
**February, 2021 No.32**

**This issue covers the following topics:**



Malaysia

## NEW REQUIREMENT TO HIRE EXPATRIATES IN MALAYSIA

新型コロナウイルスの感染拡大により多くの国で失業率が上昇するなか、各国政府は自国民の雇用を確保するための施策を打ち出している。かかる施策の一部として、外国人に対する就労ビザの発行要件を厳格化する動きがシンガポールを含め複数の国で見られるが、今般マレーシアにおいても外国人の就労ビザを申請する要件として事前に求人広告を出してマレーシア人に対して雇用の機会を提供することが求められることとなった。本稿ではこの新制度の概要について紹介する。

### Introduction

Due to COVID-19 and its impact on companies, people in many countries have lost their jobs and Malaysians are not spared from this. As part of the Malaysian Government's initiative to provide employment opportunities to Malaysians, the Department of Labor has introduced a new job advertisement requirement for employers in Malaysia seeking to employ expatriates ("**New Requirements**").

Key information of the New Requirements are summarized below:

### Summary of Key Information

1. Effective date

   The New Requirement came into force on January 1st, 2021.

2. To whom do the New Requirements apply?

   Employers in all sectors in Malaysia that intend on hiring expatriates via employment pass only. Employers that wish to hire expatriates by way of a Professional Visit Pass or Resident Pass-Talent are not required to adhere to the New Requirements. For information, there are 3 categories of expatriates regulated by the Ministry of Home Affairs:

| Expatriate | Monthly Income | Contract Term |
|---|---|---|
| Category I (Skilled) | RM10,000 and above | 2 to 5 years |
| Category II (Skilled) | RM5,000 to RM9,999 | 2 years maximum |

| | | |
|---|---|---|
| Category IIII (Semi-Skilled / Knowledge Worker | RM3,000 to RM4,999 | 1 year maximum |

3. What do the New Requirements entail?

Employers that intend to employ expatriates are required to advertise job vacancies for a minimum of 30 days on MYFutureJobs Portal under the Ministry of Human Resources. Employers are also required to conduct interviews as an effort to employ local workers to meet the pre-condition for hiring expatriates.

4. What are the steps required to meet the New Requirements?

a. To register vacancies on the MYFutureJobs portal for a minimum of 30 days and ensure all details pertaining to the vacancies are provided.

b. Employers are required to conduct interviews as an effort to source local talent within 30 days from the vacancy advertisement date and submit a report on the interview via the Hiring Outcome Report that can be downloaded at www.perkeso.gov.my;

c. Employers are required to update the company's labor information in the ePPAx System (https://www.eppax.gov.my/eppax/login) for compliance monitoring on Employment Standards on the 8th day after the vacancy has been posted and activated on the MYFutureJobs portal;

d. All employers' applications for expatriates will be presented to the Expatriates Placement Committee (JPPD) who will consider the applications by taking into account employers' efforts in acquiring local talent.

5. Are there any exemptions?

Yes, the hiring of expatriates by the following categories of employers are exempted from the New Requirements:

a. Employers who intend to hire expatriates with key positions in an organization such as Chief Executive Officer, Chief Information Officer and expatriates earning a monthly basic income of RM15,000 and above;

b. The representative office / regional office of overseas organizations / companies in the manufacturing and services sectors that are established in Malaysia to carry out activities for the company / organization headquarters;

c. Investors or shareholders who are directly involved in the company's operations – investors in this context refers to individuals who invest funds in Malaysia to achieve return of investment whilst shareholders are required to hold at least 30% equity shares and be appointed as the company's director or hold other key positions;

d. Companies which receive expatriate employees from a parent company for the purposes of training or knowledge / experience sharing between companies and to meet the needs of the companies' workforce;

e. Organizations subject to the International Organization Act (Privileges and Immunities) (Act 485) that may appoint Foreign Recruited Staff from foreign nationals; and

f. Sports organizations / club in the country for its recruitment of athletes / professionals.

6. What about renewal of employment pass?

For the purpose of renewing employment pass for approved positions, employers are not required to re-advertise vacancies or conduct job interviews. Instead, employers may liaise directly with the Immigration Department of Malaysia / Approval Agency for the purpose of renewing the existing employment pass.

