

# **FINAL REPORT**

## **REVIEW AND REFORM OF CONTRACT LAW IN MALAYSIA**

Prepared by:  
Committee for the Review and Reform of Contract Law (CRRCL)

In collaboration with:  
Monash University Malaysia  
Universiti Kebangsaan Malaysia (UKM)

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## **Foreword**

One of my priorities as Minister in the Prime Minister's Department (Law and Institutional Reform) has been to advance reforms that may not always attract public attention, but are essential to ensuring that Malaysia's legal framework remains relevant, effective, and responsive to contemporary needs.

The Contracts Act 1950 is a clear example. For more than seven decades, it has formed the foundation of contractual relationships in Malaysia, governing everything from commercial transactions to everyday agreements. Yet the law was enacted in a vastly different era and has not kept pace with developments such as digital commerce, electronic contracting, and increasingly complex commercial arrangements. As a result, many legal gaps have had to be addressed through judicial interpretation rather than statutory reform.

The impetus for this initiative began with a discussion with Philip Koh, whose longstanding experience as both practitioner and academic highlighted the pressing need to modernise Malaysia's contract law framework. That conversation led to the establishment of the Committee for the Review and Reform of Contract Law (CRRCL), a collaboration between the Legal Affairs Division of the Prime Minister's Department, Monash University Malaysia, and Universiti Kebangsaan Malaysia.

I extend my sincere appreciation to the Honourable Justice Datuk Seri Vazeer Alam Mydin Meera, Judge of the Federal Court, for chairing the Committee and guiding its work with distinction. I also thank Associate Professor Dr Adnan Trakic, Director of CLARS-MH, for coordinating this extensive research effort, as well as the Committee's members, academic partners, and officers of the Legal Affairs Division whose dedication made this work possible.

This publication presents three important reform initiatives. The first proposes a modernisation of the Contracts Act 1950 by codifying key legal principles that have evolved through case law, including economic duress, unconscionable dealing, intention to create legal relations, and reasonable limitations on exemption clauses. The second introduces a framework for recognising and protecting the rights of third parties who are intended beneficiaries of contractual arrangements. The third examines the future of agency law in an increasingly digital economy, including the legal implications of artificial intelligence systems acting on behalf of individuals and organisations.

Together, these proposals reflect a broader commitment to ensuring that Malaysia's contract law framework remains fit for purpose, supports economic growth, and provides greater legal certainty in a rapidly evolving environment.

I hope this publication serves not only as a valuable reference for policymakers, legislators, legal practitioners, academics, and industry stakeholders, but also as a catalyst for informed discussion as these proposals continue through the reform process. Ultimately, the strength of any legal system lies in its ability to serve the people effectively, fairly, and with confidence in the future.

**Dato' Sri Azalina binti Othman Said**

Minister in the Prime Minister's Department

(Law and Institutional Reform)

## **Foreword**

The Contracts Act 1950 [Act 136] has stood as one of the cornerstones of Malaysia's legal and commercial framework. It has provided the legal certainty necessary to facilitate trade, investment and economic development, while serving as the principal statute governing contractual relationships across a broad spectrum of social and commercial activities.

However, the environment in which contracts are formed, performed and enforced has changed profoundly since the Act was first enacted. The rise of the digital economy, rapid technological advancement, artificial intelligence (AI), platform-based business models and increasingly complex cross-border commercial transactions have transformed the way individuals, businesses and institutions interact. These developments have inevitably challenged traditional legal concepts and highlighted the need for a modern and responsive contract law framework that remains fit for purpose in the twenty-first century.

It is therefore with great pleasure and a deep sense of responsibility that the Legal Affairs Division of the Prime Minister's Department (BHEUU) presents this Final Report on the Review and Reform of the Contracts Act 1950. This report represents the culmination of an extensive and collaborative effort undertaken by the Committee for the Review and Reform of Contract Law (CRRCL), established to comprehensively examine the adequacy, relevance and effectiveness of Malaysia's existing contract law framework.

The recommendations contained in this report reflect a careful and balanced approach to law reform. While preserving the enduring principles that have long underpinned Malaysian contract law, the proposed reforms seek to modernise the legislative framework, enhance legal clarity and certainty, strengthen fairness in contractual dealings, and ensure that the law remains responsive to contemporary commercial realities. Particular attention has been given to emerging issues arising from digital transactions, electronic contracting, AI-assisted decision-making and evolving business practices.

Importantly, this review extends beyond the reform of the Contracts Act 1950 itself. The report also proposes the introduction of dedicated legislative frameworks in specialised areas of contract law, including the proposed Agency Bill and Contracts (Rights of Third Parties) Bill. These initiatives reflect a broader vision of creating a more coherent, accessible and future-ready legal architecture capable of supporting Malaysia's economic aspirations and strengthening confidence in our legal system.

This landmark reform initiative would not have been possible without the dedication, expertise and commitment of many individuals and institutions. BHEUU wishes to record its deepest appreciation to the Chair of the CRRCL, The Honourable Justice Dato' Seri Vazeer Alam bin Mydin Meera, for his exceptional leadership and stewardship throughout this important undertaking. The Division also extends its sincere gratitude to all members of the Committee and Working Groups, whose collective expertise and thoughtful deliberations have greatly enriched the reform process.

BHEUU's appreciation is equally extended to members of the judiciary, the legal profession, academia, government agencies, industry representatives and civil society organisations whose valuable contributions, insights and perspectives have helped shape the recommendations contained in this report. BHEUU further acknowledges the invaluable collaboration and support provided by Universiti Kebangsaan Malaysia (UKM) and Monash University Malaysia, whose academic expertise and research contributions have significantly strengthened this initiative.

As Malaysia continues its journey towards becoming a progressive, innovative and high-income nation, a modern and effective legal framework remains essential to sustaining economic growth, attracting investment and promoting public confidence in the rule of law. BHEUU is confident that the recommendations set out in this report will provide a strong foundation for the continued development of Malaysian contract law and further enhance Malaysia's standing as a trusted, competitive and forward-looking jurisdiction in the regional and global economy.

It is the BHEUU's sincere hope that this report will serve not only as a blueprint for legislative reform, but also as a catalyst for the continued development of a modern, coherent and future-ready contract law framework that will support Malaysia's aspirations as a progressive, innovative and globally competitive nation.

**Datuk Zamri bin Misman**

Director General

Legal Affairs Division (BHEUU)

Prime Minister's Department (JPM)

## **Preface**

For more than seven decades, the Contracts Act 1950 has provided the principal foundation of Malaysia's law of contract. Its enduring relevance is a testament to the strength of its underlying principles and to the capacity of the courts to develop and adapt the law in response to changing commercial and societal realities. Nevertheless, the evolution of commercial practices, rapid technological advancement, and the increasing complexity of contractual relationships make this an appropriate and timely moment for a comprehensive review of the Act.

This Report is the product of extensive research, comparative study, and wide-ranging consultation. In undertaking its mandate, the Committee benefited greatly from the contributions of the judiciary, the Bar, academia, government agencies, industry participants, and numerous stakeholders. Careful consideration was given to whether reform should take the form of wholesale replacement, comprehensive amendment, or more targeted legislative intervention.

Having undertaken that exercise, the Committee concluded that the core architecture of the Contracts Act 1950 remains fundamentally sound and ought to be preserved. The reforms proposed in this Report therefore adopt a measured, principled, and evolutionary approach. They seek to modernise and clarify the language and structure of the Act, improve coherence across its provisions, and introduce targeted substantive reforms where necessary, while maintaining continuity with established legal principles and jurisprudence.

The proposed reforms also include structural measures designed to enhance the organisation and accessibility of the legislative framework. These include the separation of certain subject areas into standalone legislation, such as agency, as well as the introduction of new statutory regimes where appropriate. In particular, the proposed Contracts (Rights of Third Parties) Bill seeks to establish a modern and coherent framework governing third-party rights, while the introduction of a new Part XI provides a statutory framework regulating exemption and limitation clauses.

Taken as a whole, the reforms represent a balanced recalibration of Malaysian contract law. They are intended to enhance clarity, accessibility, and legal certainty; strengthen commercial

confidence; and ensure that the law remains responsive to contemporary realities while preserving the foundational principles upon which it has long rested.

On behalf of the Committee, I wish to record my sincere appreciation to the Legal Affairs Division of the Prime Minister's Department (BHEUU) for its leadership, commitment, and unwavering support throughout this process. I also acknowledge with gratitude the valuable contributions of Monash University Malaysia and Universiti Kebangsaan Malaysia, as well as all members of the Committee, working groups, and stakeholders whose dedication and expertise have greatly enriched this endeavour.

It is my sincere hope that the recommendations contained in this Report will provide a strong and enduring foundation for the continued development of contract law in Malaysia.

**Dato' Seri Vazeer Alam bin Mydin Meera**

Judge of the Federal Court of Malaysia

Chair, Committee for the Review and Reform of Contract Law

## **Note on the Structure of the Final Report**

This Final Report consolidates three reports that were originally prepared as separate components under the Contract Law Review and Reform Project. The first report contains recommendations for the review and reform of the Contracts Act 1950, including proposed amendments to existing statutory provisions and the introduction of a new Part XI on Exemption and Limitation Clauses. The second report contains the proposed Agency Bill together with the accompanying explanatory materials. The third report contains the proposed Contracts (Rights of Third Parties) Bill and supporting analysis.

For ease of reference and to present the reform proposals within a single, integrated framework, the three reports have been compiled into this Final Report. The report is therefore divided into the following parts:

1. **Part I:** Contracts Act 1950
2. **Part II:** Agency Bill
3. **Part III:** Contracts (Rights of Third Parties) Bill

Each Part is intended to be read as a self-contained component of the broader contract law reform exercise and contains its own analysis, recommendations, and proposed legislative text where applicable.

## **PART I: CONTRACTS ACT 1950**

# **Report of Contract Act 1950 [*Act 136*]**

## **Law Reform**

## **1.0 CONTRACTS ACT 1950**

### **1.1 Executive Summary**

The Contracts Act 1950 has served as a foundational statute in Malaysia's legal system for over seventy years. Rooted in the Indian Contract Act of 1872, it has provided a consistent and reliable framework for regulating contractual relationships. Its enduring influence reflects both the strength of its underlying principles and its adaptability through judicial development.

However, the commercial and legal landscape within which the Act operates has evolved significantly. Modern contracting practices now encompass digital transactions, automated and AI-assisted decision-making, complex cross-border arrangements, and increasingly sophisticated commercial structures. At the same time, heightened expectations of fairness, transparency, and consumer protection have reshaped the normative foundations of contract law. These developments have exposed limitations in the existing statutory framework, particularly in relation to outdated language, gaps in the substantive law, and inconsistencies with contemporary common law principles.

Recognising the importance and urgency of reform, the Honourable Minister in the Prime Minister's Department (Legal Affairs), YB Dato' Sri Azalina binti Othman Said, established the Committee for the Review and Reform of Contract Law (CRRCL) on 14 January 2025. The Committee, chaired by The Honourable Justice Dato' Seri Vazeer Alam bin Mydin Meera of the Federal Court of Malaysia, comprises distinguished members of the judiciary, the Malaysian Bar, academia, and government. This national reform initiative is led by the Legal Affairs Division of the Prime Minister's Department (BHEUU), in collaboration with Monash University Malaysia and Universiti Kebangsaan Malaysia.

Over the course of the reform process, the Committee undertook an extensive programme of research, consultation, and stakeholder engagement. Multiple roundtables, workshops, and consultations were conducted involving judges, practitioners, regulators, academics, and industry representatives. The Committee approached its mandate with an open and principled framework, considering three possible pathways for reform: (i) repeal and replacement of the Act; (ii) comprehensive amendment of the existing Act; or (iii) targeted amendments supplemented by standalone legislation in specific areas.

Following careful deliberation, the Committee concluded that the core structure of the Contracts Act 1950 remains fundamentally sound and continues to reflect well-established principles of contract law. Accordingly, a wholesale repeal of the Act was neither necessary nor desirable. Instead, the Committee has adopted a measured and principled approach, combining targeted statutory amendments, clarification of the law, and selective modernisation, while preserving continuity with existing jurisprudence. This approach also reflects a considered prioritisation of reforms to ensure that the most pressing issues are addressed in a timely and effective manner.

#### **1.1.1. Overall Approach to Reform**

The reforms proposed in this Final Report are guided by three overarching objectives:

##### **(i) Updating and Clarifying Language and Structure**

The Act has been systematically revised to replace archaic expressions, simplify drafting, and improve clarity and readability. Explanatory material has been incorporated into the main body of the provisions, and the structure of several sections has been refined to align with contemporary legislative drafting conventions.

Statutory illustrations have also been removed. These illustrations are largely a vestige of colonial-era drafting inherited from the Indian Contract Act 1872 and are no longer necessary in a contemporary legislative framework. Many are outdated or insufficiently reflective of modern commercial realities, and their retention risks creating confusion or unintended interpretive weight. Where illustrations or explanations contained substantive legal principles, these have been incorporated directly into the operative provisions as subsections.

##### **(ii) Clarification and Coherence of Legal Principles**

The amendments clarify key legal concepts, remove ambiguities, and ensure consistency across related provisions. Particular emphasis has been placed on

aligning statutory language with established common law principles, thereby reducing interpretive uncertainty and enhancing predictability.

The reforms also harmonise terminology and refine the articulation of legal rules to ensure that related provisions operate as part of a coherent and integrated framework. This strengthens the internal consistency of the Act while maintaining continuity with established jurisprudence.

### **(iii) Targeted Substantive Reform**

Substantive changes have been introduced on a targeted basis to address gaps, outdated provisions, and areas of uncertainty, while avoiding unnecessary disruption to settled principles. The Committee has taken a measured approach, intervening only where reform is clearly justified.

These reforms respond to developments in contemporary contracting practices and evolving expectations of fairness, including in areas such as economic duress, unconscionable dealing, contractual capacity, and commercial arrangements. At the same time, they remain grounded in the existing conceptual framework of contract law, ensuring both responsiveness and legal certainty.

## **1.1.2. Key Areas of Reform**

### **(i) Amendment to the Long Title**

The long title of the Act has been amended to more accurately reflect its scope. While the Act primarily governs contractual relationships, it also includes provisions addressing obligations arising outside strict contractual formation, including those under Part VI (relations resembling those created by contract) and the provisions on bailment. The revised long title clarifies this broader coverage and ensures that it better corresponds with the substantive content of the Act.

**(ii) Clarification of the Status of the Act (Section 1)**

A foundational amendment to section 1 confirms that the Contracts Act 1950 is not a complete code and that common law principles continue to supplement the Act. This reflects long-standing judicial practice and removes any ambiguity regarding the role of external sources of law, thereby enhancing clarity and legal certainty.

**(iii) Clarification of Contract Formation Principles (Sections 6–7)**

The rules on acceptance have been clarified and restructured, particularly in section 7, to align with established common law principles. The amendments confirm that where a mode of acceptance is prescribed, acceptance is valid only if made in that manner, and that a non-conforming acceptance does not bind the proposer unless it is expressly accepted.

The provisions on revocation in section 6 have also been clarified to recognise that notice of revocation may be communicated by or on behalf of the proposer, thereby aligning the Act with established principles of agency.

**(iv) Reform of Capacity and Minors' Contracts (Section 11)**

Contracts entered into by minors are no longer treated as strictly void but are instead voidable, subject to clearly defined exceptions.

The law now expressly recognises enforceable categories of contracts involving minors, including:

- i) contracts for necessities;
- ii) contracts for the minor's benefit (including those relating to education, employment, training, or internship); and
- iii) contracts expressly permitted by written law.

This reform replaces the rigid void rule with a more flexible and balanced approach that better reflects contemporary social and commercial realities. It also aligns Malaysian law with developments in other common law jurisdictions, while ensuring that appropriate safeguards remain in place to protect minors.

**(v) Expansion of Vitiating Factors (Sections 14–16A, 19–20)**

The concept of “coercion” is replaced with “duress” in section 15, expanding the doctrine to include economic duress and other forms of illegitimate pressure recognised in contemporary common law.

A new statutory doctrine of unconscionable dealing is introduced in section 16A to address situations of unfair advantage-taking and exploitation that fall short of undue influence.

Sections 14, 19, and 20 are revised to ensure coherence across all vitiating factors, including duress, undue influence, fraud, misrepresentation, mistake, and unconscionable dealing, and to clarify the remedies available to affected parties.

**(vi) Clarification of Mistake as to Fact (Section 21)**

Section 21 has been clarified to address the effect of mutual mistake as to a matter of fact essential to the agreement. The provision now makes clear that an agreement is void only where the mistaken fact is not the subject of a warranty by one of the parties.

A definition of “warranty” has also been introduced to mean a statement or assurance of fact, whether express or implied, on which the other party may reasonably rely. This ensures that where a party has assumed responsibility for a fact, the matter is governed by principles of contractual allocation of risk rather than mistake.

The provision further clarifies that an erroneous opinion as to the value of the subject-matter does not constitute a mistake of fact.

**(vii) Reform of Consideration and Contract Variations  
(Sections 25, 26, 26A–26B)**

Section 25 has been clarified to simplify its structure and to address the effect of partial illegality. The provision now makes clear that where only part of the consideration or object of an agreement is unlawful, that part alone is void, provided it can be clearly separated from the lawful part. This introduces a principled approach

to severability and avoids the automatic invalidation of entire agreements where the unlawful element is divisible.

Section 26 has been updated to recognise that agreements made by deed are enforceable without consideration, thereby resolving long-standing uncertainty and aligning Malaysian law with established common law practice.

A new provision in section 26A allows the performance of, or promise to perform, an existing contractual obligation to constitute valid consideration for contract variations. This removes the rigidity of the traditional existing-duty rule and facilitates commercially realistic renegotiations.

Section 26B codifies the requirement of intention to create legal relations, providing express statutory recognition of a foundational principle of contract law that has previously been applied through judicial interpretation.

These reforms promote commercial certainty and flexibility, particularly in contemporary transactional contexts, while maintaining appropriate safeguards through doctrines such as duress and unconscionable dealing.

#### **(viii) Clarification of Agreements in Restraint of Marriage (Section 27)**

The exception relating to minors has been removed, and the provision now makes clear that every agreement in restraint of the marriage of any person is void. This reflects the fundamental public policy against restraints on marriage and simplifies the provision by removing an exception that is no longer necessary or justified.

The amendment is also consistent with the broader legal framework in Malaysia, in which the marriage of minors is subject to strict regulation under both civil and Shari'ah law, with a strong emphasis on welfare and protection.

#### **(ix) Restraint of Trade and Commercial Freedom (Section 28)**

The existing blanket prohibition on restraint of trade is replaced with a reasonableness-based test, under which such restraints are enforceable if they are

reasonable in scope, duration, and geographical extent, and are necessary to protect legitimate business interests.

This reform brings Malaysian law into closer alignment with other leading common law jurisdictions and reflects the practical needs of modern commercial arrangements, including employment, partnership, and business sale transactions.

**(x) Reform of Agreements in Restraint of Legal Proceedings (Section 29)**

Section 29 has been simplified to provide that any agreement which absolutely restricts a party from enforcing his or her rights under a contract by the usual legal proceedings is void to that extent.

The previous references to agreements limiting the time for enforcement and the detailed arbitration-related exceptions have been removed. These matters are more appropriately governed by the applicable statutory framework, including limitation legislation and the Arbitration Act 2005.

The reform also recognises that, in commercial practice, parties may agree on contractual timelines for the enforcement of rights. Such arrangements may serve legitimate commercial purposes where they are entered into freely and on an informed basis, particularly between parties of comparable bargaining strength. The revised provision avoids prescribing detailed rules in this area, leaving such matters to be addressed within the broader legal framework governing limitation and contractual validity.

**(xi) Reform of Wagering Agreements (Section 31)**

Section 31 has been revised to simplify and modernise the law relating to wagering agreements. The provision now makes clear that all wagering agreements are void and that no legal action may be brought to recover any money or property alleged to have been won under such agreements, or held pending the outcome of a wager.

The previous exception relating to horse racing has been removed as outdated and no longer reflective of the contemporary regulatory landscape. Instead, the provision

clarifies that wagering arrangements expressly permitted or regulated under any written law are not affected.

This reform ensures that the Act remains aligned with the broader statutory framework governing gaming and wagering activities, while providing a clear and general rule on the unenforceability of wagering agreements.

**(xii) Performance, Termination, and Contractual Remedies  
(Sections 40, 54, 56)**

The term “terminate” is adopted consistently to describe discharge for breach, replacing older expressions such as “voidable” where appropriate. This clarifies the distinction between termination for breach and avoidance arising from vitiating factors.

Sections 40, 54, and 56 have been aligned to reflect a coherent and integrated framework governing the right to terminate a contract in cases of serious or fundamental breach, including where performance is refused, prevented, or not rendered within a time that is of the essence. The revised terminology also promotes consistency with established common law principles and reduces the risk of confusion arising from inconsistent or outdated language.

The Committee also considered, but did not adopt, a proposal to introduce a general statutory duty of good faith in contract performance. While recognising the importance of good faith considerations, the Committee concluded that such a reform would represent a significant departure from the existing common law framework, which places primary emphasis on certainty and party autonomy. Existing doctrines, including those relating to misrepresentation, duress, unconscionable dealing, and the control of contractual discretions, were considered sufficient to address issues of unfairness without introducing a broad and potentially uncertain overarching obligation.

### **(xiii) Clarification of Impossibility and Frustration (Section 57)**

Section 57 has been clarified to address the effect of impossibility and supervening illegality. The provision continues to distinguish between agreements that are void ab initio due to initial impossibility and contracts that subsequently become void where performance becomes impossible or unlawful.

A new clarification provides that where a contract becomes void due to supervening impossibility or illegality, the consequences are governed by sections 15 and 16 of the Civil Law Act 1956. This ensures that issues of restitution and adjustment of rights are addressed within the existing statutory framework.

The Committee also considered, but did not adopt, proposals to introduce statutory doctrines of hardship and force majeure. While such doctrines are recognised in certain legal systems, they would represent a significant departure from the existing common law framework. Malaysian contract law, consistent with its common law foundations, places primary emphasis on party autonomy, certainty of contract, and the allocation of risk as agreed between the parties.

### **(xiv) Clarification of Discharge by Agreement and Waiver (Sections 63–64)**

Section 63 is amended to replace the term “rescission” with “termination”, clarifying that the provision concerns discharge of contractual obligations by agreement rather than avoidance from the outset. This reduces confusion and aligns the Act with contemporary contractual terminology.

The relationship between section 63 and the newly introduced section 26A is also clarified, distinguishing between variations that leave the original contract subsisting and those that result in its discharge.

Section 64 has been restructured to set out, in clearer terms, the promisee’s ability to waive or remit performance, extend time for performance, or accept alternative satisfaction, without the need for fresh consideration.

**(xv) Clarification of Consequences of Voidable Contracts (Section 65)**

Section 65 has been clarified to reflect the updated terminology adopted across the Act, by recognising both rescission and termination in relation to voidable contracts. This ensures consistency in the treatment of discharge for breach and avoidance arising from vitiating factors.

The provision also restates, in clearer terms, the consequences of such discharge, confirming that the non-rescinding or non-terminating party is released from further performance.

In addition, the restitutionary obligation has been clarified to require the party rescinding or terminating the contract to restore any benefit or advantage received, so far as possible. This reinforces the principle that a party should not retain benefits under a contract that has been set aside.

**(xvi) Clarification of Restitution under Void Agreements (Section 66)**

Section 66 has been clarified to ensure consistency in terminology by referring to any “benefit or advantage” received under a void agreement or a contract that becomes void.

The provision continues to require that such benefit or advantage be restored, or that compensation be made, thereby reaffirming the principle that a party should not be unjustly enriched where no valid contract exists or where a contract has ceased to have effect.

**(xvii) Retention of Provisions on Certain Relations Resembling Contract  
(Part VI, Sections 69–73)**

The provisions in Part VI, which govern certain relations resembling those created by contract, have been retained without substantive amendment. These provisions, including claims for necessities, reimbursement, non-gratuitous acts, and payments made by mistake or under coercion, continue to reflect well-established and functional principles.

No changes have been recommended, as the existing provisions remain clear, coherent, and consistent with established legal principles.

As part of the broader restructuring of the Act, section 72 (responsibility of finder of goods) has been relocated to the Part on bailment, where it more appropriately aligns with the law governing custodial relationships.

**(xviii) Clarification of Compensation for Breach of Contract (Section 74)**

Section 74 has been refined to clarify the principles governing compensation for breach of contract. The provision now confirms that recoverable loss includes damage which arises naturally in the usual course of things, or which the parties knew or could reasonably have contemplated at the time of contracting. This aligns the statutory language more closely with established common law principles on remoteness of damage.

An express provision has also been introduced to recognise the requirement to mitigate loss, providing that the failure of the claimant to take reasonable steps to mitigate loss or damage shall be taken into account in assessing compensation.

These amendments enhance clarity and ensure that the statutory formulation accurately reflects established principles governing remoteness and mitigation, while maintaining continuity with existing jurisprudence.

**(xix) Clarification of Compensation for Non-Contractual Obligations (Section 74A)**

A new section 74A has been introduced to restate the rule on compensation for failure to discharge obligations resembling those created by contract. This provision was previously contained within section 74 and has now been separated to distinguish more clearly between contractual and non-contractual obligations.

Section 74A confirms that where such an obligation is not discharged, the injured party is entitled to the same measure of compensation as if the obligation had arisen under a contract and had been breached.

This restructuring improves clarity and ensures a more coherent organisation of the provisions governing compensation.

**(xx) Clarification of Agreed Compensation for Breach (Section 75)**

Section 75 has been revised to clarify the law on agreed damages and penalty clauses. The provision now confirms that a party is entitled only to reasonable compensation for breach of contract, regardless of the amount stipulated in the contract.

The revised section further provides that the party claiming compensation must demonstrate that the amount sought is not exorbitant or disproportionate to the greatest legitimate loss suffered, while ensuring that any award does not exceed the sum stipulated in the contract.

The provision also clarifies that a deposit may be forfeited, provided that the amount forfeited is reasonable.

The existing exception relating to bail-bonds and similar instruments has been retained.

These amendments restate and clarify the applicable principles governing agreed damages, enhancing certainty while preserving the balance between contractual freedom and protection against excessive or penal stipulations.

**(xxi) Reorganisation of Compensation for Termination (Section 73A)**

The existing provision on compensation for a party who rightfully rescinds a contract has been relocated and restated as a new section 73A. The provision now adopts the term “terminate” to ensure consistency with the terminology used across the Act.

This restructuring places the provision within the broader framework of contractual remedies, improving coherence and accessibility. It also clarifies that a party who rightfully terminates a contract is entitled to compensation for any loss sustained as a result of non-performance.

**(xxii) Retention of Provisions on Indemnity and Guarantee  
(Part VIII, Sections 77–100)**

The provisions governing indemnity and guarantee have been retained without substantive amendment, as they continue to reflect well-established and commercially effective principles.

A targeted clarification has been introduced in section 94 to address the construction of clauses purporting to waive or subordinate a surety's rights to the creditor's securities. The provision now confirms that, in the absence of explicit contrary language, such clauses are to be interpreted as postponing, rather than extinguishing, the surety's rights. This ensures that the equitable position of the surety is preserved and avoids the risk of unjust enrichment.

As part of the broader reform, this Part is proposed to be relocated into a standalone statute, in line with the Committee's decision to separate specific subject areas from the core structure of the Act.

**(xxiii) Retention and Clarification of Bailment Provisions  
(Part IX, Sections 101–134)**

The provisions governing bailment have been retained with minimal substantive amendment, as they continue to reflect well-established and commercially workable principles. These provisions, including those relating to the duties and liabilities of bailors and bailees, finder of goods, and the law of pledge, remain clear, coherent, and consistent with established legal practice.

Targeted refinements have been introduced to improve clarity and organisation. These include the consolidation of provisions relating to finders of goods by relocating the former section 72 into this Part, and minor drafting improvements to enhance readability and consistency. In addition, section 127 has been revised to remove the presumption that a pledge extends to subsequent advances, thereby promoting transparency and ensuring that any extension of security is based on express agreement.

As part of the broader reform, this Part is proposed to be relocated into a standalone statute, in line with the Committee's approach of separating distinct subject areas from the core structure of the Act.

**(xxiv) Reform of Agency (Part X, Sections 135–191)**

Existing Part X (Agency) is proposed to be repealed and replaced by a new standalone Agency Bill. The proposed Bill, together with a separate report setting out the detailed rationale and recommendations, has been submitted independently for consideration.

**(xxv) Introduction of Statutory Controls on Exemption and Limitation Clauses (Part XI, Sections 192–206)**

A new Part XI has been introduced to regulate the use of exemption and limitation clauses in contracts. Modelled on the United Kingdom's Unfair Contract Terms Act 1977, with appropriate modifications for the Malaysian context, the provisions establish a structured framework governing the extent to which contractual liability may be excluded or restricted.

The regime provides that certain liabilities, including those arising from death or personal injury due to negligence and the supply of goods without title, cannot be excluded by contract. In other cases, the enforceability of exclusion or limitation clauses is subject to a statutory requirement of reasonableness, supported by a non-exhaustive list of factors to guide its application.

The new Part also addresses the use of exclusion clauses in standard form contracts, misrepresentation, and contracts for the supply of goods, while incorporating provisions to prevent circumvention of the statutory controls. It operates alongside existing legislation, including consumer protection laws, and is intended to complement, rather than displace, those frameworks.

Overall, the introduction of Part XI establishes a coherent and principled statutory regime for the control of exemption and limitation clauses, enhancing fairness,

transparency, and consistency in contractual dealings across both commercial and non-consumer contexts.

#### **(xxvi) Introduction of Standalone Legislation**

As part of the proposed reforms, the Committee has recommended the introduction of two standalone Bills, alongside the proposed amendments to the Contracts Act 1950.

- i) First, following the repeal of Part X (Agency), a new standalone [Agency Bill](#) has been developed to provide a more comprehensive and modern legislative framework for agency law.
- ii) Secondly, the Committee has recommended the introduction of a [Contracts \(Rights of Third Parties\) Bill](#), establishing a new statutory regime governing the rights of third parties in contractual arrangements, an area not previously addressed within the Contracts Act 1950.

Both the Agency Bill and the Contracts (Rights of Third Parties) Bill, together with their respective reports, have been completed and submitted to the Legal Affairs Division of the Prime Minister's Department (BHEUU) for consideration.

These developments reflect the Committee's broader approach of separating distinct subject areas from the core structure of the Act, while also introducing new legislative frameworks where necessary, thereby enabling more focused, coherent, and specialised treatment of specific areas of contract law.

## **1.2 Background**

The Contracts Act 1950 (the Act) has long served as the foundation of contractual relations in Malaysia. Based substantially on the Indian Contract Act 1872, it has provided a consistent and reliable legal framework for over seven decades. However, the socio-economic landscape within which the Act operates has changed profoundly since its enactment, driven by technological advancement, evolving business practices, and shifting societal expectations. Despite these developments, the Act has undergone minimal reform. The last significant amendment was introduced through the Contracts (Amendment) Act 1976, which addressed scholarship agreements. No comprehensive revision has since been undertaken, underscoring the need for a systematic reassessment of the Act's continued relevance and effectiveness.

The Act faces a range of challenges that limit its capacity to govern contemporary contractual relationships effectively. Many of its provisions are outdated and do not adequately reflect modern commercial realities, including digital transactions, electronic contracting, and the increasing use of artificial intelligence in contract formation and performance. In addition, the Act provides limited protection against unfair contractual practices, particularly in relation to exclusion and limitation clauses, and lacks a coherent framework for addressing imbalances in bargaining power.

The language and structure of the Act also present significant accessibility challenges. Much of the drafting reflects an earlier legislative style, characterised by archaic expressions and complex formulations that may be difficult to navigate, particularly for individuals and small businesses without ready access to legal expertise. These difficulties are compounded by the continued inclusion of statutory illustrations and explanations, features largely inherited from colonial-era drafting practices. While originally intended to aid interpretation, many of these illustrations are outdated, overly simplistic, or no longer reflective of contemporary commercial contexts. Their retention risks creating confusion or unintended interpretive weight and detracts from the clarity of the operative provisions.

Beyond these functional concerns, the Act exhibits important substantive and structural limitations. Certain areas of modern contract law are either underdeveloped or absent, including the regulation of unfair contract terms and the recognition of third-party rights. In addition, aspects of the Act's treatment of established doctrines, such as consideration, vitiating factors, and remedies for breach, do not fully reflect contemporary common law developments

or commercial practice. These shortcomings highlight the need for targeted reform to ensure that the law remains both principled and practically relevant.

In response to these challenges, the Committee for the Review and Reform of Contract Law undertook a comprehensive review of the Act. Following extensive consultation, research, and deliberation, the Committee concluded that the core structure of the Act remains fundamentally sound and should be preserved. Accordingly, the Final Report adopts a measured and principled approach to reform, focusing on targeted amendments, doctrinal clarification, and modernisation of language and structure, rather than wholesale repeal.

The reforms proposed in this Report update the Act in several key respects. Archaic language has been replaced, statutory illustrations have been removed, and explanatory material has been incorporated into the operative provisions. Clarity has been enhanced through the harmonisation of terminology and alignment with established common law principles. Targeted substantive reforms have also been introduced, including reforms to the law of consideration, the expansion of vitiating factors, the reform of restraint of trade, and the introduction of a new Part XI regulating exemption and limitation clauses.

In addition, the Committee has undertaken a structural reorganisation of the Act. Certain subject areas, including agency, are proposed to be removed from the Act and addressed in separate legislation, while others, such as indemnity and guarantee and bailment, are identified for possible development into standalone statutes. New legislative regimes have also been introduced where appropriate, including a Contracts (Rights of Third Parties) Bill. This approach reflects the view that the Contracts Act 1950 should operate as a statute of general principles applicable across contractual relationships, while more specialised areas of law are more effectively addressed in dedicated legislative instruments.

At the same time, the Committee has exercised deliberate restraint. Proposals such as the introduction of a general statutory duty of good faith and the codification of doctrines such as hardship and force majeure were carefully considered but not adopted. These decisions reflect the Committee's commitment to preserving legal certainty, respecting party autonomy, and maintaining consistency with Malaysia's common law foundations.

Taken together, the reforms set out in this Final Report represent a balanced recalibration of Malaysian contract law. They are intended to enhance clarity and accessibility, and to ensure that the law remains responsive to contemporary commercial realities, while preserving its underlying principles and continuity with established jurisprudence.

### **1.3 Governance Structure and Methodology**

In recognition of the need to modernise Malaysia's contract law framework and address the challenges posed by the Contracts Act 1950, the Honourable Minister in the Prime Minister's Department (Legal Affairs), YB Dato' Sri Azalina binti Othman Said, established the Committee for the Review and Reform of Contract Law (CRRCL) on 14 January 2025.

The CRRCL was entrusted with a comprehensive mandate to guide the reform process. Its key objectives included reviewing the development of contract law in Malaysia, identifying constraints and weaknesses within the existing legislative framework, examining relevant judicial decisions, and restating the principles of contract law to enhance clarity, coherence, and accessibility. The Committee was further tasked with recommending appropriate reforms, whether through amendment of the existing Act or the development of new legislative frameworks, and with preparing a final report setting out detailed legal and policy recommendations.

The Committee was chaired by The Honourable Justice Dato' Seri Vazeer Alam bin Mydin Meera of the Federal Court of Malaysia. Its membership comprised a distinguished group of judges, senior practitioners, academics, and representatives from government, reflecting a deliberate effort to bring together diverse expertise and perspectives.

The reform initiative was supported through a strategic collaboration with Monash University Malaysia and Universiti Kebangsaan Malaysia, combining academic rigour with practical and institutional experience. The research component of the project was led by Associate Professor Dr. Adnan Trakic, Director of the Centre for Commercial Law and Regulatory Studies – Malaysia Hub. This collaboration ensured that the reform process was grounded in both doctrinal analysis and practical insight, enabling a balanced and forward-looking approach.

To facilitate a comprehensive and systematic review, the work of the Committee was organised into eight dedicated Working Groups, each responsible for specific Parts of the Act or thematic

areas of reform. These Working Groups comprised members drawn from the judiciary, legal practice, academia, and relevant government agencies, supported by designated research assistants.

Each Working Group conducted detailed doctrinal and comparative analyses of the provisions within its remit, assessed their suitability in light of contemporary legal and commercial developments, and developed proposals for amendment, repeal, or replacement where appropriate. To ensure consistency and analytical rigour, all Working Groups operated within a structured framework requiring the identification of existing provisions, proposed amendments, and supporting justifications.

The findings and recommendations of the Working Groups were presented to the CRRCL for detailed deliberation. The Committee engaged in iterative review, discussion, and refinement of proposals, and where necessary, Working Groups were invited to revisit and revise their recommendations. This process ensured that all proposed reforms were subject to careful scrutiny and collective agreement.

