported failure of consideration was thus self-induced, and the Respondent could not invoke the equitable doctrine of total failure of consideration to recover monies lost by virtue of his own misconduct.

The Federal Court accordingly answered Leave Questions 3 and 6 in the negative.

Leave Questions 4 & 5

The Federal Court observed that, following *Berjaya Times Square* and *Damansara Realty*, the Malaysian jurisprudence had taken a doctrinal turn by conflating the doctrine of total failure of consideration with the right to rescind or terminate a contract for breach, thereby leaving the applicable tests governing both areas of law in a state of uncertainty.

The Federal Court also held that *Berjaya Times Square* had adopted an erroneous formulation of the test for determining whether there has been a total failure of consideration, namely “*whether the party in default has failed to perform his promise in its entirety.*” Relying on the House of Lords’ decision in *Stocznia Gdanska*, the Federal Court reaffirmed the proper test is “*whether the promisor has performed any part of the contractual duties in respect of which the payment is due.*”. Accordingly, *Berjaya Times Square* can no longer be regarded as good law.

The Federal Court therefore answered Leave Questions 4 and 5 in the affirmative.

Commentary

The decision in *Lim Swee Choo* marks a watershed moment in Malaysian restitutionary jurisprudence. For years, the decisions in *Berjaya Times Square* and *Damansara Realty* had unwittingly created a doctrinal fog by conflating the principles governing contractual termination with those governing restitution for a total failure of consideration. As a result, courts and practitioners alike were left navigating a framework where the doctrinal signposts no longer pointed in clear or coherent directions.

In unravelling this doctrinal knot, the Federal Court in *Lim Swee Choo* has restored the proper boundaries between these two areas of law and realigns Malaysian jurisprudence with well-established common-law principles. It is a decision that will undoubtedly guide practitioners, influence future litigation strategy, and serve as an authoritative reference on the doctrine of total failure of consideration for years to come.

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MALAYSIA – SINGAPORE RENEWABLE ELECTRICITY EXPORTS: LEGAL AND REGULATORY CONSIDERATIONS FOR INVESTORS

by Kamilah Kasim & Cheryl Ng Wen Xuan

Malaysia's move to allow cross-border renewable energy (RE) electricity exports presents a significant opportunity for investors in the region. Following the issuance of the third edition of the Guide for Cross-Border Electricity Sales (CBES Guide), investors are increasingly evaluating privately sponsored, project-financed renewable energy projects for sale into Singapore's market¹

This article outlines the principal legal and regulatory considerations relevant to cross-border renewable electricity export opportunities between Malaysia and Singapore.

No Project Ownership Restrictions

There are presently no express Malaysian ownership requirements under the Electricity Supply Act 1990 (Electricity Supply Act)², as amended by the Electricity Supply (Amendment) Act 2025 (Amendment Act 2025)³, or the CBES Guide. A licensee may, in principle, be approved as 100% foreign-owned, subject to the Energy Commission's licensing discretion and any future policy developments. Cross-border export projects are generally not procured under domestic renewable energy quota programmes and are therefore not, as a matter of current policy, subject to prescribed ownership or consortium participation requirements. Under the prevailing licensing framework, such projects may be structured as 100% foreign-owned entities.

This position is subject to qualification. Where a project is developed under a Government procurement or quota programme, the applicable programme guidelines may impose equity participation requirements. The Large-Scale Solar programme has, in certain rounds, included Malaysian equity participation requirements.⁴ Investors should therefore confirm whether the proposed project falls within any programme framework that prescribes such conditions.

Licensing Requirements: Public Generation Licence And Export Licence

The Amendment Act 2025 introduced a dedicated statutory framework under Part IVA governing the importation of electricity and exportation of electricity. Under Malaysian law, a project company intending to generate and export

¹ Energy Commission (Malaysia), *Guide for Cross-Border Electricity Sales* (3rd edn, April 2024), s 11.

² Electricity Supply Act 1990 (Act 447).

³ Electricity Supply (Amendment) Act 2025 (Act A1775).

⁴ Energy Commission (Malaysia), *Guidelines on Large Scale Solar Photovoltaic Plant for Connection to Electricity Networks* (2016) https://www.st.gov.my/contents/publications/guidelines_electricity/2017/Guidelines%20on%20Large%20Scale%20Solar%20Photovoltaic%20Plant%20for%20Connection%20t%20Electricity%20Networks_Feb2017.pdf accessed 22 February 2026, para 8.

electricity must hold:

- (a) a Public Generation Licence under Section 9 of the Electricity Supply Act; and
- (b) an importation of electricity or exportation of electricity licence under Section 22D of the Electricity Supply Act.

Public Generation Licence

A Public Generation Licence may only be held by a company incorporated in Malaysia, although such company may be 100% foreign-owned.⁵ The Energy Commission retains broad statutory discretion to impose licence conditions on a case-by-case basis.

Typical licence conditions include requirements relating to:

- (a) obligations on the licensee to construct, operate and maintain the facility, generate and supply electricity in accordance with applicable law, and comply with applicable safety, reliability and regulatory requirements;
- (b) construction milestones and technical specifications;
- (c) commissioning and completion timelines;
- (d) compliance with prescribed voltage, frequency and electricity quality standards under the Electricity Regulations 1994 and any subsidiary legislation made under the Electricity Supply Act, the Grid Code, and directions issued by the Energy Commission;
- (e) rights of inspection, entry and regulatory intervention exercisable by the Energy Commission;
- (f) restrictions on changes in shareholding or control;
- (g) non-transferability of the licence without regulatory approval;
- (h) insurance requirements;
- (i) payment of prescribed fees;
- (j) review and variation of licence conditions, including in response to changes in law; and
- (k) circumstances that may lead to suspension or revocation of the licence.

Importation Of Electricity Or Exportation Of Electricity Licence

To apply for an importation of electricity or exportation of electricity licence, the Malaysian project company, as Exporter, is generally required to submit the following to the Energy Commission:

- (a) a letter of approval issued to the purchaser by the relevant authority of the importing jurisdiction;
- (b) a duly executed supply agreement;
- (c) a duly executed system access agreement, where applicable; and
- (d) such additional information or documentation as the Energy Commission may require in connection with the licence application.

The Commission may grant such licence with the approval of the Minister and may impose additional or varied terms and conditions having regard to its statutory duties. All provisions of the Act applicable to a licensee under Section 9 of the

⁵ Energy Commission (Malaysia), *Guidelines on Licence Application under the Electricity Supply Act 1990 (Act 447) (2024)* <https://www.st.gov.my/contents/files/download/153/GUIDELINES%20ON%20LICENCE%20APPLICATION.pdf> accessed 22 February 2026, para 4.1.

Electricity Supply Act apply equally to an importation of electricity or exportation of electricity licensee.

The Electricity Supply Act imposes statutory restrictions on such licences, including:

- (a) a maximum validity period of twenty-one years unless extended with the express approval of the Minister; and
- (b) a prohibition on transfer without the prior written consent of the Minister.

Exporting electricity without a licence, or failing to comply with licence conditions, constitutes a criminal offence and may attract significant penalties, including substantial fines and imprisonment.⁶

From an investment perspective, the twenty-one-year validity cap should be considered alongside the intended financing tenor and any long-term corporate procurement arrangements, particularly where investors contemplate infrastructure-style capital structures extending beyond the default licence duration.

Land, Planning And Environmental Approvals

A project company must obtain the land, planning and construction approvals applicable to power generation projects in Malaysia. These requirements arise from general land use, planning and environmental regulation and are not specific to renewable energy projects.

Development Order And Planning Approvals

A Development Order is required prior to the commencement of construction.⁷ Where the project site is classified as agricultural land, the project company may require either a change of land use,⁸ or a special permit from the relevant State Authority to permit the construction and operation of a power plant.⁹ Requirements vary by State and project characteristics but commonly arise in connection with utility-scale developments.

Environmental Approvals

Approvals under the Environmental Quality Act 1974 may be required depending on the size and nature of the project.¹⁰ An Environmental Impact Assessment (EIA) is mandatory where the project falls within the prescribed activities and thresholds under the Environmental Quality (Prescribed Activities) (Environmental Impact Assessment) Order 2015. This includes fossil-fuel or combined-cycle power plants of 10 MW or more and certain transmission lines in environmentally sensitive areas. Renewable generation facilities are not uniformly prescribed by reference to technology alone. However, associated land-use changes, ancillary works or related transmission infrastructure may independently trigger EIA requirements. These requirements apply irrespective of whether the project is domestic or export-oriented and should be reflected in the development timetable.

