

September, 2024 No.88

This issue covers the following topics:

Vietnam

Draft Amendment to the Electricity Law

Dzung Pay

Malaysia

Establishment of a Data Center in Malaysia from the
Legal Perspective

Yuan Yao Lee

Vietnam

Draft Amendment to the Electricity Law

ベトナムでは、発電、送電、電力小売等の電力関連活動に関するより包括的な法的枠組みの整備に向けて、電力法の改正が検討されている。この改正法の草案は 2024 年 10 月に国会に提出される予定であり、その起草過程を通じて高い関心が寄せられている。本稿では、最新の改正電力法草案の注目すべき点を紹介する。

In an effort towards introducing a more comprehensive legal framework governing activities pertaining to electricity, Vietnam will soon promulgate a law to amend the Electricity Law No. 28/2004/QH11 (which was partially amended and supplemented by the Electricity Law No. 24/2012/QH13, Electricity Law No. 28/2018/QH14, Electricity Law No. 03/2022/QH15). The latest version of the draft amended Electricity Law (the “Draft Law”) consists of 9 chapters and 119 articles, regulating electricity development, investment in electricity projects, electricity operation licenses, trading activities, protection of electricity works and safety in the electricity sector, and state management of electricity. The Draft Law is expected to be submitted by the Government to the National Assembly for comments at the National Assembly's October 2024 session. Below are some notable observations on this Draft Law.

Authority to decide on the mechanism for adjusting retail electricity prices

Under the current law, the Prime Minister has the authority to decide on the mechanism for adjusting retail electricity prices. The Draft Law stipulates that the Government will have the authority to issue the mechanism for adjusting retail electricity prices instead of the Prime Minister, based on the consideration that electricity price adjustment needs to be considered and evaluated comprehensively based on the macroeconomic situation.

Applicable law and language for the power purchase agreement

The wording of the Draft Law suggests that the law applicable to electricity purchase and sale contract must be Vietnamese Law. The language of the contract must be Vietnamese. The English version of the contract may be used only in cases where the power plant project of the electricity producer involves foreign investment, such as investment by a foreign investor, or use of foreign funding sources. This may raise concerns among international investors and make them hesitant to invest in electricity projects in Vietnam and therefore may affect the bankability of the projects.

Handling electricity projects behind schedule

The Draft Law has new regulations to strictly handle projects that are behind schedule. Specifically, projects behind schedule may be suspended or terminated, the project implementation guarantee amount may be transferred to the state budget and the competent authority will have the right to conduct procedures to select a replacement investor or a replacement project.

Selecting investors to implement electricity projects

The current law does not have regulations on selection of investors to implement electricity projects. This has caused a lot of confusion for both state agencies and investors wishing to implement electricity projects. Regarding this issue, the Draft Law has set out the methods of selecting investors for electricity projects, including the bidding method to select investors based on the principle of investment efficiency according to the ceiling price of electricity within the price range issued by the Ministry of Industry and Trade. Details may be further clarified in the Decree guiding the amended Electricity Law.

Competitive electricity market

The Draft Law stipulates freedom of competition in the electricity market in accordance with the development levels of the market. However, the state will still regulate the operation of the electricity market. The construction and operation of some projects like nuclear power plant projects, multi-purpose strategic hydropower plant projects, emergency electricity projects, emergency power grids, and important transmission power grids from voltage level 220 kV or higher will be monopolized by the state for the purpose of ensuring national energy security. In summary, it is difficult to expect competition in the electricity industry in the near future similar to the gasoline or mobile phone markets.

Although there are still shortcomings and challenges, the Draft Law is expected to create a more transparent and effective mechanism in the context of rapid changes in the electricity/renewable energy market and ensure the country's sustainable development in relation to energy security. A number of articles in the Draft Law are expected to be regulated in more detail by the Decree, Circular and related guiding legal documents after the amended Electricity Law is issued.

[Author]



Dzung Pay (Nagashima Ohno & Tsunematsu Hanoi Branch)
dung_pay@noandt.com

Dzung Pay is a Vietnamese qualified lawyer based in Hanoi Office. She has a LL.M degree in International Comparative Law from Nagoya University.

She has broad experience advising international investors to access the Vietnamese market and resolve complex legal issues in Vietnam. Her primary areas of expertise include corporate, investment, labour, regulatory and compliance matters.

Malaysia

Establishment of a Data Center in Malaysia from the Legal Perspective

データセンターの市場規模が世界的に拡大傾向にあるなか、データセンター誘致のための諸条件が比較的整っているマレーシアにおいても、近年データセンターの新設が活況な状況にある。本稿では法的規制の観点からデータセンターの新設に際して留意すべき事項について概説する。

Introduction

Malaysia continues to emerge as a key destination for data center investments in Southeast Asia, with a number of recent transactions being concluded in relation to development of data centers in Malaysia. This article aims to set out a general overview of the main investment restrictions and requirements relating to the establishment and operation of a data center in Malaysia.