In addition to its internal deliberations, the Committee undertook an extensive programme of stakeholder engagement, including consultations, roundtables, and presentations involving members of the judiciary, the Malaysian Bar, regulators, industry representatives, and academics. This consultative approach ensured that the proposed reforms were informed not only by legal principle but also by practical considerations and stakeholder perspectives.

The governance structure and methodology adopted by the Committee reflect a deliberate and rigorous approach to law reform. By combining institutional leadership, academic expertise, practitioner insight, and stakeholder engagement, the Committee has sought to ensure that the recommendations set out in this Report are both principled and practically effective.

A full list of Committee members and Working Groups is set out in Appendix A and Appendix B.

Each Working Group produced detailed reports and supporting research materials, including comparative analyses, draft provisions, and explanatory memoranda. These materials formed an important evidential and analytical foundation for the Committee's deliberations and

recommendations. For ease of reference, the Working Group reports and supporting materials are compiled separately and made available as indicated in Appendix C.

Recordings of the Committee's meetings, during which the Working Groups' proposals were presented, deliberated, and discussed, are also compiled and made available as indicated in Appendix D.

#### **1.4 Recommendations for Reform of the Contracts Act 1950**

This section sets out the Committee's recommendations for the reform of the Contracts Act 1950. The recommendations are presented on a section-by-section basis, consistent with the structure of the Act. For each provision, the current statutory text is reproduced, followed by the proposed amendment and a concise statement of rationale. This format is adopted to promote clarity, transparency, and ease of reference, and to facilitate consideration of the proposed reforms.

| <b>Section</b>                                                                                                                                                                                                 | <b>Current Provisions</b>                                                              | <b>Proposed Amendments</b>                                                                                                         |
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|                                                                                                                                                                                                                | <b>CONTRACTS ACT 1950</b><br><br><b>(Act 136)</b><br><br>An Act relating to contracts. | <b>CONTRACTS ACT 1950</b><br><br><b>(Act 136)</b><br><br>An Act relating to contracts and certain other relations and obligations. |
| <b>Rationale:</b><br><br>The amendment expands the description of the Act to reflect that it governs not only contracts in the strict sense but also other relations and obligations recognised under the Act. |                                                                                        |                                                                                                                                    |
| <b>PART I</b><br><br><b>PRELIMINARY</b>                                                                                                                                                                        |                                                                                        |                                                                                                                                    |
| 1.                                                                                                                                                                                                             | <b>Short title.</b><br><br>1. This Act may be cited as the Contracts Act 1950.         | <b>Short title.</b>                                                                                                                |

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|    | Nothing herein contained shall affect any written law or any usage or custom of trade, or any incident of any contract, not inconsistent with this Act.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     | <p>1. This Act may be cited as the Contracts Act 1950.</p> <p>2. This Act is not a codification of the law relating to contracts and shall not affect any written law, usage, custom of trade, or any incident of any contract, not inconsistent with this Act.</p> |
|    | <p><b>Rationale:</b></p> <p>The proposed amendment introduces an express clarification that the Contracts Act 1950 is not intended to operate as a complete codification of Malaysian contract law. This clarification reflects the long-established judicial position that the Act does not exhaustively set out all principles of contract law and that common law continues to supplement the Act where it is silent. By stating this expressly in the legislation, the amendment removes any potential ambiguity and provides greater certainty to courts, practitioners, and contracting parties.</p> <p>The revised language also modernises and streamlines subsection (2) without altering its substantive effect. It maintains the principle that the Act does not displace existing written laws, commercial usages, or contractual incidents that are consistent with the Act. The clarification reinforces continuity with established practice while improving the structure and clarity of the provision.</p> |                                                                                                                                                                                                                                                                     |
| 2. | <p><b>Interpretation.</b></p> <p>In this Act the following words and expressions are used in the following senses, unless a contrary intention appears from the context:</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                | <p><b>Interpretation.</b></p> <p>In this Act, the following words and expressions are used as set out below, unless a contrary intention appears from the context:</p>                                                                                              |

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|  | <p>(a) when one person signifies to another his willingness to do or to abstain from doing anything, with a view to obtaining the assent of that other to the act or abstinence, he is said to make a proposal;</p> <p>(b) when the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted: a proposal, when accepted, becomes a promise;</p> <p>(c) the person making the proposal is called the “promisor” and the person accepting the proposal is called the “promisee”;</p> <p>(d) when, at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing, something, such act or abstinence or promise is called a consideration for the promise;</p> | <p>(a) when one person signifies to another his willingness to do or to abstain from doing anything, with a view to obtaining the assent of that other to the act or abstinence, he is said to make a proposal;</p> <p>(b) when the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted: a proposal, when accepted, becomes a promise;</p> <p>(c) the person making the proposal is called the “promisor” and the person accepting the proposal is called the “promisee”;</p> <p>(d) when, at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing, something, such act or abstinence or promise is called a consideration for the promise;</p> |
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|  | <p>(e) every promise and every set of promises, forming the consideration for each other, is an agreement;</p> <p>(f) promises which form the consideration or part of the consideration for each other are called reciprocal promises;</p> <p>(g) an agreement not enforceable by law is said to be void;</p> <p>(h) an agreement enforceable by law is a contract;</p> <p>(i) an agreement which is enforceable by law at the option of one or more of the parties thereto, but not at the option of the other or others, is a voidable contract; and</p> <p>(j) a contract which ceases to be enforceable by law becomes void when it ceases to be enforceable.</p> | <p>(e) every promise and every set of promises, forming the consideration for each other, is an agreement;</p> <p>(f) promises which form the consideration or part of the consideration for each other are called reciprocal promises;</p> <p>(g) an agreement not enforceable by law is said to be void;</p> <p>(h) an agreement enforceable by law is a contract;</p> <p>(i) an agreement which is enforceable by law at the option of one or more of the parties thereto, but not at the option of the other or others, is a voidable contract; and</p> <p>(j) a contract which ceases to be enforceable by law becomes void when it ceases to be enforceable.</p> |
|  | <p><b>Rationale:</b></p> <p>The phrase “in the following sense” has been replaced with “as set out below” to improve clarity, ensure consistency with modern legislative drafting conventions, and remove archaic language.</p>                                                                                                                                                                                                                                                                                                                                                                                                                                        |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        |

| <b>PART II</b><br><b>OF THE COMMUNICATION, ACCEPTANCE AND REVOCATION OF</b><br><b>PROPOSALS</b> |                                                                                                                                                                                                                                                                                                                                                                                                                               |                                |
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| 3.                                                                                              | <b>Communication, acceptance and revocation of proposals.</b><br><br><p>The communication of proposals, the acceptance of proposals, and the revocation of proposals and acceptances, respectively, are deemed to be made by any act or omission of the party proposing, accepting, or revoking, by which he intends to communicate the proposal, acceptance, or revocation, or which has the effect of communicating it.</p> | <b>No changes recommended.</b> |
| 4.                                                                                              | <b>Communication, when complete.</b><br><br><p>(1) The communication of a proposal is complete when it comes to the knowledge of the person to whom it is made.</p> <p>(2) The communication of an acceptance is complete—</p> <p>(a) as against the proposer, when it is put in a course of transmission to him, so as to be out of the power of the acceptor; and</p>                                                       | <b>No changes recommended.</b> |

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|    | <p>(b) as against the acceptor, when it comes to the knowledge of the proposer.</p> <p>(3) The communication of a revocation is complete—</p> <p>(a) as against the person who makes it, when it is put into a course of transmission to the person to whom it is made, so as to be out of the power of the person who makes it; and</p> <p>(b) as against the person to whom it is made, when it comes to his knowledge.</p> |                                           |
| 5. | <p><b>Revocation of proposals and acceptances.</b></p> <p>(1) A proposal may be revoked at any time before the communication of its acceptance is complete as against the proposer, but not afterwards.</p> <p>(2) An acceptance may be revoked at any time before the communication of the acceptance is complete as</p>                                                                                                     | <p><b>No changes are recommended.</b></p> |

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|    | against the acceptor, but not afterwards.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             |
| 6. | <p><b>Revocation how made.</b></p> <p>A proposal is revoked—</p> <ul style="list-style-type: none"> <li>(a) by the communication of notice of revocation by the proposer to the other party;</li> <li>(b) by the lapse of the time prescribed in the proposal for its acceptance, or, if no time is so prescribed, by the lapse of a reasonable time, without communication of the acceptance;</li> <li>(c) by the failure of the acceptor to fulfil a condition precedent to acceptance; or</li> <li>(d) by the death or mental disorder of the proposer, if the fact of his death or mental disorder comes to the knowledge of the acceptor before acceptance.</li> </ul> | <p><b>Revocation how made.</b></p> <p>A proposal is revoked—</p> <ul style="list-style-type: none"> <li>(a) by the communication of notice of revocation by or on behalf of the proposer to the other party;</li> <li>(b) by the lapse of the time prescribed in the proposal for its acceptance, or, if no time is so prescribed, by the lapse of a reasonable time, without communication of the acceptance;</li> <li>(c) by the failure of the acceptor to fulfil a condition precedent to acceptance; or</li> <li>(d) by the death or mental disorder of the proposer, if the fact of his death or mental disorder comes to the knowledge of the acceptor before acceptance.</li> </ul> |
|    | <p><b>Rationale:</b></p> <p>The proposed amendment introduces a clarification that a notice of revocation may be communicated “<b>by or on behalf of the proposer.</b>” This change addresses questions that occasionally arise regarding whether a revocation must come directly from the proposer or whether it may be effectively communicated through</p>                                                                                                                                                                                                                                                                                                               |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             |

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|    | <p>an authorised third party. By expressly recognising that revocation can be made “on behalf of” the proposer, the amendment resolves this issue and aligns the Act with established principles of agency, under which authorised agents may act within the scope of their authority to bind the principal.</p> <p>The word “or” has been inserted after paragraphs (a) and (b) to clarify that each ground of revocation operates as an independent alternative. Similar additions should be made throughout the Act, where appropriate, as a matter of prudent drafting practice.</p> <p>No further amendments are proposed, as paragraphs (b)–(d) continue to operate effectively and remain consistent with contemporary contractual doctrine.</p> |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        |
| 7. | <p><b>Acceptance must be absolute.</b></p> <p>In order to convert a proposal into a promise the acceptance must—be absolute and unqualified;</p> <p>(a) be expressed in some usual and reasonable manner, unless the proposal prescribes the manner in which it is to be accepted. If the proposal prescribes a manner in which it is to be accepted, and the acceptance is not made in that manner, the proposer may, within a reasonable time after the acceptance is communicated to him, insist that his proposal shall be accepted in the prescribed manner, and not</p>                                                                                                                                                                           | <p><b>Acceptance must be absolute.</b></p> <p>A proposal is converted into a promise if the acceptance is absolute and unqualified, and;</p> <p>(a) where the manner of acceptance is not prescribed by the proposal, if the acceptance is expressed in some usual and reasonable manner;</p> <p>(b) where the manner of acceptance is prescribed by the proposal, if the acceptance is made in that prescribed manner; or</p> <p>(c) where the manner of acceptance is prescribed by the proposal and the acceptance is not made in the prescribed manner, if the</p> |

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|    | otherwise; but, if he fails to do so, he accepts the acceptance.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      | proposer communicates that he accepts the acceptance. |
|    | <p><b>Rationale:</b></p> <p>The proposed amendment restructures section 7 to improve clarity, readability, and doctrinal coherence while also addressing a substantive concern arising from the current wording. The existing section 7(b) provides that a non-conforming acceptance (i.e., one not made in the prescribed manner) will nonetheless bind the proposer unless the proposer objects within a reasonable time. This approach is problematic, as it effectively imposes contractual liability on an offeror despite the offeree's failure to comply with an express condition. It also does not accurately reflect the common law position, under which a non-conforming acceptance is not effective unless the offeror elects to waive the requirement (see <i>Manchester Diocesan Council for Education v Commercial and General Investments Ltd</i> [1970] 1 WLR 241; <i>Tinn v Hoffman</i> (1873) 29 LT 271).</p> <p>To resolve this, the proposed amendments clarify that where a manner of acceptance is prescribed, an acceptance is valid only if made in that manner (paragraph (b)). Where the acceptance is not made in the prescribed manner, it does not bind the proposer unless the proposer communicates acceptance of the non-conforming acceptance (paragraph (c)).</p> |                                                       |
| 8. | <p><b>Acceptance by performing conditions, or receiving consideration.</b></p> <p>Performance of the conditions of a proposal, or the acceptance of any consideration for a reciprocal promise which may be offered with a proposal, is an acceptance of the proposal.</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                            | <p><b>No changes are recommended.</b></p>             |

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| 9.                                                                                                                                                | <p><b>Promises, express and implied</b></p> <p>So far as the proposal or acceptance of any promise is made in words, the promise is said to be expressed. So far as the proposal or acceptance is made otherwise than in words, the promise is said to be implied.</p>                                                                                                                                                                                                     | <b>No changes are recommended.</b>                                                                                                                 |
| <p style="text-align: center;"><b>PART III</b></p> <p style="text-align: center;"><b>OF CONTRACTS, VOIDABLE CONTRACTS AND VOID AGREEMENTS</b></p> |                                                                                                                                                                                                                                                                                                                                                                                                                                                                            |                                                                                                                                                    |
| 10.                                                                                                                                               | <p><b>What agreements are contracts.</b></p> <p>(1) All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void.</p> <p>(2) Nothing herein contained shall affect any law by which any contract is required to be made in writing or in the presence of witnesses, or any law relating to the registration of documents.</p> | <b>No changes are recommended.</b>                                                                                                                 |
| 11.                                                                                                                                               | <p><b>Who are competent to contract.</b></p> <p>Every person is competent to contract who is of the age of majority according to the law to which he is</p>                                                                                                                                                                                                                                                                                                                | <p><b>Who are competent to contract.</b></p> <p>1. Every person is competent to contract who is of the age of majority according to the law to</p> |

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|  | <p>subject, and who is of sound mind, and is not disqualified from contracting by any law to which he is subject.</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              | <p>which he is subject, and who is of sound mind, and is not disqualified from contracting by any law to which he is subject.</p> <p>2. Notwithstanding subsection (1), a contract with a minor is voidable unless it falls within one of the following exceptions —</p> <p>(a) contracts for necessities suited to his condition in life;</p> <p>(b) contracts which are for his benefit, including contracts relating to education, employment, training, or internship; or</p> <p>(c) contracts expressly permitted by written law.</p> |
|  | <p><b>Rationale:</b></p> <p>The proposed amendment expands section 11 by introducing a new subsection (2) to clarify the legal effect of contracts entered into by minors. Under the current statutory wording, the provision merely states who is competent to contract but does not expressly address the status of contracts made by persons lacking full capacity, particularly minors. This has led to reliance on case law, including <i>Mohori Bibee v Dhurmodas Ghose</i> (1903) 30 Cal 539 (PC), which establishes that a minor’s contract is void, subject to narrow exceptions. However, the rigid application of the void rule has been criticised for being overly restrictive in</p> |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                            |

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|     | <p>modern commercial and educational contexts, where minors routinely engage in beneficial transactions.</p> <p>The proposed subsection (2) codifies a more balanced and contemporary approach by providing that contracts with minors are generally voidable rather than void, while clearly delineating three recognised and distinct categories of enforceable contracts:</p> <ul style="list-style-type: none"> <li>(a) contracts for necessities; or</li> <li>(b) contracts that are for the minor’s benefit, including those related to education, employment, training, and internship; or</li> <li>(c) contracts expressly permitted by written law.</li> </ul> <p>This approach aligns with common law developments in jurisdictions such as the UK, Australia, and Singapore, where minors’ contracts for necessities and for their benefit are enforceable to the extent that they promote the minor’s welfare and participation in society. It also reflects modern policy needs, given that minors today frequently enter into educational, employment, digital, and training arrangements that are essential to their development.</p> |                                           |
| 12. | <p><b>What is a sound mind for the purposes of contracting.</b></p> <p>(1) A person is said to be of sound mind for the purpose of making a contract if, at the time when he makes it, he is capable of understanding it and of forming a rational judgment as to its effect upon his interests.</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 | <p><b>No changes are recommended.</b></p> |

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|     | <p>(2) A person who is usually of unsound mind, but occasionally of sound mind, may make a contract when he is of sound mind.</p> <p>(3) A person who is usually of sound mind, but occasionally of unsound mind, may not make a contract when he is of unsound mind.</p>                                                                              |                                                                                                                                                                                                                                                                                                                                                         |
| 13. | <p><b>“Consent”.</b></p> <p>Two or more persons are said to consent when they agree upon the same thing in the same sense.</p>                                                                                                                                                                                                                         | <b>No changes are recommended.</b>                                                                                                                                                                                                                                                                                                                      |
| 14. | <p><b>“Free consent”.</b></p> <p>Consent is said to be free when it is not caused by—</p> <ul style="list-style-type: none"> <li>(a) coercion, as defined in section 15;</li> <li>(b) undue influence, as defined in section 16;</li> <li>(c) fraud, as defined in section 17;</li> <li>(d) misrepresentation, as defined in section 18; or</li> </ul> | <p><b>“Free consent”.</b></p> <p>Consent is said to be free when it is not caused by—</p> <ul style="list-style-type: none"> <li>(a) duress, as defined in section 15;</li> <li>(b) undue influence, as defined in section 16;</li> <li>(c) unconscionable dealing, as defined in section 16A;</li> <li>(d) fraud, as defined in section 17;</li> </ul> |

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|     | <p>(e) mistake, subject to sections 21, 22 and 23.</p> <p>Consent is said to be so caused when it would not have been given but for the existence of such coercion, undue influence, fraud, misrepresentation, or mistake.</p>                                                                                                                                                                                                       | <p>(e) misrepresentation, as defined in section 18; or</p> <p>(f) mistake, subject to sections 21, 22, and 23.</p> <p>Consent is said to be so caused when it would not have been given but for the existence of such duress, undue influence, unconscionable dealing, fraud, misrepresentation, or mistake.</p>          |
|     | <p><b>Rationale:</b></p> <p>The substitution of “coercion” with “duress” aligns the Act with contemporary common law terminology and the revised definition in section 15. The addition of “unconscionable dealing” as a new ground for vitiating consent corresponds to the introduction of section 16A and recognises the need for statutory protection in situations where one party exploits another’s special disadvantage.</p> |                                                                                                                                                                                                                                                                                                                           |
| 15. | <p><b>“Coercion”.</b></p> <p>“Coercion” is the committing, or threatening to commit any act forbidden by the Penal Code, or the unlawful detaining or threatening to detain, any property, to the prejudice of any person whatever, with the intention of causing any person to enter into an agreement.</p>                                                                                                                         | <p><b>“Duress”.</b></p> <p>(1) “Duress” means the use of unlawful or illegitimate pressure which induces a person to enter into a contract.</p> <p>(2) For the purposes of subsection (1), duress includes—</p> <p>(a) threats of unlawful acts, including unlawful detention or injury to the person or property; or</p> |

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|  |  | <p>(b) illegitimate economic or other forms of pressure which leave the aggrieved party with no reasonable practical alternative but to consent to the contract.</p> <p>(3) In determining whether the pressure was illegitimate, any, some, or all of the criteria set out below may be considered:</p> <p>(a) the nature of the threat or demand;</p> <p>(b) the reasonableness or otherwise of the demand;</p> <p>(c) the presence or absence of protest at the time;</p> <p>(d) the availability of alternatives or legal remedies;</p> <p>(e) whether independent advice was obtained; and</p> <p>(f) whether steps were taken to avoid the contract thereafter.</p> |
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|     | <p><b>Rationale:</b></p> <p>The proposed amendment replaces the concept of “coercion” with the broader doctrine of “duress,” bringing the Act in line with contemporary common law developments. The existing definition in section 15 is overly narrow as it is limited to acts forbidden by the Penal Code or unlawful detention of property, which does not adequately address forms of pressure recognised in modern contracting practices, particularly economic duress.</p> <p>The revised provision captures both unlawful threats and illegitimate economic or other forms of pressure that deprive a party of meaningful choice. This reflects leading common law authorities on duress (e.g., <i>Barton v Armstrong</i> [1976] AC 104; <i>Universe Tankships Inc of Monrovia v International Transport Workers’ Federation (The Universe Sentinel)</i> [1983] 1 AC 366; <i>Pao On v Lau Yiu Long</i> [1980] AC 614), which recognise that improper pressure can vitiate consent even where no criminal act is involved. Subsection (3) provides a non-exhaustive list of relevant factors to guide judicial assessment, promoting consistency while allowing flexibility.</p> |                                           |
| 16. | <p><b>“Undue influence”.</b></p> <p>(1) A contract is said to be induced by “undue influence” where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other.</p> <p>(2) In particular and without prejudice to the generality of the foregoing principle, a</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                            | <p><b>No changes are recommended.</b></p> |

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|  | <p>person is deemed to be in a position to dominate the will of another—</p> <p>(a) where he holds a real or apparent authority over the other, or where he stands in a fiduciary relation to the other; or</p> <p>(b) where he makes a contract with a person whose mental capacity is temporarily or permanently affected by reason of age, illness, or mental or bodily distress.</p> <p>(3) (a) Where a person who is in a position to dominate the will of another, enters into a contract with him, and the transaction appears, on the face of it or on the evidence adduced, to be unconscionable, the burden of proving that the contract was not induced by undue influence shall lie upon the person in a position to dominate the will of the other.</p> |  |
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|      | (b) Nothing in this subsection shall affect section 111 of the Evidence Act 1950 [Act 56]. |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        |
| 16A. |                                                                                            | <p><b>“Unconscionable Dealing”.</b></p> <p>(1) Unconscionable dealing means conduct between parties to a contract that is unconscionable having regard to all the circumstances of the case.</p> <p>(2) In determining whether a dealing is unconscionable, the court may consider any, some, or all of the criteria set out below:</p> <ul style="list-style-type: none"> <li>(a) the relative bargaining strengths of the parties;</li> <li>(b) whether any conditions were imposed that were not reasonably necessary for the protection of the other party’s legitimate interests;</li> <li>(c) whether any undue influence, pressure, or unfair tactics were used against a party; and</li> </ul> |

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|  | <p><b>Rationale:</b></p> <p>The introduction of section 16A codifies the doctrine of unconscionable dealing, which has been recognised in both common law and Malaysian jurisprudence. In Malaysia, the Court of Appeal in <i>Saad bin Marwi v Chan Hwan Hua &amp; Anor</i> [2001] 3 CLJ 98 applied the doctrine of inequality of bargaining power (a form of unconscionability), recognising exploitation where one party took unfair advantage of another's vulnerability.</p> <p>The proposed provision offers clear statutory guidance by listing relevant factors for courts to consider, including relative bargaining strength, the reasonableness of contractual terms, use of pressure or unfair tactics, and the availability of alternative sources for goods or services. These factors mirror established principles from leading common law cases (e.g., <i>Commercial Bank of Australia Ltd v Amadio</i> (1983) 151 CLR 447; <i>Kakavas v Crown Melbourne Ltd</i> (2013) 250 CLR 392). The current Act addresses undue influence, which is premised on the existence of a position of dominance. However, it does not sufficiently address situations where a party takes unfair advantage through conduct that falls short of</p> |                                                                                                                                                                                                                                                                                                                     |

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|     | <p>undue influence, in circumstances where no such dominance is present, yet the conduct remains morally and commercially unacceptable.</p> <p>Subsection (3) establishes a threshold for intervention, centring on “serious misconduct, unfair advantage-taking, or exploitation of a party’s special disadvantage.” This ensures that relief is not granted simply because a contract is harsh, but rather where there is clear injustice in the formation process.</p>                                                                                                                                                                        |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             |
| 17. | <p><b>“Fraud”.</b></p> <p>“Fraud” includes any of the following acts committed by a party to a contract, or with his connivance, or by his agent, with intent to deceive another party thereto or his agent, or to induce him to enter into the contract:</p> <ul style="list-style-type: none"> <li>(a) the suggestion, as to a fact, of that which is not true by one who does not believe it to be true;</li> <li>(b) the active concealment of a fact by one having knowledge or belief of the fact;</li> <li>(c) a promise made without any intention of performing it;</li> <li>(d) any other act fitted to deceive;</li> </ul> <p>and</p> | <p><b>“Fraud”.</b></p> <p>(1) “Fraud” includes any of the following acts committed by a party to a contract, or with his connivance, or by his agent, with intent to deceive another party thereto or his agent, or to induce him to enter into the contract:</p> <ul style="list-style-type: none"> <li>(a) the suggestion, as to a fact, of that which is not true by one who does not believe it to be true;</li> <li>(b) the active concealment of a fact by one having knowledge or belief of the fact;</li> <li>(c) a promise made without any intention of performing it;</li> </ul> |

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|                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                         | <p>(e) any such act or omission as the law specially declares to be fraudulent.</p> | <p>(d) any other act fitted to deceive; or</p> <p>(e) any such act or omission as the law specially declares to be fraudulent.</p> <p>(2) Mere silence as to facts likely to affect the willingness of a person to enter into a contract is not fraud, unless the circumstances of the case are such that, regard being had to them, it is the duty of the person keeping silence to speak, or unless his silence is, in itself, equivalent to speech.</p> |
| <p><b>Rationale:</b></p> <p>Subsection (2) consolidates and restates what is currently found in the <i>Explanation</i> to section 17 of the Contracts Act 1950, which provides that mere silence does not amount to fraud unless there is a duty to speak or where silence is equivalent to speech. This principle is also illustrated in the existing statutory examples, specifically Illustration <b>(b)</b>, where the relationship between a father and his daughter who has just come of age imposes a duty of disclosure, and Illustration <b>(c)</b>, where silence in the face of a direct assertion amounts to a representation.</p> <p>These statutory illustrations reflect long-standing common law principles. Fraud requires intentional deception (<i>Derry v Peek</i> (1889) 14 App Cas 337), and silence generally does not constitute fraud unless there is a duty to disclose, such as in fiduciary or special relationships (<i>Nocton v Lord Ashburton</i> [1914] AC 932). Similarly, silence that is “in itself equivalent to speech” aligns with the common</p> |                                                                                     |                                                                                                                                                                                                                                                                                                                                                                                                                                                            |

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|     | <p>law doctrine of implied representation, particularly where a party's conduct reasonably conveys affirmation of a fact.</p> <p>Malaysian jurisprudence is consistent with these foundations. In <i>ALW Car Workshop Sdn Bhd v AXA Affin General Insurance Berhad</i> [2019] 7 CLJ 667, the Federal Court emphasised that fraud requires intentional deception, whether by affirmative misrepresentation or deliberate concealment.</p>                                                                                                                                                                            |                                           |
| 18. | <p><b>“Misrepresentation”.</b></p> <p>“Misrepresentation” includes—</p> <ul style="list-style-type: none"> <li>(a) the positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true;</li> <li>(b) any breach of duty which, without an intent to deceive, gives an advantage to the person committing it, or anyone claiming under him, by misleading another to his prejudice, or to the prejudice of anyone claiming under him; and</li> <li>(c) causing, however innocently, a party to an agreement to make</li> </ul> | <p><b>No changes are recommended.</b></p> |

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|     | a mistake as to the substance of the thing which is the subject of the agreement.                                                                                                                                                                                                                                                                                                                                                                                                                                                    |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    |
| 19. | <p><b>Voidability of agreements without free consent.</b></p> <p>(1) When consent to an agreement is caused by coercion, fraud, or misrepresentation, the agreement is a contract voidable at the option of the party whose consent was so caused.</p> <p>(2) A party to a contract, whose consent was caused by fraud or misrepresentation, may, if he thinks fit, insist that the contract shall be performed, and that he shall be put in the position in which he would have been if the representations made had been true.</p> | <p><b>Voidability of contract at the option of the party whose consent was caused by duress, fraud, misrepresentation, undue influence, or unconscionable dealing.</b></p> <p>(1) When consent to an agreement is caused by duress, fraud, misrepresentation, undue influence, or unconscionable dealing, the agreement is a contract voidable at the option of the party whose consent was so caused.</p> <p>(2) A party whose consent to a contract was caused by duress, fraud, misrepresentation, undue influence, or unconscionable dealing may, if that party so elects, affirm the contract and require its performance; and, where the consent was caused by fraud, that party may insist on being placed in the position in which they would have been had the representation been true.</p> <p>(3) A contract is not voidable under this section if the consent of a</p> |

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|  |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    | <p>party was caused by misrepresentation or by silence that is fraudulent within the meaning of section 17, and that party had the means of discovering the truth with ordinary diligence.</p> <p>(4) A fraud or misrepresentation that did not cause the consent of the party to the contract does not render the contract voidable.</p> |
|  | <p><b>Rationale:</b></p> <p>The current section 19 is limited to coercion, fraud, and misrepresentation, but does not reflect the expanded scope of vitiating factors recognised in the proposed reforms, including duress, undue influence, and unconscionable dealing. Subsection (1) updates the terminology and aligns the provision with the revised sections 14-16A, ensuring consistency across the Act.</p> <p>Subsection (2) preserves the principle that a party may elect to affirm the contract despite defective consent. Importantly, it clarifies that only in cases of fraud can the party insist on being placed in the position they would have occupied had the representation been true, i.e., be entitled to claim expectation losses (e.g., <i>Derry v Peek</i> (1889) 14 App Cas 337).</p> <p>Subsections (3) and (4) incorporate the exception and explanation from the current section directly into the main body of the provision for clarity. Subsection (3) limits voidability where a party could have discovered the truth through ordinary diligence, preventing opportunistic rescission in cases of easily verifiable misrepresentation or fraudulent silence. Subsection (4) confirms that causation is essential: a fraud or misrepresentation that did not induce consent cannot render a</p> |                                                                                                                                                                                                                                                                                                                                           |

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|     | contract voidable. Bringing these rules into the main text ensures that all critical principles governing voidability are immediately visible and legally enforceable, rather than buried in an explanation.                                                                                                                                                                                                                               |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 |
| 20. | <p><b>Power to set aside contract induced by undue influence.</b></p> <p>When consent to an agreement is caused by undue influence, the agreement is a contract voidable at the option of the party whose consent was so caused. Any such contract may be set aside either absolutely or, if the party who was entitled to avoid it has received any benefit thereunder, upon such terms and conditions as to the court may seem just.</p> | <p><b>Application to court for order to set aside contract induced by duress, fraud, misrepresentation, undue influence, or unconscionable dealing.</b></p> <p>(1) A contract voidable at the option of a party whose consent is caused by duress, fraud, misrepresentation, undue influence, or unconscionable dealing, may, in the alternative, be set aside by order of court on application by the party whose consent was so caused either absolutely or, if the applicant has received any benefit thereunder, upon such terms and conditions as the court may deem just.</p> <p>(2) Without limiting the generality of the foregoing, in respect of any such contract as mentioned in subsection (1), the court may also grant ancillary orders for the payment of money, for the return or repair of goods, for the supply of services or any other</p> |

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|     |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 | order in restitution as the court deems just.                                                                                                                                                                                                                                                                                                                                                                                                    |
|     | <p><b>Rationale:</b></p> <p>Subsection (1) aligns this section with the revised terminology in the Act, recognising that contracts may be voidable not only for undue influence but also for duress, fraud, misrepresentation, and unconscionable dealing. This ensures consistency with the broader reforms to sections 14-19 and explicitly allows the affected party to apply to the court for relief.</p> <p>Subsection (1) preserves the court’s existing discretion to set aside the contract absolutely or on just terms, particularly where the party has received benefits under the contract. Subsection (2) introduces a modern clarification that courts may also grant ancillary or restitutionary remedies, such as payment of money, return or repair of goods, or supply of services, thereby explicitly codifying remedies that have been recognised in common law and Malaysian practice.</p> |                                                                                                                                                                                                                                                                                                                                                                                                                                                  |
| 21. | <p><b>Agreement void where both parties are under mistake as to matter of fact.</b></p> <p>Where both the parties to an agreement are under a mistake as to a matter of fact essential to the agreement, the agreement is void.</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             | <p><b>Agreement void where both parties are under mistake as to matter of fact.</b></p> <p>(1) Where both the parties to an agreement are under a mistake as to a matter of fact essential to the agreement, and the fact is not the subject of a warranty by one of the parties, the agreement is void.</p> <p>(2) For the purposes of subsection (1), a “warranty” means a statement or assurance of fact made by a party to the contract,</p> |

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|  |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                            | <p>whether expressly or impliedly, that the fact is true and on which the other party may reasonably rely.</p> <p>(3) An erroneous opinion as to the value of the thing which forms the subject-matter of the agreement is not to be deemed a mistake as to a matter of fact.</p> |
|  | <p><b>Rationale:</b></p> <p>Subsection (1) introduces a limitation that the agreement is void only if the fact in question is not the subject of a warranty by one of the parties. This ensures that parties who have expressly or impliedly warranted a fact cannot later avoid the contract on the basis of mutual mistake, thereby aligning the provision with commercial expectations and fairness in contractual dealings. The insertion renders the proposition more accurate in light of <i>McRae v Commonwealth Disposal Commission</i> (1951) 84 CLR 377. See also <i>Great Peace</i> [2003] QB 679 at [76]-[81], which provides a more complete formulation of common mistakes.</p> <p>Subsection (2) defines “warranty” to provide legal clarity and guidance, specifying that a warranty is any statement or assurance of fact, express or implied, on which the other party may reasonably rely. This prevents confusion between statements of fact that are legally actionable and mere representations or opinions.</p> <p>Subsection (3) incorporates the Explanation from the current provision directly into the main body of the section, clarifying that an erroneous opinion as to the value of the subject matter is not a mistake as to a matter of fact. Bringing this rule into the text itself increases the visibility and enforceability of the principle.</p> |                                                                                                                                                                                                                                                                                   |

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| 22. | <p><b>Effect of mistake as to law.</b></p> <p>A contract is not voidable because it was caused by a mistake as to any law in force in Malaysia; but a mistake as to a law not in force in Malaysia has the same effect as a mistake of fact.</p>                                                                                                                                                                                  | <b>No changes are recommended.</b> |
| 23. | <p><b>Contract caused by mistake of one party as to matter of fact.</b></p> <p>A contract is not voidable merely because it was caused by one of the parties to it being under a mistake as to a matter of fact.</p>                                                                                                                                                                                                              | <b>No changes are recommended.</b> |
| 24. | <p><b>What considerations and objects are lawful, and what not.</b></p> <p>The consideration or object of an agreement is lawful, unless—</p> <ul style="list-style-type: none"> <li>(a) it is forbidden by a law;</li> <li>(b) it is of such a nature that, if permitted, it would defeat any law;</li> <li>(c) it is fraudulent;</li> <li>(d) it involves or implies injury to the person or property of another; or</li> </ul> | <b>No changes are recommended.</b> |

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|                        | <p>(e) the court regards it as immoral, or opposed to public policy.</p> <p>In each of the above cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.</p>                                                                                                                                                                                                                                                                                                                                                                     |                                                                                                                                                                                                                                                                                                                                        |
| <i>Void Agreements</i> |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               |                                                                                                                                                                                                                                                                                                                                        |
| 25.                    | <p><b>Agreements void if considerations and objects unlawful in part.</b></p> <p>If any part of a single consideration for one or more objects, or any one or any part of any one of several considerations for a single object, is unlawful, the agreement is void.</p>                                                                                                                                                                                                                                                                                                                                                      | <p><b>Agreements void if consideration or object unlawful in part.</b></p> <p>(1) If any part of the consideration or object of an agreement is unlawful, the agreement is void.</p> <p>(2) Notwithstanding subsection (1), where the unlawful part can be clearly separated from the lawful part, only the unlawful part is void.</p> |
|                        | <p><b>Rationale:</b></p> <p>The current Section 25 renders an entire agreement void where any part of a single consideration or object is unlawful, but it does not expressly address situations involving distinct promises based on distinct considerations. The proposed amendment clarifies this provision by explicitly adopting the principle of severability, as recognised in English (<i>Dunkley v Evans and another</i> [1981] 3 All ER 285) and Indian law (<i>Shin Satellite Public Co. Ltd. v. Jain Studios Limited</i>, AIR 2006 SC 963), including the recommendation of the Indian Law Commission (1958).</p> |                                                                                                                                                                                                                                                                                                                                        |