⁶ *Electricity Supply (Amendment) Act 2025 (Act A1775), Amendment of Section 37.*

⁷ *Town and Country Planning Act 1976 (Act 172) (as at 1 June 2021), s19(1).*

⁸ *National Land Code (Act 828) (Revised 2020), s52 and s124.*

⁹ *National Land Code (Act 828) (Revised 2020), s115(4)(f)-(g).*

¹⁰ *Environmental Quality Act 1974 (Act 127) (as at 7 July 2024), s34A.*

Register To Participate In The Exchange, And Enter Into A Renewable Energy (RE) Supply Agreement, To Sell Electricity For Export

Electricity exports from Malaysia are governed by the CBES Guide read together with the Electricity Supply Act and the Amendment Act. The CBES Guide distinguishes between the CBES Scheme for non-renewable exports and the CBES-RE Scheme for renewable exports.¹¹

The Amendment Act 2025 also introduced the statutory concept of a Market Operator under Section 22C. The Minister may authorise a Market Operator responsible for the management, scheduling and settlement of electricity transactions, and such Market Operator is subject to statutory obligations, including non-discriminatory conduct and compliance with applicable codes and directions.

Under the CBES-RE Scheme, renewable exports are conducted through an exchange administered by the Single Buyer rather than through bilateral power purchase agreements. The Single Buyer procures and sells renewable electricity through competitive processes, schedules delivery, settles transactions and verifies associated green attributes, including the issuance and redemption of renewable energy certificates.

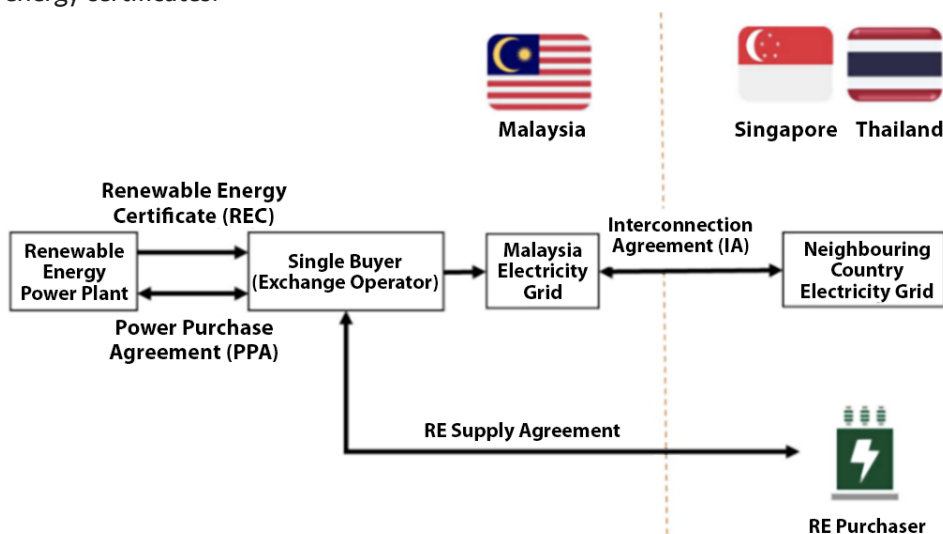


Figure 1: CBES RE Scheme

Exporters must generate and deliver electricity strictly in accordance with the dispatch schedule approved by the Single Buyer, with dispatch executed by the Grid System Operator under the Grid Code. Once approved, export capacity and scheduled energy are treated as firm for scheduling and dispatch purposes under the CBES framework. Delivery takes place through the existing Malaysia–Singapore interconnection, currently up to 300 MW into Singapore, with bundled delivery of electricity and renewable energy certificates. Eligible sources include solar, hydro and other renewable technologies approved by the Energy Commission.¹²

Although export schedules are treated as firm for scheduling and dispatch purposes, the framework does not establish a separate statutory regime guaranteeing

¹¹ Energy Commission (Malaysia), *Guide for Cross-Border Electricity Sales* (3rd edn, April 2024), cl 11.

¹² Energy Commission (Malaysia), *Guide for Cross-Border Electricity Sales* (3rd edn, April 2024), cl11.6.

priority or compensated firm interconnector access for private exporters. Export availability remains subject to system security constraints, Grid Code provisions and prevailing network conditions.

From a contractual perspective, the Singapore project company, as Importer, contracts with the Single Buyer, while the Exporter participates in the exchange as a registered bidder. The Single Buyer administers scheduling based on auction outcomes, and the Grid System Operator manages dispatch and system balancing in accordance with the Interconnection Agreement and the Grid Code.¹³

Under Section 50C of the now amended Electricity Supply Act, the Commission may issue binding guidelines relating to the importation and exportation of electricity and to green attributes, including ownership, verification and certification. Non-compliance with such guidelines constitutes an offence under the Act.

Under the CBES-RE settlement mechanics, deviations between scheduled and actual delivery may result in imbalance treatment and associated charges. Exporters should therefore assess the allocation of imbalance and scheduling risk, particularly where deviations arise from domestic system constraints, interconnector limitations or other operational factors beyond the generator's control.

Regulatory Discretion And Change In Law Exposure

The statutory framework governing electricity generation and export in Malaysia confers broad discretionary powers on the Energy Commission and the Minister. Both the Public Generation Licence and the importation of electricity or exportation of electricity licence may be granted subject to such terms and conditions as appear requisite or expedient having regard to the Commission's statutory duties. The Commission may also, with Ministerial approval, impose additional conditions or amend existing licence conditions in accordance with prescribed procedures.

This discretionary structure is consistent with Malaysia's broader electricity regulatory regime but has implications for long-term export projects structured on a project-financed basis. Licence conditions may address technical standards, operational requirements, reporting obligations, system security measures, environmental compliance, ownership changes and other regulatory matters. The potential for licence condition variation introduces regulatory change risk that must be considered alongside financing tenor and contractual commitments to offtakers.

In addition to licence condition variation, the Act empowers the Energy Commission to issue guidelines relating to importation of electricity, exportation of electricity and green attributes. Such guidelines may address verification, certification, ownership determination and other operational matters. Non-compliance with such guidelines constitutes an offence under the Act. As guidelines may evolve over time in response to policy or system developments, investors must assess the risk of regulatory recalibration affecting dispatch treatment, settlement mechanics or attribute recognition.

¹³ Energy Commission (Malaysia), *Guide for Cross-Border Electricity Sales* (3rd edn, April 2024), s11.9.

Change in law risk is particularly relevant in the context of cross-border electricity exports. Export projects operate at the intersection of Malaysian domestic regulation and Singapore's import framework. Regulatory developments in either jurisdiction may affect dispatch treatment, curtailment exposure, environmental attribute eligibility or contractual performance obligations. Where long-term offtake arrangements are contemplated, project documentation should address allocation of change in law risk, including adjustments for regulatory costs, compliance obligations and modification of technical standards.

The statutory recognition of a Market Operator under Section 22C further embeds export transactions within a regulated market structure subject to codes, directions and system governance requirements. Market design, scheduling rules and settlement methodologies may evolve over time. Investors should therefore consider whether contractual frameworks sufficiently address market rule changes and associated economic impacts.

Although the current framework provides a structured and legally grounded pathway for renewable electricity exports, it remains capable of refinement as cross-border electricity trade expands. Regulatory discretion, guideline issuance powers and system security considerations create a dynamic environment. Sophisticated investors and lenders should therefore incorporate regulatory due diligence, compliance monitoring mechanisms and adaptive contractual provisions into project structuring.

Conclusion

Malaysia's CBES-RE framework provides a viable legal pathway for cross-border renewable electricity exports and creates a clear opportunity for privately sponsored projects. However, the regime remains in development and continues to evolve.

In the interim, investors must structure projects within the existing Malaysian regulatory framework while aligning with Singapore's import requirements. Careful allocation of regulatory, operational and change-in-law risks will be critical to bankability. As further regulatory guidance and project precedents emerge, greater clarity is expected, which should strengthen the commercial and financing landscape for Malaysia – Singapore renewable electricity export projects.

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FROM DOCTOR TO HOSPITAL TO PIC: A SIGNIFICANT SHIFT IN MEDICAL LIABILITY

by Vinayak Sri Ram & Genevieve Vanniasingham

A “person in charge” (PIC), as defined under Section 32 of the Private Healthcare Facilities and Services Act 1998, is an individual who possesses such qualifications, training, and experience as may be prescribed and who is responsible for the management and control of the private healthcare facility or service to which a licence or registration relates.

In *Nur Fuziatun binti Mohd Fadzli v Gombak Medical Centre Sdn Bhd & Ors* [2025] MLJU 4319, the Court of Appeal provided important clarification regarding the scope of a PIC’s liability. The Court was tasked with determining whether a PIC, who bears a statutory duty to manage and control a private healthcare facility, owes a tortious duty of care to the patients of that facility.

The Plaintiff’s Claim

The plaintiff, a minor, claimed to have suffered brain damages arising from the circumstances of her birth, resulting in cerebral palsy. Amongst the allegations of negligence, were failures relating to the hospital’s referral system, absence of qualified specialists on standby, failure to diagnose fetal distress and the negligent undertaking a vacuum-assisted delivery. She sued the three respondents through her father and litigation representatives, namely:

- (i) 1st Defendant: Gombak Medical Centre Sdn Bhd (GMC), a private medical facility where the plaintiff was delivered. GMC issued a notice of contribution and indemnity against the 2nd and 3rd Defendants.
- (ii) 2nd Defendant: the PIC of GMC and head of the Obstetrics and Gynaecology Department.
- (iii) 3rd Defendant: the doctor who undertook the delivery of the plaintiff.

