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GLOBAL PUBLIC COMPANY ACADEMY

A COMPARISON OF TRANSACTION ISSUES ACROSS SOUTH EAST ASIA

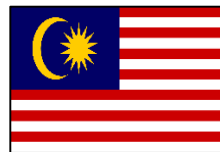
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Agenda

- Comparative overview of the legal systems in various SEA countries
- Distinctive features of transacting with/in these countries
- Incorporation requirements
- Foreign ownership restrictions
- Foreign exchange controls
- Restrictions on distributions of dividend / withholding tax
- Thin capitalisation rules and similar restrictions
- Case studies
- Q&A



Comparative Overview of the Legal Systems

| Country | Legal System |
|-----------------|--|
| Singapore | Common law – derived from the English common law system |
| Indonesia | Civil law – confluence of three distinct systems: <i>adat</i> (customary) law, Dutch colonial law and national law |
| Malaysia | Common law and Sharia law – the sharia court system operates concurrently with the common law system, and deals with sharia matters involving Islamic law and the personal and family law of Muslim individuals |
| Thailand | Civil law – primarily based on statutory law; judicial decisions are not binding but in practice, Supreme Court decisions are persuasive and are often used as secondary authoritative sources of law |
| Vietnam | Civil law – primarily based on written legislation commonly referred to as “legal instruments”; however, recently, selected precedents have been recognised as a source for interpretation of Vietnamese law (in very limited and specific circumstances) |
| The Philippines | Mixture of civil law and common law – the civil law system operates in areas such as property, succession, contracts and criminal law; while statutes and common law principles are evident in constitutional law, procedure, corporation law, negotiable instruments, taxation, insurance, labor relations, and banking laws. Islamic personal law is recognized and is operative in some parts of Mindanao. |

Distinctive Features

| Country | Distinctive Feature |
|-----------|---|
| Singapore | <ul style="list-style-type: none">• Employees – An employer has the right to transfer an employee to another employer if the organisation is being restructured (pursuant to a merger, takeover, sale of parts of the company or setting up of a subsidiary). T&Cs of employment will remain the same, unless the employee agrees otherwise.• Singapore International Commercial Court – forum for transnational commercial dispute resolution |
| Indonesia | <ul style="list-style-type: none">• Language – Transaction documents must be in <i>bahasa</i> if it involves Indonesian individuals or entities• Advertisement – Corporate actions (which result in a change of control) must be advertised and may not close within 30 days of the advertisement• Employees – Upon a sale/transfer of the business, employees have the right to be given an option to continue working for the buyer or to be terminated (i.e. no automatic transfer)• Termination benefits – If a corporate action takes place and the workers are not willing to continue their employment, the worker shall be entitled to severance pay• No concept of trusts |
| Malaysia | <ul style="list-style-type: none">• Employees – No automatic transfer of employees upon a sale of business; in fact, by law, employees' contracts of employment will be deemed terminated. Cf. In the case of a share sale, the employment contract is unaffected.• Termination benefits – If a change in the T&Cs of employment in connection with a business sale is less favourable to the employees, this will entitle the employees to termination benefits payable by the seller |

Distinctive Features (Continued)

| Country | Distinctive Feature |
|-----------------|--|
| Thailand | <ul style="list-style-type: none"> • Employees – An employee cannot be transferred to a third party (the new employer) without his/her consent; if he/she does not agree with the transfer, the current employer may be liable for severance pay • Trusts – Extent of trust law was previously extremely limited; however, in July 2018, the Cabinet approved the draft Private Trust Act Bill (which allows the setting up of private asset trusts to manage personal assets and aims to reduce repatriation of personal assets abroad). |
| Vietnam | <ul style="list-style-type: none"> • Employees – After an M&A transaction, the acquirer shall ensure that the target company will be responsible for the continuing use of the current number of contractual employees. If downsizing, the company shall elaborate and implement a labour utilisation plan and notify the competent labour authorities. • Approvals – An acquirer must obtain written approval of the Department of Planning and Investment for an acquisition of a non-public company where (a) the target operates in a business line that is conditional for foreign investors or (b) the investor acquires over 51% of the shares in the target • No concept of a friendly or hostile acquisition – buyer can approach the Board or majority shareholders • No concept of trusts |
| The Philippines | <ul style="list-style-type: none"> • Employees – No automatic transfer of employees upon a business sale. Should the transferee rehire the employees, it is not bound by the T&Cs of their former employment. |

