Global Corporate Real Estate Guide - Malaysia

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# Authors

# Real Estate Law

## What is included in the term “real estate”?

The term “real estate” is not defined in the National Land Code (Revised - 2020) (“NLC”). Under the NLC, the term “land” includes the following:

The land (including anything on or forming the surface of the earth and below the surface)

All things attached or permanently fastened to the earth, including any buildings or structures constructed on the land

All vegetation and other natural products on or below the surface

Land covered by water

## What laws govern real estate transactions?

The principal legislation governing all land matters in Malaysia is:

NLC, which is the principal land law governing all land matters in Peninsular Malaysia (including the Federal Territories of Labuan);

National Land Code (Penang & Malacca Titles) 1963;

Sarawak Land Code (Cap 81); and

Sabah Land Ordinance (Cap 68).

Pursuant to the Federal Constitution of Malaysia, land matters generally lie within the jurisdiction of the State Authority of each State in Malaysia (“State”). Each State has enacted its own subsidiary land legislations, such as various land rules, enactments, and ordinances to supplement the operation of the principal legislation mentioned above.

Other than the States, land matters relating to the three federal territories of Kuala Lumpur, Putrajaya, and Labuan fall under the purview of the Federal Government.

In addition to the above statutes, there are other legislations that govern specific land matters such as:-

Strata Titles Act 1985 (which governs and facilitates the subdivision or stratification of buildings or land into parcels); and

Strata Management Act 2003 (which regulates the maintenance and management of strata buildings and common property).

## What is the land registration system?

Land laws in Malaysia are premised on the Torrens system. A system of registration of land title and interest, where the register at the relevant land registry/office reflects legal title and interest in land.

## Which authority manages the registration of titles?

Title registration is managed by the land registrar or the land administrator of the relevant States, depending on the locality, size and category of use of the land. Where the land falls under the jurisdiction of the land registry, the registration of title is managed by the land registrar. Where the land falls under the jurisdiction of the land office, the registration of title is managed by the land administrator.

## What rights over real property are required to be registered?

Generally, all dealings must be in the prescribed form and registered at the relevant land registry/office. Upon registration of the prescribed forms, the title or interest shall be reflected in the register at the relevant land registry/office as well as the title documents of the land. The following are the dealings which are recognized under the NLC:

Transfers

Leases (i.e., leases with fixed tenure in excess of 3 years)

Charges

Easements

Under the NLC, there are certain dealings which are not capable of registration such as tenancies with a fixed tenure of not more than 3 years, and statutory liens which are protected by endorsement and entry of a lienholders’ caveat.

## What documents can landowners use to prove ownership over real property?

Under the Torrens System, registration of a person’s name on the title document is conclusive evidence as to such person’s legal title or interest in the relevant lands. A title document issued by the relevant land registry is sufficient to prove ownership.

Where a document of title is not available (for example due to a subdivision or other application at the relevant land registry / land office), then ownership can be established by producing the original sale and purchase agreement entered into with the legal owner of the master title.

Where a property without an available document of title has been subsequently sold, the current owner can provide the original sale and purchase agreement together with an original signed deed of assignment evidencing the assignment (by way of transfer) of the title, rights and interests in the property by the legal owner of the primary title, previous beneficial owners or assignees.

## Can a title search be conducted online?

Yes, for a fee.

However, certain land registries / land offices do not provide online title searches. Manual searches can be conducted in person for a fee.

## Can foreigners own real property? Are there nationality restrictions on land ownership?

1. Generally, alienated land in Peninsular Malaysia may be transferred freely (to non-foreigners) unless expressly restricted by a restriction-in-interest on the issued document of title.

2. For foreigners acquiring property, the NLC provides that prior approval of the relevant State Authority must be obtained before acquiring the title or interest in any real property in Peninsular Malaysia.