High Court Dismisses Claim

The High Court dismissed the entirety of the Plaintiff’s claim and struck out the notice of contribution, finding no negligence on the part of the 3rd Defendant and that causation had not been proven and consequently, the claim against the 1st and 2nd Defendants was dismissed as academic.

The High Court held, amongst others, that the absence of complete cardiotocography records prevented the court from finding the 3rd Defendant had acted in any way negligently. The Court further held that the presence

of light meconium-stained liquor does not provide conclusive proof that a foetus is in distress. With regard to the vacuum extraction delivery, the Court found that the delivery was carried out in accordance with accepted medical standards.

The Court Of Appeal: Systemic Failures

The Court of Appeal allowed the appeal against the 1st and 2nd Defendants and dismissed it against the 3rd Defendant, affirming that there was no negligence in the 3rd Defendant's diagnosis or delivery.

The Court held that the 2nd Defendant, as the PIC and head of the Obstetrics and Gynaecology Department owed a duty of care in tort to patients, to take reasonable care in the running of the hospital so as to prevent its patients from harm. The Court held that there existed sufficient proximity between the 2nd Defendant and the Plaintiff as to give rise to a duty of care owed by the 2nd Defendant to the Plaintiff.

The Duty To Make Available Paediatric Care

The Court of Appeal held that there existed a duty on both the 1st and 2nd Defendants to ensure that there would be timely access to all medical experts (including specialists in anaesthesiology and neo-natal care) as would be necessary to deal with complications that could reasonably be expected to arise at childbirth. This duty does not extend to the 3rd Defendant, as the physician undertaking the delivery of the baby.

The Delay To Transfer

The Plaintiff argued that the delay in transferring the Plaintiff to a hospital that had appropriate neo-natal intensive care facilities constituted a breach of the duty that was owed by the Defendants to the Plaintiff.

On 17.06.2014 at midnight, the Plaintiff was born. She was transferred to Hospital Pusrawi at 6:00am. Both experts in this case agreed that there was a delay on the part of the Defendants to refer the Plaintiff to a facility that had a neo-natal intensive care unit, or at least to have the Plaintiff to be monitored, assessed and managed by a paediatrician within the first 6 hours of birth.

The Court held that there had been an unacceptable delay in transferring the Plaintiff and that this delay breached the duty of care that was owed by the 1st and 2nd Defendants to the Plaintiff. In as far as the 3rd Defendant, the Court was satisfied that she had done all that she could have in the circumstances to ensure that the Plaintiff received the appropriate care in a timely manner, this included calling tertiary hospitals at around 2:30am and was unable to get a government hospital that would accept the transfer. It was only after she obtained the agreement of the father to ask a private hospital was she able to secure a place at Pusrawi at about 5:00am.

Failure To Diagnose Fetal Distress: Cardiotocography & Meconium Stain

The Court of Appeal asserted that the use and timing of CTG and Doppler monitoring were consistent with accepted practice. Light meconium alone did not require emergency caesarean section under any guideline. The 3rd Defendant's note "CTG still acceptable" showed ongoing monitoring throughout the 2nd stage of labour via a cardiotocogram.

The Court held that the fact that the 3rd Defendant had not proceeded with a caesarean section delivery did not constitute a breach of the duty of care owed by her to the Plaintiff. Further, the vacuum extraction technique stayed well within internationally recommended standards on pulls, cup detachments and time limit.

Causation

The Court found that the breach of duty on the part of the 1st and 2nd Defendants to provide timely access to neo-natal intensive care facilities materially and adversely contributed to the Plaintiff's condition. This was also the unanimous view of the experts who testified in this case.

The Court of Appeal allowed the appeal against the 1st and 2nd Defendants, dismissed the appeal against the 3rd Defendant, and directed that the case be sent back to the High Court for assessment of damages before a different judge, with the 1st and 2nd Defendants held jointly and severally liable for damages, pre and post-judgment interest, and RM100,000 in costs to the Plaintiff, while the Plaintiff was ordered to pay RM40,000 costs to the 3rd Defendant.

Commentary

A significant broadening of the scope of medical negligence, this case recognises and affirms the concept of system-based liability. The responsibilities of a PIC are operational and accountable, rather than merely titular. Oversight of staffing, referral systems, access to specialists may attract personal liability, even in the absence of a strict doctor-patient relationship.

In a claim for negligence, a Plaintiff must establish: (i) the existence of a duty of care; (ii) there was a breach of that duty; (iii) the breach caused damage; and (iv) that the damage was not too remote, in that it was a reasonably foreseeable consequence of the breach. In this case, it was established that the duty extended to the 2nd Defendant in his capacity as a PIC, requiring him to take reasonable care in the operation and management of the hospital facilities to prevent harm. At common law, a duty arose on the part of both the 1st and 2nd Defendants to ensure timely access to all medical specialists as would be necessary to deal with complications that could reasonably anticipated in childbirth.

The Court found that this duty was breached. A paediatrician specialising in neonatal care was not made available, whether on-call or for immediate consultation, at the

time of delivery. Further, there was a delay in transferring the Plaintiff to a hospital equipped with neonatal intensive care facilities. These were not treated as isolated clinical misjudgments, but as systemic failures in planning, access, and escalation protocols.

The harm did not arise solely from an individual act or omission in the delivery room, nor was liability confined to the treating practitioner. The absence of direct patient interaction will not insulate a PIC from liability where the alleged negligence arises from operational deficiencies within his or her remit.

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THE UNCHANGING FOUNDATION OF ISLAMIC FINANCE: A *MAQASID AL-SHARIAH* PERSPECTIVE

by Hurriyyah Kamaruzzaman & Nur Iman Mohd Radzi

Conventional banking has demonstrated a remarkable capacity for institutional learning. Each major financial crisis, from the savings and loan collapse of the 1980s, to the Asian financial crisis of 1997, to the Global Financial Crisis of 2008 and 2009, has prompted policymakers and financial institutions to collectively undertake reform.

In its aftermath, the financial institution has responded with stronger prudential standards and more refined risk management practices. Conventional banking adapts, rebuilds and strengthens itself in response to failure, and The Basel Accords is the testament of this evolution.

In recent years, the financial world has turned its attention to the concept of ethical finance. Ethical finance is a framework within sustainable finance that demands banking institutions to do something beyond economic profitability. It further asks how financial activity affects society, governance, environment, and future generations. The language used is varied – green finance, social banking, sustainable development finance; however, the underlying principle is consistent: to align the financial institution's conduct with a broader set of human values. In many aspects, this places ethical finance in the same conversation with Islamic finance.

Nevertheless, Islamic finance operates from a different premise altogether. It does not adapt its ethical characteristics in response to any crisis as the core principle itself is never designed to be adaptable in the very first place. It is fixed, and this article explores why those foundations are fixed and what framework they are anchored to.

Two Systems, One Goal: Where Conventional And Islamic Finance Part Ways

Both conventional and Islamic finance shared the same purpose: to act as a financial intermediary, mobilising capital from those who hold it to those who need it and facilitating productive economic activity in the process. Both are subject to regulatory scrutiny and have developed sophisticated products, documentation frameworks, and risk management methodologies over decades of practice. Neither is inferior to the other and in jurisdictions such as Malaysia, these 2 systems operate side by side.

What sets them apart is not their purpose, but rather the source and permanence of their ethical constraints.

For conventional finance, ethical standards are subject to revision. The ESG (Environmental, Social and Governance) framework is now widely used by many parties, including financial institutions, to assess its financial products and corporate behaviors. Yet, ESG as a formalised concept only took place in the mid-2000s. For example, the first green bond was issued by the European Investment Bank in 2007, and green finance gained meaningful traction only in 2015, following the Paris Agreement. Each of these developments reflects a commendable effort to align financial activity with evolving human values. But they also demonstrate that – what conventional finance considers ethical is continuously renegotiated; it can be through regulatory reform, market practice, investor preference and public pressure. What the market considers responsible or ethical today may be regarded as misdirection, a decade from now.

By contrast, Islamic finance outlines its ethical constraint from a jurisprudential framework that precedes modern financial markets. The prohibition on interest/usury (*riba*), the prohibition on uncertainty (*gharar*), and the prohibition on speculation (*maysir*) are some of the structural features derived from the primary sources of Islamic law/Shariah, namely *Quran* and *Sunnah*.

Crucially, Islamic finance does not face the same contingency as its counterpart. For example, the prohibition on interest/usury (*riba*) has not been relaxed in response to low-interest rate environments, and the prohibition on uncertainty (*gharar*) has not been suspended to cater for derivative markets. *Shariah* Committee or Supervisory Board is also not empowered to revise these to suit prevailing market conditions. This raises the main question: what is the source of these constraints, and what is the framework used?

The answer lies in what Islamic jurisprudence called it as *Maqasid Al-Shariah*.

Maqasid Al-Shariah: The Objectives Of Islamic Law

The concept of *Maqasid Al-Shariah* translates literally as the Objectives of Islamic Law. Its primary purpose is the realisation of benefit to people, in their worldly affairs and beyond, together with the prevention of harm, corruption and injustice. This concept was developed by Imam Al-Syatibi, one of the leading legal theorists of his time, where its underlying spirit is deeply rooted in the Quranic verse: “And we have sent You (O Muhammad) not but as a mercy for the alamin (mankind, jinns and all that exists)” (Al-Anbiya’, 21:107).