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|     | <p>Subsection (1) preserves the principle that an agreement is void if any part of its consideration or object is unlawful. Subsection (2) introduces a clarifying rule that where the unlawful part can be clearly separated from the lawful part, only the unlawful part is void, while the lawful parts remain enforceable. This ensures fairness and commercial practicality by preventing the unnecessary invalidation of lawful transactions.</p> <p><b>Illustrative Example:</b> A agrees to pay B RM50,000, RM30,000 for B to supply office furniture and RM20,000 for B to make a secret payment to a government officer. The secret payment is unlawful. Because the lawful and unlawful parts are clearly separable, the contract is void only with respect to the unlawful portion (the secret payment), while the agreement for the supply of furniture remains valid and enforceable.</p> |                                                                                                                                                                                                                                                                                                                                                                                                  |
| 26. | <p><b>Agreement without consideration, void, unless—</b></p> <p>An agreement made without consideration is void, unless—</p> <p>(a) <i>it is in writing and registered; it is expressed in writing and registered under the law (if any) for the time being in force for the registration of such documents, and is made on account of natural love and affection between parties standing in a near relation to each other;</i></p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                    | <p><b>Agreement without consideration, void, unless—</b></p> <p>(1) An agreement made without consideration is void, unless—</p> <p>(a) it is expressed in writing and registered under the law (if any) for the time being in force for the registration of such documents, and is made on account of natural love and affection between parties standing in a near relation to each other;</p> |

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|  | <p>(b) <i>or is a promise to compensate for something done;</i><br/>it is a promise to compensate, wholly or in part, a person who has already voluntarily done something for the promisor, or something which the promisor was legally compellable to do;<br/>or</p> <p>(c) <i>or is a promise to pay a debt barred by limitation law;</i><br/>it is a promise, made in writing and signed by the person to be charged therewith, or by his agent generally or specially authorized in that behalf, to pay wholly or in part a debt of which the creditor might have enforced payment but for the law for the limitation of suits.</p> <p>In any of these cases, such an agreement is a contract.</p> | <p>(b) it is a promise to compensate, in whole or in part, a person who has already voluntarily done something for the promisor, or something which the promisor was legally obliged to do;</p> <p>(c) it is a promise, made in writing and signed by the person to be bound or their authorised agent, to pay, in whole or in part, a debt that would otherwise be barred by the law relating to limitation of actions; or</p> <p>(d) it is made by deed.</p> <p>(2) An agreement falling within paragraphs (1)(a) to (d) is a contract.</p> <p>(3) Nothing in subsection (1) affects the validity of any gift actually made.</p> <p>(4) An agreement is not void under subsection (1) merely because the consideration is inadequate; however, such inadequacy may be taken into account by the</p> |
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|  | <p><b>Rationale:</b></p> <p>The proposed amendments to Section 26 retain the core structure and substantive effect of the existing provision while modernising its language and resolving long-standing doctrinal gaps in the Act.</p> <p>Subsection (1)(a)–(c) preserves the three established exceptions under which an agreement without consideration may still be enforceable. The wording has been simplified for clarity without altering their substantive meaning. These clauses remain faithful to the current Malaysian position, which permits enforcement of (i) written and registered agreements made on account of natural love and affection between parties in close relationship, (ii) promises to compensate for past voluntary acts or acts the promisor was legally obliged to perform, and (iii) written and signed promises to pay debts barred by limitation.</p> <p>A significant improvement is the introduction of subsection (1)(d), which formally recognises that agreements made by deed are enforceable without consideration. This codifies the long-standing common law principle that deeds, traditionally sealed instruments, constitute binding obligations irrespective of consideration. Jurisdictions such as the UK, Australia, and Singapore expressly recognise the enforceability of deeds, and they are frequently used for property transactions, guarantees, settlements, corporate restructurings, and trust arrangements. (<i>Re Whitaker</i>, <i>Whitaker v Palmer</i> [1901] 1 Ch 9, <i>Howard F Hudson Pty Ltd v Ronayne</i> (1972) 126 CLR 449, <i>The Bank of East Asia Limited v Sudha Natrajan</i> [2015] SGHC 328 and <i>Lim Zhipeng v Seow Suat Thin</i> [2020] SGHC 5).</p> <p>At present, the Malaysian Contracts Act is silent on the status of deeds. As Pollock and Mulla have noted, the Act contains no provision allowing a deed (a sealed document) to operate as an alternative to consideration, a deliberate historical choice inherited from Indian law. Warren Swain explains that Indian contract law</p> |                                                        |

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|      | <p>historically refused to accept the binding force of contracts entered into by deed, thereby adopting a more restrictive approach than English law (<i>History and Drafting of the Indian Contract Act 1872</i>, in <i>Foundations of Indian Contract Law</i>, OUP 2024). This omission has generated doctrinal uncertainty in Malaysia. The proposed reform resolves this uncertainty by providing clear statutory authority for the enforceability of deeds, bringing Malaysia into alignment with modern Commonwealth practice and enhancing certainty for commercial actors.</p> <p>The phrase "in any of these cases, such an agreement is a contract" in the current provision is rephrased to reflect the proposal suggested above and included in the main text of s.26 as subsection (2) to ensure coherence. While subsection (3) and (4) incorporate, in clearer legislative form, Explanation 1 and Explanation 2 from the current provision. These explanations contain substantive legal propositions, that actual gifts remain valid without consideration, and that inadequacy of consideration does not render an agreement void but it may be relevant when determining whether consent was freely given, and removing them outright would risk undermining established legal principles. Their inclusion in the main text improves coherence and aligns the drafting approach with modern legislative standards.</p> |                                                                                                                                                                                                                                                                                                                |
| 26A. |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                           | <p><b>Consideration in contract variations.</b></p> <p>A promise to perform, or the performance of, an existing contractual obligation, whether in whole or in part, owed by one party to a contract is capable of being consideration for a promise by the other party to vary the terms of the contract.</p> |

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|  | <p><b>Rationale:</b></p> <p>Section 26A introduces a significant but carefully calibrated reform to the law of consideration in the context of contract variations. Under the current Malaysian position, reaffirmed by the Federal Court in <i>Kuala Dimensi Sdn Bhd v Port Kelang Authority</i> [2025] 5 MLJ 238 at [92], a promise to perform an existing contractual obligation, or the performance of that obligation, does not constitute sufficient consideration for a variation of the original contract. As a result, parties seeking to modify contractual terms ordinarily require fresh and valuable consideration before the variation can be enforceable.</p> <p>The proposed Section 26A departs from this restrictive approach by providing that the performance of, or the promise to perform, an existing contractual obligation is capable of being consideration for a promise to vary the terms of the contract. This enables enforceability of variations where one party agrees to provide more, or accept less, in return for performance (or re-promise) of the original obligation.</p> <p>This reform does not abolish the doctrine of consideration for variations; rather, it removes the rigid existing-duty rule originating from <i>Stilk v Myrick</i> (1809) 2 Camp 317. It also moves beyond the English and Singaporean “practical benefit” cases (e.g., <i>Williams v Roffey Bros</i> [1991] 1 QB 1; <i>Sea-Land Service Inc v Cheong Fook Chee Vincent</i> [1994] 3 SLR(R) 631) by expressly validating an existing contractual obligation as sufficient consideration.</p> <p>To prevent abuse, the reform operates within a strengthened protective framework. Economic duress (Section 15) safeguards against coercively obtained modifications, while unconscionable dealing (Section 16A) can safeguard unfair variations arising from inequality of bargaining power, exploitation, or unfair tactics. Thus, Section 26A enhances commercial flexibility while safeguarding fairness.</p> |
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|      | In drafting s.26A, the Committee, after a discussion with Professor John Carter, came to an agreement to use the phrase "is capable of being consideration" as opposed to "is consideration" because the latter may cause unintended effect.                                                                                                                                                                                                                                                           |                                                                                                                                                                        |
| 26B. |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        | <p><b>Agreements void for lack of intention.</b></p> <p>An agreement which lacks the intention of the promisor and the promisee to create legal relations is void.</p> |
|      | <p><b>Rationale:</b></p> <p>Section 26B codifies the long-established requirement that the parties must intend their agreement to be legally binding. Although Malaysian courts have recognised this principle implicitly within the structure of the Contracts Act 1950, the Act currently lacks an express provision. Section 26B provides conceptual clarity and certainty. This aligns Malaysian law with other common law jurisdictions and strengthens the theoretical coherence of the Act.</p> |                                                                                                                                                                        |
| 27.  | <p><b>Agreement in restraint of marriage void.</b></p> <p>Every agreement in restraint of the marriage of any person, other than a minor during his or her minority, is void.</p>                                                                                                                                                                                                                                                                                                                      | <p><b>Agreement in restraint of marriage void.</b></p> <p>Every agreement in restraint of the marriage of any person is void.</p>                                      |
|      | <p><b>Rationale:</b></p> <p>The revised section upholds the long-established principle that agreements restraining marriage are contrary to public policy. Marriage is regarded as an institution of significant social importance, and the law has historically prohibited</p>                                                                                                                                                                                                                        |                                                                                                                                                                        |

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|     | <p>private agreements that impede an individual's freedom to marry. This principle underpins the Contracts Act and remains consistent with contemporary values of personal autonomy, equality, and freedom of choice in family matters.</p> <p>The exclusion of minors is a historical vestige adopted from the Indian Contract Act 1872. It reflected a 19th-century social context in which parental authority over minors' marriages was dominant and marriage occurred at significantly younger ages. This rationale no longer holds. Modern Malaysian law, both civil and Islamic, strictly regulates the marriage of minors and places strong emphasis on their welfare and protection. Maintaining an exception in the Contracts Act that appears to allow contractual restraints on the marriage of minors is therefore unnecessary in light of the existing legal framework.</p> <p>In addition, minors lack contractual capacity (s. 11), and such agreements would, in most cases, be void on grounds of public policy or voidable for undue influence or lack of free consent. The minor exception thus serves no functional purpose and creates uncertainty as to whether such restraints may, in certain circumstances, be enforceable.</p> |                                                                                                                                                                                                                                                                                                                                                                                                                                    |
| 28. | <p><b>Agreement in restraint of trade void.</b></p> <p>Every agreement by which anyone is restrained from exercising a lawful profession, trade, or business of any kind, is to that extent void.</p> <p><b>Saving of agreement not to carry on business of which goodwill is sold.</b></p> <p><i>Exception 1</i>—One who sells the goodwill of a business may agree with the buyer to refrain carrying on a</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          | <p><b>Agreement in restraint of trade void.</b></p> <p>(1) Subject to the provisions of this section, every agreement by which anyone is restrained from exercising a lawful profession, trade, or business of any kind is to that extent void unless the restraint is reasonable with respect to duration, geographical area, and the scope of activities restricted, and is necessary to protect the legitimate interests of</p> |

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| <p>similar business, within specified local limits, so long as the buyer, or any person deriving title to the goodwill from him, carries on a like business therein:</p> <p>Provided that such limits appear to the court reasonable, regard being had to the nature of the business.</p> <p><b>of agreement between partners prior to dissolution.</b></p> <p><i>Exception 2</i>—Partners may, upon or in anticipation of a dissolution of the partnership, agree that some or all of them will not carry on a business similar to that of the partnership within such local limits as are referred to in exception</p> <p><b>or during continuance of partnership.</b></p> <p><i>Exception 3</i>—Partners may agree that some one or all of them will not carry on any business, other than that of the partnership, during the continuance of the partnership.</p> | <p>the parties, including:</p> <p>(a) Sale of Goodwill –<br/>Where a person sells the goodwill of a business and agrees with the buyer to refrain from carrying on a similar business within specified geographical limits, provided the conditions of the restraint are reasonable;</p> <p>(b) Dissolution of Partnership – Where partners agree that upon or in anticipation of the dissolution of the partnership, any one or more of them will not carry on a business similar to that of the partnership within specified geographical limits, provided the conditions of the restraint are reasonable;</p> <p>(c) Business, Trade or Commercial Agreements – Where parties to a commercial, trade, or</p> |
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|  |  | <p>business agreement include restraints that are reasonable and proportionate for the protection of proprietary interests or to facilitate fair competition;</p> <p>(d) Employment Contracts – Where a non-compete clause applies during the period of employment and is reasonably necessary to protect the employer's legitimate interests, provided it does not unreasonably restrict the employee's right to work or practice a profession;</p> <p>(e) Confidentiality and Trade Secrets – Where an agreement prohibits the disclosure of confidential information or trade secrets, such a clause shall not be deemed a restraint of trade, provided it is reasonable and limited to the protection of proprietary or sensitive</p> |
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|  | <p><b>Rationale:</b></p> <p>The current section 28 adopts an absolute prohibition against agreements in restraint of trade, subject only to narrow exceptions relating to the sale of goodwill and partnership arrangements. Although this approach historically aimed to protect individuals from oppressive restrictions on their ability to earn a livelihood, it no longer reflects the needs of modern commercial practice. Today, many legitimate business arrangements involve limited restraints designed to protect proprietary interests, trade secrets, goodwill, or business investments. Under the present provision, such restraints risk being declared void even where they are reasonable and necessary.</p> <p>The proposed section introduces a more flexible rule by recognising that restraints of trade may be valid where they are reasonable in duration, geographical area, and scope of activities, and where the restraint is necessary to protect the legitimate interests of the parties. This brings Malaysian law into closer alignment with modern developments in common law jurisdictions such as the United Kingdom, Australia, and Singapore, all of which apply a reasonableness test rather than maintaining an absolute prohibition (<i>Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co Ltd</i> [1894] AC 535, <i>Quantum Actuarial LLP v Quantum Advisory Ltd</i> [2022] 1 All ER (Comm) 473, <i>Lindner v Murdock's Garage</i> (1950) 83 CLR 628, <i>Thomas Cowan &amp; Co Ltd v Orme</i> [1961] MLJ 41 and <i>Man Financial (S) Pte</i></p> |                                                                                                                                                                                                                                                                 |

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|     | <p><i>Ltd v Wong Bark Chuan David</i> [2008] 1 SLR(R) 663). A similar reform was recommended by the Indian Law Commission in 1958, acknowledging that the rigid rule in the Indian Contract Act had become outdated.</p> <p>The proposed provision also clarifies that certain categories of restraints are permissible when reasonable, including but not limited to those arising from the sale of goodwill, partnership dissolution, commercial and business agreements (such as franchise or distribution arrangements), employment contracts during the course of employment, and confidentiality or trade secret clauses. Express statutory recognition of these categories enhances certainty for contracting parties and reflects standard commercial practice. In particular, the express clarification that confidentiality and trade secret clauses do not constitute restraints of trade, when reasonably limited, is consistent with international practice and protects the legitimate interests of businesses without unnecessarily restricting competition.</p> <p>The new subsection on reasonableness provides courts with a clear framework for assessment, allowing consideration of all relevant circumstances, including the nature of the business, the interests of the parties, and the public interest. This ensures a balanced approach that protects both contractual freedom and individuals from unfair or disproportionate restrictions.</p> |                                                                                                                                                                                                                                                                                                    |
| 29. | <p><b>Agreements in restraint of legal proceedings void.</b></p> <p>Every agreement, by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, is void to that extent.</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                         | <p><b>Agreements in restraint of legal proceedings void.</b></p> <p>Every agreement by which any party thereto is absolutely restricted from enforcing his or her rights under or in respect of any contract by the usual legal proceedings in the ordinary tribunals, is void to that extent.</p> |

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|  | <p><b>Saving of contract to refer to arbitration dispute that may arise.</b></p> <p><i>Exception 1</i>-This section shall not render illegal a contract by which two or more persons agree that any dispute which may arise between them in respect of any subject or class of subjects shall be referred to arbitration, and that only the amount awarded in the arbitration shall be recoverable in respect of the dispute so referred.</p> <p><b>Saving of contract to refer questions that have already arisen.</b></p> <p><i>Exception 2</i>- Nor shall this section render illegal any contract in writing, by which two or more persons agree to refer to arbitration any question between them which has already arisen, or affect any law as to references to arbitration.</p> <p><i>Exception 3</i>—Nor shall this section render illegal any contract in writing between the Government and any person with respect to an award of a scholarship by the Government wherein it is provided that the discretion exercised by the Government under that contract shall</p> |  |
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|  | <p>be final and conclusive and shall not be questioned by any court.</p> <p>In this exception, the expression “scholarship” includes any bursary to be awarded or tuition or examination fees to be defrayed by the Government and the expression “Government” includes the Government of a State.</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             |  |
|  | <p><b>Rationale:</b></p> <p>The current section 29 renders agreements that restrict a party from enforcing their contractual rights, or that limit the time within which those rights may be enforced, void to that extent. While this provision historically aimed to protect parties from oppressive restrictions, it does not reflect modern commercial realities. In contemporary commercial practice, contracting parties often negotiate reasonable time limits for enforcement, particularly in complex commercial agreements such as sale and share purchase agreements (SPA/SSPA). These negotiated limitations are the product of informed bargaining, compromise, and professional advice, and generally do not prejudice the parties involved.</p> <p>The statute of limitation provides a six-year period for enforcement of contractual claims, and absolute restrictions on enforcement remain impermissible. However, in the context of commercial agreements negotiated between parties with equal bargaining power, professional advice, and access to due diligence, limitations on enforcement periods, such as one month or three years, are common, reasonable, and entirely consistent with market practice. In such cases, parties should have the freedom to agree on contractual timelines for enforcement, provided such agreements are transparent and mutually agreed.</p> <p>The current exceptions under section 29 were formulated at a time when attitudes toward arbitration were markedly different. Under section 6 of the Arbitration Act</p> |  |

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|  | <p>1952, the civil courts had a discretionary power to stay proceedings and compel parties to refer disputes to arbitration. By contrast, section 10 of the Arbitration Act 2005 makes a stay of proceedings mandatory unless specific statutory exceptions apply, and Malaysian courts – including the Federal Court and the Court of Appeal – have consistently endorsed a pro-arbitration policy since the enactment of the 2005 Act.</p> <p>In light of these developments, keeping the exceptions in s.29 appears anomalous as it allows a party to impose time restrictions on arbitration proceedings that would otherwise be invalid if applied to court proceedings, thereby undermining consistency and fairness in contractual dispute resolution (cf. <i>Extra Excel (M) Sdn Bhd v Quek Peck Keow</i> [2021] CLJU 1983).</p> <p>The proposed amendment simplifies section 29 by removing the provisions that limit the time for enforcing rights and the other restrictive clauses. This change reflects the current commercial reality, recognising that every contract is the result of negotiation, compromise, and professional input. It preserves protections where absolute restrictions on enforcement are attempted, while allowing parties the freedom to agree on reasonable contractual arrangements that define timelines for claims. The amendment aligns the Contracts Act with contemporary commercial practices without undermining fundamental legal protections.</p> <p>We wish to note that the original proposal from Working Group 2 dealing with this section proposed quite different amendments. These original amendments, as well as the rationale for them, are set out below for the purpose of transparency and clarity.</p> <p><b>Agreements in Restraint of Legal Proceedings or Extinguishment of Rights Void</b></p> <p>29. Every agreement—</p> <p>(a) by which any party thereto is absolutely restricted from enforcing his or her rights under or in respect of any contract by the usual</p> |
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|  | <p>legal proceedings in the ordinary tribunals, or which limits the time within which such rights may be enforced; or</p> <p>(b) which extinguishes the rights of any party thereto, or discharges any party thereto from any liability under or in respect of any contract on the expiry of a specified period so as to restrict any party from enforcing his or her rights, is void to that extent.</p> <p><b>29(a): Restricting Legal Proceedings or Time to Sue</b></p> <p>This provision targets clauses that interfere with the ability of a party to enforce a contractual right (the remedy) in court. <b>It covers absolute restraints on suing and clauses that shorten the statutory limitation period.</b></p> <ul style="list-style-type: none"> <li>• <i>Example 1:</i> “Party A shall not bring any action in any court to enforce this contract.” (absolute restraint on suing).</li> <li>• <i>Example 2:</i> “Any legal proceedings must be brought within 6 months, even though the Limitation Act allows 6 years.”</li> </ul> <p>Here, the underlying right still exists, but the clause restricts the forum or time period for its enforcement.</p> <p><b>29(b): Extinguishing the Right or Liability Itself</b></p> <p>This provision is more far-reaching. It targets clauses that do not merely restrict suing but instead “extinguish” the right or liability itself after a specified period.</p> <ul style="list-style-type: none"> <li>• <i>Example 1:</i> “If Party A does not claim payment within 6 months, Party A’s right to payment is extinguished.” (the right itself disappears).</li> <li>• <i>Example 2:</i> “If Party B does not sue by 1 January, Party B’s claim shall be deemed waived and Party A shall be discharged from liability.” (liability disappears, not just the ability to sue).</li> </ul> <p>This is more drastic than (a): the clause does not just block a remedy, it wipes out the right or liability itself, as if it never existed.</p> <p>The proposed amendment above is modelled after the revised wording of s.28 of the Indian Contract Act 1872 (which is in <i>pari materia</i> to the Malaysian s.29 of the Contracts Act 1950) as inserted by the Indian Contract (Amendment) Act 1996. The Indian law commission, in introducing the revised wording, observed that the</p> |
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|  | <p>existing law allows courts to strike down clauses under (a) (restricting time to sue) but upheld clauses under (b) (extinguishing the right), allowing powerful parties to achieve by “extinction” what they could not achieve by “restriction.” (<i>Vulcan Insurance Co. Ltd v Maharaj Singh</i> 1975 AIR 287 and <i>Kerela Electrical and Allied Engineering Co. Ltd. v Canara Bank</i> AIR 1980 KER 151). This causes hardship when there is unequal bargaining power particularly on occasions where consumers have to deal with big businesses. It is also highly anomalous that the abrogation of right (a more serious consequence) is permissible while the limitation on time to sue (a less serious device) is prohibited.</p> <p>Including both (a) and (b) in the revised section closes this loophole:</p> <ul style="list-style-type: none"> <li>• (a) catches restrictions on legal action.</li> <li>• (b) catches clauses extinguishing rights or liabilities.</li> </ul> <p>Together, they ensure parties cannot contractually undermine the statutory protections on limitation and enforcement of rights.</p> <p>While the original amendments raise legitimate concerns, the Contract Law Review and Reform Committee (the Committee) noted that although Malaysia shares a common legislative origin with India in the Indian Contract Act 1872, it does not share the same jurisprudential development. Accordingly, caution should be exercised in adopting amendments introduced in India without due regard to the Malaysian legal context. In particular, adopting a more restrictive approach to section 29, such as that in India, where agreements that limit the time within which contractual rights may be enforced are rendered void, would be commercially impractical. Such an approach may also risk undermining Malaysia’s attractiveness as a jurisdiction for dispute resolution among international parties.</p> <p>The Committee further observed that the concerns underlying the proposed section 29(b), particularly those relating to significant imbalances in bargaining power, are more appropriately addressed in the context of consumer transactions. These matters are better dealt with under specialised legislation, such as the Consumer</p> |
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|     | Protection Act 1999, rather than within the Contracts Act 1950, which is intended to have general application.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 |                                                                                                                                                                                                                                                                                                                                                                                                 |
| 30. | <p><b>Agreements void for uncertainty.</b></p> <p>Agreements, the meaning of which is not certain, or capable of being made certain, are void.</p>                                                                                                                                                                                                                                                                                                                                                                                                                                             | <b>No changes are recommended.</b>                                                                                                                                                                                                                                                                                                                                                              |
| 31. | <p><b>Agreements by way of wager void.</b></p> <p>(1) Agreements by way of wager are void; and no suit shall be brought for recovering anything alleged to be won on any wager, or entrusted to any person to abide the result of any game or other uncertain event on which any wager is made.</p> <p><b>Exception in favour of certain prizes for horse racing.</b></p> <p>(2) This section shall not be deemed to render unlawful a subscription or contribution, or agreement to subscribe or contribute, made or entered into for or toward any plate, prize, or sum of money, of the</p> | <p><b>Wagering agreements void.</b></p> <p>(1) Any agreement made by way of wager is void, and no legal action may be taken to recover—</p> <p>(a) any money or thing alleged to have been won under such wager; or</p> <p>(b) any money or thing paid or delivered to any person to be held pending the outcome of any game, contest, or other uncertain event on which the wager depends.</p> |

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|  | <p>value or amount of five hundred ringgit or upwards, to be awarded to the winner or winners of any horse race.</p> <p>(3) Nothing in this section shall be deemed to legalise any transaction connected with horse racing forbidden by any written law.</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 | <p>(2) Nothing in this section shall affect any agreement by way of wager, expressly permitted or regulated under any written law.</p> |
|  | <p><b>Rationale:</b></p> <p>The proposed amendment restates Section 31 of the Contracts Act 1950 in clear, modern language while preserving the principle that agreements by way of wager are void and unenforceable. It also updates the exceptions to align with Malaysia’s current statutory framework governing gaming and betting activities.</p> <p>The existing Section 31 reflects a 19th-century approach derived from the Indian Contract Act 1872 and English law, which singled out horse racing as a permissible form of wagering. This exception is now outdated and inconsistent with Malaysia’s present legislative landscape, where specific statutes such as the Betting Act 1953, the Common Gaming Houses Act 1953, and the Lotteries Act 1952 regulate lawful gaming and betting.</p> <p>Removing the horse-racing exception eliminates redundancy and colonial-era bias, ensuring that the Contracts Act focuses on the validity of wagering agreements rather than regulating gambling. Subsection (1) clarifies that wagering agreements are void and that no legal action may be taken to recover winnings or stakes held pending the outcome of any game, contest, or uncertain event. (<i>Dato’ Ting Ching Lee v Ting Siu Hua</i> [2025] 2 MLJ 29, <i>Thomas Wong Ha Ming v Loo Wee Tee</i> [2018] 9 MLJ 693).</p> |                                                                                                                                        |

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|                                                                                                                     | <p>Subsection (2) introduces a general exception to ensure that agreements expressly permitted or regulated under any written law remain valid, maintaining compatibility with existing gaming and betting regulations. This approach also enhances technological neutrality, allowing the provision to apply to emerging forms of betting, including online and digital platforms.</p> <p>The amendment improves clarity, consistency, and relevance while preserving the original policy objective: wagering agreements, unless expressly allowed by law, are unenforceable under the Contracts Act.</p> |                                           |
| <p style="text-align: center;"><b>PART IV</b></p> <p style="text-align: center;"><b>OF CONTINGENT CONTRACTS</b></p> |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                            |                                           |
| 32.                                                                                                                 | <p><b>“Contingent contract”.</b></p> <p>A “contingent contract” is a contract to do or not to do something, if some event, collateral to the contract, does or does not happen.</p>                                                                                                                                                                                                                                                                                                                                                                                                                        | <p><b>No changes are recommended.</b></p> |
| 33.                                                                                                                 | <p><b>Enforcement of contracts contingent on an event happening.</b></p> <p>(a) Contingent contracts to do or not to do anything if an uncertain future event happens cannot be enforced by law unless and until that event has happened.</p> <p>(b) If the event becomes impossible, such contracts become void.</p>                                                                                                                                                                                                                                                                                      | <p><b>No changes are recommended.</b></p> |

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| 34.                                                                                                                                                                                                                                                                                                                                                                                                                                                                    | <p><b>Enforcement of contracts contingent on an event not happening.</b></p> <p>Contingent contracts to do or not to do anything if an uncertain future event does not happen can be enforced when the happening of that event becomes impossible, and not happening.</p>                                                                                                                                                                                                 | No changes are recommended.                                                                                                                                                                                                                                                                                                                                                |
| 35.                                                                                                                                                                                                                                                                                                                                                                                                                                                                    | <p><b>When event on which contract is contingent to be deemed impossible, if it is the future conduct of a living person.</b></p> <p>If the future event on which a contract is contingent is the way in which a person will act at an unspecified time, the event shall be considered to become impossible when such person does anything which renders it impossible that he should so act within any definite time, or otherwise than under further contingencies.</p> | <p><b>Contingent events based on a person's future actions.</b></p> <p>Where a contract depends on what a person may do at some future time, the event is to be treated as impossible if that person takes any action or enters into any arrangement that makes it impossible for them to do what was expected within a definite time, or except under new conditions.</p> |
| <p><b>Rationale:</b></p> <p>Section 35 addresses contingent contracts that depend on the future actions of a person. The current wording is archaic and difficult for non-lawyers to interpret. Terms such as “future conduct of a living person” and “otherwise than under further contingencies” are outdated and unclear, though the provision still serves a useful function by dealing with situations not adequately addressed by Section 57 on frustration.</p> |                                                                                                                                                                                                                                                                                                                                                                                                                                                                           |                                                                                                                                                                                                                                                                                                                                                                            |

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|     | <p>The proposed amendment modernises the language while preserving the substance of the law. It clearly states that if a contract depends on a person’s future action, the event is treated as impossible once that person takes any action or enters into any arrangement that makes it impossible for them to perform as expected within a defined time or except under new conditions. This redraft improves readability and accessibility for non-specialists while retaining the original intent of Section 35.</p> <p><b>Example – Celebrity Endorsement:</b> A company enters into an agreement with a marketing agency: “We will pay RM500,000 if Celebrity X agrees to endorse our product at some future time.” Subsequently, Celebrity X signs an exclusive contract with another brand that legally prevents them from endorsing other products. Under Section 35, the contingent event (Celebrity X’s endorsement) is deemed impossible because their conduct now makes performance impossible. Consequently, the contingent contract becomes void.</p> |                                           |
| 36. | <p><b>When contracts become void which are contingent on happening of specified event within fixed time.</b></p> <p>(1) Contingent contracts to do or not to do anything if a specified uncertain event happens within a fixed time become void if, at the expiration of the time fixed, the event has not happened, or if, before the time fixed, the event becomes impossible.</p> <p><b>When contracts may be enforced which are contingent on specified</b></p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                  | <p><b>No changes are recommended.</b></p> |

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|                                                                                                                        | <p><b>event not happening within fixed time.</b></p> <p>(2) Contingent contracts to do or not to do anything if a specified uncertain event does not happen within a fixed time may be enforced by law when the time fixed has expired and the event has not happened, or, before the time fixed has expired, if it becomes certain that the event will not happen.</p> |                                    |
| 37.                                                                                                                    | <p><b>Agreement contingent on impossible events void.</b></p> <p>Contingent agreements to do or not to do anything, if an impossible event happens, are void, whether the impossibility of the event is known or not to the parties to the agreement at the time when it is made.</p>                                                                                   | <b>No changes are recommended.</b> |
| <p style="text-align: center;"><b>PART V</b></p> <p style="text-align: center;"><b>OF PERFORMANCE OF CONTRACTS</b></p> |                                                                                                                                                                                                                                                                                                                                                                         |                                    |
| <p style="text-align: center;"><i>Contracts which must be Performed</i></p>                                            |                                                                                                                                                                                                                                                                                                                                                                         |                                    |
| 38.                                                                                                                    | <p><b>Obligation of parties to contracts.</b></p> <p>(1) The parties to a contract must either perform, or offer to perform, their respective promises, unless the</p>                                                                                                                                                                                                  | <b>No changes are recommended.</b> |

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|                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      | <p>performance is dispensed with or excused under this Act, or of any other law.</p> <p>(2) Promises bind the representatives of the promisors in case of the death of the promisors before performance, unless a contrary intention appears from the contract.</p> |  |
| <p><b>Rationale:</b></p> <p>The proposal by the Working Group to introduce section 38A was presented to and considered by the Contract Law Review and Reform Committee (the Committee). Following deliberation, it was agreed that, in light of the legal and policy considerations involved, the proposed provision should not be adopted. The proposed section 38A would have introduced a general statutory duty of good faith in the performance of contracts. However, such a reform risks creating legal uncertainty and would represent a significant departure from Malaysia's established common law framework.</p> <p>While Malaysian courts recognise considerations of good faith in appropriate contexts, they do so through established doctrines and interpretive techniques rather than as a standalone, overarching obligation. Malaysian jurisprudence has demonstrated an ability to address issues of honesty, fairness, and the exercise of contractual discretions on a case-by-case basis without the need for legislative intervention (<i>Seven Seas Industries Sdn Bhd v Philips Electronic Supplies (M) Sdn Bhd and Anor</i>. [2008] 5 MLJ 157; <i>Aseambankers Malaysia Bhd &amp; Ors v Shencourt Sdn Bhd &amp; Anor</i> [2014] 4 MLJ 619; <i>Rohasassets Sdn Bhd (formerly known as Wisma Perkasa Sdn Bhd) v Weatherford (M) Sdn Bhd &amp; Anor</i> [2019] 6 MLJ 501; <i>Lai Fee &amp; Anor v Wong Yu Vee &amp; Ors</i> [2023] 3 MLJ 503 (FC) and <i>Pesat Bumi</i></p> |                                                                                                                                                                                                                                                                     |  |

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|     | <p><i>Sdn Bhd v Cescon Engineers Sdn Bhd</i> [2025] CLJU 1221). Existing principles relating to misrepresentation, fraud, estoppel, implied terms, and contractual interpretation provide sufficient mechanisms to regulate bad faith conduct, while preserving contractual certainty and the principle of freedom of contract.</p> <p>Accordingly, Section 38 is retained without amendment, and the proposed statutory duty of good faith is not adopted.</p>                                                                                                 |                                           |
| 39. | <p><b>Effect of refusal to accept offer of performance.</b></p> <p>(1) Where a promisor has made an offer of performance to the promisee, and the offer has not been accepted, the promisor is not responsible for non-performance, nor does he thereby lose his rights under the contract.</p> <p>(2) Every such offer must fulfil the following conditions:</p> <p>(a) it must be unconditional;</p> <p>(b) it must be made at a proper time and place, and under such circumstances that the person to whom it is made may have a reasonable opportunity</p> | <p><b>No changes are recommended.</b></p> |

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|     | <p>of ascertaining that the person by whom it is made is able and willing there and then to do the whole of what he is bound by his promise to do; and</p> <p>(c) if the offer is an offer to deliver anything to the promisee, the promisee must have a reasonable opportunity of seeing that the thing offered is the thing which the promisor is bound by his promise to deliver</p> <p>(3) An offer to one of several joint promisees has the same legal consequences as an offer to all of them.</p> |                                                                                                                                                                                                                                                                                                                             |
| 40. | <p><b>Effect of refusal of party to perform promise wholly.</b></p> <p>When a party to a contract has refused to perform, or disabled himself from performing, his promise in its entirety, the promisee may put an end to the contract, unless he has signified, by words or conduct, his acquiescence in its continuance.</p>                                                                                                                                                                           | <p><b>Effect of refusal of party to perform promise wholly.</b></p> <p>When a party to a contract has refused to perform, or disabled himself from performing, his promise in its entirety, the promisee may terminate the contract, unless he has signified, by words or conduct, his acquiescence in its continuance.</p> |

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|                                            | <p><b>Rationale:</b></p> <p>The proposed amendment replaces the phrase “put an end to the contract” with “terminate the contract” to reflect modern contractual language and drafting practice. The term “terminate” is clearer, more precise, and aligns with contemporary contractual and judicial usage.</p> <p>This amendment does not alter the substantive legal effect of Section 40. Rather, it clarifies that the provision concerns the right of the promisee to terminate the contract in response to a refusal or total inability to perform amounting to a serious or fundamental breach.</p> <p>The use of the term “terminate” is also consistent with academic commentary observing that Sections 40 and 54 of the Contracts Act 1950 together recognise the right to terminate a contract for fundamental breach. Aligning the statutory language with this understanding promotes coherence within the Act and reflects modern drafting standards.</p> <p>(See J.W. Carter, “Fundamental Breach and Discharge for Breach under the Contracts Act 1950 (Malaysia)” (2011) 28 JCL 85.)</p> |                                           |
| <i>By whom Contracts must be Performed</i> |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                            |                                           |
| 41.                                        | <p><b>Person by whom promise is to be performed.</b></p> <p>If it appears from the nature of the case that it was the intention of the parties to any contract that any promise contained in it should be performed by the promisor himself, such promise must be performed by the promisor. In other cases, the promisor or his representatives may</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   | <p><b>No changes are recommended.</b></p> |

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|     | employ a competent person to perform it.                                                                                                                                                                                                                                                                                                                                                                    |                                    |
| 42. | <p><b>Effect of accepting performance from third person.</b></p> <p>When a promisee accepts performance of the promise from a third person, he cannot afterwards enforce it against the promisor.</p>                                                                                                                                                                                                       | <b>No changes are recommended.</b> |
| 43. | <p><b>Devolution of joint liabilities.</b></p> <p>When two or more persons have made a joint promise, then, unless a contrary intention appears by the contract, all such persons, during their joint lives, and, after the death of any of them, his representative jointly with the survivor, and, after the death of the last survivor, the representatives of all jointly, must fulfil the promise.</p> | <b>No changes are recommended.</b> |
| 44. | <p><b>Any one of the joint promisors may be compelled to perform.</b></p> <p>(1) When two or more persons make a joint promise, the promisee may, in the absence of express agreement to the contrary, compel any one or more of the joint promisors to</p>                                                                                                                                                 | <b>No changes are recommended.</b> |