3. Pursuant to the Guideline on the Acquisition of Properties (“EPU Guideline”) issued by the Economic Planning Unit (“EPU”), the EPU’s approval is required for real property transactions resulting in the dilution of Bumiputera interest or government agency in real property as follows:

(a) Indirect acquisition of real property through acquisition of shares where:

(i) the transaction results in a change in control of the company owned by Bumiputera interest and/or government agency;

(ii) real property makes up more than 50% of the said company’s assets; and

(iii) the real property is valued at more than MYR 20 million.

(b) Direct acquisition of real property where:

(i) there is a dilution of Bumiputera or government interests in real property; and

(ii) the property is valued above MYR 20 million.

The following are defined under the EPU Guidelines:

(i) “Foreign interest” means a person who is not a Malaysian citizen, or a foreign incorporated company or a local incorporated company with 50% or more of its equity interest held by a Malaysian citizen or a foreign incorporated company

(ii) “Bumiputera interest” means any interest, associated group of interests or parties acting in concert comprising:

(A) a Bumiputera individual (a Malay individual or aborigine as defined under the Federal Constitution);

(B) a Bumiputera institution and trust agency; or

(C) a local company or institution where the parties stated above hold more than 50% of the voting rights in that local company or institution.

(iii) “Government agency” means the statutory bodies, non-listed government linked companies, government linked investment companies including their subsidiaries

4. If the acquisition (whether direct or indirect) will result in the dilution of Bumiputera interest or government agency, the approval of EPU will be granted subject to:

(a) an equity condition requiring the foreign entity to have of at least 30% Bumiputera interest shareholding; and

(b) the paid-up capital of the foreign entity shall be at least MYR250,000.

5. That said, the EPU Guidelines contain certain exemptions whereby the approval of the EPU will not be required. Certain key exemptions include:

(a) Multimedia Super Corridor (MSC) status companies are allowed to acquire any property in the MSC area provided that the property is only used for their operational activities including as residence for their employees;

(b) Acquisition of properties in the approved area in any regional development corridor by companies that have been granted MSC status by the local authority as determined by government; and

(c) Acquisition of industrial land by a manufacturing company.

6. Additionally, as land matters fall within the purview of the relevant State Authority, each State also has specific policies restricting the acquisition of land by foreigners, which vary from State to State. Further, foreigners are generally restricted from directly acquiring agricultural lands in Peninsular Malaysia under the policies of the States.

## Can the government expropriate real property?

Yes. The State Authority having jurisdiction over the land can compulsorily acquire the whole or any part of a property in limited circumstances but adequate notice and appropriate compensation need to be given to the land owner.

## How can real estate be held?

Generally, in Peninsular Malaysia an interest over real property can be held by any of the following means:

In perpetuity (i.e., freehold)

For a term not exceeding 99 years (leasehold land and/or leases over the entire parcel of land)

For a term not exceeding 30 years (leases over a portion of a land)

Note: Ownership and interest derived from registration may also arise by way of contract (tenancy for fixed tenure not exceeding 3 years or license agreement).

## What are the usual structures used in investing in real estate?

Depending on the purpose and the type of investment that is taking place, investors are typically:

Individuals

Corporations (including statutory bodies, joint ventures, special purpose vehicles, joint venture companies)

trusts including real estate investment trusts

## How are real estate transactions usually funded?

The most common methods of financing real estate transactions are through the following:

Cash

Shareholders’ advance/loan

External financing through institutional lenders such as financial institutions

Issuance of securities (i.e., notes, bonds, shares, etc.)

Where financing is obtained from an external source (i.e., banks or financial institutions), the property will usually be placed as security or collateral (by way of charge or assignment) for the repayment of the loan. Depending on the situation and the credit history of the borrower, the lender may also require additional security such as personal guarantees from the directors of the borrower and/or corporate guarantees from the borrower, the borrower’s parent company or its associated company.

Typically, it is the borrower’s obligation to bear all costs in relation to the external financing or loan transaction, including the lender’s legal fees, processing fees, stamp duty payable on the loan documentation and such other incidental charges in relation to the transaction.

