

## NO&amp;T Asia Legal Review

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**PERSONAL DATA PROTECTION BILL**

アジア各国で個人情報保護規制の導入や改正が進む中、インドにおいてもその動きと軌を一にして、2019 年 12 月に個人情報保護法案が議会に上程され、現在審議が続いている。成立すればインドでは初の包括的な個人情報保護規制が制定されることになり、各社対応を迫られることになると予想される。そこで本稿では、かかる個人情報保護法案のなかで特に重要性の高い規定について解説する。

**Background**

With an aim to protect the privacy of individuals with respect to their personal data and to govern the relationship between individuals and entities processing personal data, the Personal Data Protection Bill, 2019 (“**PDPB**”) was introduced in the Parliament of India in December 2019 and is currently being reviewed by the joint parliamentary committee. The joint parliamentary committee is due to submit its report in February 2020. The PDPB is largely based on the data protection bill submitted to the Ministry of Electronics and Information Technology by the Srikrishna Committee, however contains some significant changes, as set out below.

**Key Provisions**

1. **Personal Data and Sensitive Personal Data:** ‘Personal Data’ is defined under the PDPB as data about or relating to a natural person which enables such natural person to be identified and includes both physical and virtual forms of characteristics, attributes or any other feature of the identity of a natural person as well as inferences drawn from such data for the purpose of profiling. Sensitive personal data is defined as personal data that reveals, is related to, or constitutes financial data, health data, official identifiers, sex life and sexual orientation, biometric data, genetic data, and caste or tribe, religious, political belief or affiliation, and any other category as may be notified. While the previous version of the bill included passwords as sensitive personal data, this is no longer the case.

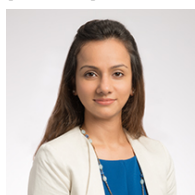
2. **Data Principal and Data Fiduciary:** Under the PDPB, the natural person whose personal data is collected is referred to as the 'data principal' and the entity that determines the purpose or means of processing this data is referred to as the 'data fiduciary'. Data fiduciaries include the State, corporate entities (including foreign companies that deal with personal data of individuals in India) and individuals. Processing is defined broadly, to include storage, adaptation, retrieval, dissemination, and erasure or destruction.
3. **Data Protection Authority:** The PDPB provides for formation of a Data Protection Authority ("DPA") which would be responsible for: (i) protecting interests of individuals, (ii) preventing misuse of personal data, and (iii) ensuring compliance with the law. It will consist of a chairperson and six members, with at least 10 years' expertise in the field of data protection and information technology.
4. **Exceptions to Consent Requirement:** Akin to privacy legislations elsewhere, the PDPB allows processing of data by fiduciaries only if consent is provided by the data principal. However certain grounds for processing of '*personal data*' without the consent of the data principal have also been set out. In addition to the grounds stipulated in the previous version of the bill i.e. prevention and detection of any unlawful activity and detection of fraud, responding to a medical emergency, whistle blowing, credit scoring and processing of publicly available personal data, under the PDPB, another ground i.e. '*operation of search engines*' has been added to the list.
5. **Right of Erasure:** Data principals have been granted an additional right under the PDPB. Now, data principals can seek a '*right to erasure*' in addition to the '*right to be forgotten*,' which was introduced under the previous version of the bill. As a consequence, data principals may now be able to seek erasure or deletion of '*personal data*' which is no longer necessary for the purpose it was processed.
6. **Consent Managers:** A new category of Data Fiduciaries called consent managers has been defined under the PDPB. These entities are to enable Data Principals to gain, withdraw, review and manage their consents across multiple fiduciaries through an accessible, transparent and interoperable platform. The conditions for being classified as a Consent Manager and the requirements for registration with the DPA will be notified under the regulations.
7. **Data Localisation Requirements and Cross Border Transfers:** The data localization requirement, which had been one of the most debatable topics under the previous version of the bill has been clarified substantially in the PDPB:
  - (i) Personal Data would be permitted to be transferred outside India and no requirement of localization (i.e. storing a copy of the data on a server in India) will apply to Personal Data;
  - (ii) Sensitive Personal Data would be required to be stored in India but such data may be transferred outside India for processing subject to explicit consent of the data principal and fulfilment of certain additional conditions;
  - (iii) Critical Personal Data (which term has not been defined yet) may be processed only in India. Some exceptions to transferring critical personal data outside India have been specified such as where the transferee is engaged in the provision of health service or emergency services or where the Central Government has deemed such transfer to be permissible or is of the opinion that the transfer does not prejudicially affect the security and strategic interest of the country.
8. **Social media intermediaries:** The PDPB introduces a new and separate category of data fiduciaries, namely 'social media intermediaries'. Social media intermediary is defined as an 'intermediary who primarily or solely enables online interaction between two or more users and allows them to create, upload, share, disseminate, modify or access information using its services'. Search engines, e-commerce entities, internet service providers, email and storage services, and online encyclopedias are expressly excluded from this definition. The PDPB provides that if a social media intermediary fulfils certain criteria and threshold of users and whose actions are likely to impact electoral democracy, security of the state, public order, sovereignty or integrity of India, then such intermediary would be notified as 'significant data fiduciary' and would consequently be subject to an additional layer of obligations such as carrying out data protection impact assessments, record keeping, appointing data protection officer, and undertaking annual audits. Further, the PDPB also requires certain social media intermediaries to incorporate voluntary verification methods for their users and verified accounts would have to be marked by a specific mark visible to all users.