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|     | <p>perform the whole of the promise.</p> <p><b>Each promisor may compel contribution.</b></p> <p>(2) Each of two or more joint promisors may compel every other joint promisor to contribute equally with himself to the performance of the promise, unless a contrary intention appears from the contract.</p> <p><b>Sharing of loss by default in contribution.</b></p> <p>(3) If any one of two or more joint promisors makes default in the contribution, the remaining joint promisors must bear the loss arising from the default in equal shares.</p> |                                           |
| 45. | <p><b>Effect of release of one joint promisor.</b></p> <p>Where two or more persons have made a joint promise, a release of one of such joint promisors by the promisee does not discharge the other joint promisor or joint promisors; neither</p>                                                                                                                                                                                                                                                                                                          | <p><b>No changes are recommended.</b></p> |

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|     | <p>does it free the joint promisor so released from responsibility to the other joint promisor or joint promisors.</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     |                                           |
|     | <p><b>Rationale:</b></p> <p>Section 45 is retained in its current form as it clearly sets out the legal position regarding the effect of releasing one joint promisor. In particular, the provision affirms that a release granted to one joint promisor does not discharge the remaining joint promisors, nor does it absolve the released promisor from liability to the other joint promisors.</p> <p>The provision is well-established, coherent, and consistent with the underlying principles governing joint obligations. It adequately protects the promisee's right to proceed against any one or more of the joint promisors and does not give rise to ambiguity or practical difficulty. Accordingly, no amendment is considered necessary.</p> |                                           |
| 46. | <p><b>Devolution of joint rights.</b></p> <p>When a person has made a promise to two or more persons jointly, then, unless a contrary intention appears from the contract, the right to claim performance rests, as between him and them, with them during their joint lives, and, after the death of any of them, with the representative of the deceased person jointly with the survivor or survivors, and after the death of the last survivor, with the representatives of all jointly.</p>                                                                                                                                                                                                                                                           | <p><b>No changes are recommended.</b></p> |

| <i>Time and Place for Performance</i> |                                                                                                                                                                                                                                                                                                                                                                                                                                       |                                                                                                                                                                                                                                                                                                                                                                                                                  |
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| 47.                                   | <p><b>Time for performance of promise where no application is to be made and no time is specified.</b></p> <p>Where, by the contract, a promisor is to perform his promise without application by the promisee, and no time for performance is specified, the engagement must be performed within a reasonable time.</p> <p>Explanation—The question “what is a reasonable time” is, in each particular case, a question of fact.</p> | <p><b>Time for performance of promise where no application is to be made and no time is specified.</b></p> <p>(1) Where, by the contract, a promisor is to perform his promise without application by the promisee, and no time for performance is specified, the engagement must be performed within a reasonable time.</p> <p>(2) What constitutes a reasonable time is, in each case, a question of fact.</p> |
|                                       | <p><b>Rationale:</b></p> <p>The Explanation has been retained but reformulated as subsection (2) to align with modern legislative drafting conventions. This amendment improves clarity and structure without altering the substantive legal position. The provision continues to emphasise that the determination of a “reasonable time” is a question of fact to be assessed in light of the circumstances of each case.</p>        |                                                                                                                                                                                                                                                                                                                                                                                                                  |
| 48.                                   | <p><b>Time and place for performance of promise where time is specified and no application to be made.</b></p> <p>When a promise is to be performed on a certain day, and the promisor has undertaken to perform it without application by the promisee, the</p>                                                                                                                                                                      | <p><b>No changes are recommended.</b></p>                                                                                                                                                                                                                                                                                                                                                                        |

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|     | promisor may perform it at any time during the usual hours of business on the day and at the place at which the promise ought to be performed.                                                                                                                                                                                                                                                                                                                             |                                                                                                                                                                                                                                                                                                                                                                                                                                                       |
| 49. | <p><b>Application for performance on certain day to be at proper time and place.</b></p> <p>When a promise is to be performed on a certain day, and the promisor has not undertaken to perform it without application by the promisee, it is the duty of the promisee to apply for performance at a proper place and within the hours of business.</p> <p>Explanation— The question “what is a proper time and place” is, in each particular case, a question of fact.</p> | <p><b>Application for performance on certain day to be at proper time and place.</b></p> <p>(1) Where a promise is to be performed on a certain day, and the promisor has not undertaken to perform it without application by the promisee, it is the duty of the promisee to apply for performance at a proper place and within the hours of business.</p> <p>(2) What constitutes a proper time and place is, in each case, a question of fact.</p> |
|     | <p><b>Rationale:</b></p> <p>The Explanation has been retained but reformulated as subsection (2) to align with modern legislative drafting conventions. This amendment improves clarity, structure, and readability without altering the substantive legal position. The provision continues to emphasise that the determination of a “proper time and place” is a question of fact to be assessed in light of the circumstances of each case.</p>                         |                                                                                                                                                                                                                                                                                                                                                                                                                                                       |

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| 50.                                       | <p><b>Place for performance of promise where no application to be made and no place fixed.</b></p> <p>When a promise is to be performed without application by the promisee, and no place is fixed for the performance of it, it is the duty of the promisor to apply to the promisee to appoint a reasonable place for the performance of the promise, and to perform it at that place.</p> | No changes are recommended. |
| 51.                                       | <p><b>Performance in manner or at time prescribed or sanctioned by promisee.</b></p> <p>The performance of any promise may be made in any manner, or at any time which the promisee prescribes or sanctions.</p>                                                                                                                                                                             | No changes are recommended. |
| <i>Performance of Reciprocal Promises</i> |                                                                                                                                                                                                                                                                                                                                                                                              |                             |
| 52.                                       | <p><b>Promisor not bound to perform unless reciprocal promisee ready and willing to perform.</b></p> <p>When a contract consists of reciprocal promises to be simultaneously performed, no promisor needs to perform his promise unless the promisee is ready and willing to perform his reciprocal promise.</p>                                                                             | No changes are recommended. |

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| 53.                                                                                                                                                                                                                                                                                                                                                                   | <p><b>Order of performance of reciprocal promises.</b></p> <p>Where the order in which reciprocal promises are to be performed is expressly fixed by the contract, they shall be performed in that order; and, where the order is not expressly fixed by the contract, they shall be performed in that order which the nature of the transaction requires.</p>                                                                                    | <p><b>No changes are recommended.</b></p>                                                                                                                                                                                                                                                                                                                                                                                                          |
| 54.                                                                                                                                                                                                                                                                                                                                                                   | <p><b>Liability of party preventing event on which contract is to take effect.</b></p> <p>When a contract contains reciprocal promises, and one party to the contract prevents the other from performing his promise, the contract becomes voidable at the option of the party so prevented; and he is entitled to compensation from the other party for any loss which he may sustain in consequence of the non-performance of the contract.</p> | <p><b>Liability of party preventing event on which contract is to take effect.</b></p> <p>When a contract contains reciprocal promises, and one party to the contract prevents the other from performing his promise, the contract may be terminated at the option of the party so prevented; and he is entitled to compensation from the other party for any loss which he may sustain in consequence of the non-performance of the contract.</p> |
| <p><b>Rationale:</b></p> <p>The proposed amendment retains the substance and effect of the existing provision while updating its terminology for consistency with Section 40 and modern contractual drafting practice. Replacing the phrase “the contract is voidable at the option of the party so prevented” with “the contract may be terminated at the option</p> |                                                                                                                                                                                                                                                                                                                                                                                                                                                   |                                                                                                                                                                                                                                                                                                                                                                                                                                                    |

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|     | <p>of the party so prevented” clarifies that the provision concerns discharge for breach rather than avoidance in the sense of vitiating factors.</p> <p>This amendment reflects the understanding that Sections 40 and 54 together recognise the right to terminate a contract for serious or fundamental breach, consistent with common law principles. Aligning the terminology across these provisions enhances internal coherence within the Contracts Act 1950 and brings the statutory language into line with contemporary legal usage.</p> <p>(See J.W. Carter, “Fundamental Breach and Discharge for Breach under the Contracts Act 1950 (Malaysia)” (2011) 28 JCL 85.)</p> |                                           |
| 55. | <p><b>Effect of default as to that promise which should be first performed, in contract consisting of reciprocal promises.</b></p> <p>When a contract consists of reciprocal promises, such that one of them cannot be performed, or that its performance cannot be claimed till the other has been performed, and the promisor of the promise last mentioned fails to perform it, the promisor cannot claim the performance of the reciprocal promise, and must make compensation to the other party to the contract for any loss which the other party may sustain by the non-performance of the contract.</p>                                                                      | <p><b>No changes are recommended.</b></p> |

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| 56. | <p><b>Effect of failure to perform at fixed time, in contract in which time is essential.</b></p> <p>(1) When a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before specified times, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promisee, if the intention of the parties was that time should be of the essence of the contract.</p> <p><b><i>Effect of failure when time is not essential.</i></b></p> <p>(2) If it was not the intention of the parties that time should be of the essence of the contract, the contract does not become voidable by the failure to do the thing at or before the specified time; but the promisee is entitled to compensation from the promisor for any loss occasioned to him by the failure.</p> | <p><b>Effect of failure to perform at fixed time, in contract in which time is essential.</b></p> <p>(1) Where a party to a contract has undertaken to do an act by a specified time, or to do several acts by specified times, and fails to do so, the contract, or the part not yet performed, may be terminated at the option of the promisee, provided that the intention of the parties was that time should be of the essence of the contract.</p> <p><b>Effect of failure when time is not essential.</b></p> <p>(2) If it was not the intention of the parties that time should be of the essence of the contract, the contract may not be terminated by reason of the failure to perform at the specified time, but the promisee is entitled to compensation from the promisor for any loss occasioned by the failure.</p> <p><b>Effect of acceptance of late performance.</b></p> |
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|  | <p><b><i>Effect of acceptance of performance at time other than that agreed upon.</i></b></p> <p>(3) If, in case of a contract voidable on account of the promisor's failure to perform his promise at the time agreed, the promisee accepts performance of the promise at any time other than that agreed, the promisee cannot claim compensation for any loss occasioned by the non-performance of the promise at the time agreed, unless, at the time of the acceptance, he gives notice to the promisor of his intention to do so.</p>                                                                                                                                                                                                                                                               | <p>(3) If, in a case where the contract may be terminated on account of the promisor's failure to perform at the time agreed, the promisee accepts performance at any time other than that agreed, the promisee cannot claim compensation for any loss occasioned by the delay, unless, at the time of acceptance, the promisee gives notice to the promisor of that intention.</p> |
|  | <p><b>Rationale:</b></p> <p>The proposed amendments modernise and clarify the language of section 56 while preserving its substantive legal effect. In particular, the replacement of the term “voidable” with “may be terminated” aligns the provision with contemporary contractual terminology and reflects the correct doctrinal characterisation of the remedy as one of discharge for breach, rather than avoidance in the sense associated with vitiating factors.</p> <p>This amendment ensures consistency with sections 40 and 54 of the Contracts Act 1950, which similarly recognise the right of an innocent party to terminate a contract in response to serious or fundamental breach. Harmonising the terminology across these provisions enhances internal coherence within the Act</p> |                                                                                                                                                                                                                                                                                                                                                                                     |

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|     | <p>and reduces the risk of confusion arising from the use of different expressions to describe the same legal consequence.</p> <p>The amendments further simplify the language of the section, improving clarity and readability while maintaining the established distinction between contracts in which time is of the essence and those in which it is not. The legal position remains unchanged: where time is of the essence, failure to perform on time gives rise to a right to terminate; where it is not, the remedy lies in damages.</p> <p>Accordingly, the amendments are clarificatory and stylistic in nature, intended to improve the accessibility and coherence of the Act without altering its substantive operation or established judicial interpretation.</p> <p>(See J.W. Carter, “Fundamental Breach and Discharge for Breach under the Contracts Act 1950 (Malaysia)” (2011) 28 JCL 85.)</p> |                                                                                                                                                                                                                                                                                                                                                                                                                              |
| 57. | <p><b>Agreement to do impossible act.</b></p> <p>(1) An agreement to do an act impossible in itself is void.</p> <p><b>Contract to do act afterwards becoming impossible or unlawful.</b></p> <p>(2) A contract to do an act which, after the contract is made, becomes impossible, or by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                         | <p><b>Agreement to do impossible act.</b></p> <p>(1) An agreement to do an act impossible in itself is void.</p> <p><b>Contract to do act afterwards becoming impossible or unlawful.</b></p> <p>(2) A contract to do an act which, after the contract is made, becomes impossible, or by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.</p> |

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|  | <p><b>Compensation for loss through non-performance of act known to be impossible or unlawful.</b></p> <p>(3) Where one person has promised to do something which he knew, or, with reasonable diligence, might have known, and which the promisee did not know, to be impossible or unlawful, the promisor must make compensation to the promisee for any loss which the promisee sustains through the non-performance of the promise.</p>                                                                                                                                                                                                                                                                                               | <p>(3) Where a contract becomes void under subsection (2), sections 15 and 16 of the Civil Law Act 1956 apply.</p> <p><b>Compensation for loss through non-performance of act known to be impossible or unlawful.</b></p> <p>(4) Where one person has promised to do something which he knew, or, with reasonable diligence, might have known, and which the promisee did not know, to be impossible or unlawful, the promisor must make compensation to the promisee for any loss which the promisee sustains through the non-performance of the promise.</p> |
|  | <p><b>Rationale:</b></p> <p>The proposed amendments retain the substance and legal effect of Section 57 while improving clarity and structural coherence. The insertion of a new subsection expressly linking frustration under subsection (2) to sections 15 and 16 of the Civil Law Act 1956 clarifies the applicable restitutionary consequences when a contract becomes void due to supervening impossibility or illegality.</p> <p>This amendment does not introduce new substantive rights or obligations. Rather, it makes explicit the existing legal position governing the adjustment of benefits and losses following frustration, thereby enhancing legal certainty and reducing the risk of inconsistent interpretation.</p> |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |

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| 58.                                                                                                                                                                                                                                                                                                                                      | <p><b>Reciprocal promise to do things legal, and also other things illegal.</b></p> <p>Where persons reciprocally promise, firstly, to do certain things which are legal, and, secondly, under specified circumstances, to do certain other things which are illegal, the first set of promises is a contract, but the second is a void agreement.</p> | <p><b>No changes are recommended.</b></p>                                                                                                                                                                     |
| 59.                                                                                                                                                                                                                                                                                                                                      | <p><b>Alternative promise, one branch being illegal.</b></p> <p>In the case of an alternative promise, one branch of which is legal and the other illegal, the legal branch alone can be enforced.</p>                                                                                                                                                 | <p><b>Alternative promise, one being illegal.</b></p> <p>In the case of an alternative promise, one of which is legal and the other illegal, the legal promise alone can be enforced.</p>                     |
| <p><b>Rationale:</b></p> <p>The proposed amendment simplifies and modernises the language of Section 59 without altering its legal effect. Replacing the phrase “one branch of which is legal and the other illegal” with “one of which is legal and the other illegal” improves readability and uses clearer, more direct drafting.</p> |                                                                                                                                                                                                                                                                                                                                                        |                                                                                                                                                                                                               |
| <p><i>Appropriation of Payments</i></p>                                                                                                                                                                                                                                                                                                  |                                                                                                                                                                                                                                                                                                                                                        |                                                                                                                                                                                                               |
| 60.                                                                                                                                                                                                                                                                                                                                      | <p><b>Application of payment where debt to be discharged is indicated.</b></p> <p>Where a debtor, owing several distinct debts to one person, makes a payment to him, either with express intimation,</p>                                                                                                                                              | <p><b>Application of payment where debt to be discharged is indicated.</b></p> <p>If a debtor owes several distinct debts to a person and makes a payment intended for a specific debt, the creditor must</p> |

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|     | <p>or under circumstances implying that the payment is to be applied to the discharge of some particular debt, the payment, if accepted, must be applied accordingly.</p>                                                                                                                                                                                                                                                                                      | <p>apply the payment to that debt if he accepts it.</p> |
|     | <p><b>Rationale:</b></p> <p>The proposed amendment simplifies the language of Section 60 while preserving its legal effect. The revised wording clearly reflects the three core elements of the provision: the debtor's intention as to the application of payment, the creditor's acceptance of that payment, and the mandatory application of the payment to the specified debt.</p>                                                                         |                                                         |
| 61. | <p><b>Application of payment where debt to be discharged is not indicated.</b></p> <p>Where the debtor has omitted to intimate, and there are no other circumstances indicating to which debt the payment is to be applied, the creditor may apply it at his discretion to any lawful debt actually due and payable to him from the debtor, whether its recovery is or is not barred by the law in force for the time being as to the limitation of suits.</p> | <p><b>No changes are recommended.</b></p>               |
|     | <p><b>Rationale:</b></p> <p>Section 61 governs the application of payments where the debtor has not indicated which debt is to be discharged. The committee considered whether the provision should be amended to reflect principles such as the rule in Clayton's Case (the</p>                                                                                                                                                                               |                                                         |

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|     | <p>“first-in, first-out” rule), which applies in the context of running accounts where no appropriation is made by either party.</p> <p>While this rule has been recognised and applied by courts, including beyond banker–customer relationships, the committee concluded that it operates as a default judicial presumption rather than a universal rule suitable for statutory codification. Codifying such a principle may unduly constrain judicial discretion and create rigidity in situations involving multiple debts of differing nature.</p> <p>The existing wording of Section 61 adequately captures the general principle that, in the absence of debtor direction, the creditor may apply payment at his discretion to any lawful debt due and payable, including debts barred by limitation. This approach preserves flexibility, aligns with established common law practice, and allows courts to apply specific doctrines such as Clayton’s Case where appropriate.</p> <p>Accordingly, Section 61 is retained without amendment to maintain legal certainty and continuity with existing jurisprudence.</p> |                                           |
| 62. | <p><b>Application of payment where neither party appropriates.</b></p> <p>Where neither party makes any appropriation the payment shall be applied in discharge of the debts in order of time, whether they are or are not barred by the law relating to the limitation of suits. If the debts are of equal standing, the payment shall be applied in discharge of each proportionably.</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     | <p><b>No changes are recommended.</b></p> |

| Contracts which need not be Performed                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   |                                                                                                                                                                                                                                 |                                                                                                                                                                                                                                   |
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| 63.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     | <p><b>Effect of novation, rescission and alteration of contract.</b></p> <p>If the parties to a contract agree to substitute a new contract for it, or to rescind or alter it, the original contract need not be performed.</p> | <p><b>Effect of novation, termination or alteration of contract.</b></p> <p>If the parties to a contract agree to substitute a new contract for it, or to terminate or alter it, the original contract need not be performed.</p> |
| <p><b>Rationale:</b></p> <p>The amendment to Section 63 replaces the term “rescission” with “termination” to reflect modern contractual language and usage. While “rescission” has a technical meaning in contract law, it is often misunderstood and is more commonly associated with remedies for vitiating factors such as misrepresentation or undue influence. As noted in <i>Seremban Gold Resort Bhd v Amerfab Sdn Bhd</i> [2006] 2 MLJ 571 and <i>Abdul Razak bin Datuk Abu Samah v Shah Alam Properties Sdn Bhd (and Another Appeal)</i> [1999] 2 MLJ 500, "true rescission" (ab initio) restores parties to their pre-contractual positions, whereas "termination" (following <i>Johnson v Agnew</i> [1980] AC 367) merely discharges future performance. This change prevents parties from mistakenly seeking total nullification when they only intend to end future duties.</p> <p>The term "termination" also clarifies that a contract remains subsisting until an affirmative election is made. Per <i>Teh Wan Sang &amp; Sons Sdn Bhd v See Teow Chuan</i> [1984] 1 MLJ 130 and <i>Berjaya Times Square Sdn Bhd v Twingems Sdn Bhd</i> [2012] 1 MLJ 597, a repudiatory breach is an "offer" to end the contract that must be accepted; the contract remains unaffected until this election is communicated (<i>P Palakrishnan a/l Perianan lwn Krishnamoorthy a/l Sinniah dan satu lagi</i> [2001] 5 MLJ 389), unless specific automatic termination is agreed upon (<i>Dream Property Sdn Bhd v Atlas Housing Sdn Bhd</i> [2015] 2 MLJ 441). By adopting "termination," the provision reinforces that once an election to end or affirm is made, as seen in <i>Goh Hooi Yin v Lim Teong Ghee</i> [1990] 3 MLJ 23 and <i>Chong Vui Kong v KKIP</i></p> |                                                                                                                                                                                                                                 |                                                                                                                                                                                                                                   |

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|     | <p><i>Sdn Bhd</i> [2020] MLJU 603, that choice is final and irreversible. This provides the legal certainty that the amended Section 63 seeks to provide regarding when a contract is extinguished.</p> <p>This section continues to deal with novation and alteration that operate to discharge the original contract. Where parties agree to substitute a new contract, or to terminate or alter their existing contract in such a way that the original contract is brought to an end, the original contract need not be performed.</p> <p>Section 63 should be distinguished from the newly proposed Section 26A, which addresses consideration in contract variations. Although both provisions concern variation agreements, they operate in different circumstances and serve distinct functions. Section 26A applies where the parties intend to vary the terms of an existing contract without discharging it. In such cases, the original contract remains on foot, subject only to the agreed variation. Section 26A clarifies that a promise to perform, or the performance of, an existing contractual obligation is capable of constituting valid consideration for such a variation.</p> <p>By contrast, Section 63 applies where the parties intend their agreement to alter the contractual relationship in a manner that brings the original contract to an end altogether, whether by novation, termination, or alteration amounting to discharge. In these circumstances, the original contract is extinguished and replaced or concluded by the parties' agreement.</p> <p>The clarification of this distinction ensures coherence between Sections 26A and 63 and provides greater certainty as to when a variation leaves the original contract intact and when it operates to discharge it entirely.</p> |                                                                                             |
| 64. | <p><b>Promisee may dispense with or remit performance of promise.</b></p> <p>Every promisee may dispense with or remit, wholly or in part, the</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               | <p><b>Promisee may dispense with performance of promise.</b></p> <p>Every promisee may-</p> |

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|  | <p>performance of the promise made to him, or may extend the time for such performance, or may accept instead of it any satisfaction which he thinks fit.</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               | <p>(i) either wholly or in part, waive or remit;</p> <p>(ii) extend the time;</p> <p>(iii) accept,</p> <p>the performance of the contract which the promisee thinks fit.</p> |
|  | <p><b>Rationale:</b></p> <p>Section 64 preserves the established principle that a promisee may unilaterally waive, relax, or modify the performance of contractual obligations owed to them, without the need for fresh consideration. This reflects the long-standing position under the Contracts Act that a party for whose benefit a contractual obligation exists may elect not to insist on strict performance.</p> <p>The proposed amendment does not alter the substantive legal effect of the provision but modernises and clarifies its language and structure. The reference to “promise” is replaced with “contract” to reflect contemporary drafting practice and to avoid ambiguity as to the scope of the section. The provision is also reorganised into clear paragraphs identifying the various forms of relief available to a promisee, including waiver of performance, partial or total remission, extension of time for performance, and acceptance of alternative performance. <i>Sim Chio Chuat v Wong Ted Fui</i> [1983] 1 MLJ 151 applied this section by ruling that a buyer waived the right to terminate for delay after treating the contract as subsisting by ordering "extra works" post-deadline. Therefore, the proposed reorganisation into clear paragraphs (waive, remit, extend, or accept alternative performance) provides a more robust statutory framework for such "waiver by conduct" scenarios.</p> <p>As noted in Pollock &amp; Mulla in their commentary on section 63 of the Indian Contract Act (which is in pari materia with the current section 64), the Indian Law Commission in its 13th Report affirmed that this provision is enforceable even in the absence of consideration. This represents a deliberate departure from the</p> |                                                                                                                                                                              |

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|     | <p>English common law position in <i>Pinnel's Case</i> (1602) 5 Co Rep 117a and its subsequent reaffirmation in <i>Foakes v Beer</i> (1884) 9 App Cas 605, which require fresh consideration for part-payment or variation of contractual obligations.</p> <p>The retention and clarification of this rule under section 64 is justified on both doctrinal and practical grounds. It legalises and removes an inherent difficulty in compromises and settlement agreements, particularly those reached after a successful mediation process, where parties commonly agree to waive or reduce contractual entitlements without insisting on fresh consideration. The provision therefore promotes commercial certainty, facilitates dispute resolution, and reflects modern contractual practice.</p> |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                           |
| 65. | <p><b>Consequences of rescission of voidable contract.</b></p> <p>When a person at whose option a contract is voidable rescinds it, the other party thereto need not perform any promise therein contained in which he is promisor. The party rescinding a voidable contract shall, if he has received any benefit thereunder from another party to such contract, restore the benefit, so far as may be, to the person from whom it was received.</p>                                                                                                                                                                                                                                                                                                                                               | <p><b>Consequences of rescission or termination of voidable contract.</b></p> <p>(1) When a person elects to rescind or terminate a voidable contract, the other party who is a promisor to that contract need not perform any promise contained in that contract.</p> <p>(2) The party rescinding or terminating a voidable contract shall, if he has received any benefit or advantage thereunder from another party to such contract, restore the benefit or advantage, so far as may be, to the person from whom it was received.</p> |

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|  | <p><b>Rationale:</b></p> <p>Section 65 addresses the consequences that follow when a voidable contract is brought to an end. The amendment introduces the words “or terminate” to reflect more accurately the ways in which a voidable contract may lawfully be ended under the Act, including situations where the contract is brought to an end pursuant to statutory rights rather than by rescission in the strict sense.</p> <p>The existing provision is framed solely in terms of rescission, which may be read as too narrow, particularly in cases where a voidable contract is terminated under provisions such as sections 54 and 56. In such cases, although the contract is effectively brought to an end at the election of one party, the language of rescission may not sit comfortably with the doctrinal basis of termination. The amendment clarifies that the restitutionary consequences in this section apply regardless of whether the voidable contract is ended by rescission or termination.</p> <p>The amendment does not alter the substantive effect of the provision. Once a voidable contract is lawfully rescinded or terminated, the other party is discharged from further performance. However, the party who elects to bring the contract to an end remains subject to a duty to restore any benefits received under the contract, so far as may be possible. This reflects the long-standing principle that a party cannot both avoid a contract and retain benefits derived from it. The principle that a party cannot avoid a contract and retain benefits is a cornerstone of this section. In <i>Yong Mok Hin v United Malay States Sugar Industries Ltd</i> [1967] 2 MLJ 9, the Federal Court affirmed that Section 65 requires the rescinding party to restore any advantage gained once the agreement is set aside.</p> <p>By adopting the phrase “the party rescinding or terminating a voidable contract”, the provision focuses on the legal consequence of bringing the contract to an end, rather than on questions of fault or innocence. The section is concerned with restitution following the discharge of a voidable contract, and not with attributing responsibility for the circumstances that rendered the contract voidable.</p> |
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| 66.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          | <p><b>Obligation of person who has received advantage under void agreement, or contract that becomes void.</b></p> <p>When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under the agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it.</p> | <p><b>Obligation of person who has received advantage under void agreement, or contract that becomes void.</b></p> <p>When an agreement is discovered to be void, or when a contract becomes void, any person who has received any benefit or advantage under the agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it.</p> |
| <p><b>Rationale:</b></p> <p>The amendment introduces the term “benefit” alongside “advantage” to clarify and broaden the scope of restitutionary obligations arising from void agreements or contracts that become void. While “advantage” may be interpreted narrowly, the inclusion of “benefit” aligns the provision more closely with modern restitution principles and common law terminology, ensuring that all forms of enrichment are captured.</p> <p>The retention of the existing Section 66 is supported by established case law that defines the scope of restitution for void agreements. Unlike English common law, which relies on the evolving doctrine of unjust enrichment, Section 66 provides a clear, codified mandate requiring the return of advantages gained under agreements that fail. This ensures that the legal consequences of voidness are grounded in equity and prevents a party from receiving a windfall at the expense of another.</p> <p>The application of this section has been carefully refined by the Federal Court to ensure commercial fairness and legal certainty. In <i>Badiaddin bin Mohd Mahiddin</i></p> |                                                                                                                                                                                                                                                                                                                                                                                  |                                                                                                                                                                                                                                                                                                                                                                                             |

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|     | <p><i>v Arab Malaysian Finance Bhd</i> [1998] 1 MLJ 393, the court provided a critical limitation by ruling that the term “any person” is restricted to the actual parties to the contract. This interpretation preserves the principle of privity and ensures that restitutionary claims are not unfairly extended to third parties who were not part of the original agreement. Furthermore, as established in <i>Yong Mok Hin v United Malay States Sugar Industries Ltd</i> [1967] 2 MLJ 9, the duty to restore is a strict statutory obligation that arises automatically once an agreement is discovered to be void or becomes void.</p> <p>The Committee specifically notes the recent scrutiny of this section in <i>Detik Ria Sdn Bhd v Prudential Corporation Holdings Ltd &amp; Anor</i> [2025] 3 MLJ 22. While the Federal Court dissected the phrase “becomes void,” it notably rejected a narrow temporal interpretation that would limit “discovered to be void” solely to agreements where the voidness was hidden from the parties at the outset. Although certain parts of the judgment regarding the discovery of voidness were obiter dictum, the decision reaffirms that Section 66 remains vital for agreements failing due to illegality, lack of certainty, or the non-fulfillment of conditions.</p> <p>Finally, while the phrase “becomes void” overlaps with specific remedies for frustration found in Section 57(3) and the Civil Law Act 1956, Section 66 serves as a necessary residual provision. It ensures that restoration is available for all contracts that terminate by operation of law, such as contingent contracts under Section 33(b), thereby maintaining a comprehensive framework for restitution across all facets of Malaysian contract law.</p> |                                                                          |
| 67. | <p><b>Mode of communicating or revoking rescission of voidable contract.</b></p> <p>The rescission of a voidable contract may be communicated or revoked in the same manner, and subject to the same rules, as apply to the</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   | <p><b>[Delete as it is already provided for under general terms]</b></p> |

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|     | communication or revocation of a proposal.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                         |                                           |
|     | <p><b>Rationale:</b></p> <p>Section 67 is proposed to be deleted on the basis that it is redundant within the broader structure of the Act. The matters it addresses, namely, the mode of communicating or revoking rescission, are already sufficiently governed by the general provisions on communication and revocation applicable to proposals and acceptances. Retaining a separate provision risks unnecessary duplication and may create interpretive confusion as to whether distinct rules apply to rescission.</p>                      |                                           |
| 68. | <p><b>Effect of neglect of promisee to afford promisor reasonable facilities for performance.</b></p> <p>If any promisee neglects or refuses to afford the promisor reasonable facilities for the performance of his promise, the promisor is excused by the neglect or refusal as to any non-performance caused thereby.</p>                                                                                                                                                                                                                      | <p><b>No changes are recommended.</b></p> |
|     | <p><b>Rationale:</b></p> <p>Section 68 addresses situations where a contract cannot be performed because the promisee fails to provide reasonable cooperation or facilities necessary for performance. The provision excuses the promisor from liability for non-performance to the extent that such non-performance is caused by the promisee's neglect or refusal.</p> <p>This section operates independently from Section 54. While Section 54 applies where a party prevents performance and gives rise to a right to rescind or terminate</p> |                                           |

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|                                                                                                                                                       | <p>the contract, Section 68 applies where the contract remains on foot but performance is hindered by the promisee’s lack of cooperation. It provides a proportionate and practical response by excusing performance without requiring termination of the contract.</p> <p>The provision reflects the fundamental principle that contractual performance often depends on mutual cooperation. A party who fails to provide reasonable access, information, approvals, or other facilities necessary for performance should not be permitted to treat the resulting non-performance as a breach. Section 68 gives statutory recognition to this duty of cooperation and ensures clarity and fairness in its application.</p> <p>Accordingly, Section 68 continues to serve a useful and distinct function within the Act and should be retained.</p> |                                           |
| <p style="text-align: center;"><b>PART VI</b></p> <p style="text-align: center;"><b>OF CERTAIN RELATIONS RESEMBLING THOSE CREATED BY CONTRACT</b></p> |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     |                                           |
| 69.                                                                                                                                                   | <p><b>Claim for necessities supplied to person incapable of contracting, or on his account.</b></p> <p>If a person, incapable of entering into a contract, or anyone whom he is legally bound to support, is supplied by another person with necessities suited to his condition in life, the person who has furnished such supplies is entitled to be reimbursed from the property of such incapable person.</p>                                                                                                                                                                                                                                                                                                                                                                                                                                   | <p><b>No changes are recommended.</b></p> |

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| 70. | <p><b>Reimbursement of person paying money due by another, in payment of which he is interested.</b></p> <p>A person who is interested in the payment of money which another is bound by law to pay, and who therefore pays it, is entitled to be reimbursed by the other.</p>                                                                                                       | No changes are recommended.    |
| 71. | <p><b>Obligation of person enjoying benefit of non-gratuitous act.</b></p> <p>Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered.</p> | No changes are recommended.    |
| 72. | <p><b>Responsibility of finder of goods.</b></p> <p>A person who finds goods belonging to another and takes them into his custody, is subject to the same responsibility as a bailee.</p>                                                                                                                                                                                            | [Moved to Part IX on Bailment] |
| 73. | <p><b>Liability of person to whom money is paid, or thing delivered, by mistake or under coercion.</b></p>                                                                                                                                                                                                                                                                           | No changes are recommended.    |

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|                                                                     | A person to whom money has been paid, or anything delivered, by mistake or under coercion, must repay or return it.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          |
| <b>PART VII</b><br><b>OF THE CONSEQUENCES OF BREACH OF CONTRACT</b> |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          |
| 74.                                                                 | <b>Compensation for loss or damage caused by breach of contract.</b><br><br>(1) When a contract has been broken, the party who suffers by the breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from the breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.<br><br>(2) Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.<br><br><b>Compensation for failure to discharge obligation resembling those created by contract.</b> | <b>Compensation for loss or damage caused by breach of contract.</b><br><br>(1) When a contract has been broken, the party who suffers by the breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from the breach, or which the parties knew or could reasonably have contemplated, when they made the contract, to be likely to result from the breach of it.<br><br>(2) Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.<br><br>(3) In determining the loss or damage arising from a breach of |

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|  | <p>(3) When an obligation resembling those created by contract has been incurred and has not been discharged, any person injured by the failure to discharge it is entitled to receive the same compensation from the party in default as if the person had contracted to discharge it and had broken his contract.</p> <p><i>Explanation</i> - In estimating the loss or damage arising from a breach of contract, the means which existed of remedying the inconvenience caused by the non-performance of the contract must be taken into account.</p>                                                                                                                                                                                    | <p>contract, the failure of the person complaining of the breach to mitigate the loss or damage shall be taken into account.</p> |
|  | <p><b>Rationale:</b></p> <p>Section 74 sets out the general principles governing compensation for loss or damage arising from breach of contract. The proposed amendments refine the provision without altering its fundamental structure or policy.</p> <p>First, subsection (1) is amended to clarify the scope of recoverable loss by incorporating the standard of reasonable contemplation. The current wording refers only to losses which the parties “knew” to be likely to result from the breach. The amended formulation recognises that liability for damages extends not only to losses actually known to the parties at the time of contracting, but also to losses that could reasonably have been contemplated by them.</p> |                                                                                                                                  |

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|  | <p>This aligns the provision more closely with established common law principles derived from <i>Hadley v Baxendale</i> [1854] EWHC J70; (1854) 9 Exch 341 and its subsequent development, and reflects modern judicial approaches to foreseeability of loss (<i>Tham Cheow Toh v Associated Metal Smelters Ltd</i> [1971] 1 MLJ 271, <i>Poratha Corp Sdn Bhd v Technofit Sdn Bhd</i> [2020] 1 MLJ 74, <i>Kerajaan Negeri Terengganu v SKKPJ (TM) Sdn Bhd (and Another Appeal)</i> [2022] 4 MLJ 847, <i>Suzannah Helen Harvey &amp; Anor v Langkawi Yacht Club Sdn Bhd</i> [2024] 7 MLJ 385).</p> <p>Secondly, subsection (2), which excludes compensation for remote and indirect loss or damage, is retained without substantive change. This continues to serve as an important limiting principle, ensuring that damages remain proportionate and connected to the breach, and preventing speculative or excessive claims.</p> <p>Thirdly, the existing Explanation to section 74 is elevated into a standalone subsection as subsection (3). This change is stylistic and structural rather than substantive. It highlights the principle of mitigation of loss, namely that, in assessing damages, the court must take into account the means reasonably available to the innocent party to remedy or reduce the inconvenience caused by the breach. Elevating this rule enhances clarity and ensures that mitigation is clearly recognised as an integral component of the law of contractual damages.</p> <p>Finally, subsection (3) of the current provision, dealing with compensation for failure to discharge obligations resembling those created by contract, has been relocated to a new section 74A under Part VI. This reflects the non-contractual nature of such obligations and avoids conceptual confusion between breach of contract and quasi-contractual or restitutionary claims, while preserving the substance of the rule.</p> |
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|  |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       | <p><b>Section 74(3) introduced as new section 74A</b></p> <p><b>Compensation for failure to discharge obligation resembling those created by contract.</b></p> <p><b>74A.</b> When an obligation resembling those created by contract has been incurred and has not been discharged, any person injured by the failure to discharge it is entitled to receive the same compensation from the party in default as if the person had contracted to discharge it and had broken his contract.</p> |
|  | <p><b>Rationale:</b></p> <p>The proposed section 74A relocates the substance of the existing section 74(3). The obligation contemplated by this subsection does not arise from agreement or breach of contract, but from a non-contractual obligation imposed by law, commonly described as a quasi-contractual or restitutionary obligation.</p> <p>The substance of the provision is unchanged. It continues to provide that where an obligation resembling one created by contract has been incurred and not discharged, the injured party is entitled to compensation assessed by reference to contractual principles. The purpose of the provision is remedial rather than classificatory: it does not convert a non-contractual obligation into a contract, but adopts contractual measures of compensation to ensure fairness, certainty, and consistency.</p> |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |

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| 75. | <p><b>Compensation for breach of contract where penalty stipulated for.</b></p> <p>When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.</p> <p><i>Explanation</i> – A stipulation for increased interest from the date of default may be a stipulation by way of penalty.</p> <p><i>Exception</i> – When any person enters into any bail-bond, recognizance, or other instrument of the same nature, or under the provisions of any law, or under the orders of the Federal Government or the Government of any State, gives any bond for the performance of any public duty or act in which the public are interested, he shall be liable, upon breach of the</p> | <p><b>Agreed compensation for breach of contract.</b></p> <p>(1) A party to a contract can only receive reasonable compensation from the party in breach irrespective of the amount of the agreed damages stipulated in the contract that has been breached.</p> <p>(2) The party claiming reasonable compensation pursuant to subsection (1) must prove that the reasonable compensation is not exorbitant and disproportionate to the greatest legitimate losses that he has suffered.</p> <p>(3) The reasonable compensation must not exceed the amount of the agreed damages.</p> <p>(4) A party who is entitled to forfeit any deposit may do so provided the amount is reasonable.</p> <p>(5) When any person enters into any bail-bond, recognizance, or other instrument of the same nature, or, under the provisions of any law, or under the orders of the Federal Government or the Government of any State,</p> |
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| <p>condition of any such instrument, to pay the whole sum mentioned therein.</p> <p><i>Explanation</i> – A person who enters into a contract with the Government does not necessarily thereby undertake any public duty, or promise to do an act in which the public are interested.</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                            | <p>gives any bond for the performance of any public duty or act in which the public are interested, he shall be liable, upon breach of the condition of any such instrument, to pay the whole sum mentioned therein.</p> |
| <p><b>Rationale:</b></p> <p>This section is redrafted to reaffirm and clarify the original legislative intent underlying section 75 of the Contracts Act 1950, namely the statutory control of agreed damages through the concept of “reasonable compensation”. The provision is approached independently of subsequent common law developments on penalties and liquidated damages, and without being influenced by later judicial formulations such as <i>Dunlop Pneumatic Tyre Co Ltd v New Garage &amp; Motor Co Ltd</i> [1915] AC 79, <i>Fawziah Holdings Sdn Bhd v Metramac Corp Sdn Bhd</i> (formerly known as <i>Syarikat Teratai KG Sdn Bhd</i>) and another appeal [2006] 1 MLJ 505, <i>Selva Kumar a/l Murugiah v Thiagarajah Retnasamy</i> [1995] 1 MLJ 817, <i>Johor Coastal Development Sdn Bhd v Constrajaya Sdn Bhd</i> [2009] 4 CLJ 569, <i>Cavendish Square Holding BV v Talal El Makdessi and ParkingEye Ltd v Beavis</i> [2015] UKSC 67, and <i>Cubic Electronics Sdn Bhd (in liquidation) v Mars Telecommunications Sdn Bhd</i> [2019] 6 MLJ 15.</p> <p>The need for legal control over agreed damages clauses is beyond question. Even in jurisdictions that have significantly refined the penalty doctrine, courts have consistently rejected its complete abolition. However, the common law distinction between penalties and liquidated damages has long been criticised as artificial and conceptually unstable, often serving merely as a judicial mechanism for controlling excessive stipulations rather than as a principled classification.</p> <p>Section 75 adopts a different and more direct legislative technique. Instead of relying on the penalty–liquidated damages dichotomy, it subjects all agreed</p> |                                                                                                                                                                                                                          |

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|  | <p>damages clauses to a single statutory standard of “reasonable compensation”. This approach avoids the conceptual difficulties of the common law and represents a deliberate legislative choice to regulate agreed damages substantively rather than categorically.</p> <p>Judicial developments requiring proof of actual loss have, however, blurred the distinction between section 74 (general damages for breach) and section 75 (agreed damages). Such an approach risks undermining the wording and purpose of section 75, which expressly provides that reasonable compensation may be awarded whether or not actual loss is proved. While the section does not dispense with the need for evidence altogether, it does not require proof of actual damages in the same manner as section 74.</p> <p>The amended provision clarifies that a claimant must adduce some evidence to enable the court or tribunal to assess the reasonableness of the compensation claimed. This reflects the practical reality that reasonableness cannot be determined in an evidential vacuum, while at the same time preserving the conceptual distinction between agreed damages and compensatory damages for proven loss.</p> <p>The formulation that compensation must not be “exorbitant and disproportionate to the greatest legitimate loss” is intended to provide guidance on the assessment of reasonableness. While this language bears some resemblance to modern common law reasoning, its precise scope and formulation may require further refinement to ensure consistency with the statutory framework and legislative intent of section 75.</p> <p>Subsection (4) clarifies the treatment of deposits by expressly recognising the right of a party to forfeit a deposit, subject to the overriding requirement of reasonableness. This reflects existing commercial practice while ensuring that deposit forfeiture remains subject to judicial control to prevent abuse.</p> |
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|     | <p>Subsection (5) retains, in substance, the existing exception relating to bail-bonds and similar instruments involving public duties. It preserves the policy that, in such cases, the full sum stipulated may be recoverable upon breach, reflecting the public interest considerations underpinning such obligations.</p> <p>The provision deliberately retains the requirement that the contract must have been broken before section 75 applies. This maintains fidelity to the original policy of the section, which is expressly premised on breach of contract, and avoids adopting broader approaches that detach agreed damages from breach altogether.</p>                                               |                                                                                                                                                                                                                                                                                            |
| 76. | <p><b>Party rightfully rescinding contract entitled to compensation.</b></p> <p>A person who rightly rescinds a contract is entitled to compensation for any damage which he has sustained through the non-fulfilment of the contract.</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                           | <p><b>To move this to new section 73A.</b></p> <p>Party rightfully terminating contract entitled to compensation.</p> <p>73A. A person who rightly terminates a contract is entitled to compensation for any damage which he has sustained through the non-fulfilment of the contract.</p> |
|     | <p><b>Rationale:</b></p> <p>This amendment relocates the provision to a new section 73A and updates the terminology from “rescinds” to “terminates” to ensure conceptual clarity and consistency with modern contract law usage.</p> <p>The term “rescission” has traditionally been associated with the setting aside of a contract, often retrospectively and in the context of vitiating factors, whereas “termination” more accurately reflects discharge for breach and the prospective ending of contractual obligations. The revised wording therefore aligns the provision with the broader structure of the Act, particularly the use of “termination” in provisions dealing with breach and discharge.</p> |                                                                                                                                                                                                                                                                                            |

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|                                                                                                                          | <p>The amendment is not intended to alter the substantive legal position. It simply clarifies that a party who lawfully brings a contract to an end remains entitled to claim compensation for losses arising from the non-fulfilment of the contract.</p> <p>By placing the provision immediately after section 73, the amendment also improves the structural coherence of the Act.</p>                                                            |                                           |
| <p style="text-align: center;"><b>PART VIII</b></p> <p style="text-align: center;"><b>OF INDEMNITY AND GUARANTEE</b></p> |                                                                                                                                                                                                                                                                                                                                                                                                                                                      |                                           |
| 77.                                                                                                                      | <p><b>“Contract of Indemnity”.</b></p> <p>A contract by which one party promises to save the other from loss caused to him by the conduct of the promisor himself, or by the conduct of any other person, is called a "contract of indemnity".</p>                                                                                                                                                                                                   | <p><b>No changes are recommended.</b></p> |
| 78.                                                                                                                      | <p><b>Rights of indemnity-holder when sued.</b></p> <p>The promisee in the contract of indemnity, acting within the scope of his authority, is entitled to recover from the promisor-</p> <p>(a) all damages which he may be compelled to pay in any suit in respect of any matter to which the promise to indemnify applies;</p> <p>(b) all costs which he may be compelled to pay in any such suit if, in bringing or defending it, he did not</p> | <p><b>No changes are recommended.</b></p> |

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|     | <p>contravene the orders of the promisor, and acted as it would have been prudent for him to act in the absence of any contract of indemnity, or if the promisor authorized him to bring or defend the suit; and</p> <p>(c) all sums which he may have paid under the terms of any compromise of any such suit, if the compromise was not contrary to the orders of the promisor, and was one which it would have been prudent for the promisee to make in the absence of any contract of indemnity, or if the promisor authorized him to compromise the suit.</p> |                                    |
| 79. | <p><b>“Contract of guarantee”, “surety”, “principal debtor”, and “creditor”.</b></p> <p>A "contract of guarantee" is a contract to perform the promise, or discharge the liability, of a third person in case of his default. The person who gives the guarantee is called the "surety"; the person in respect of which default the guarantee is given is called the "principal debtor", and the person to whom the guarantee is given is called</p>                                                                                                               | <b>No changes are recommended.</b> |

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|     | the "creditor". A guarantee may be either oral or written.                                                                                                                                              |                                    |
| 80. | <p><b>Consideration for guarantee.</b></p> <p>Anything done, or any promise made, for the benefit of the principal debtor may be a sufficient consideration to the surety for giving the guarantee.</p> | <b>No changes are recommended.</b> |
| 81. | <p><b>Surety's liability.</b></p> <p>The liability of the surety is co-extensive with that of the principal debtor, unless it is otherwise provided by the contract.</p>                                | <b>No changes are recommended.</b> |
| 82. | <p><b>"Continuing guarantee".</b></p> <p>A guarantee which extends to a series of transactions is called a "continuing guarantee".</p>                                                                  | <b>No changes are recommended.</b> |
| 83. | <p><b>Revocation of continuing guarantee.</b></p> <p>A continuing guarantee may at any time be revoked by the surety, as to future transactions, by notice to the creditor.</p>                         | <b>No changes are recommended.</b> |
| 84. | <p><b>Revocation of continuing guarantee by surety's death.</b></p> <p>The death of a surety operates, in the absence of any contract to the contrary, as a revocation of a</p>                         | <b>No changes are recommended.</b> |

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|     | continuing guarantee, so far as regards future transactions.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    |                                    |
| 85. | <p><b>Liability of two persons, primarily liable, not affected by arrangement between them that one shall be surety on other's default.</b></p> <p>Where two persons contract with a third person to undertake a certain liability, and also contract with each other that one of them shall be liable only on the default of the other, the third person not being a party to the contract, the liability of each of the two persons to the third person under the first contract is not affected by the existence of the second contract, although the third person may have been aware of its existence.</p> | <b>No changes are recommended.</b> |
| 86. | <p><b>Discharge of surety by variance in terms of contract.</b></p> <p>Any variance, made without the surety's consent, in the terms of the contract between the principal debtor and the creditor, discharges the surety as to transactions subsequent to the variance.</p>                                                                                                                                                                                                                                                                                                                                    | <b>No changes are recommended.</b> |
| 87. | <b>Discharge of surety by release or discharge of principal debtor.</b>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                         | <b>No changes are recommended.</b> |

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|     | <p>The surety is discharged by any contract between the creditor and the principal debtor, by which the principal debtor is released, or by any act or omission of the creditor, the legal consequence of which is the discharge of the principal debtor.</p>                                                                                                               |                                    |
| 88. | <p><b>Discharge of surety when creditor compounds with, gives time to, or agrees not to sue principal debtor.</b></p> <p>A contract between the creditor and the principal debtor, by which the creditor makes a composition with, or promises to give time to, or not to sue, the principal debtor, discharges the surety, unless the surety assents to such contract.</p> | <b>No changes are recommended.</b> |
| 89. | <p><b>Surety not discharged when agreement made with third person to give time to principal debtor.</b></p> <p>Where a contract to give time to the principal debtor is made by the creditor with a third person, and not with the principal debtor, the surety is not discharged.</p>                                                                                      | <b>No changes are recommended.</b> |
| 90. | <p><b>Creditor's forbearance to sue does not discharge surety.</b></p>                                                                                                                                                                                                                                                                                                      | <b>No changes are recommended.</b> |

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|     | <p>Mere forbearance on the part of the creditor to sue the principal debtor or to enforce any other remedy against him does not, in the absence of any provision in the guarantee to the contrary, discharge the surety.</p>                                                                                                                                                                   |                                    |
| 91. | <p><b>Release of one co-surety does not discharge others.</b></p> <p>Where there are co-sureties, a release by the creditor of one of them does not discharge the others; neither does it free the surety so released from his responsibility to the other sureties.</p>                                                                                                                       | <b>No changes are recommended.</b> |
| 92. | <p><b>Discharge of surety by creditor's act or omission impairing surety's eventual remedy.</b></p> <p>If the creditor does any act which is inconsistent with the rights of the surety, or omits to do any act which his duty to the surety requires him to do, and the eventual remedy of the surety himself against the principal debtor is thereby impaired, the surety is discharged.</p> | <b>No changes are recommended.</b> |
| 93. | <p><b>Rights of surety on payment or performance.</b></p>                                                                                                                                                                                                                                                                                                                                      | <b>No changes are recommended.</b> |

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|     | <p>Where a guaranteed debt has become due, or default of the principal debtor to perform a guaranteed duty has taken place, the surety, upon payment or performance of all that he is liable for, is invested with all the rights which the creditor had against the principal debtor.</p>                                                                                                                                                                                         |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                         |
| 94. | <p><b>Surety's right to benefit of creditor's securities.</b></p> <p>A surety is entitled to the benefit of every security which the creditor has against the principal debtor at the time when the contract of suretyship is entered into, whether the surety knows of the existence of such security or not; and, if the creditor loses or, without the consent of the surety, parts with the security, the surety is discharged to the extent of the value of the security.</p> | <p><b>Surety's right to benefit of creditor's securities.</b></p> <p>(1) A surety is entitled to the benefit of every security which the creditor has against the principal debtor at the time when the contract of suretyship is entered into, whether the surety knows of the existence of such security or not; and if the creditor loses, or without the consent of the surety parts with the security, the surety is discharged to the extent of the value of the security.</p> <p>(2) <u>For the purpose of this section, any clause in a contract of guarantee that purports to waive or subordinate the surety's rights shall, in the absence of explicit, contrary language, be construed as merely postponing the surety's rights to benefit from the</u></p> |

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|     |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       | <u>securities until such time as the creditor has been paid in full.</u> |
|     | <p><b>Rationale:</b></p> <p>This amendment is intended to preserve surety's equity. Legislatively confirms the equitable principle that such clauses prevent the surety from competing with the secured creditor, rather than destroying the surety's eventual right to the security.</p> <p>Section 94 entitles the surety to the benefit of every security held by the creditor against the principal debtor. However, creditors frequently insert clauses requiring the surety to waive or subordinate their rights to the creditor's securities until the creditor is fully satisfied.</p> <p>Singaporean jurisprudence provides crucial guidance, confirming that clauses purporting to waive subrogation rights should (e.g., Clause 4(A) in <i>Salim Anthony v Sumitomo Corp Capital Asia Pte Ltd [2004] SGHC 117</i>), in most cases, be construed as merely postponing those rights until the secured creditor is paid in full. An interpretation leading to the absolute extinguishment of subrogation rights, allowing the creditor to retain security after recovering the entire outstanding amount from the surety, would result in unjust enrichment for the creditor. Codifying this equitable construction is vital for clarity.</p> |                                                                          |
| 95. | <p><b>Guarantee obtained by misrepresentation invalid.</b></p> <p>Any guarantee which has been obtained by means of misrepresentation made by the creditor, or with his knowledge and assent, concerning a material part of the transaction, is invalid.</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          | <b>No changes are recommended.</b>                                       |

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| 96. | <p><b>Guarantee obtained by concealment invalid.</b></p> <p>Any guarantee which the creditor has obtained by means of keeping silence as to material circumstance is invalid.</p>                                                                                                                                                         | <b>No changes are recommended.</b> |
| 97. | <p><b>Guarantee on contract that creditor shall not act on it until co-surety joins.</b></p> <p>Where a person gives a guarantee upon a contract that the creditor shall not act upon it until another person has joined in it as co-surety, the guarantee is not valid if that other person does not join.</p>                           | <b>No changes are recommended.</b> |
| 98. | <p><b>Implied promise to indemnify surety.</b></p> <p>In every contract of guarantee there is an implied promise by the principal debtor to indemnify the surety; and the surety is entitled to recover from the principal debtor whatever sum he has rightfully paid under the guarantee, but not sums which he has paid wrongfully.</p> | <b>No changes are recommended.</b> |
| 99. | <p><b>Co-sureties liable to contribute equally.</b></p> <p>Where two or more persons are co-sureties for the same debt or duty,</p>                                                                                                                                                                                                       | <b>No changes are recommended.</b> |

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|                                                                                                         | <p>either jointly or severally, and whether under the same or different contracts, and whether with or without the knowledge of each other, the co-sureties, in the absence of any contract to the contrary, are liable, as between themselves, to pay each an equal share of the whole debt, or of that part of it which remains unpaid by the principal debtor.</p>                                                             |                                                                                                                                                                                                                                                                                                                                                                                    |
| 100.                                                                                                    | <p><b>Liability of co-sureties bound in different sums.</b></p> <p>Co-sureties who are bound in different sums are liable to pay equally as far as the limits of their respective obligations permit.</p>                                                                                                                                                                                                                         | <b>No changes are recommended.</b>                                                                                                                                                                                                                                                                                                                                                 |
| <p style="text-align: center;"><b>PART IX</b></p> <p style="text-align: center;"><b>OF BAILMENT</b></p> |                                                                                                                                                                                                                                                                                                                                                                                                                                   |                                                                                                                                                                                                                                                                                                                                                                                    |
| 101.                                                                                                    | <p><b>“Bailment”, “bailor” and “bailee”.</b></p> <p>A “bailment” is the delivery of goods by one person to another for some purpose, upon a contract that they shall, when the purpose is accomplished, be returned or otherwise disposed of according to the directions of the person delivering them. The person delivering the goods is called the “bailor”. The person to whom they are delivered is called the “bailee”.</p> | <p><b>“Bailment”, “bailor” and “bailee”.</b></p> <p>(1) A “bailment” is the delivery of goods by one person to another for some purpose, upon a contract that they shall, when the purpose is accomplished, be returned or otherwise disposed of according to the directions of the person delivering them. The person delivering the goods is called the “bailor”. The person</p> |

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|      | <p><i>Explanation</i>—If a person already in possession of the goods of another contracts to hold them as a bailee, he thereby becomes the bailee, and the owner becomes the bailor of such goods, although they may not have been delivered by way of bailment.</p>                                                                                                                                     | <p>to whom they are delivered is called the “bailee”.</p> <p>(2) If a person already in possession of the goods of another contracts to hold them as a bailee, he thereby becomes the bailee, and the owner becomes the bailor of such goods, although they may not have been delivered by way of bailment.</p>                                            |
| 102. | <p><b>Delivery to bailee how made.</b></p> <p>The delivery to the bailee may be made by doing anything which has the effect of putting the goods in the possession of the intended bailee or of any person authorized to hold them on his behalf.</p>                                                                                                                                                    | <p><b>No changes are recommended.</b></p>                                                                                                                                                                                                                                                                                                                  |
| 103. | <p><b>Bailor’s duty to disclose faults in goods bailed.</b></p> <p>The bailor is bound to disclose to the bailee faults in the goods bailed, of which the bailor is aware, and which materially interfere with the use of them, or expose the bailee to extraordinary risks; and, if he does not make the disclosure, he is responsible for damage arising to the bailee directly from those faults.</p> | <p><b>Bailor’s duty to disclose faults in goods bailed.</b></p> <p>(1) The bailor is bound to disclose to the bailee faults in the goods bailed, of which the bailor is aware, and which materially interfere with the use of them, or expose the bailee to extraordinary risks; and, if he does not make the disclosure, he is responsible for damage</p> |

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|                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     | <p>If the goods are bailed for hire, the bailor is responsible for the damage, whether he was or was not aware of the existence of the faults in the goods bailed.</p>                                                                                                                          | <p>arising to the bailee directly from those faults.</p> <p>(2) If the goods are bailed for hire, the bailor is responsible for the damage, whether he was or was not aware of the existence of the faults in the goods bailed.</p> |
| 104.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                | <p><b>Care to be taken by bailee.</b></p> <p>In all cases of bailment the bailee is bound to take as much care of the goods bailed to him as a man of ordinary prudence would, under similar circumstances, take of his own goods of the same bulk, quality, and value as the goods bailed.</p> | <p><b>No changes are recommended.</b></p>                                                                                                                                                                                           |
| <p><b>Rationale:</b></p> <p>While there is a suggestion that professional bailees or bailees for reward should be held to a higher standard instead of the uniform standard in s.104 but Malaysian cases (e.g. <i>Fordeco Sdn Bhd v PK Fertilizers</i> [2019] and <i>Chong Kien Yong</i> [2024]) have shown that the courts are able to apply a graduated standard based on the circumstances and contextual background of each case.</p> <p>Similarly, India (<i>Taj Mahal Hotel v United India Insurance Co</i> [2020]), has recognised different standards depending on commercial capacity.</p> <p>Since the courts are able to apply the standard according to the circumstances and the contextual background of each case, there appears to be no real issue in the application of s.104. Hence, the general standard is to be retained.</p> |                                                                                                                                                                                                                                                                                                 |                                                                                                                                                                                                                                     |

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| 105. | <p><b>Bailee when not liable for loss, etc., of thing bailed.</b></p> <p>The bailee, in the absence of any special contract, is not responsible for the loss, destruction, or deterioration of the thing bailed, if he has taken the amount of care of it described in section 104.</p>                           | <b>No changes are recommended.</b>                                                                                                                                                                                       |
| 106. | <p><b>Termination of bailment by bailee's act inconsistent with conditions.</b></p> <p>A contract of bailment is voidable at the option of the bailor, if the bailee does any act with regard to the goods bailed, inconsistent with the conditions or the bailment.</p>                                          | <p><b>Avoidance of bailment</b></p> <p>A contract of bailment is voidable at the option of the bailor, if the bailee does any act with regard to the goods bailed, inconsistent with the conditions or the bailment.</p> |
|      | <p><b>Rationale:</b></p> <p>The title is rephrased for better understanding but the section itself remains unchanged as there is no issue with it.</p>                                                                                                                                                            |                                                                                                                                                                                                                          |
| 107. | <p><b>Liability of bailee making unauthorized use of goods bailed.</b></p> <p>If the bailee makes any use of the goods bailed, which is not according to the conditions of the bailment, he is liable to make compensation to the bailor for any damage arising to the goods from or during such use of them.</p> | <b>No changes are recommended.</b>                                                                                                                                                                                       |

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| 108. | <p><b>Effect of mixture, with bailor's consent, of his goods with bailee's.</b></p> <p>If the bailee, with the consent of the bailor, mixes the goods of the bailor with his own goods, the bailor and the bailee shall have an interest, in proportion to their respective shares, in the mixture thus produced.</p>                                                                                                            | <b>No changes are recommended.</b> |
| 109. | <p><b>Effect of mixture, without bailor's consent, when the goods can be separated.</b></p> <p>If the bailee, without the consent of the bailor, mixes the goods of the bailor with his own goods, and the goods can be separated or divided, the property in the goods remains in the parties respectively; but the bailee is bound to bear the expense of separation or division, and any damage arising from the mixture.</p> | <b>No changes are recommended.</b> |
| 110. | <p><b>Effect of mixture, without bailor's consent, when the goods cannot be separated.</b></p> <p>If the bailee, without the consent of the bailor, mixes the goods of the bailor with his own goods, in such a manner that it is impossible to separate the goods bailed from the other goods and deliver them back, the bailor is entitled</p>                                                                                 | <b>No changes are recommended.</b> |

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|      | to be compensated by the bailee for the loss of the goods.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                         |                                    |
| 111. | <p><b>Repayment by bailor of necessary expenses.</b></p> <p>Where, by the conditions of the bailment, the goods are to be kept or to be carried, or to have work done upon them by the bailee for the bailor, and the bailee is to receive no remuneration, the bailor shall repay to the bailee the necessary expenses incurred by him for the purpose of the bailment.</p>                                                                                                                                                                                       | <b>No changes are recommended.</b> |
| 112. | <p><b>Restoration of goods lent gratuitously.</b></p> <p>The lender of a thing for use may at any time require its return, if the loan was gratuitous, even though he lent it for a specified time or purpose. But if, on the faith of the loan made for a specified time or purpose, the borrower has acted in such a manner that the return of the thing lent before the time agreed upon would cause him loss exceeding the benefit actually derived by him from the loan, the lender must, if he compels the return, indemnify the borrower for the amount</p> | <b>No changes are recommended.</b> |

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|      | in which the loss so occasioned exceeds the benefit so derived.                                                                                                                                                                                                                                                                                          |                                    |
| 113. | <p><b>Return of goods bailed, on expiration of time or accomplishment of purpose.</b></p> <p>It is the duty of the bailee to return, or deliver according to the bailor's directions, the goods bailed, without demand, as soon as the time for which they were bailed has expired, or the purpose for which they were bailed has been accomplished.</p> | <b>No changes are recommended.</b> |
| 114. | <p><b>Bailee's responsibility when goods are not duly returned.</b></p> <p>If, by the fault of the bailee, the goods are not returned, delivered, or tendered at the proper time, he is responsible to the bailor for any loss, destruction, or deterioration of the goods from that time.</p>                                                           | <b>No changes are recommended.</b> |
| 115. | <p><b>Termination of gratuitous bailment by death.</b></p> <p>A gratuitous bailment is terminated by the death either of the bailor or of the bailee.</p>                                                                                                                                                                                                | <b>No changes are recommended.</b> |
| 116. | <b>Bailor entitled to increase or profit from goods bailed.</b>                                                                                                                                                                                                                                                                                          | <b>No changes are recommended.</b> |

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|      | In the absence of any contract to the contrary, the bailee is bound to deliver to the bailor, or according to his directions, any increase or profit which may have accrued from the goods bailed.                                                                                                       |                                    |
| 117. | <p><b>Bailor's responsibility to bailee.</b></p> <p>The bailor is responsible to the bailee for any loss which the bailee may sustain by reason that the bailor was not entitled to make the bailment, or to receive back the goods, or to give directions respecting them.</p>                          | <b>No changes are recommended.</b> |
| 118. | <p><b>Bailment by several joint owners.</b></p> <p>If several joint owners of goods bail them, the bailee may deliver them back to, or according to the directions of, one joint owner without the consent of all, in the absence of any agreement to the contrary.</p>                                  | <b>No changes are recommended.</b> |
| 119. | <p><b>Bailee not responsible on re-delivery to bailor without title.</b></p> <p>If the bailor has no title to the goods, and the bailee, in good faith, delivers them back to, or according to the directions of, the bailor, the bailee is not responsible to the owner in respect of the delivery.</p> | <b>No changes are recommended.</b> |

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| 120.  | <p><b>Right of third person claiming goods bailed.</b></p> <p>If a person, other than the bailor, claims goods bailed, he may apply to the court to stop the delivery of the goods to the bailor, and to decide the title to the goods.</p>                                                                                                                                                                                                                                                                        | <b>No changes are recommended.</b>                                                                                                                                                        |
| 121.  | <p><b>Right of finder of goods; may sue for specific reward offered.</b></p> <p>The finder of goods has no right to sue the owner for compensation for trouble and expense voluntarily incurred by him to preserve the goods and to find out the owner; but he may retain the goods against the owner until he receives such compensation; and, where the owner has offered a specific reward for the return of goods lost, the finder may sue for such reward, and may retain the goods until he receives it.</p> | <b>No changes are recommended.</b>                                                                                                                                                        |
| 121A. | <b>Originally Section 72.</b>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      | <p><b>Responsibility of finder of goods.</b></p> <p>A person who finds goods belonging to another and takes them into his custody, is subject to the same responsibility as a bailee.</p> |

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|      | <p><b>Rationale:</b></p> <p>Section 121 already concerns the right of finders of goods. By consolidating the finder's obligations alongside their existing rights, it eliminates the need for cross-reference between disconnected chapters, by laying out their complete set of responsibilities and entitlements in one accessible, comprehensive location.</p>                                                                                                                                                  |                                           |
| 122. | <p><b>When finder of thing commonly on sale may sell it.</b></p> <p>When a thing which is commonly the subject of sale is lost, if the owner cannot with reasonable diligence be found, or if he refuses, upon demand, to pay the lawful charges of the finder, the finder may sell it—</p> <p>(a) when the thing is in danger of perishing or of losing the greater part of its value; or</p> <p>(b) when the lawful charges of the finder, in respect of the thing found, amount to two-thirds of its value.</p> | <p><b>No changes are recommended.</b></p> |
| 123. | <p><b>Bailee's particular lien.</b></p> <p>Where the bailee has, in accordance with the purpose of the bailment, rendered any service involving the exercise of labour or skill in respect of the goods bailed, he has, in the absence of a contract to the contrary, a right to retain the goods until he</p>                                                                                                                                                                                                     | <p><b>No changes are recommended.</b></p> |

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|                             | receives due remuneration for the services he has rendered in respect of them.                                                                                                                                                                                                                                                                                                                                                                            |                                    |
| 124.                        | <p><b>General lien of bankers, factors, wharfingers, advocates and policy brokers.</b></p> <p>Bankers, factors, wharfingers, advocates and policy brokers may, in the absence of a contract to the contrary, retain, as a security for a general balance of account, any goods bailed to them; but no other persons have a right to retain, as a security for such balance, goods bailed to them, unless there is an express contract to that effect.</p> | <b>No changes are recommended.</b> |
| <i>Bailments of Pledges</i> |                                                                                                                                                                                                                                                                                                                                                                                                                                                           |                                    |
| 125.                        | <p><b>“Pledge”, “pawnor” and “pawnee”.</b></p> <p>The bailment of goods as security for payment of a debt or performance of a promise is called “pledge”. The bailor is in this case called the “pawnor”. The bailee is called the “pawnee”.</p>                                                                                                                                                                                                          | <b>No changes are recommended.</b> |
| 126.                        | <p><b>Pawnee’s right of retainer.</b></p> <p>The pawnee may retain the goods pledged, not only for payment of the debt or the performance of the</p>                                                                                                                                                                                                                                                                                                      | <b>No changes are recommended.</b> |

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|                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                         | promise, but for the interest of the debt, and all necessary expenses incurred by him in respect of the possession for the preservation of the goods pledged.                                                                                                                                                                                                                                                                                                           |                                                                                                                                                                                                                                                                                       |
| 127.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    | <p><b>Pawnee not to retain for debt or promise other than that for which goods pledged. Presumption in case of subsequent advances.</b></p> <p>The pawnee shall not, in the absence of a contract to that effect, retain the goods pledged for any debt or promise other than the debt or promise for which they are pledged; but such contract, in the absence of anything to the contrary, shall be presumed in regard to subsequent advances made by the pawnee.</p> | <p><b>Pawnee not to retain for debt or promise other than that for which goods pledged.</b></p> <p>The pawnee shall not, in the absence of a contract to that effect, retain the goods pledged for any debt or promise other than the debt or promise for which they are pledged.</p> |
| <p><b>Rationale:</b></p> <p>The revised provision removes the presumption that a pledge extends to subsequent advances, thereby confining the pawnee's right of retention strictly to the debt or obligation for which the goods were originally pledged, unless the parties expressly agree otherwise.</p> <p>This amendment reflects a deliberate policy shift towards greater clarity and transactional fairness. The earlier formulation, inherited from the Contracts Act 1950, permitted an implied extension of security to future advances.</p> |                                                                                                                                                                                                                                                                                                                                                                                                                                                                         |                                                                                                                                                                                                                                                                                       |

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|      | <p>While historically defensible, such presumptions are no longer aligned with modern commercial expectations, where security arrangements are typically documented with precision.</p> <p>The committee considered that presumptive extensions of security risk producing unintended consequences, particularly for less sophisticated parties who may not appreciate that pledged goods could secure obligations beyond the original transaction. This may distort bargaining positions and undermine informed consent.</p> <p>By omitting the presumption, the provision promotes transparency and certainty. Parties who intend cross-collateralisation or security for future advances remain free to do so, but must express that intention clearly in their agreement. This approach preserves commercial flexibility while ensuring that security rights are grounded in explicit consent rather than implication.</p> <p>The amendment also aligns pledge law with contemporary secured transactions practice, which emphasises clear documentation, disclosure, and predictability. In doing so, it reduces interpretive disputes and reinforces the principle that proprietary security interests should not be extended beyond their agreed scope without clear and conscious agreement by the parties.</p> |                                                                                                                                      |
| 128. | <p><b>Pawnee's right as to extraordinary expenses incurred.</b></p> <p>The pawnee is entitled to receive from the pawnor extraordinary expenses incurred by him for the preservation of the goods pledged.</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          | <p><b>No changes are recommended.</b></p>                                                                                            |
| 129. | <p><b>Pawnee's right where pawnor makes default.</b></p> <p>If the pawnor makes default in payment of the debt, or performance,</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     | <p><b>Pawnee's right where pawnor defaults</b></p> <p>If the pawnor makes default in payment of the debt, or performance, at the</p> |

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|      | <p>at the stipulated time, of the promise in respect of which the goods were pledged, the pawnee may bring a suit against the pawnor upon the debt or promise, and retain the goods pledged as a collateral security; or he may sell the thing pledged, on giving the pawnor reasonable notice of the sale.</p> <p>If the proceeds of such sale are less than the amount due in respect of the debt or promise, the pawnor is still liable to pay the balance. If the proceeds of the sale are greater than the amount so due, the pawnee shall pay over the surplus to the pawnor.</p> | <p>stipulated time, of the promise in respect of which the goods were pledged, the pawnee may bring a suit against the pawnor upon the debt or promise, and retain the goods pledged as a collateral security; or he may sell the <b>goods</b> pledged, <b>in a reasonable manner and upon</b> giving the pawnor reasonable notice of the sale.</p> <p>If the proceeds of such sale are less than the amount due in respect of the debt or promise, the pawnor is still liable to pay the balance. If the proceeds of the sale are greater than the amount so due, the pawnee shall pay over the surplus to the pawnor.</p> |
|      | <p><b>Rationale:</b></p> <p>Minor rephrasing is done for better clarification.</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             |
| 130. | <p><b>Defaulting pawnor's right to redeem.</b></p> <p>If a time is stipulated for the payment of the debt, or performance of the promise, for which the pledge is made, and the pawnor makes default in payment of the debt or performance of</p>                                                                                                                                                                                                                                                                                                                                       | <p><b>No changes are recommended.</b></p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   |

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|      | <p>the promise at the stipulated time, he may redeem the goods pledged at any subsequent time before they are actually sold; but he must, in that case, pay, in addition, any expenses which have arisen from his default.</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    |                                           |
| 131. | <p><b>Pledge by possessor of goods, or of documentary title to goods.</b></p> <p>A person who is in possession of any goods, or of any bill of lading, dock-warrant, warehouse-keeper's certificate, wharfinger's certificate, or warrant or order for delivery, or any other document of title to goods, may make a valid pledge of the goods or documents:</p> <p>Provided that—</p> <ul style="list-style-type: none"> <li>(a) the pawnee acts in good faith, and under circumstances which are not such as to raise a reasonable presumption that the pawnor is acting improperly; and</li> <li>(b) the goods or documents have not been obtained from their lawful owner, or from any person in lawful custody of</li> </ul> | <p><b>No changes are recommended.</b></p> |