## Conclusion

The implementation of the New Requirements should be taken into account by the employers into their recruitment

process as priority will need to be given to local candidates and there will be additional lead-time that will be incurred before an expatriate may be hired for a vacant position.

[Author]

**Aizad Bin Abul Khair** (Nagashima Ohno & Tsunematsu Singapore LLP)
aizad_khair@noandt.com
Aizad Bin Abul Khair is a Malaysian and UK qualified foreign attorney in the Singapore office. His areas of practice include mergers and acquisitions, equity capital markets, joint ventures and general corporate matters. Aizad has extensive experience working in Malaysian related matters and this includes sale and acquisition of private companies and businesses, listing and other equity capital raising on the Malaysian Stock Exchange, take-overs and corporate restructuring.

Singapore

## CHANGES TO ICC ARBITRATION: THE 2021 ICC ARBITRATION RULES

2021 年 1 月 1 日付で ICC 仲裁規則が改訂され、同日以降に提起された全ての事案に対しては新規則が適用されることとなった。本稿では最新の ICC 仲裁規則の主要な改正点について概説する。

### Introduction

On 1 January 2021, the new 2021 ICC Arbitration Rules ("**2021 Rules**"), a copy of which can be found here https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/) came into force and became immediately applicable to all cases filed with the ICC from that day on. The following sets out some key changes that may be of note when selecting arbitral rules and preparing for arbitrations under the 2021 Rules.

### Type of Dispute

The changes made by the 2021 Rules further adapts ICC arbitration to a broader range of scenarios in commercial disputes.

In more complex disputes, the 2021 Rules provide easier access to multi-party and multi-contract arbitrations with revisions to its previous provisions on Joinder and Consolidation in Articles 7 and 10 respectively.

Where previously, a joinder (after the arbitral tribunal's constitution) could only occur upon the agreement of all parties; the newly inserted Article 7(5) now requires the arbitral tribunal to decide on one party's Request for Joinder by taking into account "*all relevant circumstances, which may include whether the arbitral tribunal has prima facie jurisdiction over the additional party…*". Note that at this stage, the arbitral tribunal only has to be satisfied that it "*has prima facie jurisdiction*", its findings does not bar a subsequent jurisdictional challenge from being raised. .

Revisions to Article 10(b) have also clarified that upon the request of one party, the ICC Court can consolidate arbitrations between different parties pursuant to multiple arbitration agreements as long as those arbitration agreements are the same. Previously, arbitrations between different parties could only be consolidated upon the request by one party, if the arbitrations were all based on a single arbitration agreement.

The changes in the 2021 Rules also took into account disputes of comparatively smaller quantum. The previous version of the ICC Arbitration Rules introduced an Expedited Procedure that applied by default (subject to certain exemptions) to arbitrations with a disputed quantum of US $2 million or less. The Expedited Procedure consisted of shorter timelines and gave the arbitrator broad discretion on limiting various procedural steps such as documents production. Changes to APPENDIX VI Article 1(2)b) raised the disputed quantum for the Expedited Procedure's default application, from US $2 million to US $3 million, for arbitration agreements concluded on 1 January 2021 onwards.

Lastly, 2021 Rules also considered urgent disputes requiring emergency relief. The changes in the 2021 Rules made urgent interim relief more readily available by limiting the instances where the Emergency Arbitrator provision would be unavailable. Under the previous Article 29(6)(c), the Emergency Arbitrator provision would not apply where "*parties have agreed to another pre-arbitral procedure that provides for the granting of conservatory, interim or similar measures*". This has been deleted and replaced with a new exemption covering treaty-based arbitrations.

## Tribunal Neutrality

The 2021 Rules also sought to make ICC arbitrations more transparent. To this end, changes were introduced to improve conflict detection and conflict avoidance, as well as unconscionable constitutions of arbitral tribunals.