This purposive dimension also has received formal regulatory recognition in Malaysia. In November 2023, the Securities Commission Malaysia (SC) issued the *Maqasid Al-Shariah* Guidance for the Islamic Capital Market – a framework designed to complement existing Shariah requirements. As the SC Chairman stated at its launch, the Guidance reflects the concept of *halal* and *tayyib*, products and services should be permissible and at the same time, beneficial, sustainable and good for society. The Guidance is structured around six (6) aspirations: Humanity, Justice and Benevolence, Clarity and Transparency, Flexibility and Innovation, Fiduciary

and Accountability, and Accessibility and Inclusivity. Each aspiration maps directly onto the *Maqasid Al-Shariah*. Furthermore on 9 March 2026, the SC had launched the Malaysia's Capital Market Masterplan 2026-2030 which placed *Maqasid Al-Shariah* principles as the anchoring governance for the Islamic Capital Market.

To fully appreciate what that mapping entails, it is necessary to understand the classical structure of *Maqasid Al-Shariah*. Islamic jurisprudence organises the *Maqasid Al-Shariah* into three (3) categories of priority. The first and most critical is the essentials (*daruriyyat*), those interests whose neglect would lead to fundamental disorder in human affairs. The second is the complementary (*hajiyyat*), interests that while not essential to survival, remove hardship and facilitate ordinary human life. The third is the embellishments (*tahsiniyyat*), matters of refinement that enhance the quality of life beyond what is merely comfortable. For the purpose of this article, the focus is on the first category: the five (5) essential values that the *Maqasid Al-Shariah* is designed, above else, to protect.

The Five Essential Values Of *Maqasid Al-Shariah* In The Context Of Islamic Finance

The five essentials represent those interests without which neither the individual nor society can function. Their neglect does not merely cause inconvenience; it produces fundamental harm to the fabric of human life.

1. Protection of Faith

The preservation of faith is the most important thing that leads people to embrace the presence of Allah SWT in every human undertaking, acts or omissions. In the context of Islamic finance, it reflects the principle that financial activity must not be divorced from moral ethics, transactions that exploit, deceive or cause systemic harm are inconsistent with this objective. It gives rise to the institutional requirement of independent *Shariah* supervisory committee, whose mandate is purposive, rather than merely procedural.

2. Protection of Life

The preservation of life extends beyond physical survival. In financial terms, this translates to the obligation that the system must not create conditions that endanger livelihoods. *Takaful* is a direct expression of this objective, as it is organised around mutual contributions, where participants collectively pool risk, and any surplus is redistributed rather than being retained as a profit. Not only that, contemporary scholars have also extended this protection to encompass the natural environment as the preservation of life cannot be meaningfully achieved in an ecosystem that is degraded, polluted or depleted.

Key products: General *Takaful* for property and liability coverage, Family *Takaful* for life and critical illness protection, Medical *Takaful* structured under *Wakalah* or *Mudarabah* model, ensuring that surplus contributions are returned to participants, Green *Sukuk*, *Shariah*-compliant bonds whose proceeds are directed towards renewable energy projects, sustainable infrastructure and environmental conservation initiatives.

3. Protection of Intellect

The preservation of intellect requires that financial activity supports the capacity of individuals and communities to learn and develop. *Waqf* endowments towards educational institutions is a classic example of this objective.

Key products: *Waqf* (endowment) directed to educational and social infrastructure, Education *Sukuk*, *Shariah*-compliant bonds whose proceeds fund learning institutions.

4. Protection of Lineage

The preservation of lineage and family encompasses the legal and financial arrangements that support intergenerational continuity and social cohesion. Islamic finance products in this sphere are designed to ensure that wealth passes between generations in a structured, equitable and *Shariah*-compliant manner, avoiding the concentration or dissipation of family assets.

Key products: *Hibah* (inter vivos gift) structures for estate planning and wealth transfer, Family *Takaful* providing protection for dependants, *Amanah* (trust) arrangements for the structured management of family assets across generations.

5. Protection of Wealth

The preservation of wealth is perhaps the most directly relevant to the daily practice of Islamic finance. It requires financial activity to facilitate fair, productive, and equitable circulation of wealth. Instruments like *Murabahah*, *Musharakah* and *Mudarabah* are designed to ensure that financing activities are grounded in real economic activities. Returns from these instruments are earned through legitimate efforts and risk sharing, without any usury/interest (*riba*), excessive uncertainty (*gharar*) and speculation (*maysir*).

Key products: *Murabahah* (cost-plus financing) for asset acquisition, *Musharakah* (partnership financing) for equity-based ventures, *Mudarabah* (profit-sharing arrangements) where the financier provides capital and the entrepreneur provides effort, *Ijarah* (leasing) for asset-based financing.

The Structural Advantage Of Islamic Finance

Islamic finance, grounded in faith – operates at a precisely deeper level and thus, its ethical constraints are demonstrated as embedded within the system. To illustrate, due to the prohibition on usury/interest (*riba*), it removes the mechanism of interest altogether and replaces it with arrangements grounded in real economic activity. Further, the prohibition on excessive uncertainty (*gharar*) in Islamic finance can be seen when it disqualifies instruments whose value is fundamentally speculative and detached from identifiable underlying assets. The requirement that returns be earned through trade, partnership, or the use of real assets is also a pertinent condition of validity, not just a mere guideline.

This structural characteristic produces a form of certainty that ethical finance has

yet to achieve. It is also worth noting that a client entering a transaction based on Islamic finance knows in advance, that the ethical parameters of that transaction will not be diluted for whatever reasons. Moreover and notably, the Islamic principle of *waqf* – is a product of Islamic finance which conventional finance has not yet managed to replicate. This product is a built-in mechanism for ensuring circulation of wealth in society, unlike social-impact related finance offered by conventional or ethical finance which will only exist when there is a demand for it.

None of this is to suggest that conventional or ethical finance has failed, nor that its ongoing evolution lacks value. In fact, the refinement of ESG practices has brought about meaningful accountability, channeled substantial capital toward environmental and social priorities, and reshaped how financial institutions present their commitments to the public. These developments matter. Yet, despite this progress, a growing number of observers within the sustainable finance space are beginning to question whether the ESG framework possesses the structural robustness needed to truly fulfil its long-term promises.

Conclusion

The narrative surrounding Islamic finance has, for too long, been framed primarily in terms of prohibition: what it forbids and which conventional structures it cannot replicate. This framing misses the salient point, when in fact, Islamic finance is actually defined by what it seeks to achieve.

For the general public, Islamic finance should not be approached as a niche or faith-exclusive offering. It is a mature and globally operating financial system, one that has surpassed USD5 trillion in global assets as of 2024.¹⁴ *Maqasid Al-Shariah* itself is universal in its scope, transcending barriers of religion, geography, and background. Its fundamental proposition is that law and finance ought to serve human wellbeing in a principled, consistent, and accountable manner.

The *Maqasid Al-Shariah* framework is laid-out and adaptable. Diverse range of products and services have been structured based on this. Islamic finance in many jurisdictions has reached maturity. What remains is for clients, be it the financial institutions or the borrower to decide, whether financial products grounded in fixed principle are something that they are prepared to engage with, understand and value.

¹⁴ Standard Chartered, "Global Islamic Finance Assets to Surpass USD 7.5 Trillion by 2028", 19 May 2025, https://www.sc.com/en/uploads/sites/66/content/docs/SCB_Islamic-banking-for-Financial-Institutions

ARTIFICIAL INTELLIGENCE GOVERNANCE IN MALAYSIA: FROM EXISTING LEGAL PROTECTIONS TO FUTURE REGULATORY OBLIGATIONS

by Lim Zhi Jian & Evien See

Artificial intelligence technologies are rapidly transforming economic activities, social interactions, and governance structures across jurisdictions worldwide. Generative artificial intelligence systems capable of producing realistic text, images, audio, and video outputs have introduced unprecedented opportunities for innovation while simultaneously raising complex legal and ethical concerns. Issues relating to misinformation, intellectual property infringement, data protection, consumer deception, and accountability have prompted governments to consider whether existing legal frameworks remain adequate to address emerging risks associated with artificial intelligence deployment.

Malaysia is presently navigating a transitional phase in artificial intelligence regulation. Unlike certain jurisdictions that have enacted dedicated artificial intelligence legislation, Malaysia has thus far relied on a combination of existing sectoral laws and policy driven governance instruments to regulate artificial intelligence related activities. The establishment of the National Artificial Intelligence Office (NAIO) further reflects Malaysia's commitment to advancing artificial intelligence adoption while strengthening governance coordination at the national level. Against this backdrop, the proposed Artificial Intelligence Governance Bill represents a significant step towards establishing a comprehensive statutory framework governing artificial intelligence across its lifecycle.