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|      | <p>them, by means of an offence or fraud.</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     |                                           |
|      | <p><b>Rationale:</b></p> <p>In India, s.178 which was originally in pari materia with our s.131 has been amended to “where a mercantile agent is, with the consent of the owner, in possession of goods, or the document of title to goods, any pledge made by him, when acting in the ordinary course of business of a mercantile agent shall be as valid as if he were expressly authorised by the owner of the goods to make the same; provided that the pawnee acts in good faith and has not at the time of the pledge notice that the pawnor has not authority to pledge.”</p> <p>This amendment seems to grant only a mercantile agent the authority to create a pledge by the simple delivery of documents of title. The provision has drawn criticism, since it produces the odd result that an agent may exercise a power that the owner himself cannot.</p> <p>To remedy this issue, additional explanation and s.178A was added.</p> <p>Seeing that India’s amendment was basically made to restore the law back to before the 1930 amendment, it is best not to fix what is not broken and to leave it as it is.</p> |                                           |
| 132. | <p><b>Pledge where pawnor has only a limited interest.</b></p> <p>Where a person pledges goods in which he has only a limited interest, the pledge is valid to the extent of that interest.</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   | <p><b>No changes are recommended.</b></p> |

| <i>Suits by Bailees or Bailor against Wrongdoers</i> |                                                                                                                                                                                                                                                                                                                                                                                                                              |                                    |
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| 133.                                                 | <p><b>Suit by bailor or bailee against wrongdoer.</b></p> <p>If a third person wrongfully deprives the bailee of the use of possession of the goods bailed, or does them any injury, the bailee is entitled to use such remedies as the owner might have used in the like case if no bailment had been made; and either the bailor or the bailee may bring a suit against a third person for such deprivation or injury.</p> | <b>No changes are recommended.</b> |
| 134.                                                 | <p><b>Apportionment of relief or compensation obtained by such suits.</b></p> <p>Whatever is obtained by way of relief or compensation in any such suit shall, as between the bailor and the bailee, be dealt with according to their respective interests.</p>                                                                                                                                                              | <b>No changes are recommended.</b> |

**Existing Part X on Agency (sections 135-191) is proposed to be repealed and replaced by a new standalone [Agency Bill](#).**

## 1.5 Proposed Additional Part

| <b>PART XI</b><br><b>EXEMPTION AND LIMITATION CLAUSES</b>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               |
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| <p><b>Overview and purpose of Part XI.</b></p> <p>The draft new Part XI – Exemption and Limitation Clauses – regulates the use of exclusion and limitation clauses in certain contexts. It is modelled on the United Kingdom’s Unfair Contract Terms Act 1977 (<b>UK UCTA</b>), with modifications for the Malaysian context. Equivalent legislation has also been implemented in Singapore (Unfair Contract Terms Act 1994) and Hong Kong (Control of Exemption Clauses Ordinance 1990).</p> <p>The provisions provide that certain liability cannot be limited by a contract, and other exclusions are subject to a “reasonableness” test.</p> <p>The liability that cannot be excluded is liability in respect of:</p> <ul style="list-style-type: none"><li>• Personal injury or death due to negligence (s193(1)); and</li><li>• The supply of goods without title (s195(1)).</li></ul> <p>Exclusions of liability which are subject to a “reasonableness” test are:</p> <ul style="list-style-type: none"><li>• Loss or damage caused by negligence (s193(2));</li><li>• Breach of standard terms of business (s194);</li><li>• Breach of statutory implied warranties in relation to the supply of goods (eg conformity with description, quality or fitness for a particular purpose) (s195(2)); and</li><li>• Misrepresentation (s197).</li></ul> <p>This regime will operate alongside and in addition to other laws regulating unfair contract terms, such as the Consumer Protection Act 1999 which provides broader protection against</p> |

a wider range of unfair terms. As the proposed new Part will not be limited to consumers, it is appropriate to be included in the Contracts Act 1950.

| Section             | Proposed Provision                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       |
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| <i>Introductory</i> |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          |
| 192.                | <p><b>Scope of Part XI.</b></p> <p>(1) For the purposes of this Part of this Act, “negligence” means the breach:</p> <ul style="list-style-type: none"> <li>(a) of any obligation, arising from the express or implied terms of a contract, to take reasonable care or exercise reasonable skill in the performance of the contract;</li> <li>(b) of any common law duty to take reasonable care or exercise reasonable skill (but not any stricter duty).</li> </ul> <p>(2) This Part is subject to sections 202 to 206.</p> <p>(3) In the case of both contract and tort, sections 193 to 196 apply (except where the contrary is stated in section 195(3) only to business liability, that is liability for breach of obligations or duties arising from things done or to be done by a person in the course of a business (whether the person’s own business or another’s).</p> <p>(4) In relation to any breach of duty or obligation, it is immaterial for any purpose of this Part of this Act whether the breach was inadvertent or intentional, or whether liability for it arises directly or vicariously.</p> |
|                     | <p><b>Rationale:</b></p> <p>The proposed provision defines the scope of the Part and clarifies the circumstances in which the statutory controls on exclusion and limitation clauses</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 |

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|  | <p>apply. It is modelled on section 1 of the UK UCTA, with modifications to suit the Malaysian context.</p> <p>First, subsection (1) introduces a statutory definition of “negligence”. The definition covers both breaches of contractual obligations to exercise reasonable care or reasonable skill (subsection (1)(a)) and breaches of the common law duty of care (subsection (1)(b)). By expressly including both contractual and tortious duties, the provision ensures that the statutory controls apply consistently regardless of whether liability arises in contract or tort. This reflects the approach adopted in section 1(1) of the UK UCTA.</p> <p>Secondly, subsection (2) clarifies that this Part is subject to other provisions that limit or exclude its application, in particular sections 202 to 204 which deal with specific exclusions such as international supply contracts, choice of law issues, and defined categories of contracts. These exclusions broadly follow the structure of the UK UCTA, although their appropriateness in the Malaysian context requires consideration, as discussed further below in relation to sections 202 to 204.</p> <p>Thirdly, subsection (3) provides that, as a general rule, the statutory controls apply only to “business liability”, namely liability arising from acts or omissions occurring in the course of a business. This reflects the policy that regulation of exclusion clauses should primarily target commercial dealings rather than purely private arrangements, consistent with section 1(3) of the UK UCTA. However, subsection (3) also recognises important exceptions, including liability arising under section 195(3) (sale of goods and hire-purchase) and section 197 (misrepresentation), which are not confined to business liability. This differs from the position under the Australian Consumer Law, which is generally limited to conduct in trade or commerce, and raises a question as to whether all controls should be confined to business liability in the Malaysian context.</p> <p>Finally, subsection (4) clarifies that the statutory controls apply irrespective of whether the breach of duty or obligation was inadvertent or intentional, and regardless of whether liability arises directly or vicariously. This ensures that parties cannot avoid the operation of the statutory regime simply by characterizing</p> |
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|                                                                       | the nature of the breach. Certain provisions in the UK UCTA, including references to the Occupiers' Liability Act 1957, have not been included as they are not directly relevant within the Malaysian legal framework.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 |
| <i>Avoidance of liability for negligence, breach of contract, etc</i> |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        |
| 193.                                                                  | <p><b>Negligence liability.</b></p> <p>(1) A person cannot by reference to any contract term generally or to particular persons exclude or restrict their liability for death or personal injury resulting from negligence.</p> <p>(2) In the case of other loss or damage, a person cannot so exclude or restrict their liability for negligence except in so far as the term satisfies the requirement of reasonableness.</p> <p>(3) Where a contract term purports to exclude or restrict liability for negligence a person's agreement to or awareness of it is not of itself to be taken as indicating their voluntary acceptance of any risk.</p> <p><b>Rationale:</b></p> <p>This provision regulates the exclusion or restriction of liability for negligence. It is modelled on section 2 of the UK UCTA and establishes clear limits on the extent to which parties may contract out of liability arising from negligent conduct.</p> <p>First, subsection (1) prohibits any contractual term that seeks to exclude or restrict liability for death or personal injury resulting from negligence. This reflects the policy position that liability for serious harm caused by negligence should not be capable of contractual exclusion.</p> |

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|      | <p>Secondly, subsection (2) provides that, in relation to other forms of loss or damage resulting from negligence, liability may only be excluded or restricted where the relevant term satisfies the requirement of “reasonableness”. This introduces a balancing mechanism that allows contractual flexibility while ensuring that exclusion clauses operate fairly in the circumstances.</p> <p>Finally, subsection (3) provides that a person’s agreement to, or awareness of, a contractual term does not by itself constitute voluntary acceptance of the risk created by negligence. This prevents parties from arguing that mere knowledge of an exclusion clause amounts to consent to the risk of negligent harm.</p> <p>The equivalent provisions in the UK UCTA extended to apply to non-contractual notices. Following deliberation, the Committee considered that it was appropriate to limit the scope of the new provision to contractual terms.</p> |
| 194. | <p><b>Liability arising under standard contracts.</b></p> <p>(1) This section applies as between contracting parties where one of them deals on the other’s written standard terms of business.</p> <p>(2) As against that party, the other cannot by reference to any contract term—</p> <p style="padding-left: 40px;">(a) when in breach of contract, exclude or restrict any liability in respect of the breach; or</p> <p style="padding-left: 40px;">(b) claim to be entitled:</p> <p style="padding-left: 80px;">(i) to render a contractual performance substantially different from that which was reasonably expected of them, or</p> <p style="padding-left: 80px;">(ii) in respect of the whole or any part of their contractual obligation, to render no performance at all,</p> <p>except in so far as (in any of the cases mentioned above in this subsection) the</p>                                                                                |

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|  | contract term satisfies the requirement of reasonableness.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |
|  | <p><b>Rationale:</b></p> <p>This provision regulates the use of exclusion and limitation clauses in contracts where one party contracts on the other’s written standard terms of business. It is modelled on section 3 of the UK UCTA and aims to address the imbalance that often arises in standard form contracting situations.</p> <p>Subsection (1) identifies the scope of the provision, applying where one contracting party deals on the other’s written standard terms of business. Standard form contracts are typically drafted by one party in advance and presented to the other on a “take-it-or-leave-it” basis, leaving little or no opportunity for negotiation. In such circumstances, there is a heightened risk that the drafting party may include terms that exclude or significantly limit liability.</p> <p>Subsection (2) provides that, as against that party, the other party cannot, by reference to a contract term, exclude or restrict liability for breach of contract (subsection (2)(a)), or claim to be entitled to render performance substantially different from that reasonably expected, or no performance at all (subsection (2)(b)(i)–(ii)), except in so far as the term satisfies the requirement of reasonableness under section 199. The provision therefore subjects such terms to the statutory reasonableness test, ensuring that they operate fairly in the circumstances.</p> <p>The provision addresses a gap in existing Malaysian law. While the Consumer Protection Act 1999 provides protection against unfair terms in consumer contracts, it does not extend to business-to-business transactions. This provision is intended to apply to standard form contracts used in such contexts, thereby introducing statutory control over exclusion clauses in commercial dealings where negotiation may be limited in practice.</p> |

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|                                                       | Overall, the section ensures that contractual obligations cannot be undermined through the use of exclusion or limitation clauses in standard form contracts, while preserving flexibility through the application of the reasonableness test under section 199.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              |
| <i>Liability arising from sale or supply of goods</i> |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               |
| 195.                                                  | <p><b>Sale and hire-purchase.</b></p> <p>(1) Liability for breach of the obligations arising from:</p> <p>(a) section 14(a), (b) or (c) of the Sale of Goods Act 1957 (seller's implied undertakings as to title, etc.); or</p> <p>(b) section 7(1)(a) or (b) of the Hire Purchase Act 1967 (the corresponding thing in relation to hire purchase),</p> <p>cannot be excluded or restricted by reference to any contract term.</p> <p>(2) Liability for breach of the obligations arising from:</p> <p>(a) section 15, 16 or 17 of the Sale of Goods Act 1957 (seller's implied undertakings as to conformity of goods with description or sample, or as to their quality or fitness for a particular purpose);</p> <p>(b) section 7(1)(c) – (e) of the Hire Purchase Act 1967 (the corresponding things in relation to hire-purchase),</p> <p>cannot be excluded or restricted by reference to a contract term except in so far as the term satisfies the requirement of reasonableness.</p> |

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|  | <p>(3) The liabilities referred to in this section are not only the business liabilities defined by section 192(3), but include those arising under any contract of sale of goods or hire purchase agreement.</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     |
|  | <p><b>Rationale:</b></p> <p><i>Function and operation of the provision</i></p> <p>This provision regulates the exclusion or restriction of liability in relation to statutory implied terms governing contracts for the sale of goods and hire-purchase agreements. It is modelled on section 6 of the UK UCTA and aims to ensure that key statutory protections relating to goods cannot be undermined through contractual drafting.</p> <p>First, subsection (1) prohibits the exclusion or restriction of liability for breach of the implied undertakings relating to title under sections 14(a) to (c) of the Sale of Goods Act 1957, as well as the corresponding provisions under sections 7(1)(a) and (b) of the Hire Purchase Act 1967. These obligations concern the seller’s right to sell the goods and the buyer’s entitlement to quiet possession and freedom from undisclosed encumbrances. Given the fundamental nature of these obligations, the provision does not permit their exclusion or limitation by contract.</p> <p>Secondly, subsection (2) provides that liability for breach of implied terms relating to the conformity and quality of goods, as set out in sections 15 – 17 of the Sale of Goods Act 1957 and Sections 7(1)(c) – (e) of the Hire Purchase Act 1967, may only be excluded or restricted where the relevant term satisfies the requirement of reasonableness under section 199. This approach allows parties some flexibility in allocating commercial risk while ensuring that exclusion clauses remain subject to judicial scrutiny.</p> <p>The existing Section 62 of SOGA 1957 allows parties to contract out of any right, duty, or liability by express agreement to reflect the traditional principle of freedom of contract. However, there is a new proposal concerning core implied terms;</p> |

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|  | <p>Sections 15 (Description), 16 (Quality and Fitness), and 17 (Sample), to the requirement of ‘reasonableness.’ This shift aligns SOGA with the proposed Part XI of the Contracts Act 1950. Under this standard, a limitation clause is not automatically void; rather, its validity depends on whether it was a fair and reasonable one to be included, having regard to the circumstances which were, or ought reasonably to have been, known to or in the contemplation of the parties when the contract was made.</p> <p>Thirdly, subsection (3) clarifies that the liabilities referred to in this section are not confined to “business liability” as defined in section 192(3), but extend to all contracts of sale of goods and hire purchase agreements. This provision expands protection against exemption and limitation clauses beyond conventional business liabilities, while preserving the specialized consumer framework of the CPA 1999. Consequently, consumers are afforded a dual-track remedy: they may challenge a clause under the Contracts Act 1950 via the ‘reasonableness test,’ or invoke Part IIIA of the CPA 1999, which subjects the term to the more rigorous ‘fairness test.’”</p> <p><i>Comparative and policy considerations</i></p> <p>The Committee considered whether section 195, which is modelled on section 6 of the UK UCTA should be omitted in light of comparative developments, in particular a 2005 report of the Law Commission and Scottish Law Commission [1], and the position under the Australian Consumer Law.</p> <p>In doing so, the Committee noted that the 2005 UK Report proposed a more streamlined regime and questioned the continued need for separate goods-specific controls in business-to-business contracts, on the basis that the controls in the UK UCTA on limiting liability for negligence and under standard form contracts may be sufficient. Those recommendations did not proceed.</p> <p>The Committee also considered the Australian position. Under the Australian Consumer Law, statutory guarantees relating to the supply of goods apply by reference to the nature and value of the transaction (including goods ordinarily acquired for personal, domestic or household use, or transactions below specified</p> |
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|      | <p>monetary thresholds), rather than by reference to whether the contract is negotiated. As a result, the Australian framework does not impose a general control over exclusion of implied terms across all negotiated B2B contracts, but instead adopts a more targeted, transaction-based approach.</p> <p>Notwithstanding these developments, the Committee determined that section 195 should be introduced. Consistent with the position in the United Kingdom, section 195 performs an important and distinct function by regulating the exclusion of liability for breach of core statutory implied terms in contracts for the supply of goods, including in negotiated contracts. The provision ensures that such fundamental obligations remain subject to statutory control irrespective of the nature of the bargaining process.</p> <p>The Committee further notes that a parallel review of Sale of Goods Act 1957 is currently being undertaken by the Bahagian Hal Ehwal Undang-Undang (BHEUU). As part of this review, new provisions are being proposed to restrict a seller's ability to exclude or limit liability in respect of the implied terms under sections 15, 16 and 17 of that Act. Those proposed restrictions are similarly grounded in a "reasonableness" test, which mirrors the approach proposed under Part XI of the Contracts Act 1950. The provisions proposed in section 195 are intended to mirror those being considered in that review. At the implementation stage, only one legislative pathway should proceed, and duplication should be avoided.</p> |
| 196. | <p><b>Miscellaneous contracts under which goods pass.</b></p> <p>(1) Where the possession or ownership of goods passes under or in pursuance of a contract not governed by the law of sale of goods or hire-purchase, subsection (2) below applies as regards the effect (if any) to be given to contract terms excluding or restricting liability for breach of obligation arising by implication of law from the nature of the contract.</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    |

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|  | <p>(2) Liability in respect of:</p> <ul style="list-style-type: none"> <li>(a) the goods' correspondence with description or sample, or their quality or fitness for any particular purpose;</li> <li>(b) the right to transfer ownership of the goods, or give possession; or</li> <li>(c) the assurance of quiet possession to a person taking goods in pursuance of the contract,</li> </ul> <p>cannot be excluded or restricted by reference to any such term except in so far as the term satisfies the requirement of reasonableness.</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              |
|  | <p><b>Rationale:</b></p> <p>This provision regulates the exclusion or restriction of liability for implied obligations in contracts under which possession or ownership of goods passes, but which are not governed by the law relating to sale of goods or hire-purchase. It is modelled on section 7 of the UK UCTA and addresses transactions involving the supply of goods through contractual arrangements other than sale or hire-purchase, such as hire, lease, or other forms of goods supply.</p> <p>In such contracts, obligations relating to matters such as title, quiet possession, correspondence with description or sample, and the quality or fitness of goods may arise by implication of law from the nature of the transaction. The proposed provision provides that liability for breach of these implied obligations cannot be excluded or restricted unless the relevant contractual term satisfies the requirement of reasonableness.</p> <p>The provision reflects the policy underlying section 7 of the UK UCTA, which similarly subjects exclusion clauses relating to implied obligations in non-sale supply contracts to the reasonableness test. However, unlike the UK and Singapore legislation, which cross-refer to statutory implied terms under the Supply of Goods and Services Act 1982 (UK) and the Supply of Goods Act 1982 (Singapore), there</p> |

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|                                                | <p>is no equivalent statutory framework in Malaysia governing the supply of goods outside the context of sale or hire-purchase. Accordingly, the proposed provision refers more generally to obligations arising by implication of law from the nature of the contract, thereby capturing comparable protections derived from common law principles.</p>                                                                                                                                                                                                                                                                                                                                                                                      |
| <p><i>Other provisions about contracts</i></p> |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               |
| 197.                                           | <p><b>Misrepresentation.</b></p> <p>If a contract contains a term which would exclude or restrict:</p> <ul style="list-style-type: none"> <li>(1) any liability to which a party to a contract may be subject by reason of any misrepresentation made by them before the contract was made; or</li> <li>(2) any remedy available to another party to the contract by reason of such a misrepresentation,</li> </ul> <p>that term shall be of no effect except in so far as it satisfies the requirement of reasonableness.</p>                                                                                                                                                                                                                |
|                                                | <p><b>Rationale:</b></p> <p>This provision regulates contractual terms that seek to exclude or restrict liability arising from misrepresentation. It is modelled on section 8 of the UK UCTA and is intended to prevent parties from avoiding liability for pre-contractual misrepresentations through contractual drafting, including the use of “entire agreement” clauses.</p> <p>The provision applies where a contract contains a term that purports to exclude or restrict liability for misrepresentation (subsection (1)), or to exclude or restrict any remedy available in respect of such misrepresentation (subsection (2)). In such cases, the term will be of no effect except in so far as it satisfies the requirement of</p> |

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|      | <p>reasonableness under section 199. The provision is therefore directed at contractual devices such as “entire agreement” clauses and non-reliance clauses, which may operate to limit or exclude liability for pre-contractual representations. While such clauses may serve legitimate purposes in promoting contractual certainty, they may also be used to avoid responsibility for misleading statements made during negotiations, and are accordingly subject to the statutory reasonableness test.</p> <p>Consistent with the UK model, the provision is not limited to “business liability” and may therefore apply more broadly to contractual relationships.</p> <p>In the United Kingdom and Singapore, provisions of this kind operate alongside dedicated legislation governing misrepresentation (such as the Misrepresentation Act 1967 (UK)), which modifies the common law position and provides additional remedies. Malaysia does not have equivalent standalone legislation governing misrepresentation. For this reason, it is appropriate for the provision to be incorporated directly within the Contracts Act 1950. In contrast, the UK and Singapore provisions amend the relevant misrepresentation legislation.</p> <p>A broadly comparable outcome can be observed in Australian law through section 18 of the Australian Consumer Law, which prohibits misleading or deceptive conduct in trade or commerce. Liability arising from such conduct cannot be excluded by contract. However, the Australian provision is limited to conduct occurring in trade or commerce, whereas the proposed provision is not restricted in this way.</p> |
| 198. | <p><b>Evasion by means of secondary contract.</b></p> <p>A person is not bound by any contract term prejudicing or taking away their rights which arise under, or in connection with the performance of, another contract, so far as those rights extend to the enforcement of another’s liability which this Part of this Act prevents that other from excluding or restricting.</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     |

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|                                      | <p><b>Rationale:</b></p> <p>This provision is intended to prevent the statutory controls in this Part from being circumvented through the use of secondary or collateral agreements. It is modelled on section 10 of the UK UCTA and addresses situations where a party may attempt to avoid the effect of statutory restrictions on exclusion clauses by requiring another party to enter into a separate agreement, waiver, or undertaking connected with the main contract.</p> <p>The provision operates where a contractual term in a secondary agreement purports to prejudice or remove rights arising under, or in connection with the performance of, another contract. In such circumstances, a person will not be bound by that term to the extent that it affects rights relating to the enforcement of liability which this Part prevents from being excluded or restricted. The provision therefore supports the operation of the statutory controls contained in this Part by ensuring that they cannot be avoided indirectly.</p> <p>For example, a party should not be able to require the other party to sign a separate waiver, indemnity, or side agreement that effectively removes rights which the legislation intends to preserve. Without such a provision, the statutory protections could be undermined through contractual structuring rather than through explicit exclusion clauses in the primary contract.</p> |
| <p><i>Explanatory provisions</i></p> |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |
| <p>199.</p>                          | <p><b>The “reasonableness” test.</b></p> <p>(1) In relation to a contract term, the requirement of reasonableness for the purposes of this Part of this Act is that the term shall have been a fair and reasonable one to be included having regard to the circumstances which were, or ought reasonably to have been, known to or in the contemplation of the parties when the contract was made.</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                         |

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|  | <p>(2) In determining for the purposes of section 195 or 196 above (liability arising from sale or supply of goods) whether a contract term satisfies the requirement of reasonableness, regard shall be had in particular to the following matters; but this subsection does not prevent the court or arbitrator from holding, in accordance with any rule of law, that a term which purports to exclude or restrict any relevant liability is not a term of the contract:</p> <p>(a) the strength of the bargaining positions of the parties relative to each other, taking into account (among other things) alternative means by which the customer's requirements could have been met;</p> <p>(b) whether the customer received an inducement to agree to the term, or in accepting it had an opportunity of entering into a similar contract with other persons, but without having to accept a similar term;</p> <p>(c) whether the customer knew or ought reasonably to have known of the existence and extent of the term (having regard, among other things, to any custom of the trade and any previous course of dealing between the parties);</p> <p>(d) where the term excludes or restricts any relevant liability if some condition is not complied with, whether it was reasonable at the time of the contract to expect that compliance with that condition would be practicable;</p> <p>(e) whether the goods were manufactured, processed or adapted to the special order of the customer.</p> <p>(3) Where by reference to a contract term a person seeks to restrict liability to a specified sum of money, and the question arises (under this Part)</p> |
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|  | <p>whether the term satisfies the requirement of reasonableness, regard shall be had in particular but without prejudice to subsection (2) above to—</p> <p>(a) the resources which the person could expect to be available to them for the purpose of meeting the liability should it arise; and</p> <p>(b) how far it was open to the person to cover themselves by insurance.</p> <p>(4) It is for those claiming that a contract term satisfies the requirement of reasonableness to show that it does.</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    |
|  | <p><b>Rationale:</b></p> <p>This provision sets out the statutory “reasonableness” test, which forms the central mechanism for determining whether certain exclusion or limitation clauses are enforceable under this Part. The provision is modelled on section 11 and Schedule 2 of the UK UCTA, and provides both a general standard and a non-exhaustive list of factors to guide its application.</p> <p>Subsection (1) establishes the general test, that a contract term will satisfy the requirement of reasonableness if it is fair and reasonable having regard to the circumstances which were, or ought reasonably to have been, known to or contemplated by the parties at the time the contract was made. This reflects the approach adopted in the UK UCTA, which emphasises an assessment based on the circumstances existing at the time of contracting rather than hindsight.</p> <p>Subsection (2) provides a list of factors to be taken into account in determining reasonableness in relation to implied obligations relating to the sale or supply of goods under sections 195 and 196. These factors include the relative bargaining strength of the parties (subsection (2)(a)), the availability of alternatives (subsection 2(b)), the parties’ knowledge of the term (subsection 2(c)); the practicality of compliance with any conditions (subsection (2)(d)), and whether the goods were specially manufactured or adapted for the customer (subsection (2)(e)).</p> |

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|  | <p>These factors are not exhaustive and are intended to guide the court while preserving flexibility to consider all other relevant circumstances.</p> <p>Subsection (3) provides additional factors that must be considered in relation to liability caps. In such cases, consideration must be given to the resources available to the party seeking to rely on the limitation (subsection (3)(a)) and the availability of insurance (subsection (3)(b)). This reflects the policy that the allocation of risk through contractual limitation should be assessed in light of the parties’ ability to manage that risk.</p> <p>Subsection (4) places the burden of proof on the party seeking to rely on the term to show that it satisfies the requirement of reasonableness. This allocation of the evidential burden ensures that parties seeking to benefit from exclusion or limitation clauses must demonstrate that the term was fair and reasonable in the circumstances.</p> <p>In drafting this provision, the factors previously contained in Schedule 2 of the UK UCTA have been incorporated directly into the section to consolidate the reasonableness test and avoid the need for a separate schedule.</p> <p>As an alternative legislative model, consideration was given to the “unfairness” test as contained in section 24 of the Australian Consumer Law. This test provides that a term is unfair if it causes a significant imbalance in the parties’ rights and obligations, is not reasonably necessary to protect legitimate interests, and would cause detriment. Although a similar test is used for unfair contract terms regulation in the UK and other jurisdictions, it has not been applied in the business-to-business context (other than for small business contracts in Australia). For that reason, it is considered more appropriate to follow the UK UCTA’s reasonableness test, which will allow reference to extensive jurisprudence to assist with the application in the business-to-business context.</p> |
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| 200. | <p><b>Varieties of exemption clause.</b></p> <p>(1) To the extent that this Part of this Act prevents the exclusion or restriction of any liability it also prevents—</p> <ul style="list-style-type: none"> <li>(a) making the liability or its enforcement subject to restrictive or onerous conditions;</li> <li>(b) excluding or restricting any right or remedy in respect of the liability, or subjecting a person to any prejudice in consequence of their pursuing any such right or remedy;</li> <li>(c) excluding or restricting rules of evidence or procedure;</li> </ul> <p>and (to that extent) sections 193, 195 and 196 also prevent excluding or restricting liability by reference to terms which exclude or restrict the relevant obligation or duty.</p> <p>(2) But an agreement in writing to submit present or future differences to arbitration is not to be treated under this Part of this Act as excluding or restricting any liability.</p> |
|      | <p><b>Rationale:</b></p> <p>This provision clarifies the range of contractual mechanisms that fall within the concept of an “exclusion or restriction of liability” for the purposes of this Part. It is modelled on section 13 of the UK UCTA and is intended to prevent parties from circumventing statutory controls through indirect contractual devices.</p> <p>Subsection (1) provides that, to the extent that this Part prevents the exclusion or restriction of liability, it also prevents contractual terms that have the practical effect of limiting the enforcement of that liability. This includes terms that make liability or its enforcement subject to restrictive or onerous conditions (subsection (1)(a)), exclude or restrict rights or remedies or subject a person to prejudice for</p>                                                                                                                                                      |

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|  | <p>pursuing them (subsection (1)(b)), or exclude or restrict rules of evidence or procedure (subsection (1)(c)). The provision therefore ensures that the statutory controls cannot be avoided by drafting techniques that operate on remedies or enforcement rather than on liability itself.</p> <p>In addition, subsection (1) clarifies that, where this Part prevents the exclusion or restriction of liability under provisions such as sections 193, 195 and 196, it also prevents attempts to achieve the same result indirectly by excluding or restricting the underlying obligation or duty itself through contractual terms. This reinforces the effectiveness of the statutory regime by addressing both direct and indirect forms of exclusion.</p> <p>Subsection (2) provides that an agreement in writing to submit present or future disputes to arbitration is not to be treated as excluding or restricting liability for the purposes of this Part. This reflects the policy that arbitration agreements concern the forum for dispute resolution rather than the existence or scope of substantive liability.</p> <p>In the Malaysian context, there may be some overlap between this provision and section 29 of the Contracts Act 1950, which renders agreements in restraint of legal proceedings void, subject to certain exceptions including arbitration. While the present provision is consistent with that framework, consideration may be required as to whether any clarification is necessary to ensure coherence and avoid duplication.</p> |
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| 201. | <p><b>Interpretation of Part XI.</b></p> <p>In this Part of this Act—</p> <p>“business” includes a profession and the activities of any government department or local or public authority;</p> <p>“goods” has the same meaning as in the Sale of Goods Act 1957;</p> <p>“hire-purchase agreement” has the same meaning as in the Hire Purchase Act 1967; “negligence” has the meaning given by section 192(1);</p> <p>“personal injury” includes any disease and any impairment of physical or mental condition.</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       |
|      | <p><b>Rationale:</b></p> <p>This provision sets out the key definitions applicable to this Part and is modelled on section 14 of the UK UCTA. Its purpose is to clarify the meaning of several important terms used throughout the statutory framework governing exclusion and limitation clauses.</p> <p>The definition of “business” is broad and includes not only commercial activities but also professions and the activities of government departments, local authorities, and other public bodies. This reflects the approach adopted in the UK UCTA, where statutory controls on exclusion clauses apply to both private sector and certain public sector activities. In the Malaysian context, consideration may be required as to whether government activities should fall within the scope of “business” for the purposes of this Part. By comparison, the Australian Consumer Law applies to government entities only to the extent that they are “carrying on a business”, as provided under sections 2A to 2C of the Competition and Consumer Act 2010.</p> |

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|                      | <p>The provision defines “goods” by reference to the Sale of Goods Act 1957, and “hire-purchase agreement” by reference to the Hire Purchase Act 1967, thereby ensuring consistency with existing Malaysian statutory frameworks governing transactions involving goods. These definitions are central to the operation of provisions such as section 195 (sale and hire-purchase) and section 196 (miscellaneous contracts under which goods pass), and their accuracy and suitability should be confirmed.</p> <p>In addition, the provision defines “negligence” by reference to section 192(1), ensuring consistency with the definition that underpins the operation of section 193 (negligence liability) and related provisions. Finally, “personal injury” is defined to include disease and impairment of physical or mental condition, aligning with the scope of liability addressed in section 193(1).</p> |
| <i>Miscellaneous</i> |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        |
| 202.                 | <p><b>International supply contracts.</b></p> <p>(1) The limits imposed by this Part on the extent to which a person may exclude or restrict liability by reference to a contract term do not apply to liability arising under such a contract as is described in subsection (3) below.</p> <p>(2) The terms of such a contract are not subject to any requirement of reasonableness under [section 194]: and nothing in this Part shall require the incorporation of the terms of such a contract to be fair and reasonable for them to have effect.</p> <p>(3) Subject to subsection (4), that description of contract is one whose characteristics are the following:</p>                                                                                                                                                                                                                                           |

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|  | <p>(a) either it is a contract of sale of goods or it is one under or in pursuance of which the possession or ownership of goods passes; and</p> <p>(b) it is made by parties whose places of business (or, if they have none, habitual residences) are in the territories of different States.</p> <p>(4) A contract falls within subsection (3) above only if either:</p> <p>(a) the goods in question are, at the time of the conclusion of the contract, in the course of carriage, or will be carried, from the territory of one State to the territory of another; or</p> <p>(b) the acts constituting the offer and acceptance have been done in the territories of different States; or</p> <p>(c) the contract provides for the goods to be delivered to the territory of a State other than that within whose territory those acts were done.</p> |
|  | <p><b>Rationale:</b></p> <p>The draft provision follows s 26 of the UK UCTA in excluding contracts for the international supply of goods from the statutory controls. This exclusion warrants careful consideration.</p> <p>Under the proposed provision, the statutory restrictions on exclusion or limitation clauses do not apply to contracts falling within the definition of an international supply contract set out in subsections (3) and (4). Under subsection (3), the provision applies where the contract involves the sale or supply of goods and the parties have places of business (or habitual residences) in different States. Subsection (4) further requires that the contract has a sufficient international element, such as cross-border carriage of goods (subsection (4)(a)), offer and</p>                                       |

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|      | <p>acceptance occurring in different States (subsection (4)(b)), or delivery of goods to a different State (subsection (4)(c)).</p> <p>The original rationale for the UK approach was to facilitate international trade by allowing parties greater freedom to allocate risk and by avoiding placing domestic exporters at a competitive disadvantage. However, this rationale has been questioned in subsequent UK law reform work. A 2005 report by the Law Commission and Scottish Law Commission observed that the exclusion broader than necessary and influenced by historical treaty considerations, and suggested that a more targeted approach, potentially limited to export contracts, may be preferable.[2]</p> <p>In contrast the Australian Consumer Law does not contain an equivalent for international supply contracts. Instead, its provisions relating to unfair contract terms and consumer guarantees may apply extraterritorially in certain circumstances, including where the supplier carries on business in Australia.[3] This highlights a different policy approach, favouring the continued application of statutory protections notwithstanding the international character of the transaction.</p> <p>The appropriate scope of any exclusion for international supply contracts in the Malaysian context therefore requires careful consideration, including whether the exclusion should be retained, narrowed (for example, to export contracts), or omitted altogether.</p> |
| 203. | <p><b>Choice of law clauses.</b></p> <p>(1) Where the law applicable to a contract is the law of any part of Malaysia only by choice of the parties (and apart from that choice would be the law of some country outside Malaysia) sections 193 to 197 of this Part do not operate as part of the law applicable to the contract.</p> <p>(2) This Part has effect notwithstanding any contract term which applies or purports to apply the law of some country outside Malaysia, where the term appears to the court, or arbitrator or arbiter to have been imposed wholly or</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              |

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|     | <p>mainly for the purpose of enabling the party imposing it to evade the operation of this Part.</p> <p><b>Rationale:</b></p> <p>This provision addresses the interaction between the statutory controls in this Part and contractual choice of law clauses. It is modelled on section 27 of the UK UCTA and is intended to prevent parties from manipulating the applicable law of a contract in order to circumvent the statutory regulation of exclusion and limitation clauses.</p> <p>First, subsection (1) provides that where Malaysian law applies to a contract solely by virtue of the parties' choice, and the contract would otherwise be governed by the law of a country outside Malaysia, the statutory controls contained in sections 193 to 197 of this Part will not apply. This reflects the policy that the statutory regime should not be imposed on contracts that have no substantial connection with Malaysia apart from the parties' selection of Malaysian law as the governing law.</p> <p>Second, subsection (2) establishes an anti-avoidance rule. It provides that this Part will apply notwithstanding a contractual term that applies, or purports to apply, the law of a country outside Malaysia where the choice of foreign law appears to have been imposed wholly or mainly for the purpose of evading the operation of this Part. This ensures that the parties cannot avoid the statutory controls by selecting a foreign governing law in circumstances where the contract otherwise has a sufficient connection with Malaysia.</p> |
| 204 | <p><b>Scope of sections 193 (negligence liability), 194 (liability under standard contracts) and 196 (miscellaneous contracts under which goods pass)</b></p> <p>(1) Sections 193 and 194 of this Part do not extend to:</p> <p>(a) any contract of insurance (including a contract to pay an annuity on human life);</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    |