The newly inserted Article 11(7) expands the scope of early conflict detection by requiring parties to give prompt notice "*of any non-party which has entered into an arrangement for the funding of claims or defences and under which it has an economic interest in the outcome of the arbitration*". The ICC has helpfully clarified that "*Article 11(7) would normally not capture (i) inter-company funding within a group of companies, (ii) fee arrangements between a party and its counsel, or (iii) an indirect interest, such as that of a bank having granted a loan to the party in the ordinary course of its ongoing activities rather than specifically for the funding of the arbitration*".

Conflict detection was also considered in instances of changes to party representation, where the newly inserted Article 17(1) requires a party to give prompt notice of any change in representation. If conflict were to arise in such a situation, the 2021 Rules empowers the arbitral tribunal "*to avoid a conflict of interest*" by taking "*any measure necessary*" after affording the relevant party "*an opportunity to the parties to comment in writing within a suitable period of time*". Such measures can include "*exclusion of new party representatives from participating in whole or in part in the arbitral proceedings*". Do note however, that the 2021 Rules do not seem to address the situation of a conflict of interest arising from the involvement of a third-party funder midway through proceedings.

The 2021 Rules also sought greater transparency in the constitution of arbitral tribunals – particularly in situations of contractually directed arbitral appointments with a "*significant risk of unequal treatment and unfairness that may affect the validity of the award*". In such instances, the newly inserted Article 12(9) allows the ICC Court to disregard the relevant contractual provision and "*appoint each member of the arbitral tribunal*".

For treaty-based arbitrations, the newly inserted Article 13(6) provides that "*no arbitrator shall have the same nationality of any party to the arbitration*".

## Conduct of Proceedings

In terms of the case management of proceedings, the 2021 Rules introduced two key changes.

First, revisions to Article 26(1) in the 2021 Rules now give arbitral tribunals the discretion to hold hearings via remote means, "*after consulting the parties, and on the basis of the relevant facts and circumstances of the case*". This revision was coupled with the deletion of the previous Article 25(2) that compelled arbitral tribunals to "*hear the parties together in person if any of them*" so requested. These revisions circumvent the problem of undue delay caused by parties tactically insisting on their right to physical hearings under the previous version of the ICC Arbitration Rules.

Second, revisions to Article 22(2) now require arbitral tribunals to actively adopt effective case management measures including "*encouraging the parties to consider settlement of all or part of the dispute*" per the revisions to APPENDIX IV h)(i) in the 2021 Rules. It therefore appears that the 2021 Rules may result in arbitral tribunals adopting a more judge-lead approach in case management.

## Parties' Recourse

The 2021 Rules gave parties new forms of recourse against arbitral tribunals and the ICC Court.

Vis-à-vis arbitral tribunals, the 2021 Rules provided for the issuance of a new type of award by the arbitral tribunal. Under Article 36(3), within 30 days of receipt of an award, parties can apply for an additional award to address "*claims made in the arbitral proceedings which the arbitral tribunal has omitted to decide*".

Vis-à-vis the ICC Court, under APPENDIX II Article 5, parties are now able to request for the ICC Court to communicate

the reasons for its decisions under Articles:

- 6(4) (challenge to the existence, validity or scope of the arbitration agreement),
- 10 (consolidation of arbitrations),
- 12(8) (constitution of arbitral tribunal in light of parties' disagreement in multi-party arbitrations),
- 12(9) (constitution of arbitral tribunal where there is a significant risk that the contractual mechanism for appointment may affect the validity of the award),
- 14 (challenge of arbitrators) and
- 15(2) (replacement of arbitrators on the ICC Court's own initiative).

Notwithstanding the above, the ICC Court is not obliged to provide the requested reasons for its decision and may withhold its reasons under "*exceptional circumstances*" per APPENDIX II Article 5(3). What these "exceptional circumstances" entail remains to be seen, as no elaboration was given in the ICC's "Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration" dated 1 January 2021.

Nevertheless, a party aggrieved by a decision of the ICC Court can commence a claim against it pursuant to the newly inserted Article 43, that provides that claims against the ICC Court are governed by French law, and can only be decided by the Paris Judicial Tribunal *(Tribunal Judiciaire de Paris)* in France.

## Conclusion

The changes brought by the 2021 Rules have expanded the features of ICC arbitration. However, the value of those changes to parties would ultimately have to depend on their positions within the specific circumstances of their dispute.