Incorporation Requirements

| Country | No. of directors | No. of shareholders | Share capital |
|-----------|--|--|---|
| Singapore | <ul style="list-style-type: none"> At least 1 director who is ordinarily resident For public company – follow Code of Corporate Governance (half/majority independent) AC/RC/NC – generally non-executive, majority independent | <ul style="list-style-type: none"> At least 1 member; no limit for public companies; maximum of 50 members for private companies | <ul style="list-style-type: none"> No minimum share capital requirement. |
| Indonesia | <ul style="list-style-type: none"> Two-tier board (both private and public) – the board of commissioners supervises the board of directors At least 2 directors (at least 1 independent); no maximum number (subject to additional requirements for specific sectors) Generally at least 2 commissioners (at least 30% independent) (subject to additional requirements for specific sectors) | <ul style="list-style-type: none"> At least 2 members | <ul style="list-style-type: none"> For PT companies (Indonesian shareholders) – min. <u>authorised</u> share capital is IDR50 million (US\$3,650); min. <u>issued</u> share capital is IDR12.5 million (US\$910). For PT PMAs (i.e. PTs with foreign ownership), the minimum investment is IDR10 billion (USD\$730,000) in each business field. |
| Malaysia | <ul style="list-style-type: none"> Private company – at least 1 director Public company – at least 2 directors | <ul style="list-style-type: none"> At least 1 member (for both private and public companies) A foreign national can form a company as a sole shareholder | <ul style="list-style-type: none"> 100% foreign-owned company – min. paid up capital of RM500,000 for advisory and consultancy businesses and RM 1mil for import, export and trading businesses. JV (min. 50% owned by locals) – min. authorised capital of RM500,000 and paid up capital of RM350,000. |

Incorporation Requirements (Continued)

| Country | No. of directors | No. of shareholders | Share capital |
|-----------------|---|---|--|
| Thailand | <ul style="list-style-type: none"> Private company – no statutory max. or min. (but 2 directors are needed to hold a board meeting) Public company – at least 5 directors to form a board | <ul style="list-style-type: none"> Private company – at least 3 Public company – at least 15 | <ul style="list-style-type: none"> Generally no min./max. share capital requirement for a Thai-owned company (i.e. one that is at least 51% Thai-owned) provided that the min. par value per share is THB5 (subject to objection by Dept. of Business Development); but Minimum share cap for a foreign majority-owned company – THB 2mil; THB 3m if the intended activity is reserved under the Foreign Business Act. |
| Vietnam | <ul style="list-style-type: none"> At least 1 director/general director JSC/MLLC – must have a control board if ≥ 11 shareholders or 1 shareholder holding $> 50\%$ of the total shares | <ul style="list-style-type: none"> JSC – at least 3, no max. MLLC – at least 2, max. 50 Single-member LLC – just 1 | <ul style="list-style-type: none"> With the exception of certain sectors (such as banking, finance, insurance and real estate), no minimum share capital requirement. |
| The Philippines | <ul style="list-style-type: none"> At least 5 and a maximum of 15 directors in a stock corporation | <ul style="list-style-type: none"> Min. 5 and max. 15 in a stock corporation at incorporation; may have unlimited stockholders after | <ul style="list-style-type: none"> For corporations $>40\%$ foreign-owned – min. USD\$200,000 (subject to exceptions, e.g. domestic market enterprises involving advanced technology – US\$100,000). For corporations $\leq 40\%$ foreign-owned – PHP5,000 (US\$100) (subject to requirements for certain industries). |