## Who usually produces the documentation in real estate transactions?

Based on the Conveyancing Practice Rulings issued by the Bar Council of Malaysia, the seller’s solicitors prepare and supply the sale and purchase agreements unless otherwise mutually agreed by the parties. However, it is common market practice that the buyer’s solicitors will prepare the initial draft letter of offer and the sale and purchase agreement.

## Can an owner or occupier inherit liability for matters relating to the real estate even if they occurred before the real estate was bought or occupied?

Generally, an owner or occupier will not inherit liability for matters relating to the property before purchase or occupation unless otherwise agreed. Typically, the owner or occupier will only be liable for the matters relating to the property bought or occupied by them from and including the date they take vacant or exclusive possession.

However, an owner could inherit liability prior to their acquisition by operation of law in certain circumstances. For example, where there is a breach by the previous legal owner which continues after the property is bought over by a new owner, of any of:

Condition of title

Environmental requirements

By way of example, the land registry/land office may require the current owner to comply with specific conditions of title and the Malaysian Department of Environment may require the current owner to clean up contamination even if the owner had not caused the contamination.

## Does a seller or occupier retain any liabilities relating to the real estate after they have disposed of it?

Generally, a seller or occupier will not retain any liability. However, there are certain circumstances that certain liabilities will remain with the seller, including:

where the seller committed an offense while being the registered owner or occupier, then disposal of the land does not in itself automatically release the seller from such offense; and

where the seller defaulted in any contract or agreement relating to the property which it has signed with any third party such as a tenancy agreement with a tenant, before the real estate is disposed of. Such contractual liability is personal in nature and will remain with the seller, notwithstanding the sale or disposal of the property.

# Acquisition of Real Property

## What are the usual documents involved in such transactions?

Letter of offer

This is usually the first document to be signed in any real estate transaction. The letter of offer records the parties’ mutual intent to sell/buy the property and the key terms (i.e., price, time and manner of payment of the price, conditions precedent, if any, description of the property including conditions of title, if any, time for handover and time period to negotiate and finalize the formal sale and purchase agreement). The letter of offer is normally binding against the parties and pending the execution of the formal sale and purchase agreement, the letter of offer will bind the parties to the transaction.

Searches/due diligence report (where necessary)

Depending on the nature and value of the property, the buyer may instruct their solicitor to conduct due diligence on the real property prior to the execution of the sale and purchase agreement. It is the norm that the buyer’s solicitor conducts a land search on the real property (where a separate issue document of title is available) to ascertain ownership of the seller and also whether there are any issues arising from the land that are relevant to the buyer.

Sale and purchase agreement

The sale and purchase agreement will record all relevant terms in respect of the transaction and the property. The sale and purchase agreement should also contain the typical rights and benefits accruing to the buyer and the representations and warranties of the seller.

Instrument of transfer

This refers to the instrument of transfer prescribed by the NLC to be presented to the relevant land registry / land office to effect registration and is applicable where title to the property has been issued.

Where the separate title document to the property is not available, the parties will sign a deed of assignment to effect legal assignment (by way of transfer) of the title, rights and interests to the buyer.

## What are the warranties given by a seller to a buyer?

In addition to warranties in relation to title to the property, a seller usually gives the following warranties:

The seller has all appropriate authority to dispose of the property, including no resolution and petition against the seller has been made or presented in respect of insolvency and winding-up proceedings

The due diligence materials including documents and information given to the buyer for the purpose of due diligence are correct and accurate

There are no encumbrances on the property (usually save for a legal charge/assignment in favor of the seller’s current financier)

The seller shall not further encumber the land in any way whatsoever without the buyer’s consent

The seller has complied with all restrictions in interest and conditions on title to the property (express and implied)

The seller is not aware and has not received any notice for compulsory acquisition in respect of the property

The seller has not received any notices from the authority for the breach of any applicable laws affecting the land

The seller observed and complied with any applicable laws affecting the land (including environmental laws)

The construction of the building forming part of the property complies with any applicable laws and is issued with the requisite certificate of completion and compliance (certifying that such building is fit for occupation)

## When is the sale legally binding?

Parties are usually bound upon the execution of the letter of offer. Where the letter of offer is expressed as not binding, then upon execution of the sale and purchase agreement (subject to any conditions precedent provided in the agreement).