1. Conditions and Restrictions stipulated on Land Title

One of the key aspects of the establishment of a data center in Malaysia is land. It is important to peruse the particulars and conditions stipulated on the land title, which sets out, amongst others, particulars about the registered proprietor, nature of ownership (e.g. freehold or leasehold), express conditions governing the use of the property, and restriction-in-interest which are restrictions governing the dealings of properties. For example, one common form of restriction-in-interest is that certain properties cannot be transferred, leased or charged without the prior written consent of the state authority. In such case, the transferor will need to apply for the state authority's consent prior to the transfer and non-compliance with the restriction-in-interest will result in non-registration of the transfer.

As stated above, the proposed establishment of a data center must be aligned with the express conditions stipulated on the land title as a breach of an express condition may result in a fine being imposed or the property being liable to forfeiture to the state authority under Section 127 of the Malaysian National Land Code (Revised 2020) (the "MNL").

Further, it is prudent to check with the relevant local state authority on the applicable zoning and industrial use requirements in respect of the proposed establishment of a data center. For instance, the Johor Bahru City Council has published its Industrial Guideline which sets out the minimum standards to be complied by a data center established within its jurisdiction, including that the data center must be located in an industrial area and comply with a maximum built-up area of 60% of the land.

2. Foreign Equity Restrictions in respect of Acquisition and Lease of Land

Pursuant to Section 433B of the MNL, acquisition or lease of land by a foreign company (including a company incorporated in Malaysia with at least 50% voting rights held by a foreign company) requires the prior approval of the relevant state authority. Failure to obtain the state authority's prior approval will result in the acquisition or lease being null and void.¹

The approval of the Economic Planning Unit may be required under the Guideline on the Acquisition of Properties ("**EPU Guideline**") if, amongst others, the property value is RM20 million or more and such acquisition results in a dilution of *Bumiputera*² ownership of property. In addition, an indirect acquisition of property with a value exceeding RM20 million, through acquisition of shares which results in a change of control of a company owned by *Bumiputera*, may also require the approval of the Economic Planning Unit under the EPU Guideline. Where the Economic Planning Unit's approval above is required under the EPU Guideline, such approval may be granted subject to the applicant's satisfaction of a minimum 30% *Bumiputera* equity condition.

¹ Section 433C of the MNL.

² "*Bumiputera*" is defined in the Guideline on the Acquisition of Properties to mean Malay or natives (as defined in the Federal Constitution of Malaysia).

However, the EPU Guideline also sets out a list of exceptions to the requirement of obtaining the approval of the Economic Planning Unit contemplated under the EPU Guideline. One of the exceptions is if the purchaser of the property is a holder of status of Malaysia Digital (MD) which intends to acquire the property for its own operational use, and that property is situated in the area of Multimedia Super Corridor (MSC). A company which undertakes MD activities (including artificial intelligence, data center and cloud services) may be eligible to apply for the MD status and various incentives from the Malaysian Government.

3. Key Regulatory Approval in respect of Operation of Data Center

Foreign data center developers are generally allowed to own up to 100% equity participation in the Malaysian entity(ies) incorporated to undertake development of data centers in Malaysia. However, the services offered by the data centers will need to be considered in detail and depending on the type of services provided by the data centers, the data center developer may be required to obtain specific regulatory approvals, and some approvals are subject to foreign equity restrictions.

In general, a data center may require a class licence pursuant to the Malaysian Communications and Multimedia Act 1998 as an applications service provider to provide “cloud services”. “Cloud service” is defined to mean “*any service made available to end users on demand via the Internet from a cloud computing provider’s server*”³ and the class licence to provide cloud service only requires registration with the Malaysian Communication and Multimedia Commission (the “MCMC”) and there is no shareholding restriction imposed under the said class licence.

4. Processing of Personal Data

Following the passing of the Personal Data Protection (Amendment) Bill 2024 by the Malaysian Parliament in July 2024 and upon the amendments coming into force, there will be new obligations on data processors under the amended Personal Data Protection Act 2010 (the “**Amended PDPA 2010**”). Amongst the new obligations, a data processor which processes personal data on behalf of a data controller must comply with the security principle as set out in Section 9 of the Amended PDPA 2010, which requires the data processor to take practical steps to protect the personal data from any loss, misuse, modification, unauthorized or accidental access or disclosure, alteration or destruction.

Further, a data processor is required to appoint one or more data protection officers who must be accountable to the data processor for compliance with the Amended PDPA 2010. Based on the public consultation paper⁴ issued by the Malaysian Department of Personal Data Protection, the Personal Data Protection Commissioner intends to introduce specific regulations and guideline with regard to the appointment of data protection officer. It was suggested in the consultation paper that only data processors that carry out data processing activities of a large scale by considering specific prescribed factors, will be required to appoint a data protection officer. The consultation paper also suggested that the data protection officer should be ordinarily resident in Malaysia in order to ensure accessibility and responsiveness to the Personal Data Protection Commissioner and set out examples of responsibilities of the data protection officer such as to monitor the data processor’s personal data compliance and to carry out data protection impact assessments.