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|  | <p>(b) any contract so far as it relates to the creation or transfer of an interest in land, or to the termination of such an interest, whether by extinction, merger, surrender, forfeiture or otherwise;</p> <p>(c) any contract so far as it relates to the creation or transfer of a right or interest in any patent, trade mark, copyright or design right, registered design, technical or commercial information or other intellectual property, or relates to the termination of any such right or interest;</p> <p>(d) any contract so far as it relates:</p> <ul style="list-style-type: none"> <li>(i) to the formation or dissolution of a company (which means anybody corporate or unincorporated association and includes a partnership), or</li> <li>(ii) to its constitution or the rights or obligations of its corporators or members;</li> </ul> <p>(e) any contract so far as it relates to the creation or transfer of securities or of any right or interest in securities.</p> <p>(2) Section 193(1) extends to:</p> <ul style="list-style-type: none"> <li>(a) any contract of marine salvage or towage;</li> <li>(b) any charterparty of a ship or hovercraft; and</li> <li>(c) any contract for the carriage of goods by ship or hovercraft; but subject to sections 193, 194 and 196 do not extend to any such contract.</li> </ul> <p>(3) Where goods are carried by ship or hovercraft in pursuance of a contract which either—</p> |
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|  | <p>(a) specifies that as the means of carriage over part of the journey to be covered, or</p> <p>(b) makes no provision as to the means of carriage and does not exclude that means,</p> <p>then sections 193(2), and 194 do not extend to the contract as it operates for and in relation to the carriage of the goods by that means.</p> <p>(4) Section 193(1) and (2) do not extend to a contract of employment, except in favor of the employee.</p> <p>(5) Section 193(1) does not affect the validity of any discharge and indemnity given by a person, on or in connection with an award to them of compensation for pneumoconiosis attributable to employment in the coal industry, in respect of any further claim arising from their contracting that disease.</p>                                                                                                                                                                                                                                       |
|  | <p><b>Rationale:</b></p> <p>This provision specifies certain categories of contracts that fall outside the scope of selected provisions within this Part, namely sections 193 (negligence liability), 194 (liability arising under standard contracts), and 196 (miscellaneous contracts under which goods pass). It is derived from Schedule 1 of the UK UCTA, which identifies particular contractual contexts where the statutory controls on exclusion and limitation clauses do not apply.</p> <p>Subsection (1) sets out a number of exclusions reflecting the view that certain types of transactions operate within specialised legal or commercial frameworks where the application of the general statutory controls may be inappropriate or unnecessary. These include contracts of insurance (subsection (1)(a)), contracts relating to interests in land (subsection (1)(b)), intellectual property transactions (subsection (1)(c)), corporate formation and governance arrangements (subsection</p> |

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|  | <p>(1)(d)), and contracts involving securities (subsection (1)(e)). Such transactions are often governed by distinct regulatory regimes or involve sophisticated parties operating within established commercial practices.</p> <p>However, as these exclusions are drawn from the UK UCTA, each category warrants careful consideration in the Malaysian context, including whether the underlying policy rationale applies with equal force, whether the relevant transactions are already adequately regulated under Malaysian law, and whether any modification, narrowing, or omission of particular exclusions may be appropriate.</p> <p>The provision also addresses maritime and carriage contracts. Under subsection (2), section 193(1) (which prohibits exclusion of liability for death or personal injury resulting from negligence) is preserved in relation to certain maritime contracts, including marine salvage, towage, charterparties, and contracts for the carriage of goods by ship or hovercraft, while sections 193, 194 and 196 are otherwise excluded in this context. This reflects the traditionally specialized and internationally harmonized nature of maritime law.</p> <p>Further refinement is provided in subsection (3), which limits the application of section 193(2) and section 194 in relation to contracts involving carriage of goods by ship or hovercraft, where those provisions would otherwise apply to that aspect of performance.</p> <p>These maritime-related exclusions also require specific consideration in the Malaysian context, particularly given the extent to which international conventions, domestic maritime legislation, and commercial practice already regulate risk allocation in these sectors.</p> <p>In addition, subsection (4) excludes contracts of employment from the scope of certain controls, except where the relevant protection operates in favour of the employee. This ensures that the statutory controls do not interfere with employment arrangements in a manner that would disadvantage employees. Given its highly specific historical origin, consideration should be given to whether this</p> |
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|      | <p>exception is necessary or appropriate in the Malaysian context.</p> <p>Finally, subsection (5) preserves the validity of certain discharge and indemnity arrangements relating to compensation for pneumoconiosis arising from employment in the coal industry, notwithstanding section 193(1) reflecting the historical context of the corresponding UK provision.</p> <p>In drafting the proposed section, the exclusions originally contained in Schedule 1 of the UK UCTA have been incorporated directly into the body of the legislation to improve structural clarity and avoid the need for a separate schedule.</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              |
| 205. | <p><b>Saving for other relevant legislation.</b></p> <p>(1) Nothing in this Part removes or restricts the effect of, or prevents reliance upon, any contractual provision which:</p> <ul style="list-style-type: none"> <li>(a) is authorised or required by the express terms or necessary implication of an enactment; or</li> <li>(b) being made with a view to compliance with an international agreement to which Malaysia is a party, does not operate more restrictively than is contemplated by the agreement.</li> </ul> <p>(2) A contract term is to be taken for the purposes of this Part, as satisfying the requirement of reasonableness if it is incorporated or approved by, or incorporated pursuant to a decision or ruling of, a competent authority acting in the exercise of any statutory jurisdiction or function and is not a term in a contract to which the competent authority is itself a party.</p> <p>(3) In this section—</p> <p>“competent authority” means any court, arbitrator or arbiter, government department or public authority;</p> <p>“enactment” means any legislation (including subordinate legislation) of</p> |

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|  | <p>Malaysia and any instrument having effect by virtue of such legislation;<br/>and</p> <p>“statutory” means conferred by an enactment.</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   |
|  | <p><b>Rationale:</b></p> <p>This provision preserves the operation of other legislative frameworks that may authorise or regulate contractual terms affecting liability. It is modelled on section 29 of the UK UCTA and functions as a savings provision to ensure that the statutory controls contained in this Part do not inadvertently override or conflict with other applicable laws.</p> <p>First, subsection (1) provides that nothing in this Part prevents reliance on contractual provisions that are expressly authorised or required by legislation, whether by express terms or necessary implication (subsection (1)(a)). It also preserves contractual terms incorporated in order to comply with international obligations, provided that such terms do not operate more restrictively than contemplated by the relevant agreement (subsection (1)(b)). This ensures that the statutory controls operate coherently alongside both domestic legislation and Malaysia’s international commitments.</p> <p>Secondly, subsection (2) provides that a contractual term is to be taken as satisfying the requirement of reasonableness under section 199 where it has been incorporated or approved by, or pursuant to a decision or ruling of, a competent authority exercising statutory powers. This reflects the policy that terms subject to regulatory or judicial scrutiny should not ordinarily be re-examined under the statutory reasonableness test. However, this deeming provision does not apply where the competent authority is itself a party to the contract.</p> <p>Finally, subsection (3) defines key terms used in the provision, including “competent authority”, “enactment”, and “statutory”, in order to ensure clarity and consistency in interpretation. These definitions support the operation of subsections (1) and (2) by identifying the sources of authority and types of</p> |

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|      | instruments to which the provision applies.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             |
| 206. | <p><b>Commencement and transitional.</b></p> <p>(1) Subject to subsection (2), nothing in this Part applies to contracts made before the date on which this Part comes into force; but subject to this, it applies to liability for any loss or damage which is suffered on or after that date.</p> <p>(2) This Part will apply to contracts made before the commencement of this Part if and to the extent they are amended after the commencement of this Part.</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   |
|      | <p><b>Rationale:</b></p> <p>This provision addresses the temporal operation of this Part and clarifies the extent to which the statutory controls apply to contracts formed before and after commencement. It is modelled in part on section 31 of the UK UCTA, with an additional clarification included in subsection (2).</p> <p>First, subsection (1) provides that this Part does not apply to contracts made before its commencement. This reflects the general principle against retrospective operation of legislation, ensuring that parties are not subject to new statutory controls in respect of contractual arrangements entered into prior to the introduction of the regime. However, subsection (1) also clarifies that, subject to this limitation, the Part applies to liability for loss or damage suffered on or after commencement, thereby ensuring that the new provisions govern future consequences even where they arise from ongoing contractual relationships.</p> <p>Secondly, subsection (2) provides that this Part will apply to contracts made before commencement to the extent that those contracts are amended after commencement. This ensures that where parties revisit and vary their contractual arrangements, the amended terms are subject to the statutory controls in this Part. The inclusion of this provision is particularly relevant in the context of long-term</p> |

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|  | <p>or “evergreen” commercial arrangements, such as master services agreements, which may remain in force for extended periods but are frequently varied over time.</p> <p>Together, subsections (1) and (2) strike a balance between respecting existing contractual arrangements and ensuring that the statutory controls apply prospectively to new or revised contractual terms.</p> |
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[1] Law Commission and Scottish Law Commission, *Unfair Terms in Contracts: Report on a Reference under Section 3(1)(e) of the Law Commissions Act 1965* (Law Com No 292; Scot Law Com No 199, 2005) [2.26].

[2] Law Commission and Scottish Law Commission, *Unfair Terms in Contracts: Report on a Reference under Section 3(1)(e) of the Law Commissions Act 1965* (Law Com No 292; Scot Law Com No 199, 2005) [7.35] – [7.61].

[3] *Competition and Consumer Act 2010* (Cth) s 5; *Karpik v Carnival plc* [2023] HCA 39.

## **PART II: AGENCY BILL**

# **Report of Agency Law Reform**

## Table of Definitions

|                               |                                                                  |
|-------------------------------|------------------------------------------------------------------|
| CA 1950                       | Contracts Act 1950 (Act 136) (Malaysia)                          |
| CCLA 2017                     | Contract and Commercial Law Act 2017 (New Zealand)               |
| EU                            | European Union                                                   |
| Guernsey                      | The Island of Guernsey                                           |
| India                         | India (Bharat)                                                   |
| ICA 1872                      | Indian Contract Act 1872 (India)                                 |
| Irish/Ireland                 | Ireland (Éire)                                                   |
| Ontario, Canada               | The Province of Ontario, Canada                                  |
| Restatement (Third) of Agency | American Law Institute's Restatement of the Law of Agency, Third |
| UK                            | The United Kingdom of Great Britain and Northern Ireland         |
| US                            | The United States of America                                     |

## **2.0 REPORT OF AGENCY LAW REFORM**

### **2.1 Executive Summary**

#### **2.1.1 General**

- (i) This Report presents the proposed reform of agency law under the CA 1950 of Malaysia. The initiative aims to modernise the statutory framework governing agency relationships to accommodate legal developments, technological advancements and international and other pertinent aspects.

#### **2.1.2 Overview of the Report**

- (i) This Report discusses, in relation to agency law, its history and background, a multi-jurisdictional comparison of legislation, legislative proposals and legal writings, proposals of committees on law reform in various jurisdictions, case law in Malaysia and the Commonwealth, Malaysian agency law ex CA 1950, technology and artificial intelligence, exclusions of liability and indemnities and private international law and the application of foreign law. It also proposes a draft Bill on agency law and policies and a comparative matrix are included. Also proposed, a consultation on the proposals.

#### **2.1.3 History and Background**

- (i) We considered the history and background to the CA 1950 particularly the ICA 1872 and recommendations of various Indian Law Commissions;
- (ii) We also provided an overview of this Report.

#### **2.1.4 Comparison of Legislation and Codes or Proposals elsewhere with Malaysia**

- (i) We considered relative to Malaysian legislation various foreign material;

- (ii) he foreign material were either of a legislative nature, proposals for legislation including, codes and some major works on agency law but did not include the recommendations of various law commissions or law committees for the reform of agency law, those being treated separately in this Report;
- (iii) Examples of the foreign material include: New Zealand CCLA 2017; the UK Commercial Agents (Council Directive) Regulations 1993 (UK SI 1993/3053); the UK Powers of Attorney Act 1971; the Uniform Electronic Transactions Act 1999 (Uniform Law Commission); the Electronic Transactions (Guernsey) Law 2000; and the Electronic Transactions (Electronic Agents) (Guernsey) Ordinance 2019;
- (iv) Malaysian legislation compared was not restricted to the CA 1950 and also included New Zealand CCLA 2017; the UK Commercial Agents (Council Directive) Regulations 1993 (UK SI 1993/3053); the UK Powers of Attorney Act 1971; the Uniform Electronic Transactions Act 1999 (Uniform Law Commission); the Electronic Transactions (Guernsey) Law 2000; and the Electronic Transactions (Electronic Agents) (Guernsey) Ordinance 2019;
- (v) Our review focused on some common traits in the comparisons, some differences in approach, language or terminology, artificial intelligence and technology and powers of attorney;

#### 2.1.5 **Foreign Committee Reports on Agency**

- (i) We reviewed the work of various foreign law committees pertinent to agency
- (ii) New Zealand CCLA 2017; the UK Commercial Agents (Council Directive) Regulations 1993 (UK SI 1993/3053); the UK Powers of Attorney Act 1971; the Uniform Electronic Transactions Act 1999 (Uniform Law Commission); the Electronic Transactions (Guernsey)

Law 2000; and the Electronic Transactions (Electronic Agents) (Guernsey) Ordinance 2019;

- (iii) We focused particularly on the recommendations of the 13<sup>th</sup> Report of the Law Commission of India relating to agency law as that Report involved a review of the ICA 1872 involving agency law, the closest approximation to Part X of the CA 1950. We did not agree with all the recommendations of the 13<sup>th</sup> Report but adopted some aspects of the recommendations for incorporation into the draft Bill, see Paragraph 4.0 for details;
- (iv) Our review also extended to committee reports of powers of attorney;

#### **2.1.6 Malaysian and Commonwealth Case Law on Agency**

- (i) Commonwealth case law on agency is extensive. Malaysian case law on agency is more limited in relative terms. We have not attempted a comprehensive review of case law on agency as that would not be practical for the purposes of our review on agency law reform;
- (ii) We have focused on only particular aspects:
  - (a) The introduction of manifest assent into agency law in Malaysia and the Commonwealth, consent having been the more traditional approach;
  - (b) The use of the definition of apparent authority in Restatement (Third) of Agency in Malaysia and the Commonwealth;
  - (c) Agency by estoppel;
  - (d) Legal capacity of an agent and liability of one without legal capacity;
  - (e) Fiduciary or otherwise in an agency relationship;

- (f) Whether an agent needs to have authority to affect a principal's legal relations;
- (iii) We also noted from our review the application of the common law by the Malaysian courts in relation to agency law without necessarily reference to the provisions of Part X of the CA 1950;
- (iv) Our review in this paragraph of this Report also included discussions of the 13<sup>th</sup> Report of the Indian Law Commission, Bowstead and Reynolds on Agency and the Restatement (Third) of Agency in conjunction with cases;
- (v) Our approach:
  - (a) To introduce manifest assent into the draft Bill particularly with its use in English and Australian courts and in the Malaysian court and its use in Bowstead and Reynolds on Agency;
  - (b) To introduce apparent authority into the draft Bill based on the definition in the Restatement (Third) of Agency with reference to a Malaysian case and Bowstead and Reynolds on Agency;
  - (c) To only make a reference to the doctrine of estoppel in relation to provisions on apparent authority in the draft Bill with no attempt to define the doctrine, difficulties with definition including, Bowstead and Reynolds on Agency not agreeing with the definition in Restatement (Third) of Agency;
  - (d) To make clear in the draft Bill that an agent need not have legal capacity but with modifications to the approach on liability taken in the CA 1950 in this context, considering the common law approach and commentary in Bowstead and Reynolds on Agency;

- (e) To make clear in the draft Bill that an agent need not be a fiduciary or to have authority to affect the principal's legal relations based on the common law;
- (f) To approach the draft Bill in a way where its provisions may be complemented by the common law, the approach taken by Malaysian courts in relation to the application of the common law relative to the CA 1950;

#### 2.1.7 **Other laws relating to agency in Malaysia**

- (i) Our review focused particularly on the law of powers of attorney in Peninsular Malaysia, Sabah and Sarawak. We proposed a unified law on powers of attorney to apply to the whole of Malaysia, to be incorporated in the draft Bill. The unified law retains attestation formalities similar to the Powers of Attorney Act 1949 but with some modifications. The mandatory requirements for deposit are not proposed to be adopted in the draft Bill although regulations may be adopted for a voluntary deposit regime. The provisions in the draft Bill adopt many of the provisions in the UK Powers of Attorney Act 1971, with some modifications;
- (ii) Also proposed, are provisions to dispense with some of the formalities at common law applying to seals, in the context of agency. These include, some modifications to the Malaysian Companies Act 2016;
- (iii) Provisions on disability not amounting to legal incapacity are also proposed;
- (iv) We considered some sectoral written laws which could affect the law of agency. We took the view that the draft Bill should not attempt to alter the provisions of other written laws in specific sectors in respect of agency. To do so would require a very extensive review of each of those sectors and their laws;

**2.1.8 Electronic means, electronic form, electronic transactions, etc.; smart contracts; artificial intelligence systems (“AI systems”)**

- (i) We considered legislation in Malaysia and elsewhere recognising the use of technology in transactions and other matters. These included, the Malaysian Electronic Commerce Act 2006, the Malaysian Companies Act 2016, the Ontario Electronic Commerce Act 2000, the Guernsey Electronic Transactions (Guernsey) Law 2000 and the New Zealand Contract and Commercial Law Act 2017. Malaysian and Commonwealth case law was also considered. We took the view that the draft Bill should specifically cater for the use of technology in relation to agency matters;
- (ii) We also, separately, considered artificial intelligence systems in the context of agency. We considered a plethora of legislation, including, Guernsey and Ontario, among many others. We also considered many other legal aspects including, legal personality and also case law. We took the view that an artificial intelligence system should be capable by legislative intervention to be an agent in an agency context although such a system should not ordinarily be capable of being an agent. This would help clarify the law as case law would take considerable time to develop and provide also more clarity in ascribing responsibility and liability associated with the acts of an artificial intelligence system. We proposed in the draft Bill that while the principal of an artificial intelligence system acting as an agent should ordinarily be the party liable for the acts of the artificial intelligence system, liability could be ascribed differently where the artificial intelligence system acted in a defective way. In the latter case, we proposed that liability be ascribed along the lines of the EU Directive 2024/2853 with economic operators of the artificial intelligence system being liable;

**2.1.9 Limitations on liability and indemnities**

- (i) We considered whether an agent should be able to enjoy without restriction the protection of provisions excluding or limiting the

liability of an agent or providing for the agent to be indemnified. We took the view that such provisions should be allowed provided they were reasonable and that an absolute prohibition should not be introduced. Provisions have been proposed in the draft Bill;

#### **2.1.10 Private international law**

- (i) Agency law often involves cross border and international aspects particularly in this modern day and age. We took the view that specific provisions should appear in the draft Bill on matters of private international law and the application of foreign law. We had also considered this aspect in the context of the application of laws relating to artificial intelligence systems acting as agents, these appearing in the proposals in the draft Bill related to our discussions and recommendations in Paragraph 7.0;

#### **2.1.11 Bill, policy statement and consultation questions & Comparison matrix**

- (i) We have attached as Appendices the draft Bill and corresponding policy statements and comparative matrix as well as consultation process proposals. Our approach to the Bill:
  - (a) This report considered;
  - (b) The addition of provisions on technology and artificial intelligence, in particular;
  - (c) The proposal for a draft Bill on agency to introduce new laws on agency distinct from CA 1950 with Part X of CA 1950 being superseded;
  - (d) The draft Bill being drafted along more contemporary legislative lines and not as a code or quasi code with specific provisions recognising the application of the common law in tandem with the provisions of the draft Bill;

#### 2.1.12 Overview of Some of the Provisions of the Proposed Draft Bill

- (i) Clause 2 provides for the interpretation of the draft Bill, including definitions of key terms and rules governing its application and relationship with other law:
  - (a) It introduces in Malaysian agency law key definitions for terms such as “artificial intelligence”, “electronic agent”, and “electronic record”. These are necessary to support the draft Bill's expanded scope into technology, automation, and digital transactions, which are not addressed in Part X of the CA 1950;
  - (b) It clarifies the core terms of the agency relationship, such as “agent”, “principal”, and “sub-agent”, by expressly linking their definitions to the operative provisions of the draft Bill (Clauses 3 and 10 respectively);
  - (c) It introduces definitions for ‘legal capacity’ and ‘mental incapacity’. These definitions are fundamental to establishing the draft Bill’s framework on capacity, which distinguishes between the requirements for agents and principals and includes provisions for persons with disabilities, an area for which Part X of the CA 1950 is silent on;
  - (d) It clarifies the relationship between the draft Bill and other laws. It confirms that the draft Bill is not an exhaustive code and is to be complemented by the common law and equity. It also establishes rules of private international law to determine when Malaysian law governs an agency relationship, providing greater certainty for cross-border transactions;
- (ii) A generic definition of agency and some of its elements appear in Clauses 3 and 4 of the draft Bill:
  - (a) The generic definition of agency introduces the language of manifest assent in the creation of an agency. This tracks

language used in some Commonwealth jurisdictions particularly, England and Australia and also in one case, Malaysia. The language appears in the authoritative English textbook on agency law, Bowstead and Reynolds on Agency (as detailed in the report) and has been used as the reference point in many of these cases. The use of manifest assent is relatively recent. Part X of the CA 1950 uses the more traditional terminology of consent;

- (b) It makes clear that an agency relationship need not be a fiduciary relationship, in line with the common law. Part X of the CA 1950 is silent on this point and presumably, a fiduciary relationship is unnecessary;
- (c) It makes clear that an agency relationship need not be a fiduciary relationship, in line with the common law. Part X of the CA 1950 is silent on this point and presumably, a fiduciary relationship is unnecessary;
- (d) It makes clear that an agent need not have legal capacity in order to be an agent in line with the common law although there are some carve outs on the liability of an agent in the case of minors and those suffering from certain mental incapacity. Part X of the CA 1950 seems to allow for an agent without legal capacity but provides also for carve outs on the liability of an agent in the case of minors and those of unsound mind. The changes in the draft Bill provide for a less absolutist approach to carve outs drawing from aspects of the common law with some modifications premised on some minors and some suffering from a degree of mental incapacity being actually in a position to understand and carry out agency obligations;
- (e) It provides that a principal should generally have legal capacity although some carve outs are provided including, in relation to

irrevocable powers of attorney and where written law were to provide for survival of a power despite a loss of legal capacity, living wills and enduring powers of attorney being some of those in mind;

- (f) It provides guidance on when Malaysian law applies to legal capacity in connection with agency;
- (g) It reiterates the common law position and the position in Part X of the the CA 1950 that an agency does not require consideration;

(iii) Clause 5:

- (a) Makes clear that the expressed provisions on what an agent can and cannot do as specified in Part III of the draft Bill are not necessarily the provisions by which an agent must conduct himself. An agent may conduct himself in a different way depending on the circumstances to which the draft Bill also gives guidance. To be clear, although this is not expressed in the draft Bill itself, a receiver or an agent without a fiduciary obligation or authority to act may, as an illustration be subject to modified or different rules from some other agent. This approach does not detract from the way in which agency law has been approached under the current regime encompassing Part X of the CA 1950;
- (b) Requires that provisions limiting the liability of an agent or providing an indemnity is subject to certain limitations, particularly that they be fair and reasonable having regard to the circumstances. Part X of the CA 1950 does not contain an equivalent;

- (iv) Clause 6 provides for certain default provisions by which an agent may conduct himself. It largely tracks (with some modifications) provisions

in Part X of the CA 1950 and some basic common law rules. As indicated in paragraph 3.2(b), these default provisions may not necessarily apply to an agent as circumstances may vary.

(v) Clause 7:

- (a) Provides the basic circumstances by which an agent may have actual authority to do something. As with the generic definition of agency, the language of manifest assent has been used for the reasons discussed;
- (b) Provides more specifically for when an agent has actual authority, which may be expressed or implied. Many of these provisions derive from Part X of the CA 1950 and common law rules;
- (c) As discussed above, the actual authority of an agent may vary according to circumstances;

(vi) Clause 8:

- (a) Provides for apparent authority on the part of an agent. Apparent authority does not appear in Part X of the CA 1950 although it is an established common law principle. This provision has considered apparent authority as espoused by Bowstead and Reynolds on Agency and the American Restatement (as detailed in the Report). The provision is generic and does not attempt to provide in detail matters of apparent authority, the common law to be then referred;
- (b) Makes clear that the provision on apparent authority does not limit the operation of the doctrine of estoppel as the two concepts overlap to some degree. The draft Bill does not provide for the meaning of estoppel, the cases on estoppel being myriad and not always consistent in approach. Bowstead and

Reynolds on Agency does not agree with the approach to estoppel in the American Restatement. Part X of the CA 1950 does not provide for estoppel;

- (vii) Clause 9 provides for rights of an agent to payment and remuneration and to retain property and to certain indemnities and compensation, based on provisions in Part X of the CA 1950 with modifications;
- (viii) Clauses 10 and 11 provide for sub-agency situations, largely based on provisions in Part X of the CA 1950;
- (ix) Clause 12 provides for how and when a principal may ratify the acts of an agent and its ramifications, based on provisions in Part X of the CA 1950 with modifications;
- (x) Clause 13 provides for when an agency may terminate and its ramifications. It expands on the provisions in Part X of the CA 1950 with added provisions;
- (xi) Clause 14 provides for how an agency impacts on third parties dealing with it, largely based on provisions in Part X of the CA 1950;
- (xii) Clauses 15 to 21:
  - (a) Introduce for the first time provisions on powers of attorney applying to all of Malaysia. Part X of the CA 1950 does not provide expressly for powers of attorney;
  - (b) Requires that powers of attorney must be attested by particular people along similar lines to the requirements of the Powers of Attorney Act 1949 albeit with some modifications;
  - (c) Makes clear that the provisions on powers of attorney do not affect other requirements under other written laws for witnessing or registration of powers of attorney and rules relating to the execution of instruments by bodies corporate.

Separate and additional rules on the registration of powers of attorney under land laws will, as an illustration, continue to apply;

- (d) Provides that a power of attorney may be proven through a copy in the manner specified. This is based on the UK Powers of Attorney Act 1971;
  - (e) Provides that a power of attorney may be irrevocable in certain circumstances. The circumstances have been revised from those in the Powers of Attorney Act 1949 and are based on the UK Powers of Attorney Act 1971;
  - (f) Provides for the ramifications when a power of attorney is revoked particularly as regards donees and third parties;
  - (g) Makes clear that section 5 of the Civil Law Act 1956 does not apply as there is case law in Sabah which suggest its application in relation to powers of attorney and particularly, the reception of the UK Powers of Attorney Act 1971;
  - (h) Provides for a voluntary regime for the deposit of powers of attorney, subject to regulations made by the Minister. This differs from the mandatory regime in the Powers of Attorney Act 1949;
- (xiii) Clauses 22 and 23 provide expressly that agency matters may be in electronic form or effected by electronic means, as an option;
- (xiv) Clauses 24 to 30:
- (a) Provide that electronic agents (artificial intelligence) may be recognised as agents acting for a principal (with the principal liable in an agency context) in particular circumstances and

even though the electronic agent may not have legal personality or otherwise be capable of acting as an agent;

- (b) Provide that a person may be liable as principal in an agency context through a myriad of electronic agents and not just one;
  - (c) Provide that the liability of a principal in an agency context would be modified where the electronic agent is defective in the manners specified. In such a case, claims may be made for loss, damage and injury arising from the defect. The claims would be treated as if a claim under tort but with specific provisions to cater for the agent being an artificial intelligence, special provisions on evidence particularly as regards the difficulty of establishing a claim in relation to artificial intelligence and the apportionment of liability between various parties. Claims not covered by these provisions may still be actionable;
  - (d) Allow the Minister to make regulations including in respect of exemptions or modifications to some of the provisions on liability;
  - (e) Allow the Rules Committee to make rules relating to claims, under the Courts of Judicature Act 1964;
- (xv) Clause 31 modifies the application of seals in an agency context so as to remove some of the technical complexities applicable to the use of seals. It does not affect specific requirements imposed by other written law except in respect of subsection 67(3) of the Companies Act 2016. The exception is to obviate difficulties with statutory cooperations established under state ordinances and the requirement for their consent;
- (xvi) Clause 32 is to assist persons with disabilities in relation to agency arrangements;

- (xvii) Clause 33 provides for the status of rules of private international law in the context of the draft Bill;
- (xviii) Clause 34 repeals Part X of the CA 1950 and the Powers of Attorney Act 1949;
- (xix) Clause 35 provides for saving and transitional provisions as between the Bill and existing laws on agency and powers of attorney.

#### **2.1.13 Other appendices**

- (i) We have also attached appendices on policy statements, comparative matrix and consultations as referenced above.

## **2.2 Introduction**

2.2.1 This Report aims to review the agency law provisions within the CA 1950 with a view to modernisation and reform.<sup>1</sup>

2.2.2 The approach of this Report is to:

- (i) consider whether the current agency law provisions within the CA 1950 suffice without further change or addition;
- (ii) if changes or additions are necessary or advisable, then the manner and extent of the changes or additions;
- (iii) in order to consider the changes or additions, comparative and historical studies and reviews of existing or proposed contract or agency codes or legislation, case law, changes in society, commercial practice, technology and other circumstances, Malaysia and elsewhere;

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<sup>1</sup> Laws of Malaysia, Contracts Act 1950 (“CA 1950”), Act 136.

- (iv) consider whether any new legislation on agency law should take the form of wholly new legislation superseding the CA 1950 or merely amending the CA 1950;
- (v) consider whether illustrations found in the CA 1950 should continue to be incorporated in any new legislation containing the changes or additions;
- (vi) consider whether the new legislation on agency law should take the form of a comprehensive code for agency law along Continental European Civilian Codes or otherwise and whether it would be necessary or advisable to incorporate express provisions on this matter; and
- (vii) consider whether it would be necessary or advisable to incorporate saving and transitional provisions in any new legislation.

## 2.3 History and Background

2.3.1 The CA 1950 is based on the ICA 1872,<sup>2</sup> which was preceded by the recommendations of the Third Indian Law Commission, as set out in the East India (Contract Law) Report.<sup>3</sup>

2.3.2 The recommendations of the East India (Contract Law) Report were not wholly accepted and changes were made to the draft of the ICA before it finally passed into law.<sup>4</sup> The changes to the draft of the ICA 1872 on agency were not a substantive alteration to the ambit of agency matters, more drafting structures and a simplification of illustrations.<sup>5</sup>

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<sup>2</sup> M F Cheong, 'The Malaysian Contracts Act 1950: Some Legislative and Judicial Developments Towards a Modern Law of Contract' (2009) 36 JMCL 53.

<sup>3</sup> Warren Swain, 'History and Drafting of the Indian Contract Act 1872' in Krishnaprasad, N Venkatesan, S Swaminathan and U Varottil (eds), *Foundations of Indian Contract Law* (Oxford University Press 2024) 3–21; For the full citation of the East India (Contract Law) Report, see n 5.

<sup>4</sup> Gail Pearson, 'The Resignation of the Third Indian Law Commission: Who Makes Law?' (2020) 41(2) *Adelaide Law Review* 575.

<sup>5</sup> Comparison based on the Indian Contract Act 1872 (India Act 9 of 1872) ss 182–238 and House of Commons, *Copies of Papers Showing the Present Position of the Question of a Contract Law for India and of All Reports of the Indian Law Commissioners on the Subject of Contracts*, HC Paper No 239, Session 1867–68, 37–45 ('East India (Contract Law) Report').

2.3.3 The recommendations of the East India (Contract Law) Report proposed provisions on agency.<sup>6</sup> Aside from the provisions in the draft legislation relating to agency in the East India (Contract Law) Report, the sole comment in it on agency was to propose: “that a person who enters into a contract as an agent cannot enforce it if they were actually acting for themselves”.<sup>7</sup> The recommendations of the East India (Contract Law) Report contained illustrations to the proposed provisions on agency.<sup>8</sup>

2.3.4 The provisions of the ICA 1872 in its final iteration as adopted 1872 encompassed aspects of agency law, covering appointment and authority of agents, sub-agents, ratification, revocation/termination of authority, duties of principal and agent, effects on third-party contracts, and the presumption of a contract to the contrary. It is these provisions on agency which were substantially adopted in the CA 1950.<sup>9</sup> The final iteration of the ICA 1872 and the CA 1950 contain illustrations as with the draft legislation in the East India (Contract Law) Report.

2.3.5 Agency does not seem to have received as much attention in the context of the ICA 1872 relative to other areas of the ICA 1872. Sir Frederick Pollock’s *Principles of Contract at Law and in Equity* while discussing matters of agency law only made a passing reference to the ICA 1872.<sup>10</sup> The Law Commission of India, in its post-independence 13th Report (1958), discussed agency in the

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<sup>6</sup> House of Commons, n 5, 37–45.

<sup>7</sup> Ibid, 3, states “We propose to lay it down that a person with whom a contract has been entered into in the character of agent is not entitled to require the performance of it if he was, in reality, acting not as agent but on his own account. In defining the responsibility of a master for the misconduct of his servant, we have stopped a little short of the limits assigned to it by the English law. We think that the responsibility ought to cease as soon as the misconduct assumes the character of intentional wrongdoing.”

<sup>8</sup> Jeannie Marie Paterson and Elise Bant, ‘Legislative Design and the Codification Project’ in Krishnaprasad, N Venkatesan, S Swaminathan and U Varottil (eds), *Foundations of Indian Contract Law* (OUP 2024) 41, quoting House of Lords, *Returns and Papers Relative to the Affairs of the East India Company*, vol 4 (Sessional No 263, 30 June 1852) 27–28. The First Law Commission charged with drafting the Contract Act explained the aim of the illustrations as follows:

These illustrations will, we trust, greatly facilitate the understanding of law, and will at the same time often serve as a defence of law. In our definitions, we have often found ourselves under the necessity of sacrificing neatness and perspicuity to precision, and of using hard and awkward expressions which would convey our whole meaning and no more than our whole meaning. Such definitions standing by themselves would repel and perplex every reader ... we hope that when each of these definitions is followed by a collection of cases falling under it, and of cases which, though at first sight they appear to fall under it, do not really fall under it, the definitions and the reasons which led the adoption of it will be readily understood.

<sup>9</sup> CA 1950 (n 1), ss 135–191.

<sup>10</sup> Frederick Pollock, *Principles of Contract at Law and in Equity: Being a Treatise on the General Principles Concerning the Validity of Agreements, with a Special View to the Comparison of Law and Equity, and with References to the Indian Contract Act, and Occasionally to Roman, American, and Continental Law*, First American, from the Second English ed. (Cincinnati: Robert Clarke, 1881), 236–237.

context of the ICA 1872 but no amendments to the law of agency were implemented ultimately.<sup>11</sup>

2.3.6 We take the view that provisions on agency law in any new legislation should address common areas and developments in agency law where practicable. In this respect, we have considered in this Report:

- (i) A comparison of legislation, legal writings and codes or proposed codes, in Malaysia and elsewhere. The comparison benchmarks the CA 1950 and also references the Powers of Attorney Act 1949. Legislation, legal writings and codes or proposed codes compared are not restricted to those involving general agency law but also include those covering specific aspects of agency as well as technological and artificial intelligence matters, including, any which may be pertinent to approaches to agency even if not directly so;
- (ii) A review of the drafting approach taken in some foreign legislation where analogies with agency law may be drawn or where express provisions appear in relation to matters, such as, whether legislation is a code or not, the application of common law in the context of the legislation and the application of the legislation to foreign law. In this context, we have considered provisions in the New Zealand CCLA 2017 and the New Zealand Trusts Act 2019, the latter also because of similarities between agency law and trust law;
- (iii) A review of some of the committee reports abroad pertinent to agency law;
- (iv) A review of some Malaysian and Commonwealth cases and related materials pertinent to agency law;

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<sup>11</sup> Law Commission of India, *13th Report* (1958), 62–73. Despite the Law Commission’s record of successful law reforms, only 92 of its 277 reports have been implemented since independence, leaving many recommendations unaddressed.

- (v) A review of technology and artificial intelligence in the context of agency and of some pertinent legislation and approaches;
- (vi) A review on restrictions on limitations on liability and indemnities in favour of agents;
- (vii) A review on private international law and the application of foreign law in the context of agency.

2.3.7 Our conclusions and recommendations appear below. Amongst them, we think that the reformed agency law should take the form of legislation separate from the CA 1950 particularly with extensive new areas being recommended by us to be included including, in the areas of technology and artificial intelligence. We have set out below in this Report:

- (i) Our reasoning and discussions;
- (ii) A draft Bill in Appendix I containing our proposed legislation;
- (iii) The Policies of the Bill in Appendix II;
- (iv) The Comparison Matrix in respect of the Bill in Appendix III setting out a comparison with the existing provisions in Part X of the CA 1950 and the Powers of Attorney Act 1949 as well as other detailed commentary on the provisions of the Bill and their rationale;
- (v) The dialogue between us and National University Singapore in relation to agency law in Appendix IV;
- (vi) Proposals for engagement with stakeholders together with proposed questions for their consideration in Appendix V.