9. **Privacy by design policy:** The PDPB introduces a requirement for every data fiduciary to prepare a privacy by design policy which is required to meet the prescribed criteria including setting out the managerial, organizational, business practices and technical systems designed by the data fiduciary to anticipate, identify and avoid harm to the data principal in the course of processing such data principal's personal data. After framing such policy, it may be submitted to the DPA for certification. Upon certification, the policy would need to be published on the website of the data fiduciary.
10. **Creation of Regulatory Sandbox:** In order to encourage innovation in artificial intelligence, machine learning or any other emerging technology in public interest, the DPA has been entitled to create a regulatory sandbox which could be between 12 to 36 months in duration. Entities included in the sandbox will be exempted from complying with the purpose, storage/retention, consent and other requirements under the law.
11. **Exemption to Government Agencies:** The PDPB empowers the Central Government to exempt, by an order in writing, any government agency from the application of all or any provisions of the law with respect to processing 'personal data' on grounds such as public order, prevention and incitement to the commission of any cognisable offence relating to the sovereignty and integrity of India, security of state, friendly relations with foreign states etc. Processing of personal data for the purpose of this provision includes sharing by or sharing with such agency of the government by any data fiduciary, data principal or data processor. Under the previous version of the bill, such exemptions were only available to the Central Government pursuant to a law passed by the Parliament.
12. **Anonymised data:** The PDPB also empowers the Central Government, in consultation with the DPA, to direct any data fiduciary or data processor to provide anonymised personal data or other non-personal data to enable the Government to better target delivery of services or formulate evidence-based policies.

## Conclusion

The PDPB has eased out some concerns previously raised by stakeholders and brought in more clarity, particularly on the issue of data localisation and cross-border transfers. The report of the joint parliamentary committee is awaited and the finer details of the law have to be spelt out, however, some new issues have already been brought to the fore by various interested groups. Specifically, the blanket powers granted to the Government to exempt government agencies from the provisions of the privacy law as well as the right to seek anonymised data from data fiduciaries have been severely criticised. While the introduction of a data protection law is the need of the day to protect the rights of individuals, corporate entities should prepare for the additional compliance burden and costs that would inevitably follow upon this law coming into force.

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## Malaysia

## RECOGNITION OF DOCTRINE OF UNIVERSAL SUCCESSION AND TRANSMISSION OF SHARES BY OPERATION OF LAW

一般的に、二つの法人が合併した場合、合併により消滅する法人の資産や権利義務は当然に存続会社に承継される。これは消滅会社が保有する株式についても同様に存続会社に承継されるのが原則であるが、マレーシア法人の外国株主が外国の会社法に基づき合併した場合に、保有するマレーシア法人の株式について同様の包括承継が生じるかについては、マレーシア法上明確でなかった。その点に関して先般、法律上当然に包括承継が生じる旨の裁判例が出された。実務上、クロスボーダーの組織再編取引においては頻出する事例であることから、本稿では当該裁判例について解説する。

### Introduction

The Malaysian High Court, has in the recent decision of *United Renewable Energy Co Ltd v TS Solartech Sdn. Bhd. [2019] LNS 118* (“**United Renewable Energy Case**”), recognized the concept of universal succession in the context of transmission of shares and confirmed that transmission of shares is not just limited to the death of a shareholder or when a shareholder becomes bankrupt.