## When is title transferred?

Under the NLC, the legal title in land vests on the buyer upon registration of the instrument of transfer in the form prescribed by NLC at the relevant land registry / land office. Although the relevant land registry / land office may take some time to complete the registration of the instrument of transfer after the presentation of the instrument of transfer, upon completion of the registration process, title/interest is deemed to have transferred to or vested in the buyer as of the date of presentation of instrument of transfer at the relevant land registry/office.

## What are the costs usually shouldered by the parties?

The buyer usually pays for:

Stamp duty on all copies of the sale and purchase agreement

Stamp duty payable on the instrument of transfer or other dealings

The ’buyer’s own legal costs (including due diligence costs, professional consultation charges, valuation charges etc.) in connection with the preparation and completion of the transaction

Application fees and registration fees for the transfer or other dealing and for any approvals/consents required to be obtained by the buyer

Costs and expenses relating to any external financing as may be obtained by the buyer to finance the purchase including stamp duty on the loan or financing documents and the registration fee of any land charge which is required to be registered over the property (as security for the external financing)

The seller usually pays for:

The ’seller’s own legal costs (including seller due diligence costs (if required), professional consultation charges, valuation charges etc.) in connection with the preparation and completion of the transaction

Fees for any approvals/consents required to be obtained by the seller for the disposal or sale of the property pursuant to any restriction-in-interest endorsed on the title document or the applicable laws

Tax relating to disposal of property, including real property gains tax payable under the Real Property Gains Tax Act 1976

Costs of removal, discharge or release of any encumbrance created over the property (including any charge that the seller has created in favor of its financier)

# Leases

## What are the usual forms of leases?

The NLC distinguishes between “leases”, which have a term exceeding three years (and are required to be registered) and “tenancies exempt from registration”, which have a term up to three years (and are not registrable).

Registration of a lease accords a tenant certain rights against future owners of the land. However, tenancies may be endorsed and will give the tenant similar rights to that of a registered tenant.

Leases and tenancies may be made up of the following:

Lease or tenancy over the whole or part of a land

Where the lease or tenancy is over vacant land, the tenant may have rights for development or further use of the land. Where there is vegetation, buildings or structures on the land, by implication of the definition of land, the lease or tenancy would include such vegetation, buildings or structures.

Lease or tenancy over part of a building or structure

Leases or tenancies may also be in respect of only part of a building or structure. Lessees / tenants in this instance will not normally have rights in and to the land.

## Are lease provisions regulated or freely negotiable?

Generally, provisions of a lease / tenancy agreement are freely negotiated by the parties. However, certain provisions in the NLC, unless specifically excluded, are implied in lease / tenancy agreements.

## Is there a maximum term for leases? Can these be extended?

The NLC sets provides that:

Where the lease is over the entire land, the maximum tenure of the lease is 99 years

Where the lease is over part of a land, the maximum tenure of the lease is 30 years

Where the parties enter into a tenancy exempt from registration (over the entire or part of the land), the maximum tenure of the tenancy is 3 years

Parties may negotiate to provide for an extension of the lease by election by one or more parties or by mutual agreement. In the absence of such extension, the lease will expire.

## What are the usual lease terms?

The length of the term usually depends on the purpose of the lease and the type of property. Most tenancies / leases of office or retail spaces are for three-year (tenancy) or five-year (lease) terms with options to extend the term for a further period(s) of three or five years.

Leases for industrial and commercial lands are normally for longer periods ranging from 5 – 10 years or 15 – 30 years. Often, lessees / tenants are entitled to rights of renewal for additional terms.

Large commercial and industrial facilities will sometimes require an electricity substation to be built on the land and the utility company will normally take a long-term lease over the land for the portion where the substation is situated.

## Are there instances where tenants may demand an extension of the lease?

These are to be contractually agreed by the parties. In the absence of an option to renew clause in the relevant lease / tenancy agreement, lessees / tenants do not have an express right to extension.