[Author]

**Weijian Teo** (Nagashima Ohno & Tsunematsu Singapore LLP)
weijian_teo@noandt.com

Weijian Teo is a Singapore qualified attorney based in the firm's Singapore office. His practice has focused on complex cross-border commercial disputes, building and construction disputes and international arbitrations; having previously been instructed to act at all levels of the Singapore Courts and arbitrations under various institutional rules such as SIAC, ICC and DIFC-LCIA . The matters that he has handled encompass a diverse range of sectors such as energy, infrastructure, construction, tourism and hospitality, industrial manufacturing, international trade and cryptocurrency.

Myanmar

## LEGAL ISSUES TO CONSIDER IN LIGHT OF THE STATE OF EMERGENCY IMPOSED BY THE MILITARY

2021 年 2 月 1 日、ミャンマーにおいて、2008 年憲法第 417 条に基づき非常事態宣言が発出され、元国軍幹部のウ・ミン・スエ副大統領が暫定的に大統領に指名された。非常事態宣言の期間は 2021 年 2 月 1 日から 1 年間とされており、当面不透明な情勢が続くことが予想される。本稿は今回の非常事態宣言下における現状について、法的な観点からの分析を試みるものである。

### Background

The President Office of the Republic of the Union of Myanmar issued an Ordinance 1/2021 under the authority of Vice-President U Myint Swe and declared a state of emergency in accordance with Article 417 of the Constitution of Myanmar 2008 (the **"Constitution"**) after arbitrary detention of the members of the Government, including state Counsellor Daw Aung San Suu Kyi, President U Win Myint and other officials of the National League for Democracy (**"NLD"**) on early morning of 1 February 2021. Under the Ordinance 1/2021, the state of emergency is effective nationwide and the duration of the state of emergency is one year effective from 1 February 2021.

Ordinance 1/2021 stated that Vice-President U Myint Swe will serve as the Acting President during the state of emergency and the legislative, judicial and executive power is handed over to Min Aung Hlaing, the Military's Commander-in-Chief of Defense Services, in accordance with the Article 418 of the Constitution. According to Ordinance 1/2021, the reason to declare a state of Emergency was due to failure to ensure free, fair and transparent general elections held on 8 November 2020 by the Union Election Commission (**"UEC"**), which had lost of sovereignty and national solidarity among the various ethnic groups in Myanmar. The Office of the Commander-in-Chief of Defense Services issued the Notification 1/2021 on 2 February 2021 which provides that UEC will be re-constituted and following the end of the state of emergency, a free and fair multiparty general elections will be held and power will be transferred to the government formed by the winning party.

Set out below is a summary of key issues and considerations with respect to the situation on the ground in Myanmar.

### Possible international sanctions

In response to the declaration of state of emergency imposed by the military, the President of the United States and leaders of other G7 countries have threatened to re-impose sanctions if power is not transferred back to the NLD. The Department of Treasury of the United States announced that it had designated 10 current and former Myanmar military officials and 3 Myanmar entities to the Specially Designated Nationals and Blocked Persons (**"SDN"**) list. If a new sanctions regime is implemented, it is likely to be targeted at the military, their companies and related partners. Foreign companies sourcing or investing in Myanmar should therefore be mindful to ensure that they are not directly or indirectly dealing with military or their related businesses. Therefore, foreign investors should proactively pay attention to any developments in relation to new or amended sanctions being imposed.

### Commercial contracts

While each contract will have to be examined on its own, declaration of the state of emergency and other related circumstances are likely to have an impact on commercial contracts. The circumstances that may result in difficulties for businesses to perform their contractual obligations include imposition of new international sanctions, delay in obtaining permits and licenses for commercial projects due to the lack of manpower as several government officials are not reporting to work in order to participate in the civil-disobedience movement, delay of material delivery, importation and custom clearance due to widespread demonstrations and protests and ban on night shifts due to curfew, and so on. Companies that are unable to perform their obligations under an existing commercial contracts that are or may be disrupted by the declaring the state of emergency, may seek to rely on force majeure provisions in a contract in order to avoid liability. Contracts should be analyzed to check whether the contract contains a force majeure clause and whether the clause covers this event in order for a party to invoke force majeure.