Against this evolving regulatory landscape, there are questions arising with regard to the scope of future obligations that may be imposed on artificial intelligence developers, and even users. One of the issues receiving increasing attention is whether mandatory labelling of artificial intelligence generated content should be introduced to enhance transparency and accountability. This article discusses the Malaysia's current legal framework applicable to artificial intelligence, considers the anticipated role of the proposed Artificial Intelligence Governance Bill, and evaluates the potential incorporation of mandatory labelling obligations within Malaysia's emerging artificial intelligence regulatory regime.

Existing Legal Framework Applicable To Artificial Intelligence In Malaysia

At present, Malaysia does not have a single consolidated statute specifically regulating artificial intelligence technologies. Nevertheless, various existing laws already apply to activities involving artificial intelligence systems depending on the nature of the conduct and the risks involved. These laws collectively form a foundational regulatory framework governing artificial intelligence deployment.

Intellectual property laws remain particularly relevant in the context of artificial intelligence development and use. The Copyright Act 1987 governs the protection of literary, artistic, musical, and other works, including content that may be used as training data for artificial intelligence models. Concerns have arisen globally regarding the use of copyrighted materials without authorisation in training datasets, as well as ownership of outputs generated by artificial intelligence systems. In Malaysia, enforcement of copyright rights is primarily undertaken by the Ministry of Domestic Trade and Cost of Living (KPDN) pursuant to the Copyright Act 1987, while the Intellectual Property Corporation of Malaysia (MYIPO) performs administrative and registration functions. Existing intellectual property legislation therefore remains applicable regardless of technological context.

Data protection law also plays an important role in regulating artificial intelligence applications involving personal data. The Personal Data Protection Act 2010 imposes obligations relating to consent, disclosure, security, and data processing practices. Artificial intelligence systems that collect or process personal data must therefore comply with statutory requirements governing lawful data usage. Similarly, cybersecurity and communications laws may apply where artificial intelligence technologies are deployed in digital platforms or network environments.

Consumer protection legislation further provides safeguards against misleading or deceptive conduct arising from artificial intelligence generated outputs in commercial contexts. The Consumer Protection Act 1999 prohibits false representations and unfair practices, which may encompass circumstances where artificial intelligence generated content is presented in a manner that misleads consumers regarding authenticity or origin.

These existing legal frameworks demonstrate that artificial intelligence activities are not entirely unregulated within Malaysia. However, reliance on sector specific laws may create fragmentation and uncertainty, particularly where risks arise across multiple domains simultaneously. Artificial intelligence technologies often involve interconnected issues relating to data, intellectual property, consumer protection, and ethics, thereby highlighting the need for a more cohesive governance approach.

Policy Based Artificial Intelligence Governance Initiatives

Recognising the importance of artificial intelligence for national development, Malaysia has introduced policy initiatives to guide responsible artificial intelligence adoption. The National Artificial Intelligence Roadmap 2021 to 2025 outlines strategic priorities aimed at strengthening infrastructure, promoting adoption across sectors, and developing talent. Complementing the roadmap, the Ministry

of Science, Technology and Innovation issued the National Guidelines on Artificial Intelligence Governance and Ethics to encourage responsible artificial intelligence development and deployment.

The Guidelines articulate principles including fairness, reliability, safety, privacy, inclusiveness, transparency, accountability, and the pursuit of human benefit. They emphasise stakeholder responsibilities encompassing policymakers, developers, deployers, and end users. Notably, these Guidelines are not legally binding and operate primarily as soft law instruments intended to encourage voluntary compliance while fostering innovation.

The reliance on voluntary governance reflects Malaysia's recognition that artificial intelligence remains an evolving technological field. A flexible approach allows industry experimentation while governance frameworks mature. However, as artificial intelligence adoption expands, and associated risks become more visible, voluntary principles alone may prove insufficient to address complex legal and ethical challenges.

Emergence Of The Artificial Intelligence Governance Bill

The proposed Artificial Intelligence Governance Bill represents Malaysia's first attempt to establish a comprehensive statutory framework regulating artificial intelligence across its lifecycle. Government statements indicate that the Bill will introduce obligations relating to risk assessment, transparency requirements, compliance measures, and audits to ensure responsible artificial intelligence development and deployment.

Importantly, the Bill is expected to adopt a risk-based classification framework, whereby regulatory obligations correspond to the level of risk associated with particular artificial intelligence applications. Such an approach reflects international regulatory trends that distinguish between low risk, moderate risk, and high-risk artificial intelligence uses.

The legislation is also intended to address legal and ethical concerns associated with artificial intelligence training processes, including the use of copyrighted data without authorisation. While the Bill does not replace existing intellectual property laws, it serves as an overarching governance framework to ensure accountability throughout the artificial intelligence system lifecycle.

Statements by government officials further indicate that the Bill will incorporate mechanisms relating to incident reporting, ethical oversight, and protection of citizens' rights. The legislation is currently in its early drafting stage and is anticipated to undergo stakeholder consultation and parliamentary review prior to enactment, with reports suggesting that progress towards tabling may occur by around mid-2026. Nevertheless, its development signals Malaysia's intention to transition from policy driven governance towards enforceable statutory obligations.

Regulatory Drivers And The Need For Comprehensive Governance

Recent developments worldwide illustrate the challenges faced by regulators in managing risks associated with artificial intelligence deployment. Instances involving misuse of generative artificial intelligence tools, including the creation of harmful or unlawful content, have prompted regulatory intervention by authorities. In parallel, significant litigation has emerged in other jurisdictions concerning intellectual property and authorship issues arising from artificial intelligence systems. Cases such as *Bartz et al. v. Anthropic PBC*, which concerns allegations relating to the use of copyrighted works in training artificial intelligence models, *Thaler v. Perlmutter*, which addressed the question of copyright protection for works generated without human authorship, and more demonstrate the growing legal uncertainty surrounding artificial intelligence technologies. Such disputes highlight limitations in relying solely on reactive enforcement under existing laws and underscore the need for clearer governance frameworks capable of addressing risks across the artificial intelligence lifecycle.

Artificial intelligence systems possess the capacity to generate outputs at scale and with increasing realism, thereby amplifying potential harm. Without proactive governance mechanisms, enforcement may occur only after damage has already occurred. Consequently, comprehensive governance frameworks are necessary to address risks systematically across the artificial intelligence lifecycle.

Mandatory Labelling Of Artificial Intelligence Generated Content

Within the broader context of artificial intelligence regulation, mandatory labelling of artificial intelligence generated content has gained attention as a potential transparency mechanism. Labelling refers to the requirement that content created or materially altered using artificial intelligence systems be clearly disclosed to users. Disclosure mechanisms may include visible notices, metadata indicators, or embedded technical markers. Several jurisdictions have begun implementing such transparency obligations, including platform-based labelling requirements in China, disclosure provisions under the European Union Artificial Intelligence Act, and emerging state level regulations in the United States requiring identification of artificial intelligence generated or manipulated content in specific contexts.

The rationale for mandatory labelling rests upon several considerations. Transparency enables individuals to assess credibility and authenticity when interacting with digital content. Disclosure reduces the risk of deception in commercial transactions and informational environments. Labelling may also support enforcement by enabling identification of artificial intelligence involvement in harmful outputs.

From a legal perspective, mandatory disclosure may complement existing consumer protection and intellectual property frameworks. Where artificial intelligence generated content is used in advertising or commercial representations, failure to

disclose may create misleading impressions regarding authorship or authenticity. Transparency obligations could therefore enhance consumer rights without fundamentally altering existing legal doctrines.

However, mandatory labelling also presents challenges. Enforcement difficulties arise where artificial intelligence generated content originates from foreign jurisdictions or where detection technologies remain imperfect. Compliance burdens may affect smaller organisations with limited resources. Additionally, overbroad regulatory requirements may risk stifling innovation if obligations are imposed indiscriminately across low-risk applications.

Integrating Labelling Within Malaysia's Artificial Intelligence Governance Framework

If Malaysia were to introduce mandatory labelling obligations, integration within the proposed Artificial Intelligence Governance Bill would provide a coherent regulatory approach. A risk-based framework may allow disclosure requirements to focus on contexts involving higher potential for harm, such as political communications, news dissemination, or commercial advertising, while lower risk applications may warrant lighter regulatory intervention.

To ensure effectiveness, non-compliance with mandatory labelling obligations should be treated as a regulatory offence, subject to appropriate penalties. The introduction of enforcement consequences would serve both deterrent and signalling functions, demonstrating that transparency obligations are not merely advisory but form part of the broader accountability framework governing artificial intelligence deployment.

Clear designation of regulatory oversight would also be necessary. In particular, oversight of online content related obligations could fall within the purview of the Malaysian Communications and Multimedia Commission (MCMC), given its existing regulatory mandate over digital communications and internet service providers. Coordination with other relevant authorities may nevertheless be required where sector specific issues arise, including consumer protection or intellectual property concerns.

In addition, technical standards would be necessary to ensure consistency and interoperability across platforms. Collaboration between government agencies, industry stakeholders, and technology providers would be essential in developing feasible implementation mechanisms. Transitional measures and guidance could assist small and medium enterprises in achieving compliance without undue burden.