Foreign Ownership Restrictions

| Country | Foreign Ownership Restrictions |
|-----------|---|
| Singapore | <ul style="list-style-type: none"> • 100% company ownership by foreign shareholders generally permissible • Except in the broadcasting and domestic news media sectors |
| Indonesia | <ul style="list-style-type: none"> • Negative investment list (DNI) – list of businesses which are (i) closed for foreign investment and (ii) open for foreign investment with certain requirements (including a foreign ownership limit ranging from 49%-95%; lines of businesses not listed in the DNI are generally open for 100% foreign ownership • Examples: <ul style="list-style-type: none"> - (Healthcare) Hospital consultancy services – 100% - (Healthcare) Healthcare support services including the provision of medical equipment rental/clinics – 100% - (Communication and Informatics) Fixed and mobile telecommunication networks and telecommunication services (e.g. internet service providers) – 67% - (Public Works) Construction consultancy services involving (i) advanced technology, (ii) high risk, and/or (iii) a value of more than IDR10 billion – 67% (or 70% for ASEAN investors) - (Public Works) Construction consultancy services that (i) use simple/medium technology, (ii) are low/medium risk, and/or (iii) have a work value of less than IDR10 billion – 0% (reserved for domestic SMEs) - (Trade) Department stores – 67%, subject to certain requirements including obtaining specific licences - (Trade) Retail trading via mail or internet order – previously 0%, now subject to partnership with domestic SMEs |
| Malaysia | <ul style="list-style-type: none"> • Liberalisation – removed its all-round foreign equity ceiling of 70% in 2009 – companies in service sectors such as computer, health and social, transport, and tourism can now be 100% foreign-owned • Areas which are still subject to Bumiputera reservations include banking and finance, water, batik production, agriculture, defense, energy and telecommunications – examples: <ul style="list-style-type: none"> - Financial services – 70% - Petroleum industry – 49% - Insurance and takaful (Islamic insurance) operators – 70% |

Foreign Ownership Restrictions (Continued)

| Country | Foreign Ownership Restrictions |
|-----------------|---|
| Thailand | <ul style="list-style-type: none"> Like Indonesia, business sectors with foreign equity restrictions are set out in a list comprising 3 categories: <ul style="list-style-type: none"> List One – “Businesses that foreigners are not permitted to engage in for special reasons” <ul style="list-style-type: none"> Businesses <u>completely closed</u> to foreign investment – strategic/traditional industries e.g. newspaper or radio broadcasting/television stations, rice farming/growing plantations, livestock farming, land trading, etc. List Two – “Businesses related to national safety or security or having impacts on arts, culture, traditions, customs and folklore handicrafts or natural resources and the environment” <ul style="list-style-type: none"> Activities related to national safety/security, arts/culture, tradition or natural resources A foreign majority-owned company can engage in List 2 activities if <u>Thai nationals or juristic persons hold $\geq 40\%$</u> (or 25%, if there is reasonable cause and permission is granted by the Minister of Commerce with approval by the Cabinet) of the total shares and Thai directors consists of \geq two-fifths of the Board List Three – “Businesses in respect of which Thai nationals are not ready to compete with foreigners” <ul style="list-style-type: none"> Activities which foreign companies are prohibited from engaging in <u>unless the relevant approval is sought</u> – e.g. accounting, legal, architectural or engineering services, advertising, hotel business, guided touring, etc. Assuming the relevant approval is sought, the business can be 100% foreign-owned |
| Vietnam | <ul style="list-style-type: none"> 49% cap on foreign ownership in all public companies was removed in 2015 – foreign investors can now invest up to 100% in public companies which do not operate in restricted or conditional business lines for foreign investment. For business lines conditional in respect of foreign investment (i.e. financial and professional services, trading in and exploration for energy and minerals, certain types of education, the operation of ports, railroads and airports, construction, etc.), the cap will be as prescribed by law or, in the absence of any cap specified under the law, a 49% cap will apply. |
| The Philippines | <ul style="list-style-type: none"> Similar to Indonesia and Thailand, foreign ownership restrictions are found in two lists <ul style="list-style-type: none"> List A – Activities reserved to Philippine nationals by mandate of the Constitution and other specific laws (ranging from 0%-60% maximum foreign equity) List B – Areas of activities and enterprises regulated for reasons of security, defence, risk to health and morals and protection of small and medium-sized enterprises (restriction of up to 40% foreign equity) |