In the event that a force majeure clause has not been specifically provided for in a contract or the circumstances are not sufficient to invoke the force majeure provision, the doctrine of frustration under Section 56 of the Myanmar Contract Act 1872 may be applicable to discharge a party's contractual obligations during the state of emergency.

Parties entering into new contracts must consider the impact of the current situation and appropriately include a clause in the contract, that protects them from liability should this situation continue to develop.

## New government regime and change in investment climate

In terms of the executive function, the Office of the Commander-in-Chief of the Defense Services has issued subsequent notifications to replace the NLD government, removing NLD appointed ministers under the military's new administration. Such changes in government organization may affect ongoing negotiations related to permits and licenses. The Commander-in-Chief of Defense Services and the State Administration Council have so far reappointed 14 Union ministers and many other top civil servants and dismissed NLD office holders. Among the new Union ministers, U Aung Naing Oo has been appointed as Minister Investment and Foreign Economic Relations. He was DICA's director general and the MIC's secretary from 2012 to 2019 and served as director general and permanent secretary of the Ministry of Investment and Foreign Economic Relations until the state of emergency. His appointment projects a commitment from the military to an open investment climate, since he is well-respected and has experience in local and foreign business community.

However, as a result of current situation, a number of foreign companies have already announced that they will be suspending operations and terminate their businesses in Myanmar. Further, banking and telecommunication services have been significantly disrupted, further leading to chaos and disruption in business activities. As of the date of this article, the situation remains fluid and there continues to be a likelihood of further disruptions.

The Office of the Commander-in-Chief of Defense Services stated in the Notification 1/2021 that military will continue to take measures to promote economic recovery. Notably, until amended by the Commander-in-Chief's exercise of legislative powers, all laws, rules, and regulations in force prior to the declaration of the state of emergency continue to be valid and effective. However, it remains to be seen whether military will introduce new law and regulations on foreign investment that could restrict in operating in the country.

## Impact on Foreign Expats in Myanmar

After declaring the state of emergency, the Commander-in-Chief of Defense Service has amended a series of laws such as the Penal Code 1860, the Law Protecting Privacy and Security of Citizen 2017 and the Electronic Transaction Law 2014 that allow it to make arrests or search private premises without warrants, to intercept communications and obtain personal information from telephone companies or open private letters and packages. In addition, the amending laws increases the military's power over online service providers by authorizing the authorities to conduct unspecified interventions for a broad range of reasons, including public order, investigating crime, and safeguarding public life, property and public welfare. Curfews have also been imposed from 8 pm to 4 am in major cities such as Yangon. It may be advisable for foreign expats currently living in Myanmar to be cautious and liaise with their embassies for safe return to their home countries while the situation on the ground remains unclear. While international flights continue to be suspended until 30 April 2021, relief flights are operating.

## Conclusion

Given the above, business owners need to consider a business resilience and preservation of existing investment plan to ensure that organizations are able to meet the ongoing challenges created by this current situation. While the situation continues to evolve, businesses should continue to monitor the impact that the state of emergency is likely to have on their contracts and businesses.

[Author]

**Win Shwe Yi Htun** (Nagashima Ohno & Tsunematsu Singapore LLP)
win_shwe_yi_htun@noandt.com
Win Shwe Yi Htun is a Myanmar qualified attorney in the Singapore office. Her areas of practice include mergers and acquisitions, general corporate matters, joint venture and employment sectors. Prior to joining NO&T, Shwe Yi worked at top-tiers corporate law firms in Myanmar, where she gained significant experience in handling corporate and commercial transactions, and had participated on various investment projects involving commercial parties from Japan, China, Singapore and Thailand.

[EDITORS' PROFILES]

**Nobuo Fukui** (Nagashima Ohno & Tsunematsu Singapore LLP)
nobuo_fukui@noandt.com

Nobuo Fukui is a partner at Nagashima Ohno & Tsunematsu and a representative of its Singapore Office (Nagashima Ohno & Tsunematsu Singapore LLP). He has been stationed in Singapore since 2013 and providing legal services mainly to Japanese companies and its affiliates to expand their business into south-east Asian countries.