A public reporting mechanism may further strengthen enforcement by allowing individuals to notify regulators of suspected non-compliant artificial intelligence generated content. Such mechanisms would support regulatory monitoring while promoting community participation in maintaining a trustworthy digital environment.

Conclusion

Malaysia's approach to artificial intelligence regulation is evolving from reliance on existing sectoral laws and voluntary policy frameworks towards the development of a comprehensive statutory governance regime. The proposed Artificial Intelligence Governance Bill represents a significant milestone in establishing accountability obligations across the artificial intelligence lifecycle while preserving the applicability of existing laws.

Mandatory labelling of artificial intelligence generated content should be considered within this broader regulatory context rather than as an isolated intervention. Transparency obligations may enhance public trust, support responsible innovation, and complement existing legal protections. Nevertheless, careful design is required to balance regulatory objectives with practical feasibility and innovation considerations.

As artificial intelligence technologies continue to advance, Malaysia has the opportunity to develop a regulatory framework that integrates legal certainty, ethical responsibility, and technological progress. A coherent governance approach that incorporates transparency mechanisms alongside risk-based regulation may position Malaysia as a regional leader in responsible artificial intelligence adoption.

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GLOBAL MINIMUM TAX (PILLAR TWO): IMPLEMENTATION IN MALAYSIA

by Amira Ahmad Azhar & Dharshini Sharma

The OECD/G20 Inclusive Framework's Two-Pillar Solution announced in October 2021 establishes Pillar Two as a 'common approach' intended to ensure that large multinational enterprise (MNE) groups pay a minimum level of tax in each jurisdiction where they operate.

The mechanism is the Global Anti-Base Erosion (GloBE) rules, which impose a 'top-up tax' where the jurisdictional effective tax rate (ETR) falls below 15%. This architecture is not framed as a harmonisation of statutory corporate tax rates, rather, it is a coordinated outcome rule, constructed through a jurisdiction-by-jurisdiction blending of profits and covered taxes and then a top-up to the minimum rate where required.¹⁵

For capital-importing jurisdictions such as Malaysia, the Global Minimum Tax (GMT) does not merely raise a floor. It reshapes the mechanics of fiscal sovereignty, neutralises core incentive techniques for in-scope MNEs, and redistributes the practical incidence of taxing rights through rule ordering. The reform is presented as coordination. In practice, it functions as conditional compulsion. The real policy question then shifts from "whether to participate" to "how to avoid structural disadvantage within participation."

From a domestic legal perspective, this reframes GMT not as an abstract international commitment, but as a concrete charging mechanism embedded within Malaysian income tax law. The implications are therefore not merely policy-oriented, they are operational and compliance-driven.

Malaysia's adoption of the GMT must be read against its broader international tax commitments. The Ministry of Finance has stated Malaysia's participation in OECD tax initiatives as an associate member with commitments that include transparency and substance expectations tied to tax incentives and preferential regimes. This is relevant context because Pillar Two alters the effective value of incentives that reduce covered taxes without reducing the GloBE income base and it therefore pressures incentive design toward refundable credits or non-tax instruments or toward incentives that more directly affect the profit base used for GloBE computations.¹⁶

Separately, for the purposes of administrative compliance, the Inland Revenue Board (IRB) has framed Malaysia's GMT as a dual-mechanism system, comprising of a Domestic Top-up Tax (DTT) to secure domestic taxing rights over low-taxed Malaysian profits and a Multinational Top-up Tax (MTT) that aligns with Pillar Two's income inclusion model. IRB's guideline explicitly positions these mechanisms as Malaysia's implementation of the GloBE rules within Part XI of the Income Tax Act 1967.¹⁷

¹⁵ OECD/G20 Inclusive Framework on BEPS, 'Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy' (8 October 2021) <<https://www.oecd.org/content/dam/oecd/en/topics/policy-issues/beps/statement-on-a-two-pillar-solution-to-address-the-tax-challenges-arising-from-the-digitalisation-of-the-economy-october-2021.pdf>>; accessed 2 March 2026.

¹⁶ Ministry of Finance Malaysia, 'Malaysia's Commitment in International Tax Standard'

¹⁷ Guideline on the Implementation of Global Minimum Tax in Malaysia (12 September 2025)

Malaysia Within The Pillar Two Rule ¹⁸

Concept	What Pillar Two targets	Malaysia's implementation choice
Minimum standard	Jurisdictional ETR floor of 15%	A domestic charge (DTT) plus a multinational charge (MTT)
Computation method	Jurisdictional blending of profit and covered taxes	RB depicts an eight-step top-up I computation workflow
Compliance instrument	Standardised information return (GIR) and safe harbours	IRB adopts GIR filing/exchange approach and safe-harbour framework

1. Legal basis and scope

On paper, Pillar Two rests on a deceptively simple premise, where large MNE groups with consolidated revenues of at least 750 million Euros should pay a minimum effective tax rate of 15% in every jurisdiction in which they operate.

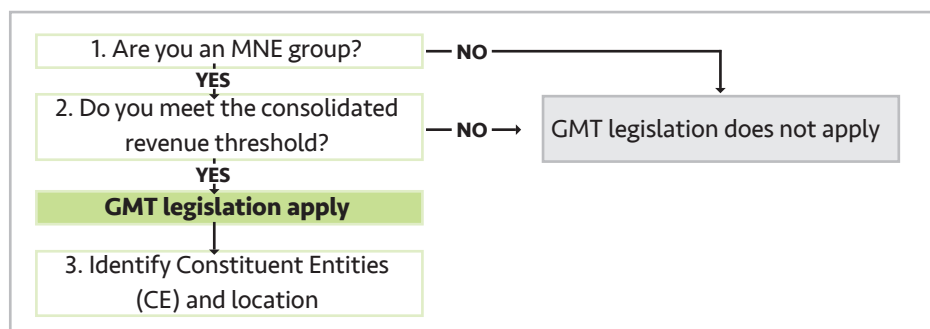
Yet the machinery through which this minimum is enforced is neither simple nor neutral. The regime is built around three interlocking mechanisms:

- a) The Income Inclusion Rule (IIR) which permits the jurisdiction of the Ultimate Parent Entity (UPE) to impose a top-up tax where low-taxed income arises elsewhere in the group.
- b) The Undertaxed Profits Rule (UTPR) which functions as a secondary rule reallocating taxing rights to other jurisdictions where the IIR is not applied.
- c) The Qualified Domestic Minimum Top-Up Tax (QDMTT) which allows the source jurisdiction to collect the top-up tax itself before it is ceded to others.

The legislative and operational framework for DTT and MTT sits in the new Part XI of the Income Tax Act 1967 (ITA 1967), introduced through the Finance (No 2) Act 2023. DTT and MTT take effect for financial years beginning on or after 1 January 2025.¹⁹

The Finance (No 2) Act 2023 text contains the insertion of the new Part XI under the heading 'Implementation of Domestic Top-up Tax and Multinational Top-up Tax', evidencing the statutory choice to place GMT within the core income tax statute rather than as an external levy.²⁰

These inclusions are consistent with the GloBE model, where Malaysia applies the 750 million Euro consolidated revenue threshold and requires that the group be an MNE group in the tested year. IRB's flowchart below explains that a purely domestic group is not an MNE group and is therefore outside the regime even if it meets the revenue threshold because the definition of MNE group requires at least one entity or permanent establishment outside the jurisdiction of the ultimate parent entity.²¹



¹⁸ <https://www.hasil.gov.my/en/international/global-minimum-tax-gmt/how-to-calculate-the-top-up-tax/>

¹⁹ Guideline on the Implementation of Global Minimum Tax in Malaysia (12 September 2025)

²⁰ Finance (No 2) Act 2023 (Act 851)

²¹ <https://www.hasil.gov.my/en/international/global-minimum-tax-gmt/flowchart-the-application-of-gmt/>

Excluded entities remain central in Malaysia because they determine whether a particular entity is treated as a 'Constituent Entity' for Pillar Two purposes. The excluded entities in the GMT application are governmental entities, international organisations, non-profits, pension funds and certain investment funds or real estate investment vehicles that are ultimate parent entities.²²

However, the insertion of Part XI into the ITA raises a structural interpretive question: DTT and MTT are labelled as income tax, yet their computational base is not "statutory income" as understood under Sections 4, 5 and 33 of the ITA.

Instead, they are derived from GloBE income, a financial accounting construct subject to OECD-defined adjustments. This creates a dual-track income tax regime within a single statute, one based on source-derived statutory income and another based on jurisdictionally blended accounting profit. The coexistence of these bases may give rise to interpretive tension where definitions overlap or conflict.