### What is the doctrine of universal succession?

The doctrine of universal succession originates from Roman law. It is a legal concept in which a successor company assumes all rights and liabilities of the preceding company pursuant to a merger under foreign law.

To illustrate, if Company X is a foreign shareholder of a Malaysian company which merges, under Japanese law, with Company Y resulting in a successor company in Japan, then under the concept of universal succession the shares held by Company X in the Malaysian company shall automatically be transmitted by operation of law to the successor company i.e. Company Y. Company X need not transfer its shares in the Malaysian company to Company Y by using an instrument of transfer.

This concept has been widely recognized by the courts in Commonwealth jurisdictions but it is relatively foreign in Malaysia prior to the *United Renewable Energy Case* as there is no legislation in Malaysia which provides for the merging of two entities resulting in one surviving entity.

### Brief Facts of the United Renewable Energy Case

Solartech Energy Corp (“**SEC**”) is a foreign shareholder of a joint venture company, TS Solartech Sdn Bhd (“**TS Solar**”), in Malaysia. SEC had merged with two other companies at its place of incorporation, Taiwan, which resulted in one single-merged company known as United Renewable Energy Co Ltd (“**United Renewable Energy**”).

Thereafter, United Renewable Energy wrote to TS Solar informing them of the merger and requesting them to effect the transmission of shares in TS Solar by operation of law from SEC to United Renewable Energy as the successor company. However, TS Solar refused to effect the transmission of shares on the basis that the passing of title requires a transfer of shares via an instrument of transfer.

### The Decision of the Malaysian High Court

The Malaysian High Court held that there had been an automatic devolution of title in the shares to United Renewable Energy by operation of law upon the occurrence of the merger.

In coming to its decision, the Malaysian High Court relied on judgments from several Commonwealth Courts, notably the leading English House of Lords’ decision of *National Bank of Greece and Athens SA v Metliss [1958] AC 509* (“**Metliss Case**”) and the Singapore case of *JX Holdings Inc. v Singapore Airlines Ltd [2016] SGHC 212* (“**Singapore Airlines Case**”). In the *Metliss Case*, English House of Lords laid down the principle that the succession of corporate personality is a matter that goes to the status of the foreign corporation and as such, is governed by the law of

incorporation. As far as the law of the forum is concerned, once an entity is recognized as having the status of a universal successor, it will be clothed with both the assets and liabilities. Thus, the concept of universal succession is recognized.

The Singapore Airlines Case had similar facts to that of the United Renewable Energy Case and was decided in the context of a universal succession pursuant to a merger. The Singapore High Court held that the transfer of assets and liabilities through the process of a universal succession was a transmission and not a transfer within the meaning of the Singapore Companies Act. As such, the shares in question were transmitted to the succeeding company by operation of law, and the succeeding company was entitled to be registered as a shareholder in place of the predecessor company without having to prepare and deliver a proper instrument of transfer.

### **Conclusion**

In a nutshell, the United Renewable Energy Case confirms that Malaysia does recognize the doctrine of universal succession, and this is in line with other Commonwealth decisions as well. Non-Malaysian companies seeking to undertake mergers in their countries will draw comfort that such mergers are likely to be recognized in Malaysia by virtue of the doctrine of universal succession. The assumption of all assets, liabilities, obligations and rights by the successor entity will be recognized as a consequence of such merger.

Where these assets include shares, the shares would be treated as having been transmitted to the successor company by operation of law. The successor company would be entitled to be registered as the owner of the said shares without the need for any instrument of transfer.

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## Thailand

## RESTRICTING UNFAIR TRADE PRACTICES IN FRANCHISE BUSINESS

2019 年 12 月 6 日付で、タイの競争法である取引競争法に基づく規則として、フランチャイズ事業における不正取引に関するガイドラインが制定され、2020 年 2 月 4 日付で発効した。フランチャイズ事業に特化したタイにおける初めての規制であり、フランチャイザーがフランチャイジーに対して優位な立場を利用して行う不公正な行為が規制対象となっている。

**Background**

Under Section 57 of the Trade Competition Act B.E.2560 (2017) (the “TCA”), no business operator shall undertake any conduct resulting in damage to other business operators. Pursuant to this Section 57, the Trade Competition Commission (the “TCC”), as an independent regulator of the TCA, announces guidelines on prohibited action by specific businesses.