He is a graduate of the University of Tokyo (LL.B., 2001) and Duke Law School (LL.M., 2009). He was admitted to the Japan Bar in 2003 and New York State Bar in 2010. He worked as a foreign lawyer at Widyawan & Partners (Jakarta) from 2010 to 2013, focusing on Indonesian legal practice, and he has extensive legal experience in the Indonesia related transactions.

**Rashmi Grover** (Nagashima Ohno & Tsunematsu Singapore LLP)
rashmi_grover@noandt.com

Rashmi Grover is an Indian and UK qualified foreign attorney in the Singapore office. Her areas of practice include mergers and acquisitions, private equity and general corporate. She has extensive experience working in the Indian markets and advising clients on corporate commercial and finance transactions including transactions involving mergers, formation of joint ventures, acquisition of stakes in companies, private equity investments, business/asset acquisition transactions, regulatory filings, debt issuances and structured lending transactions.

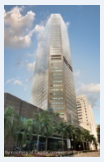
www.noandt.com


## NAGASHIMA OHNO & TSUNEMATSU

JP Tower, 2-7-2 Marunouchi, Chiyoda-ku, Tokyo 100-7036, Japan
Tel: +81-3-6889-7000 (general) Fax: +81-3-6889-8000 (general) Email: info@noandt.com


Nagashima Ohno & Tsunematsu is the first integrated full-service law firm in Japan and one of the foremost providers of international and commercial legal services based in Tokyo. The firm's overseas network includes offices in New York, Singapore, Bangkok, Ho Chi Minh City, Hanoi and Shanghai, and collaborative relationships with prominent local law firms throughout Asia and other regions. The over 500 lawyers of the firm, including about 40 experienced foreign attorneys from various jurisdictions, work together in customized teams to provide clients with the expertise and experience specifically required for each client matter.


**Singapore Office**
(Nagashima Ohno & Tsunematsu Singapore LLP)



6 Battery Road #40-06
Singapore 049909
Tel: +65-6654-1760 (general)
Fax: +65-6654-1770 (general)
Email: info-singapore@noandt.com

**Bangkok Office**
(Nagashima Ohno & Tsunematsu (Thailand) Co., Ltd.)

34th Floor, Bhiraj Tower at EmQuartier
689 Sukhumvit Road, Klongton Nuea
Vadhana, Bangkok 10110, Thailand
Tel: +66-2-302-4800 (general)
Fax: +66-2-302-4899 (general)
Email: info-bangkok@noandt.com

**HCMC Office**
(Nagashima Ohno & Tsunematsu HCMC Branch)

Suite 1801, Saigon Tower
29 Le Duan Street, District 1
Ho Chi Minh City, Vietnam
Tel: +84-28-3521-8800 (general)
Fax: +84-28-3521-8877 (general)
Email: info-hcmc@noandt.com

**Hanoi Office**
(Nagashima Ohno & Tsunematsu Hanoi Branch)

Suite 10.04, CornerStone Building
16 Phan Chu Trinh, Hoan Kiem District
Ha Noi City, Vietnam
Tel: +84-24-3266-8140 (general)
Fax: +84-24-3266-8141 (general)
Email: info-hanoi@noandt.com

**Shanghai Office**
(Nagashima Ohno & Tsunematsu
Shanghai Representative Office)

21st Floor, One ICC, 999 Middle Huaihai Road
Xuhui District, Shanghai 200031, China
Tel: +86-21-2415-2000 (general)
Fax: +86-21-6403-5059 (general)
Email: info-shanghai@noandt.com


**For more details on our overseas practice**

If you would like the convenience of receiving future editions of the NO&T Asia Legal Review by email direct to your Inbox, please fill out our newsletter registration form at the following link: https://www.noandt.com/en/publications/newsletter/asia.html
Should you have any questions about this newsletter, please contact us at asia-legal-review@noandt.com.
Please note that other information related to our firm may be also sent to the email address provided by you when subscribing to the NO&T Asia Legal Review.