2. Mechanics in Malaysia: Top-up computation and DTT circularity

It can be understood from the IRB's guidelines that the computation of top-up tax uses the jurisdictional blending mechanism in which income and covered taxes are aggregated for all constituent entities within the same jurisdiction. The jurisdictional ETR is then calculated and where it is below 15%, a top-up percentage is applied to arrive at the jurisdictional top-up amount.²³

The critical Malaysia-specific design choice is that DTT is intended to operate domestically without creating circularity in the calculations. IRB states that, when computing DTT, a portion is removed 'to prevent a circular computation' and it summarises the result as:²⁴

$$\text{DTT} = (\text{Top-up Tax Percentage} \times \text{Excess Profits}) + \text{Additional Current Top-up Tax}$$

Where:

$$\text{Top-up Tax Percentage} = 15\% - \text{Jurisdictional Effective Tax Rate}$$

$$\text{Jurisdictional Effective Tax Rate} = \frac{\text{Sum of the Adjusted Covered Taxes of each CE in Malaysia}}{\text{Net GloBE income of each CE in Malaysia}}$$

$$\text{Excess Profits} = \text{Net GloBE income} - \text{Substance-based income Exclusion}$$

These framing matters because it indicates that Malaysia's domestic minimum tax is not merely an accounting add-back but is structured to preserve the GloBE computation order.

The IRB's Domestic Top-up Tax guideline describes DTT as a charge derived from the jurisdictional top-up tax computed under the regime and then allocated to Malaysian constituent entities with positive GloBE income, proportionate to their share of total positive domestic GloBE income. The practical consequence is that

²² Guideline on the Implementation of Global Minimum Tax in Malaysia (12 September 2025)

²³ <https://www.hasil.gov.my/en/international/global-minimum-tax-gmt/how-to-calculate-the-top-up-tax/>

²⁴ Guideline on the Implementation of Domestic Top-Up Tax in Malaysia (3 February 2026)

DTT is not an entity-specific minimum tax, rather it is a jurisdictional top-up that is subsequently assigned across profitable domestic entities.²⁵

A further Malaysia-specific point is the institutional narrative around investment competitiveness. MIDA's public note on Malaysia's GMT recognises that global minimum tax may reshape investor choices and indicates an ongoing review of Malaysia's tax incentive framework with the stated aim of preserving competitiveness while aligning with the new international policy environment. This is significant because it anticipates that Malaysia's response may increasingly rely on non-tax incentives or Pillar Two-resilient instruments, rather than rate reductions that are neutralised by top-up tax.²⁶

3. Administration in Malaysia

Malaysia's GMT compliance architecture has two reporting layers: the group-wide GloBE Information Return (GIR) and Malaysia-specific top-up tax returns required from constituent entities. The GIR is typically submitted to the tax authority in the ultimate parent entity's jurisdiction and it further recognises exchange-based compliance via Qualifying Competent Authority Agreements (QCAA) under which Malaysian constituent entities may not need to file the GIR locally where exchange mechanisms apply.²⁷

A key 2025 clarification is IRB's requirement that the MNE group identify for each implementing jurisdiction or QDMTT-only jurisdiction, the relevant category and the GIR data points that should be provided to that jurisdiction. This pushes compliance beyond 'prepare one GIR' toward 'govern dissemination' and it will likely drive internal controls, audit trails and cross-jurisdictional sign-off processes especially for groups headquartered outside Malaysia with Malaysian constituent entities.²⁸

On timing, IRB provides transitional filing relief, where filings may be made within 18 months after the end of the reporting year for the first filing transition year. The operation of that transitional approach for early years reinforces that Malaysia is intentionally pursuing a 'soft landing' compliance posture consistent with OECD transitional penalty relief concepts.²⁹

Further, Malaysia also provides a transitional penalty relief during the defined transition period, under which no fines or penalties will be imposed where IRB considers that the taxpayer has taken 'reasonable measures' and acted in good faith to comply. The penalty relief is framed as administrative discretion anchored to a factual standard ('reasonable measures') which is capable of being contested, audited and evidenced in practice through governance documentation.

The phrase 'reasonable measures' is not statutorily defined. In practice, this places emphasis on demonstrable governance frameworks, documented tax control processes, internal review protocols and evidence of reliance on professional advice where appropriate. Absent such documentation, taxpayers may face difficulty substantiating good faith compliance in the event of audit.

4. Safe Harbours: Malaysia's practical exposure and strategic choices

Malaysia in general adopts the GloBE safe-harbour architecture including

²⁵ Guideline on the Implementation of Domestic Top-Up Tax in Malaysia (3 February 2026)

²⁶ Malaysian Investment Development Authority (MIDA), 'The Implementation of Global Minimum Tax (GMT) in Malaysia' <<https://www.mida.gov.my/the-implementation-of-global-minimum-tax-gmt-in-malaysia/>>

²⁷ Guideline on the Implementation of Global Minimum Tax in Malaysia (12 September 2025)

²⁸ Guideline on the Implementation of Global Minimum Tax in Malaysia (12 September 2025)

²⁹ IRB, *Frequently Asked Questions on the Implementation of the Global Minimum Tax (GMT) in Malaysia (FAQs version 6.0, 3 February 2026)*

the QDMTT safe harbour, transitional CbCR safe harbour and permanent safe harbour. Safe harbours are not simply concessions, but they operate as jurisdiction-level risk filters that can reduce compliance burdens while simultaneously narrowing dispute terrain by deeming top-up to be zero where the conditions are satisfied.³⁰

Malaysia's introduction of a DTT must be understood within this framework. In the absence of a DTT, any effective tax rate below 15% would simply generate additional tax liabilities payable in the jurisdiction of the parent entity. The QDMTT therefore functions as a protective mechanism, ensuring that Malaysia retains taxing rights over income generated within its territory. The question that then, remains unanswered is whether this enhances Malaysia's competitive position or it prevents revenue displacement?

5. Malaysia-specific policy implications: Incentives, administrative law and dispute risk

Malaysia's GMT implementation is likely to affect investment policy primarily through the incentive channel. Malaysia has historically managed competitiveness using targeted tax incentives, many of which have been reviewed in the OECD context for transparency, substance and harmful tax practice risks. Pillar Two adds a new dimension by reducing the effectiveness of incentives that depress covered taxes below a 15 per cent ETR outcome. In turn, this may accelerate Malaysia's incentive recalibration toward 'Pillar Two-resilient' instruments and non-tax support.

MIDA's commentary aligns with this direction, explicitly noting that GMT may reshape investor choices and that Malaysia is reviewing its incentive framework to keep it relevant and competitive. From a legal-policy perspective, this foreshadows a shift from 'rate competition' toward 'base and substance competition' where investors are attracted by operational ecosystems, grants and infrastructure rather than by low ETR outcomes susceptible to top-up.³¹

A further Malaysia-specific legal issue is the role of IRB's guidance in shaping compliance expectations. IRB's guideline expressly states that where inconsistencies arise, the GloBE rules should take precedence. This creates a layered interpretive environment, where there is primary law in Part XI ITA 1967, administrative guidelines and OECD commentary/administrative guidance being treated as interpretive anchors. In practice, dispute risk is likely to concentrate on classification questions, safe-harbour eligibility and evidence of 'reasonable measures' for penalty relief.

Finally, Malaysia's approach must be seen as part of a broader coordinated system, not as an isolated domestic minimum tax. The OECD model rules and accompanying examples emphasise that Pillar Two is built to produce coordinated outcomes and avoid double taxation through rule ordering, offsets and allocation mechanics. Where Malaysia's DTT matures into a 'qualified' domestic minimum tax, its practical significance extends beyond Malaysian collections. It becomes a shielding mechanism that can reduce top-up exposure elsewhere.

³⁰ *Guideline on the Implementation of Global Minimum Tax in Malaysia* (12 September 2025)

³¹ *Malaysian Investment Development Authority (MIDA), 'The Implementation of Global Minimum Tax (GMT) in Malaysia'* <<https://www.mida.gov.my/the-implementation-of-global-minimum-tax-gmt-in-malaysia/>>

Conclusion

If rate-based incentives are neutralised for large MNEs, Malaysia must then reconsider the design of its investment promotion regime. The strategic shift must move toward instruments that remain effective within Pillar Two framework, including:

- Properly structured refundable tax credits that are recognised favourably under the GloBE rules.
- Direct grants and subsidies.
- Enhanced allowances linked to substantive economic activity regulatory and infrastructural facilitation.

Replacing implicit tax competition with explicit fiscal support shifts the policy debate from technical tax design to broader questions of public finance and accountability. The GMT therefore compels not merely technical adjustment, but institutional recalibration.

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CARBON CREDITS IN MALAYSIA – M&A AND ESG CONSIDERATIONS FOR BUSINESSES AND INVESTORS

by Raphael Tay & Shivani Sivanesan

Carbon credits have rapidly evolved from niche environmental instruments into strategic corporate assets. As Malaysian businesses face increasing pressure to decarbonise operations, satisfy investor ESG expectations and align with global supply chain requirements, carbon credits are becoming embedded within corporate transactions and investment strategies.

In Malaysia, the voluntary carbon market (VCM) is developing against a backdrop of policy evolution, regional cooperation and growing institutional participation. For businesses and investors, particularly those involved in mergers and acquisitions (M&A), joint ventures, infrastructure investments and project finance, carbon credits now present both opportunity and risk.

This article examines Malaysia's emerging carbon market landscape, with a particular focus on M&A, transactional structuring, and ESG-related considerations relevant to corporate decision-makers.

What Are Carbon Credits?