Foreign Exchange Controls

| Country | Forex Controls |
|-----------------|---|
| Singapore | <ul style="list-style-type: none"> • No foreign exchange or currency restrictions on the remittance or repatriation of capital or profits in or out |
| Indonesia | <ul style="list-style-type: none"> • None – however, transfer of funds in foreign currency to/from abroad is subject to a reporting obligation to Bank Indonesia |
| Malaysia | <ul style="list-style-type: none"> • Exchange transactions are regulated by the Central Bank of Malaysia (<i>Bank Negara Malaysia</i>) <ul style="list-style-type: none"> - E.g. A resident exporter is allowed to retain $\leq 25\%$ of foreign currency proceeds from exports; the balance 75% must be converted into Ringgit (a higher foreign currency retention % will need <i>Bank Negara</i> approval) |
| Thailand | <ul style="list-style-type: none"> • All foreign exchange transactions are generally regulated by / require the permission of the Bank of Thailand • Foreign currencies can be transferred or brought into Thailand without limit; but any person receiving foreign currencies from abroad must repatriate such funds immediately and sell to/deposit with an authorised bank within 360 days • Liberalisation – amendment of the exchange control law and regulations in 2017 <ul style="list-style-type: none"> - Less supporting documents required for outward remittance - Commercial banks can now grant THB loans to non-residents for investment in Thailand / neighbouring countries - Easing of restrictions on daily balance limit in Non-resident Baht Accounts |
| Vietnam | <ul style="list-style-type: none"> • All buying, selling, lending and transfer of foreign currency must be made through banks and other financial institutions authorised by the State Bank of Vietnam • Outflow of foreign currency by transfer is only authorised for certain transactions such as payments for imports and services abroad, the refunding of loans contracted abroad and the payment of interest accrued thereon, transfers of profits and dividends, and revenues from the transfer of technology. |
| The Philippines | <ul style="list-style-type: none"> • A person who brings into / takes out of the Philippines foreign currency and other foreign currency-denominated bearer monetary instruments (such as travelers' checks, notes, money orders, bonds, securities, etc.) in excess of USD10,000 (or its equivalent) is required to make a written declaration with the central bank • Companies must seek approval from the central bank for purchases of foreign exchange above USD1 million |