## On what grounds may a lease be terminated?

Lease and tenancy agreements normally provide that parties may terminate upon:

expiry of the agreed tenure of the leases or tenancies exempt from registration;

parties having mutually agreed to terminate without cause;

the breach of the terms of the lease / tenancy, where a lessor / landlord can generally terminate a lease / tenancy should the lessee / tenant fail to honor the terms of the lease / tenancy agreement (including failure to pay rent and to maintain the property in good condition);

damage and destruction to the property and compulsory acquisition may also allow a lease to be terminated.

## Must rents be paid in local currency?

Parties are free to decide the currency of payment, but Malaysian ringgit is typically used.

## Is rent paid on a monthly basis? Is it required to be paid in advance?

Rent is usually paid monthly and in advance (within the first seven days of the month). However, this is subject to contract.

## How is rent reviewed? Are there limits to the increase in rent?

Rent is usually fixed for the initial term, but this is subject to contract. The mechanism for determining the revision of rent for a renewal period is usually provided for in the lease / tenancy agreement. It is common when considering rent revision that rent for the renewal period takes into account the current market value of the property. Otherwise, a formula may be provided, which may provide limits for increasing the rent.

There is no specific limitation on rent increases.

## What are the basic obligations of landlords and tenants?

The following is usually required of landlords:

Maintain and keep the structure of the building in good and tenantable condition and repair

Take out fire insurance on the property

Pay all quit rent and assessment in respect of the land

Permit the tenant to peaceably hold and enjoy the property during the term without any interruption or disturbance by the landlord (subject to the tenant not breaching the lease)

The following is usually required of tenants:

Pay rent to the landlord in a timely manner

Keep the interior of the property in good and tenantable condition and repair

Pay all utilities due

Take out fire insurance on the ’tenant’s property

Use the property for the permitted use only

Yield up the property upon expiry or early termination of lease / tenancy

Not cause any annoyance / nuisance to the lessor / landlord or any other person

Not to make any structural renovations without the consent of the lessor / landlord

Not use the premises for illegal / immoral purposes

## What provisions or restrictions typically apply to the transfer of the lease by the tenant? May a tenant sublet the leased premises?

Typically, a lease / tenancy can only be transferred, assigned or sublet to a third party with the prior written consent of the lessor / landlord. However, parties are free to contractually agree to subletting rights.

Where there is sub-tenant / sub-letting occurs, the period of the sub-tenancy term / sublease term must end before the expiry of the term of the head tenancy / head lease.

## What happens in the event of destruction of the leased premises?

Depending on the severity of the destruction, the lessor / landlord may opt to rebuild the property. In the meantime, rent of the property is often suspended.

In the event that the leased premises become untenantable, the lessee / tenant usually has the right to terminate the lease / tenancy agreement without any penalty.

## Who is usually responsible for insuring the leased premises?

The landlord is responsible for insuring the premises. However, the tenant is usually responsible for insuring the ’tenant’s property within the leased premises.

## Will the lease survive if the owner sells the leased premises?

Given that a lease is a registrable transaction and the NLC provides that leases are to be registered, upon registration of a sale of property, the new owner will be aware of the existence of the lease. The terms of the lease will survive and are binding on the new owner.

However, where the parties have entered into a tenancy exempt from registration or the lease is not registered before the sale of the leased property, the lease or tenancy agreement will not bind the new owner unless the new owner agrees to assume the role of the current owner as lessor or landlord after the sale of the leased premises.

## Will the lease survive if the leased premises are foreclosed?

If the foreclosure is in respect of a legal charge registered after the lease, then in the absence of a non-disturbance agreement, the lease may be terminated at the option of the chargor.

Where the lease was registered prior to a legal charge, then the lease will survive foreclosure proceedings. Again, tenancies generally do not survive foreclosure proceedings.

# Planning and Environmental Issues

## Who has authority over land development and environmental regulation?

The relevant local authority having jurisdiction over the property has the authority over land development.