A carbon credit is a tradable instrument representing the reduction, avoidance or removal of one metric tonne of carbon dioxide equivalent (CO₂e) from the atmosphere. Credits are generated by projects that demonstrably reduce greenhouse gas (GHG) emissions, such as renewable energy developments, energy efficiency initiatives, methane capture projects, or forestry and conservation activities that sequester carbon.

In the Malaysian context, carbon credits are presently generated and traded within the voluntary carbon market framework. Malaysian projects (such as forestry, peatland conservation and renewable energy initiatives) may issue credits verified under internationally-recognised standards such as Verra or Gold Standard. Once verified, credits are recorded in electronic registries maintained by the relevant standard body and may be transacted domestically or cross-border.

Malaysia's institutional trading platform, the Bursa Carbon Exchange (BCX), operated by Bursa Malaysia, facilitates the auction and trading of verified carbon credits. While BCX provides market infrastructure and governance rules for exchange participants, Malaysia does not yet have a comprehensive statutory compliance carbon pricing regime. As such, the legal validity and commercial

integrity of Malaysian carbon credits depend primarily on contractual arrangements, adherence to international verification standards, and registry transparency.

It is important to note that carbon credits are intangible assets rather than physical commodities. Their value depends on robust measurement, reporting and verification (MRV) processes, clarity of project rights (including land tenure in nature-based projects), and confidence that the credited emissions reductions are real, additional and not double-counted. In M&A transactions, this intangible and compliance-driven nature gives rise to distinct legal, regulatory and valuation considerations which form the core discussion in this article.

Malaysia's Carbon Market Framework

Malaysia's carbon trading ecosystem is presently centred on the voluntary market. The launch of the Bursa Carbon Exchange (BCX) by Bursa Malaysia marked a significant step in institutionalising carbon credit trading domestically.

BCX facilitates the trading of verified carbon credits and other environmental instruments via three modes of trading: auction, continuous trading and off-market transactions. It aims to position Malaysia as a regional hub and is recognised as the world's first Shariah-compliant carbon exchange.

While BCX provides a regulated trading platform, Malaysia does not yet have a comprehensive statutory carbon pricing regime or overarching carbon trading legislation. Accordingly, much of the legal certainty surrounding carbon credits derives from contractual arrangements, international standards and exchange rules, rather than statute.

Due to the above, many Malaysian-origin credits are also verified under international standards such as:

- Verra (Verified Carbon Standard – VCS)
- Gold Standard

Carbon Credits As Assets In M&A Transactions

Carbon credits increasingly feature in corporate transactions, typically in the following ways – as standalone assets being acquired or monetised; as embedded value within operating businesses; or as strategic tools supporting ESG positioning post-acquisition.

Each scenario raises distinct considerations.

Where credits are core assets, buyers must assess legal entitlement to generate credits, verification status under recognised standards such as Verra, forward sale obligations under ERPAs, and permanence risks. Where credits are embedded within broader operations, issues include ownership of carbon rights, valuation assumptions tied to pipeline credits, financing constraints

and policy exposure. As strategic ESG tools, attention must be paid to credit integrity, disclosure alignment (particularly for companies listed on Bursa Malaysia), reputational risk and decisions on retirement versus monetisation, including potential trading on platforms such as the Bursa Carbon Exchange. In all cases, carbon credits can materially affect valuation, risk allocation and transaction structuring.

From a transactional perspective, carbon credits are not merely ancillary ESG considerations. They can influence purchase price and earn-out structures; affect representations, warranties and indemnity scope; trigger consent requirements under commercial agreements; and introduce contingent liabilities tied to environmental performance.

As Malaysian carbon markets continue to develop, including trading infrastructure such as BCX, carbon credit-related considerations are likely to become increasingly central in structuring, valuing and negotiating corporate transactions. For dealmakers, the key is early identification: whether carbon credits represent core value, embedded upside, or reputational risk will determine the depth of diligence and sophistication of contractual protections required.

Due Diligence In Transactions Involving Carbon Credits

In M&A involving companies that generate, hold, or rely on carbon credits, enhanced diligence is essential. Traditional financial and legal diligence must be supplemented with climate and registry-specific review.

Title And Ownership

Unlike conventional tangible assets, carbon credits exist as registry entries. Accordingly, due diligence must confirm several key issues, including: the project developer's legal right to generate credits (including land tenure and environmental approvals); proper issuance under an accredited standard; registry records reflecting ownership and transfer history; and absence of encumbrances, pledges or double-counting risks.

Where credits are tied to forestry or land-use projects, underlying land rights including indigenous or customary rights must be carefully examined.

Project Viability And Permanence Risk

Carbon projects often involve long-term monitoring and permanence obligations. Investors should also assess items such as risk of reversal; applicable insurance coverage or indemnity structures; and ongoing compliance with monitoring, reporting and verification (MRV) requirements.

Failure of a project to meet verification standards can impair the validity of credits and trigger replacement or refund obligations.

Reporting Compliance And Regulatory Risk

ESG And Disclosure Implications In Corporate Transactions

Carbon credits are closely tied to corporate sustainability claims. In an acquisition context, buyers must also assess the seller's disclosure obligations and whether those credits align with the buyers' own disclosed climate and corporate strategy and positioning, and if it can realistically meet the disclosure obligations tied to the carbon credits to be acquired. Misalignment between disclosed climate strategy and actual credit quality may create post-acquisition reputational and regulatory risk.

Further, Malaysia's carbon market remains policy-driven and evolving. Due diligence would require the appropriate reviews of regulatory and policy updates where available, and appropriate highlighting of risks of change. Policy shifts may affect exportability, recognition, or host-country authorisation of credits.

Transaction Structuring Considerations

Share vs Asset Acquisitions

In share acquisitions, carbon credits and related liabilities transfer with the target company. Buyers must therefore assess items such as historic representations made to credit purchasers; forward delivery obligations under certain agreements such as Emission Reduction Purchase Agreements (ERPAs); and potential misstatements in ESG disclosures.

In asset acquisitions, parties must clearly define items such as whether issued but unretired credits are included; treatment of pending or pipeline credits; and allocation of historical liabilities.

Clear drafting is critical to avoid ambiguity over entitlement to future issuances derived from pre-completion activities.

Emission Reduction Purchase Agreements (ERPAs)

ERPAs are commonly used for forward sale of credits. In acquisition contexts, ERPAs may constrain future flexibility of the target or lock in pricing below current market value. Certain ERPA clauses may also impose strict delivery and verification conditions.

Change-of-control provisions, assignment rights, and termination triggers are also some clauses that must be carefully reviewed during due diligence and renegotiated where necessary.

Representations, Warranties And Indemnities

Given the intangible and compliance-driven nature of carbon credits, transaction

documentation should also include tailored representations and warranties provisions covering issues such as valid issuance under recognised standards; accuracy of registry records; absence of double issuance or double counting; compliance with environmental and land-use laws; and absence of disputes with verifiers or registry administrators (whether current, pending or threatened).

Indemnities may be required for credit invalidation, reversal events attributable to pre-completion conduct, or regulatory non-compliance. Further, warranty and indemnity insurance providers are increasingly scrutinising carbon-related exposures, requiring robust underwriting disclosures.

Valuation Challenges

Separately, valuing carbon credits in an acquisition transaction would also present complexity due to its evolving and developing nature. Volatility in voluntary carbon markets, reputational value tied to ESG positioning, and permanence and policy risk may also affect the valuation of carbon credits.

Cross-Border and Regional Considerations

Malaysia's growing participation in regional and international sustainability initiatives underscores the increasing cross-border dimension of carbon markets. In late 2024, Malaysia signed a Memorandum of Cooperation on the ASEAN Common Carbon Framework (ACCF) with other ASEAN member states to advance a more unified regional carbon market and strengthen collaboration on carbon trading. This development signals a broader push toward greater interoperability and efficiency of carbon credit systems across Southeast Asia.

As carbon credits are frequently transacted across borders, Malaysian-origin credits may be purchased by foreign entities or incorporated into multinational climate strategies. This cross-border dimension introduces additional legal and commercial complexity beyond purely domestic transactions. Parties must consider issues such as host-country authorisation requirements for international transfers, recognition of credits under foreign compliance or reporting regimes, currency and enforcement risks, and the practical challenges of resolving disputes across jurisdictions. In this context, careful drafting of governing law, jurisdiction and arbitration clauses in ERPA and carbon credit sale and purchase agreements becomes particularly important to manage multi-jurisdictional exposure and ensure enforceability.

Conclusion

Malaysia's voluntary carbon market is developing into a structured and increasingly sophisticated ecosystem. Platforms such as the BCX provide institutional infrastructure, while international certification standards underpin credibility.

For businesses and investors engaged in M&A, carbon credits introduce a new asset class characterised by regulatory evolution, valuation uncertainty and ESG exposure. Properly structured and diligence, carbon assets can enhance transaction

value and strategic positioning. Poorly managed, they can generate contingent liabilities and reputational risk.

As Malaysia advances toward its long-term decarbonisation commitments, carbon credits will continue to intersect with corporate transactions, investment strategy and governance frameworks. Legal advisors should therefore integrate carbon market considerations into mainstream M&A practice where appropriate, ensuring that climate considerations are addressed as core transactional matters, rather than as peripheral ESG checklist items.

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