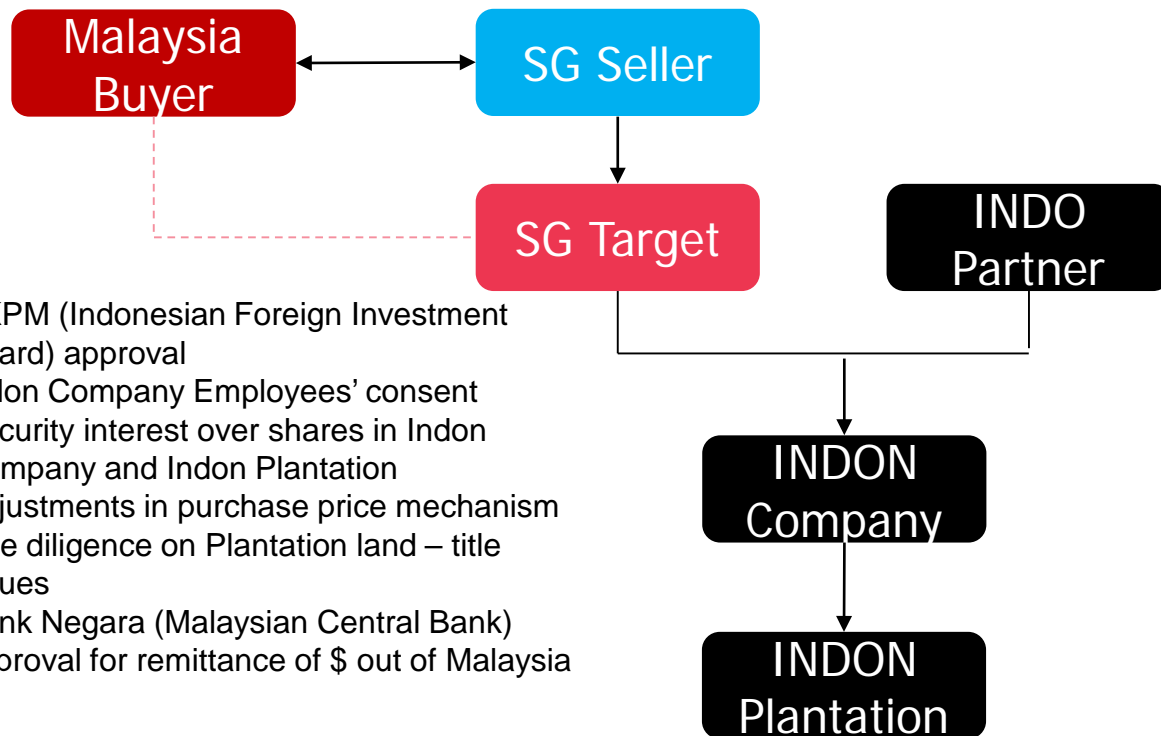
Dividend Distribution / Withholding Tax

| Country | Dividend Restrictions |
|-----------------|---|
| Singapore | <ul style="list-style-type: none"> Singapore currently does <u>not</u> impose withholding tax on dividends <ul style="list-style-type: none"> Dividends <u>paid</u> by Singapore resident companies are tax exempt in the hands of the recipient Dividends <u>received</u> from foreign companies are subject to <u>income tax</u> if remitted to Singapore (subject to exemptions) |
| Indonesia | <ul style="list-style-type: none"> Dividends <u>paid</u> to a non-resident taxpayer are subject to 20% withholding tax, unless reduced by an applicable tax treaty Dividends <u>received</u> from foreign companies are subject to tax if at least 50% of the shares of the foreign company are owned by one or more resident taxpayers – if so, income tax applies to the dividends received by the resident taxpayer |
| Malaysia | <ul style="list-style-type: none"> No withholding tax on Malaysian dividends <u>paid</u> (income tax payable on chargeable income is the final tax in Malaysia) Foreign dividends <u>received</u> are currently exempted under the Income Tax Act |
| Thailand | <ul style="list-style-type: none"> Dividends <u>paid</u> are subject to a withholding tax of 10% Dividends <u>received</u> are taxed as the ordinary income of the Thai company |
| Vietnam | <ul style="list-style-type: none"> Dividends can only be remitted once a year after a company's tax year has passed and an audited financial statement is prepared No withholding tax is imposed on profits <u>paid</u> to foreign corporate shareholders Dividends <u>received</u> from foreign companies may be subject to corporate income tax (for Vietnamese corporate shareholders) or personal income tax (for individuals), unless provisions under a tax treaty state otherwise |
| The Philippines | <ul style="list-style-type: none"> Dividends <u>distributed</u> by a Philippine company to a non-resident are generally taxed at 30% on the gross amount of dividends (subject to tax sparing arrangements or income tax treaties) Dividends <u>received</u> by Philippine domestic or resident foreign companies from a domestic corporation are not subject to tax |

Dividend Distribution / Withholding Tax

| Country | Dividend Restrictions |
|-----------------|--|
| Singapore | <ul style="list-style-type: none"> Singapore does not have thin capitalisation rules However, entities in certain regulated industries are subject to capital requirements |
| Indonesia | <ul style="list-style-type: none"> There is no express regulation restricting loans from foreign affiliates However, there is a regulation on the maximum debt-to-equity ratio in a company – Minister of Finance Regulation No. 169/PMK.010/2015 regarding the Stipulation of Debt-to-Equity Ratio for Income Tax Purpose states that companies' debt-to-equity ratio must be equal to or under 4:1 |
| Malaysia | <ul style="list-style-type: none"> Under the earning-stripping rules (w.e.f. 1 January 2019), the interest deduction on loans between related companies within the same group will be limited to a ratio determined by the Inland Revenue Board ranging from 10% to 30% of a company's earnings before interest and taxes (EBIT) or earnings before interest, taxes, depreciation and amortisation (EBITDA) |
| Thailand | <ul style="list-style-type: none"> Thailand does not have thin capitalisation rules |
| Vietnam | <ul style="list-style-type: none"> Vietnam does not have any specific tax-driven thin capitalisation rules |
| The Philippines | <ul style="list-style-type: none"> The Philippines does not have formal thin capitalisation laws However, thin capitalisation is relevant when dealing with certain government agencies <ul style="list-style-type: none"> For instance, under current Bangko Sentral ng Pilipinas and Board of Investment rules concerning loans, private sector non-bank borrowers must maintain a long-term debt-to-equity ratio of 75:25 or better for the entire duration of their foreign/foreign currency loans |

Case Study 1 – *Acquisition of Indonesian Plantation*



- BKPM (Indonesian Foreign Investment Board) approval
- Indon Company Employees' consent
- Security interest over shares in Indon Company and Indon Plantation
- Adjustments in purchase price mechanism
- Due diligence on Plantation land – title issues
- Bank Negara (Malaysian Central Bank) approval for remittance of \$ out of Malaysia

Case Study 2 – Bermuda Companies Listed on SGX

- 1) Par value
- 2) Register of Members

Q&A

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Wai Ming Yap counsels corporate clients on merger and acquisition transactions, project finance, and equity and debt capital markets (including Islamic finance), as well as gaming and leisure. Wai Ming's experience spans more than 30 years of managing sophisticated corporate transactions in Singapore and Malaysia. He also acts as a sponsor to issuers on Catalist, the sponsor-supervised board of The Singapore Exchange (SGX).

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