The Ministry of Natural Resources, Environment and Climate Change has the overall responsibility and authority to ensure a balance between the management of natural resources and the environment in achieving sustainable development. The Department of Environment (an enforcement arm of the Ministry of Natural Resources, Environment and Climate Change) has authority over environmental regulation.

## What environmental laws affect the use and occupation of real estate?

The primary legislation that is related to the prevention, abatement, control of pollution and enhancement of the environment in Malaysia is the Environmental Quality Act 1974 (the “EQA”) and all subsidiary legislations.

## What main permits or licenses are required for building or occupying real estate?

The primary legislations governing the construction of a building are the Street, Drainage and Building Act 1974, the Town and Country Planning Act 1976 and all subsidiary legislations. For the purpose of the Federal Territory of Kuala Lumpur, the primary legislations are the Federal Territory (Planning) Act 1982 and the subsidiary legislation made thereunder.

Planning Permission (in the case of the Federal Territory of Kuala Lumpur, a development order) and approval for building plans must be obtained from the local authorities prior to the commencement of any construction of a building on land. Upon completion of the construction and prior to occupation of the building, the owner or developer will have to obtain a Certificate of Completion and Compliance (a “CCC”).

Where the proposed activity on the property falls under the category of “prescribed activity” within the meaning of the EQA, an environmental impact assessment must be conducted and approved by the Director General of Environmental Quality.

Additionally, where manufacturing activities are to be undertaken on the property, the owner or occupier must obtain prior approval from the Ministry of International Trade and Industry of Malaysia before the commencement of operations.

## Can an environmental cleanup be required?

Under the EQA, the director general may issue a notice to the owner/occupier of land to take steps to reduce, mitigate, disperse, remove, eliminate, destroy or dispose of pollution within the time specified in the notice.

## Are there minimum energy performance requirements for buildings?

No. However, there is a voluntary rating system known as the Green Building Index (“GBI”) which was initially established by the Malaysian Institute of Architects, with four categories of green certifications including Certified, Silver, Gold and Platinum. GBI rates green and sustainable buildings designed based on six criteria:

Energy efficiency - improve energy consumption, minimize solar heat gain, harvest natural light, use renewable energy and ensure proper maintenance

Indoor environment quality - good indoor air quality performance with low volatile organic compound materials, quality air filtration, proper control of temperature

Materials & Resources - use environment-friendly materials and implement property construction waste management

Sustainable site planning & management - appropriate sites with planned access to public transportation, open spaces, and landscaping. Environmental conservation in sensitive areas. Implement proper construction management. Reduce strain on existing infrastructure capacity

Water efficiency - rainwater harvesting, water recycling, and water-saving fittings

Innovation - innovative design and initiatives meeting the green building index objective

## Are there other regulatory measures that aim to improve the sustainability of newly constructed and existing buildings?

In Malaysia, construction practices are regulated by the Uniform Building By-Laws 1984 (the “UBBL”), which are subsidiary legislation made under the Street, Drainage and Building Act 1974. The UBBL entails the provision for energy efficiency in buildings, specifically clause 38A which states that:

New or renovated non-residential buildings with air-conditioned space exceeding 4,000 square meters shall be:

designed to meet the requirements of MS 1525 with regards to the Overall Thermal Transfer Value and the Roof Thermal Transfer Value; and

provided with an Energy Management System.

The roof of all buildings (residential and non-residential) shall not have a thermal transmittance (U-value) greater than: (a) 0.4 W/m2.K for a lightweight roof (below 50 kg/m2); and (b) 0.6 W/m2.K for a heavyweight roof (above 50 kg/m2); unless provided with other shading or cooling means.

However, not all States in Malaysia adopt the UBBL. Some States have their own Uniform Building By-Laws, which may entail different energy efficiency requirements.

In granting any planning permission, local authorities may impose certain conditions requiring the construction of the buildings to comply with energy efficiency requirements under the UBBL. It is incumbent upon the architect to ensure that these conditions are complied with before a CCC is issued for the building.

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