In this regard, on 6 December 2019, the Notification of the TCC on Guidelines for Consideration of Unfair Trade Practices in Franchise Business (the “Notification”) was publicly announced and came into force on 4 February 2020. The Notification is the first regulation to impose restriction upon franchise business under the realm of anti-monopoly laws. The purpose of this Notification is to ensure good governance in trade practices and to establish a clear principle in the implementation of fair and reasonable trade practices in accordance with the TCA which will enhance franchise business to be more organized and meet international standards as well as result in a speedy economic growth of the country.

**Key Provisions**

The Notification defines the scope of franchise business, franchisor and franchisee and imposes the duties on the franchisor to prevent cohesive trade practice against the franchisee. It also sets out a guideline which stipulates criteria in determining unfair trade practices.

**(1) Definition of “franchise business”, “franchisor” and “franchisee”**

The Notification will be applied to the “franchise business” between the “franchisor” and the “franchisee” who fall within the scope of the following definitions:

- (i) “Franchise Business” means a business operation in which one person namely “franchisor” has entered into a written agreement with another person namely “franchisee” to operate business by exercising the format, system, process and rights in intellectual property of franchisor or in which franchisor is entitled to grant other persons use for the purpose of business operation within the specified time period or area.
- (ii) “Franchisor” means a person who grants the right to operate franchise business.
- (iii) “Franchisee” means a person who receives the right to operate franchise business.

**(2) Duties of the franchisor**

In order to maintain a fair competition and transparency in the franchise business, the franchisor is required to comply with the duties stipulated under the Notification as follows:

- (i) *Duty to disclosure necessary information prior to the execution of franchise agreement:* The franchisor must disclose the details of the business operation to the franchisee which include the information on:
  - Royalty and franchise fee;



- Relevant trademark, patent, and copyright, applicable time period, scope, terms and restrictive conditions; and
- Renewal of franchise agreement, amendment, cancellation and termination of franchise agreement.

- (ii) *Duty to notify the franchisee of competition by the franchisor and the franchisee's priority to open a new store:* If the franchisor wishes to extend its branch which is managed and operated by the franchisor itself, the franchisee who has the closest branch shall be informed in advance and such franchisee shall be given the right to open such branch first. The franchisor shall also stipulate an appropriate period in which the franchisee may respond to the franchisor.

**(3) The criteria in determining unfair trade practices of the franchisor which may cause damages to the franchisee**

As mentioned above, the Notification provides the criteria in determining unfair action by the franchisor in any way which may cause damages to the franchisee and thus prohibited by Section 57 of the TCA. Such actions shall include:

- (i) Setting restrictive conditions against the franchisee without a reasonable ground such as forcing the franchisee to purchase any goods or services which are not related to franchise business, or forcing the franchisee to purchase goods or services only from the franchisor or vendors designated by the franchisor, etc.;
- (ii) Setting additional conditions after the execution of the franchise agreement such as forcing the franchisee to purchase other goods or services or conduct any other act which are outside the franchise agreement, except when there is a reasonable commercial ground;
- (iii) Prohibiting the franchisee from purchasing the goods or services from the suppliers that offer goods or services at lower price without a reasonable ground;
- (iv) Prohibiting the franchisee to sell perishable goods or expiring goods at a discount price without a reasonable ground;
- (v) Setting different conditions among franchisees without reasonable ground leading to unfair discriminatory trade practices; or
- (vi) Setting any inappropriate conditions which are outside the purpose of maintaining reputation, quality and standard of franchisor under franchise agreement.

**Penalty**

In case the franchisor's action is deemed to violate Section 57 of the TCA, violator shall be subject to an administrative fine of up to 10% of annual revenue in the year of violation, or an administrative fine up to 1,000,000 THB in case the violation occurs in the first year of business operation. In addition, the franchisee who has been injured by the violating franchisor is also entitled to demand compensation by civil case.

**Conclusion**

The Notification intends to prevent the use of superior position by franchisors to impose unfair conditions upon small-scale franchisees and to prevent the franchisor to unfairly compete with the franchisee. Although the franchisor should be aware of its new duties under the Notification, the Notification itself should not become the source of panic for business operators. This is because the provisions under the franchise agreement that will not undermine fair trade and have legitimate grounds e.g. to ensure quality or uniformity among franchise stores, will not constitute unfair trade practice under the Notification. It is also important to note that, due to this abstract nature of the Notification, it is expected that the Notification will require more clarity and guidelines from the TCC for effective enforcement.

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