5. Guidelines on the Sustainability of Data Center

Earlier in 2024, the MCMC revised the voluntary technical code “Specification for Green Data Centres” which provides a framework for data centers to optimize their energy practices to align with global standards for energy efficiency and sustainability. Data center operators in Malaysia may consider the best practices stipulated in the voluntary technical code to improve their energy efficiency and reduce their carbon footprint.

In addition, it was earlier reported that the Malaysian Government intends to issue Guidelines for Data Center Power Usage Effectiveness and Water Usage Effectiveness in 2024 and other local state authorities such as the

³ The Advisory Notice issued by the MCMC dated 15 October 2021

⁴ Public Consultation Paper No. 02/2024: The Appointment of Data Protection Officer, issued by the Malaysian Department of Personal Data Protection

Johor Town and Country Planning Department and the Johor State Government also intend to issue guidelines which aim to coordinate and monitor data center development planning in the state. As at the date of this article, such guidelines have not been published, but data center operators in Malaysia ought to be mindful of the applicable guidelines when the same are published by the Malaysian authorities.

Conclusion

There is no general overarching foreign investment restriction in Malaysia and subject to the applicable sectoral restrictions and land ownership restrictions, foreign data center developers are generally allowed to own up to 100% equity participation in the Malaysian entity(ies) incorporated to undertake development of data centers in Malaysia. However, it would be prudent for data center developers and operators to consider the relevant regulations and guideline above that are applicable to their data centers in Malaysia.

[Author]



Yuan Yao Lee (Nagashima Ohno & Tsunematsu Singapore LLP)

yuan_yao_lee@noandt.com

Yuan Yao is an associate with Nagashima Ohno & Tsunematsu (Singapore office). His practice focus is on public and private M&A, take-overs, capital markets (equity), regulatory compliance and general corporate advisory matters.

Before joining Nagashima Ohno & Tsunematsu, Yuan Yao read law at University of Warwick between 2013 – 2016 and was called to the Bar of England of Wales (2017) and the High Court of Malaya (2018). He also practiced at one of the top-tier law firms in Malaysia from 2018 till 2023.

[EDITORS' PROFILES]



Nobuo Fukui (Nagashima Ohno & Tsunematsu Singapore LLP Partner)

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.

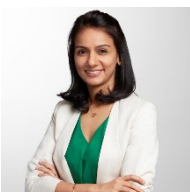


Keigo Sawayama (Nagashima Ohno & Tsunematsu Hanoi Branch Partner)

keigo_sawayama@noandt.com

Keigo Sawayama is a partner at Nagashima Ohno & Tsunematsu and a representative of its Hanoi Office (Nagashima Ohno & Tsunematsu Hanoi Branch). He has been stationed in Hanoi since 2011 and providing legal services mainly to Japanese companies and its affiliates to expand their business into Vietnam and other countries in South-East Asia.

He is a graduate of the University of Tokyo (LL.B., 2004) and Harvard Law School (LL.M., 2011). He was admitted to the Japan Bar in 2005 and New York State Bar in 2014.



Rashmi Grover (Nagashima Ohno & Tsunematsu Singapore LLP Partner)

rashmi_grover@noandt.com

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

This newsletter is given as general information for reference purposes only and therefore does not constitute our firm's legal advice. Any opinion stated in this newsletter is a personal view of the author(s) and not our firm's official view. For any specific matter or legal issue, please do not rely on this newsletter but make sure to consult a legal adviser. We would be delighted to answer your questions, if any.

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, based in Tokyo, Japan, is widely recognized as a leading law firm and one of the foremost providers of international and commercial legal services. The firm's overseas network includes locations in New York, Singapore, Bangkok, Ho Chi Minh City, Hanoi, Jakarta* and Shanghai. The firm also maintains collaborative relationships with prominent local law firms. The approximately 600 lawyers of the firm, including about 50 experienced lawyers from various jurisdictions outside Japan, work together in customized teams to provide clients with the expertise and experience specifically required for each client matter. (*Associate office)

Singapore Office

(Nagashima Ohno & Tsunematsu Singapore LLP)



6 Battery Road Level 41
 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, Bhira 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

Jakarta Office (*Associate office)

(IM & Partners in association with

Nagashima Ohno & Tsunematsu)



Jakarta Mori Tower 14th Floor, Unit 1401
 Jalan Jenderal Sudirman Kav. 40-41
 Jakarta 10210, Indonesia
 Tel: +62-21-25098080 (general)
 Fax: +62-21-25098090 (general)
 Email: info-jakarta@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 global practice](#)

If you would like to receive future editions of the NO&T Asia Legal Review by email directly to your Inbox, please fill out our newsletter subscription form at the following link: https://www.noandt.com/en/newsletters/nl_asia_legal_review/

Should you have any questions about this newsletter, please contact us at [<asia-legal-review@noandt.com>](mailto: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.