## 2.4 Comparison of Legislation and Codes or Proposals elsewhere with Malaysia

2.4.1 We have considered legislation and agency subject matter outside Malaysia (including, proposals for contract or agency codes) against the CA 1950. The table below sets out the comparison. The comparison does not attempt to set out at length each of the provisions in the matters compared. Rather, it is a comparison of the general subject matter. The comparison does not attempt to compare each provision in the legislation and agency subject matter compared and only what we consider to be some of the matters salient to the comparison. The comparison also mentions legislation in Malaysia on powers of attorney where the comparison requires. We have also added to our review albeit not as a comparison some of the provisions in the New Zealand Trusts Act 2019 particularly the provisions in Subparts 1 and 2 of Part 3 on Duties of trustee and Exemption and indemnity clauses. Reference to the fiduciary nature of both agents and trustees as discussed earlier. The comparison does not mention the CPA 1999 and the Irish legislation earlier referenced. These are discussed at a later stage of this Report when discussing artificial intelligence.

2.4.2 We have selected these for comparison. The contract or agency codes compared are proposals and have not been adopted. The agency matters compared not being legislation are based on the general subject matter on agency covered by Bowstead and Reynolds on Agency and the Restatement (Third) of Agency as detailed.<sup>12</sup> Legislation from other jurisdictions, including, some addressing matters of artificial intelligence, also appear as detailed:

2.4.3 The following table compares key statutory and common law sources relating to agency law across jurisdictions:

*See the following page for the detailed comparison table.*

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<sup>12</sup> William Bowstead and Francis Reynolds, *Bowstead and Reynolds on Agency on Agency* (23rd edn, Sweet & Maxwell 2024); American Law Institute, *Restatement of the Law of Agency, Third* (2006).

| McGregor's contract code                                                                 | CCLA                                                                                                                                                                     | CARs                                                                                                                                                    | Bowstead and Reynolds on Agency                                                                                                                                                                                | Powers of Attorney Act (UK)                                       | Restatement of the Law of Agency                                                                                                                                          | UETA                                                                                                                                                          | Guernsey Electronic Transactions Law                                                                                                                          | PCAC                                                                                                                                                                 | CA 1950                                                                  |
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| <b>Legislation and Codes/Proposals</b>                                                   |                                                                                                                                                                          |                                                                                                                                                         |                                                                                                                                                                                                                |                                                                   |                                                                                                                                                                           |                                                                                                                                                               |                                                                                                                                                               |                                                                                                                                                                      |                                                                          |
| Contract code : drawn up on behalf of the English Law Commission (McGregor, Harvey 1993) | <b>New Zealand</b><br>New Zealand Contract and Commercial Law Act 2017                                                                                                   | <b>United Kingdom</b><br>Commercial Agents (Council Directive) Regulations 1993 ("CARs")<br>[UK Statutory Instrument 1993 No. 3053]                     | <b>United Kingdom</b><br>Bowstead and Reynolds on Agency (Sweet & Maxwell, 2024)                                                                                                                               | <b>United Kingdom</b><br>Powers of Attorney Act 1971 [Chapter 27] | <b>United States</b><br>[Marquette Law Review, Vol. 20 Issue 3, Article 3]                                                                                                | <b>United States</b><br>Uniform Electronic Transactions Act ("UETA") 1999 (Uniform Law Commission)                                                            | <b>Guernsey</b><br>Electronic Transactions (Guernsey) Law, 2000 & The Electronic Transactions (Electronic Agents) (Guernsey) Ordinance, 2019                  | Proposed Code of Agency Contracts ("PCAC")<br><br>[Malayan Law Review, Vol. 13 No. 1]                                                                                | <b>Malaysia</b><br>Contracts Act 1950 [Act 136] (on Agency: s.135-s.191) |
| <b>Date of operation/Amendment</b>                                                       |                                                                                                                                                                          |                                                                                                                                                         |                                                                                                                                                                                                                |                                                                   |                                                                                                                                                                           |                                                                                                                                                               |                                                                                                                                                               |                                                                                                                                                                      |                                                                          |
| 1993                                                                                     | 1 September 2017                                                                                                                                                         | 1 January 1994                                                                                                                                          | 19 December 2023                                                                                                                                                                                               | 12 May 1971                                                       | 3 April 1936                                                                                                                                                              | 29 July 1999                                                                                                                                                  | 24 July 2000 & 1 March 2019                                                                                                                                   | July 1971                                                                                                                                                            | 1 January 1950                                                           |
| <b>Definitions / Interpretation of Agent</b>                                             |                                                                                                                                                                          |                                                                                                                                                         |                                                                                                                                                                                                                |                                                                   |                                                                                                                                                                           |                                                                                                                                                               |                                                                                                                                                               |                                                                                                                                                                      |                                                                          |
| No provision.                                                                            | <b>Interpretation</b><br>296. — mercantile agent means an agent who has, in the ordinary course of the agent's business as an agent, authority to—<br>(a) sell goods; or | <b>Interpretation, application and extent</b><br>2 — (1) In these Regulations— "commercial agent" means a self-employed intermediary who has continuing | <b>Agency and Authority</b><br>1— (1) Agency is the fiduciary relationship which exists between two persons, one of whom expressly or impliedly manifests assent that the other should act on his behalf so as | No provision.                                                     | <b>§ 1.01 Agency Defined</b><br>Agency is the fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent') that the | <b>Definitions</b><br>2—(6) "Electronic agent" means a computer program or an electronic or other automated means used independently to initiate an action or | <b>Electronic agents</b><br>14— (3) For the purposes of this section, "electronic agent" means a computer program or electronic or other automated means used | <b>Definition of Agency</b><br>1.1 — Agency is the consensual relationship in which one person appoints another to act in his behalf in a representative capacity to | "Agent" and "principal" defined.                                         |

|  |                                                                                                                               |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 |                                                                                                                                                                                                                                                                                                                                                                                |  |                                                                                                                                                          |                                                                                                                      |                                                                                                                                                                                                              |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       |  |
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|  | <p>(b) consign goods for the purpose of sale; or</p> <p>(c) buy goods; or</p> <p>(d) raise money on the security of goods</p> | <p>authority to negotiate the sale or purchase of goods on behalf of another person (the “principal”), or to negotiate and conclude the sale or purchase of goods on behalf of and in the name of that principal; but shall be understood as not including in particular:</p> <p>(i) a person who, in his capacity as an officer of a company or association, is empowered to enter into commitments binding on that company or association;</p> <p>(ii) a partner who is lawfully authorised to enter into</p> | <p>to affect his legal relations with third parties, and the other of whom similarly manifests assent so to act or so acts pursuant to the manifestation. The one on whose behalf the act or acts are to be done is called the principal. The one who is to act is called the agent. Any person other than the principal and the agent may be referred to as a third party</p> |  | <p>agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act.</p> | <p>respond to electronic records or performances in whole or in part, without review or action by an individual.</p> | <p>independently to initiate an action or to respond in whole or in part to information or actions in electronic form or communicated by electronic means, without review or action by a natural person.</p> | <p>effect contracts and other legal relations between the first person and the third persons.</p> <p><b>Definition of Agent</b></p> <p>1.1B —An Agent is one who represents another in contractual or other legal dealings with third persons.</p> <p><b>Definition of General Agent</b></p> <p>1.7A —A general agent is an agent empowered by his principal to conduct a series of transactions with a continuity of service.</p> <p><b>Definition of Special Agent</b></p> <p>1.7B —A special agent is an agent empowered by his principal to conduct a single transaction or a</p> |  |
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|                                                                                                                                                                                              |                                                                                                                                                                                                                                                                   | commitments binding on his partners;<br><br>(iii) a person who acts as an insolvency practitioner (as that expression is defined in section 388 of the Insolvency Act 1986(3)) or the equivalent in any other jurisdiction; |                                                                                                                                                                                                                              |               |                                                                                                                                                                                                                           |               |                                                                                                                                                                                                                                     | number of transactions without continuity of service.                                                                                                                                                                           |               |
| <b>Authority of Agent</b>                                                                                                                                                                    |                                                                                                                                                                                                                                                                   |                                                                                                                                                                                                                             |                                                                                                                                                                                                                              |               |                                                                                                                                                                                                                           |               |                                                                                                                                                                                                                                     |                                                                                                                                                                                                                                 |               |
| <b>Agent with authority to contract</b><br>621. — (1) Where, in negotiating a contract, a person is authorized to act for and is acting on behalf of another and it is apparent to the other | <b>Sale, pledge, or other disposition by agent in possession with owner's consent is valid</b><br><br>297.— (1) This section applies if a mercantile agent ( <b>A</b> ) is, with the consent of the owner of goods ( <b>B</b> ), in possession of the goods or of | No provision.                                                                                                                                                                                                               | <b>Agency and Authority</b><br>1— (2) In respect of the acts to which the principal so assents, the agent is said to have authority to act; and this authority constitutes a power to affect the principal's legal relations | No provision. | <b>§ 2.01 Actual Authority</b><br>An agent acts with actual authority when, at the time of taking action that has legal consequences for the principal, the agent reasonably believes, in accordance with the principal's | No provision. | <b>Legal effect of actions carried out by means of an electronic agent</b><br>2.3 —A contract may be made, formed or created by the interaction of electronic agents, acting on behalf of the parties, even where no natural person | <b>Actual Authority</b><br><br>3.1 —Actual Authority is the legal power in the agent, voluntarily delegated to him by the principal, to make contracts or affect other legal relations between his principal and third persons. | No provision. |

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| <p>negotiating party that such person is acting as agent on behalf of a principal, a contract is made between the principal and the other negotiating party. unless it can be shown that the agent and the other party intended to contract only with each other.</p> <p>(2) Where the other party is unaware, and it is not apparent, that the agent is acting on behalf of a principal, no contract is made between the principal and the other party.</p> <p><b>Agent with apparent or usual authority to contract</b></p> | <p>the documents of title to the goods.</p> <p>(2) A sale, a pledge, or any other disposition of the goods made by A, when acting in the ordinary course of business as a mercantile agent, is as valid as if A were expressly authorised by B to make the sale, pledge, or other disposition.</p> <p>(3) However, subsection (2) applies only if the person who takes the goods under the disposition —</p> <p>(a) acts in good faith; and</p> |  | <p>with third parties</p> <p>(3) Where such authority results from a manifestation of assent that the agent should represent or act for the principal expressly or impliedly made by the principal to the agent personally, the authority is called actual authority, express or implied. But the agent may also have authority resulting from such a manifestation made by the principal to a third party; such authority is called</p> | <p>manifestations to the agent, that the principal wishes the agent so to act.</p> <p><b>§ 2.02 Scope of Actual Authority</b></p> <p>(1) An agent has actual authority to take action designated or implied in the principal's manifestations to the agent and acts necessary or incidental to achieving the principal's objectives, as the agent reasonably understands the principal's manifestations and objectives when the agent determines how to act.</p> <p>(2) An agent's interpretation of the principal's manifestations is reasonable if it reflects any meaning known by the agent to be ascribed by the principal and, in</p> |  | <p>was aware of, or reviewed, the electronic agents' actions or the resulting terms.</p> | <p><b>Actual Authority: Express or Implied.</b></p> <p>3.2 —The actual authority of an agent may be express or implied.</p> <p><b>Express Actual Authority</b></p> <p>3.3 —Express actual authority is delegated to the agent in his contract of employment or subsequent directions from his principal in written or spoken words.</p> <p><b>Implied Actual Authority</b></p> <p>3.4 — Implied actual authority is that authority which the agent may reasonably infer from the express actual authority. It is the power in the agent to do all acts reasonably necessary or incidentally</p> |  |
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| <p>622. — (1) Where the agent does not have authority to contract on behalf of the principal but the principal has acted so as to lead the other party to contract in the reasonable belief that</p> <p>(a) the agent has such authority or</p> <p>(b) the agent has power to enter into the contract on behalf of whomever turns out to be his principal a contract is made between the principal and the other party.</p> | <p>(b) does not, at the time of the disposition, have notice that A has no authority to make the disposition.</p> <p>(4) Subsection (2) is subject to the rest of this subpart.</p> |  | <p>apparent authority.</p> <p>(4) A person may have the same fiduciary relationship with a principal where that person acts on behalf of that principal but has no authority to affect the principal's relations with third parties. Because of the fiduciary relationship such a person may also be called an agent</p> |  | <p>the absence of any meaning known to the agent, as a reasonable person in the agent's position would interpret the manifestations in light of the context, including circumstances of which the agent has notice and the agent's fiduciary duty to the principal.</p> <p>(3) An agent's understanding of the principal's objectives is reasonable if it accords with the principal's manifestations and the inferences that a reasonable person in the agent's position would draw from the circumstances creating the agency.</p> <p><b>§ 2.03</b><br/><b>Apparent Authority</b></p> |  |  | <p>appropriate to accomplish the express actual authority.</p> <p><b>Implied Actual Authority:</b><br/><b>Emergency.</b></p> <p>3.5 — In case of an emergency in which it is impracticable for the agent to communicate with the principal, an agent has implied actual authority to do all such acts for the purpose of protecting his principal from loss as would be done by any reasonable person of ordinary prudence, for his own account, under the circumstances.</p> <p><b>Apparent Authority</b></p> <p>3.7 — Apparent Authority is the legal power in the agent, though in excess</p> |  |
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|  |  |  |  |  | <p>Apparent authority is the power held by an agent or other actor to affect a principal's legal relations with third parties when a third party reasonably believes the actor has authority to act on behalf of the principal and that belief is traceable to the principal's manifestations.</p> <p><b>§ 3.03 Creation of Apparent Authority</b></p> <p>Apparent authority, as defined in § 2.03, is created by a person's manifestation that another has authority to act with legal consequences for the person who makes the</p> |  |  | <p>of his actual authority, to make contracts or affect other legal relations between his principal and third persons, arising from and in accordance with the statements or conduct of the principal to such third persons concerning the agent's authority.</p> <p><b>Apparent Authority: General Grant; Secret Limitations</b></p> <p>3.8 — A third person, informed by the principal of the appointment of the agent to his position or of the general grant of actual authority in the agent and uninformed of particular limitations thereon, may infer from the</p> |  |
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|  |  |  |  |  | <p>manifestation, when a third party reasonably believes the actor to be authorized and the belief is traceable to the manifestation.</p> |  |  | <p>appearance of authority thus created that the agent has the same authority as is normally and usually exercised by agents appointed to similar positions in that line of business or in that trade.</p> <p><b>Apparent Authority: Acquiescence in Disobedience</b></p> <p>3.9 — Acquiescence by the principal in a series of contracts or other legal relations effected by his agent with a third person in excess of the agent's actual authority creates apparent authority in the agent to effect similar contracts or legal relations with the same third person in the future.</p> |  |
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| <b>Sub-agent</b> |               |               |                                                                                                                                                                                                                                                                                                                                                                                                                                                          |               |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     |               |               |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             |                                  |
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| No provision.    | No provision. | No provision. | <b>Lien of Sub-Agents</b><br><br>68 — (1)<br>Except where otherwise expressly provided by statute, a sub-agent who is employed by an agent in circumstances where the agent has no actual or apparent authority to delegate the agent's functions has no lien over the goods or chattels of the principal as against the principal<br>(2) Where a sub-agent is employed by an agent in circumstances where the agent has actual or apparent authority to | No provision. | <b>§ 3.15 Subagency</b><br>(1) A subagent is a person appointed by an agent to perform functions that the agent has consented to perform on behalf of the agent's principal and for whose conduct the appointing agent is responsible to the principal. The relationships between a subagent and the appointing agent and between the subagent and the appointing agent's principal are relationships of agency as stated in § 1.01.<br>(2) An agent may appoint a subagent only if | No provision. | No provision. | <b>Definition of Subagent</b><br><br>7.1 — A subagent is a person, appointed by an agent acting within his actual or apparent authority, to perform functions undertaken by the agent for the principal, but for whose conduct the agent agrees with the principal to be primarily responsible.<br><br><b>No Implied Authority to Delegate Personal Tasks</b><br><br>7.2 — With the exception stated in Section 7.3 (v), actual authority in an agent to conduct a transaction does not create implied authority to delegate to another the | s.143-s.148 [refer to appendix]. |

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|  |  |  | <p>delegate without creating privity of contract between principal and sub-agent, the sub-agent—</p> <p>(a) has the same right of lien, general or particular, against the principal, over the goods and chattels of the principal, in respect of claims arising in the course of the sub-agency, as the sub-agent would have had against the agent if the agent had been the owner of the goods and chattels; and such right of lien is not liable</p> |  | <p>the agent has actual or apparent authority to do so.</p> |  |  | <p>performance of acts which the agent has expressly or impliedly undertaken to perform personally, including those requiring use of discretion, judgment or special skill of the agent.</p> <p><b>When Implied Authority to Delegate to Subagent</b></p> <p>7.3 — Unless otherwise agreed, authority to appoint a subagent is inferred from authority to conduct a transaction for the principal for the performance of which the agent is to be responsible to the principal if:</p> <p>(i) the authorized transaction cannot lawfully be performed</p> |  |
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|  |  |  | <p>to be defeated by any settlement between the principal and the agent to which the sub-agent is not a party;</p> <p>(b) has the same right of general lien over the goods and chattels of the principal in respect of all claims, whether arising in the course of the sub-agency or not, as the sub-agent would have had against the agent if the agent had been the owner of the goods and chattels; provided that, as against the principal, such right</p> |  |  |  |  | <p>by the agent in person;</p> <p>(ii) the agent is a corporation, partnership or other organization;</p> <p>(iii) the business is of such a nature or is to be conducted in such a place that it is impracticable for the agent to perform it in person;</p> <p>(iv) the appointment of subagents for the performance of such transactions is usual, or the principal has reason to know that the agent employs subagents; or</p> |  |
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|  |  |  | <p>of lien is available only to the extent of the lien, if any, to which the agent would have been entitled if the goods and chattels had been in the agent's possession; and</p> <p>(c) has the same right of lien, general or particular, over the goods and chattels of the principal, as the sub-agent would have had against the agent if the agent had been the owner of the goods and chattels, where that at the</p> |  |  |  |  | <p>(v) an unforeseen contingency arises in which it is impracticable to communicate with the principal and in which such an appointment is necessary in order to protect the interests of the principal entrusted to the agent.</p> <p><b>Duties of Subagent to Principal</b></p> <p>7.6A — Unless otherwise agreed, a subagent who knows of the existence of the agent's principal has the same duties to that principal as would an agent appointed by the principal, except the duties dependent upon</p> |  |
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|                     |               |               |                                                                                                                                                                                                                                                                              |               |                                                                                                                                                                                                                                                                                                        |               |               | <p>the existence of a contract.</p> <p><b>Duties of Subagent to Agent</b></p> <p>7.6B — Unless otherwise agreed, a subagent has the same duties to the agent as an agent has to a principal.</p>                                                     |                                  |
| <b>Ratification</b> |               |               |                                                                                                                                                                                                                                                                              |               |                                                                                                                                                                                                                                                                                                        |               |               |                                                                                                                                                                                                                                                      |                                  |
| No provision.       | No provision. | No provision. | <p><b>Ratification</b></p> <p>13 — Where an act is done purportedly in the name or on behalf of another by a person who has no actual authority to do that act, the person in whose name or on whose behalf the act is done may, if the third party had believed the act</p> | No provision. | <p><b>§ 4.01 Ratification Defined</b></p> <p>1) Ratification is the affirmance of a prior act done by another, whereby the act is given effect as if done by an agent acting with actual authority.</p> <p>(2) A person ratifies an act by</p> <p>(a) manifesting assent that the act shall affect</p> | No provision. | No provision. | <p><b>Definition of Ratification</b></p> <p>4.1 — Ratification is the subsequent affirmance by one person of acts which were previously performed, professedly on his behalf, by another who was without actual or apparent authority to so act.</p> | s.149-s.153 [refer to appendix]. |

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|  |  |  | <p>to be authorised, by ratifying the act, make it as valid and effectual, subject to the provisions of Articles 14 to 20, as if it had been originally done by his authority, whether the person doing the act was an agent exceeding his authority, or was a person having no authority to act for him at all.</p> <p><b>What Constitutes Ratification</b></p> <p>17 — (1) Ratification may be express or by conduct.</p> <p>(2) An express ratification is a manifestation by one on whose behalf an unauthorised act has</p> |  | <p>the person's legal relations, or</p> <p>(b) conduct that justifies a reasonable assumption that the person so consents.</p> <p>(3) Ratification does not occur unless</p> <p>(a) the act is ratifiable as stated in § 4.03,</p> <p>(b) the person ratifying has capacity as stated in § 4.04,</p> <p>(c) the ratification is timely as stated in § 4.05, and</p> <p>(d) the ratification encompasses the act in its entirety as stated in § 4.07.</p> <p><b>§ 4.02 Effect of Ratification</b></p> <p>(1) Subject to the exceptions stated in subsection (2), ratification retroactively</p> |  |  | <p><b>Ratification: Express or Implied</b></p> <p>4.2 — Ratification may be express or it may be implied by the conduct of the person on whose behalf the acts are done.</p> <p><b>Implied Ratification</b></p> <p>4.3 — Implied ratification may be established by any conduct of the purported principal manifesting his consent to become a party to the transaction after he has been informed of all material facts of the transaction</p> <p><b>Purporting to Act as Agent</b></p> <p>4.7 — Ratification is not effective unless the agent or purported</p> |  |
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|  |  |  | <p>been done that he treats the act as authorised and becomes a party to the transaction in question. It need not be communicated to the third party.</p> <p>(3) Ratification will be implied whenever the conduct of the person in whose name or on whose behalf the act or transaction is done or entered into is such as to clear evidence that he adopts or recognises such act or transaction : and may be implied from the</p> |  | <p>creates the effects of actual authority.</p> <p>(2) Ratification is not effective:</p> <p>(a) in favor of a person who causes it by misrepresentation or other conduct that would make a contract voidable;</p> <p>(b) in favor of an agent against a principal when the principal ratifies to avoid a loss; or</p> <p>(c) to diminish the rights or other interests of persons, not parties to the transaction, that were acquired in the subject matter prior to the ratification.</p> |  |  | <p>agent professed to act for the person who subsequently attempts to ratify.</p> <p><b>Affirmance After Withdrawal of Third Person</b></p> <p>4.9 — Ratification is effective only if the affirmance of the transaction occurs before the third person has manifested his withdrawal from it either to the person on whose behalf the act was done or to the agent or purported agent.</p> |  |
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|                     |               |                                                                                                                            | <p>mere acquiescence or inactivity of the principal.</p> <p>(4) The adoption of part of a transaction operates as a ratification of the whole.</p> <p>(5) It is not necessary that the ratification of a written contract should be in writing, but the execution of a deed can only be ratified by deed.</p> |               |               |               |               |               |               |
| <b>Remuneration</b> |               |                                                                                                                            |                                                                                                                                                                                                                                                                                                               |               |               |               |               |               |               |
| No provision.       | No provision. | <p><b>Form and amount of remuneration in absence of agreement</b></p> <p>6 — (1) In the absence of any agreement as to</p> | <p><b>Whether Agent Entitled to Any Remuneration</b></p> <p>55 — (1) An agent is only entitled to remuneration for the agent's</p>                                                                                                                                                                            | No provision. | No provision. | No provision. | No provision. | No provision. | No provision. |

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|  |  | <p>remuneration between the parties, a commercial agent shall be entitled to the remuneration that commercial agents appointed for the goods forming the subject of his agency contract are customarily allowed in the place where he carries on his activities and, if there is no such customary practice, a commercial agent shall be entitled to reasonable remuneration taking into account all the aspects of the transaction.</p> <p>(2) This regulation is without prejudice to the application</p> | <p>services if either the express or implied terms of the agency contract, if any, so provide or the agent has a right in restitution to claim on a quantum meruit.</p> <p>(2) Where the contract contains express terms providing for remuneration to be paid, the agent cannot normally claim remuneration other than in accordance with those terms. In the absence of such express terms the right to claim any remuneration, and the amount and terms of</p> |  |  |  |  |  |  |
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|  |  | <p>of any enactment or rule of law concerning the level of remuneration.</p> <p>(3) Where a commercial agent is not remunerated (wholly or in part) by commission, regulations 7 to 12 below shall not apply.</p> | <p>payment of such remuneration, are determined by such terms as may be implied into the contract.</p> <p>(3) In deciding what terms are to be implied the court will have regard to all the circumstances of the case, including the nature and length of the services, the express terms of the contract and the customs, usages and practices of the particular area of activity. In the absence of any factors to the contrary, a</p> |  |  |  |  |  |  |
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|                                            |                                                                                                                                                                                                                                                                                                                                                                                                  |                                                                                                                                                                                                                                                                                                                                                                                                | term will be implied that the agent is entitled to reasonable remuneration.                                                                                                                                                                                                                                                                                                                                                                                     |                                                                                                                                                                                                                                                                                                                                                                                                     |                                                                                                                                                                                                                                                                                                                                                                                                                      |               |               |               |                                                                                                                                                                    |
| <b>Revocation of Authority/Termination</b> |                                                                                                                                                                                                                                                                                                                                                                                                  |                                                                                                                                                                                                                                                                                                                                                                                                |                                                                                                                                                                                                                                                                                                                                                                                                                                                                 |                                                                                                                                                                                                                                                                                                                                                                                                     |                                                                                                                                                                                                                                                                                                                                                                                                                      |               |               |               |                                                                                                                                                                    |
| No provision.                              | <b>Effect of withdrawal or expiry of owner's consent</b><br>299. — (1) This section applies if a mercantile agent has, with the consent of the owner of goods, been in possession of the goods or of the documents of title to the goods.<br>(2) A sale, a pledge, or any other disposition that would have been valid if the consent of the owner had continued is valid despite the withdrawal | <b>Conversion of agency contract after expiry of fixed period</b><br>14 — An agency contract for a fixed period which continues to be performed by both parties after that period has expired shall be deemed to be converted into an agency contract for an indefinite period.<br><b>Minimum periods of notice for termination of agency contract</b><br>15 — (1) Where an agency contract is | <b>Revocation of authority</b><br>12-022 — It is submitted that authority is of its nature revocable in the absence of relevant rules making it irrevocable. This follows from the law's recognition of the dangers of conferring on another a power to bind oneself. The question whether authority has actually been revoked as between principal and agent must depend on the law governing the grant of authority, unaffected by any contract between them: | <b>Protection of donee and third persons where power of attorney is revoked.</b><br>5. — (1) A donee of a power of attorney who acts in pursuance of the power at a time when it has been revoked shall not, by reason of the revocation, incur any liability (either to the donor or to any other person) if at that time he did not know that the power had been revoked.<br>(2) Where a power of | <b>§ 3.06 Termination of Actual Authority—In General</b><br>An agent's actual authority may be terminated by:<br>(1) the agent's death, cessation of existence, or suspension of powers as stated in § 3.07(1) and (3); or<br>(2) the principal's death, cessation of existence, or suspension of powers as stated in § 3.07(2) and (4); or<br>(3) the principal's loss of capacity, as stated in § 3.08(1) and (3); | No provision. | No provision. | No provision. | Notice requirement: section 154. CA 1950 did not include details on the time period of the notice.<br>No provision on right of agent to compensation or indemnity. |

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|  | <p>or expiry of the consent.</p> <p>(3) However, subsection (2) applies only if the person who takes the goods under the disposition does not, at the time of the disposition, have notice that the consent has been withdrawn or has expired.</p> | <p>concluded for an indefinite period either party may terminate it by notice.</p> <p>(2) The period of notice shall be—</p> <p>(a) 1 month for the first year of the contract;</p> <p>(b) 2 months for the second year commenced ;</p> <p>(c) 3 months for the third year commenced and for the subsequent years; and the parties may not agree on any shorter periods of notice.</p> <p>(3) If the parties agree on longer periods than those laid</p> | <p>this would on the view adopted in this chapter be the law governing the external contract. This is an example of the help afforded by the recognition of the independence of the grant of authority from the accompanying contract. The revocation may or may not be a breach of such a contract.</p> <p>However, that need not affect third parties. Thus apparent authority under the law governing the external transaction may persist despite internal revocation of authority as between principal and agent (unless the third party has notice of it), and the existence of apparent</p> | <p>attorney has been revoked and a person, without knowledge of the revocation, deals with the donee of the power, the transaction between them shall, in favour of that person, be as valid as if the power had then been in existence.</p> <p>(3) Where the power is expressed in the instrument creating it to be irrevocable and to be given by way of security then, unless the person dealing with the donee knows that it was not in fact given</p> | <p>or</p> <p>(4) an agreement between the agent and the principal or the occurrence of circumstances on the basis of which the agent should reasonably conclude that the principal no longer would assent to the agent's taking action on the principal's behalf, as stated in § 3.09; or</p> <p>(5) a manifestation of revocation by the principal to the agent, or of renunciation by the agent to the principal, as stated in § 3.10(1); or</p> <p>(6) the occurrence of circumstances specified by statute.</p> |  |  |  |  |
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|  |  | <p>down in paragraph (2) above, the period of notice to be observed by the principal must not be shorter than that to be observed by the commercial agent.</p> <p>(4) Unless otherwise agreed by the parties, the end of the period of notice must coincide with the end of a calendar month.</p> <p>(5) The provisions of this regulation shall also apply to an agency contract for a fixed period where it is converted</p> | <p>authority comes under the normal rules applicable to such authority in a case between principal and third party. Under English law at any rate it is arguable that if the authority is revoked by death, it cannot survive even within a doctrine of apparent authority, for the principal has simply been removed. It is submitted elsewhere in this work that this reasoning should in any case no longer be permitted to affect the normal operation of the doctrine of apparent authority. In any case it is a rule of English law, applicable where English law applies. Termination of authority by</p> | <p>by way of security, he shall be entitled to assume that the power is incapable of revocation except by the donor acting with the consent of the donee and shall accordingly be treated for the purposes of subsection (2) of this section as having knowledge of the revocation only if he knows that it has been revoked in that manner.</p> <p>(4) Where the interest of a purchaser depends on whether a transaction between the donee of a power of attorney</p> | <p><b>§ 3.10<br/>Manifestation<br/>Terminating<br/>Actual<br/>Authority</b></p> <p>(1) Notwithstanding any agreement between principal and agent, an agent's actual authority terminates if the agent renounces it by a manifestation to the principal or if the principal revokes the agent's actual authority by a manifestation to the agent. A revocation or a renunciation is effective when the other party has notice of it.</p> <p>(2) A principal's manifestation of revocation is, unless otherwise agreed, ineffective to terminate a power given as security or to</p> |  |  |  |  |
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|  |  | <p>under regulation 14 above into an agency contract for an indefinite period subject to the proviso that the earlier fixed period must be taken into account in the calculation of the period of notice.</p> | <p>lack of mental capacity, insolvency or bankruptcy is apt to be dealt with specifically by statute, though questions of the conflict of laws application of such statutes could undoubtedly arise. In England and Wales the law applicable to certain aspects of a lasting power of attorney is now governed by the Hague Convention of 2000 on the International Protection of Adults, which attributes jurisdiction primarily to the authorities of the adult's habitual residence, but Article 15 of</p> | <p>and another person was valid by virtue of subsection (2) of this section, it shall be conclusively presumed in favour of the purchaser that that person did not at the material time know of the revocation of the power if—</p> <p>(a) the transaction between that person and the donee was completed within twelve months of the date on which the power came into operation; or</p> <p>(b) that person makes a statutory</p> | <p>terminate a proxy to vote securities or other membership or ownership interests that is made irrevocable in compliance with applicable legislation. See §§ 3.12- 3.13.</p> <p><b>§ 3.11</b><br/> <b>Termination of Apparent Authority</b><br/> (1) The termination of actual authority does not by itself end any apparent authority held by an agent.<br/> (2) Apparent authority ends when it is no longer reasonable for the third party with whom an agent deals to believe that the agent continues to act with actual authority.</p> |  |  |  |  |
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|  |  |  | which permits the designation of an applicable law in certain circumstances. | <p>declaration, before or within three months after the completion of the purchase, that he did not at the material time know of the revocation of the power.</p> <p>(5) Without prejudice to subsection (3) of this section, for the purposes of this section knowledge of the revocation of a power of attorney includes knowledge of the occurrence of any event (such as the death of the donor) which has the effect of revoking the power.</p> |  |  |  |  |  |
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|                                  |               |                                                                                                                                                                                                                     |               | <p>(6) In this section “purchaser” and “purchase” have the meanings specified in section 205(1) of the Law of Property Act 1925.</p> <p>(7) This section applies whenever the power of attorney</p> |                                                                                                                                                                                                                                   |               |               |                                                                                                                                                                                                                                                     |                 |
| <b>Principal’s Duty to Agent</b> |               |                                                                                                                                                                                                                     |               |                                                                                                                                                                                                     |                                                                                                                                                                                                                                   |               |               |                                                                                                                                                                                                                                                     |                 |
| No provision.                    | No provision. | <p><b>Duties of a principal to his commercial agent</b></p> <p>4 — (1) In his relations with his commercial agent a principal must act dutifully and in good faith.</p> <p>(2) In particular, a principal must—</p> | No provision. | No provision.                                                                                                                                                                                       | <p><b>§ 2.07 Restitution of Benefit</b></p> <p>If a principal is unjustly enriched at the expense of another person by the action of an agent or a person who appears to be an agent, the principal is subject to a claim for</p> | No provision. | No provision. | <p><b>Definition of Principal</b></p> <p>1.1A — A Principal is one who appoints another to act for and represent him in contractual or other legal dealings with third persons.</p> <p><b>Comment on Section 1.1</b></p> <p>The Principal-agent</p> | S. 175 – s.178. |

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|  |  | <p>(a) provide his commercial agent with the necessary documentation relating to the goods concerned;</p> <p>(b) obtain for his commercial agent the information necessary for the performance of the agency contract, and in particular notify his commercial agent within a reasonable period once he anticipates that the volume of commercial transactions will be significantly lower than that which the commercial agent could normally</p> |  |  | restitution by that person. |  |  | <p>relationship, though usually an employment relation based on contract, needs only the consent of the parties and may be gratuitous. The representative character of the agent makes it a more particular relationship than that of master and servant. In the latter, a master employs a servant to do physical or mental work entirely under the control of the master and without power to create legal relations between the master and the third persons. In spite of these basic distinctions, a person whose basic employment status is that of servant can be delegated limited or special agency</p> |  |
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|                                  |                                                                                    | <p>have expected.</p> <p>(3) A principal shall, in addition, inform his commercial agent within a reasonable period of his acceptance or refusal of, and of any non-execution by him of, a commercial transaction which the commercial agent has procured for him.</p> |                                                                                                                                                                                               |               |               |               |               | powers by his master. |                 |
| <b>Agent's Duty to Principal</b> |                                                                                    |                                                                                                                                                                                                                                                                        |                                                                                                                                                                                               |               |               |               |               |                       |                 |
| No provision.                    | Principal remains bound unless the third party had notice: section 299(2) and (3). | <p><b>Duties of a commercial agent to his principal</b></p> <p>3 — (1) In performing his activities a commercial agent must look after the interests of his</p>                                                                                                        | <p><b>Agent's fiduciary duties to principal</b></p> <p>12-032 — In so far as general fiduciary duties apply between principal and agent, it could be said that these are non-contractual.</p> | No provision. | No provision. | No provision. | No provision. | No provision.         | S.164 – s. 174: |

|  |  |                                                                                                                                                                                                                                                                                                                                                                                                         |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                         |  |  |  |  |  |  |
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|  |  | <p>principal and act dutifully and in good faith.</p> <p>(2) In particular, a commercial agent must—</p> <p>(a) make proper efforts to negotiate and, where appropriate, conclude the transactions he is instructed to take care of;</p> <p>(b) communicate to his principal all the necessary information available to him;</p> <p>(c) comply with reasonable instructions given by his principal.</p> | <p>There are certainly dicta that fiduciary duties are separate from any related contract. There are also indications that the duty is or can be contractual. In the UK, if the duty is regarded as contractual, the Rome I Regulation would apply. In so far as the duty is characterised as non-contractual this might bring such duties under the Regulation on the Law Applicable to Non-Contractual Obligations. However, the effect of that Regulation seems to be that such duties should often be regarded as arising in connection with the contract between principal and</p> |  |  |  |  |  |  |
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|                                                        |                                            |               | agent for the purposes of that Regulation and hence governed by the law governing that contract. So by one means or another (but more probably by virtue of Rome I) the law governing any contract between principal and agent seems likely normally to apply to such duties. |               |               |               |               |                                                                                                                                                                                                                                                                               |                                  |
| <b>Effect of Agency on Contract with Third Persons</b> |                                            |               |                                                                                                                                                                                                                                                                               |               |               |               |               |                                                                                                                                                                                                                                                                               |                                  |
| No provision.                                          | Express authorized needed: section 297(2). | No provision. | <b>Effect of representations where third party also acts through agents</b><br>8-024 — The foregoing paragraphs are premised on a third party who acts directly. It is, however, part of regular commerce for both sides to the transaction to act through                    | No provision. | No provision. | No provision. | No provision. | <b>Principal: Disclosed and Unnamed</b><br><br>5.1 — Unless designated as undisclosed, the term principal in this article shall include disclosed principals, those whose existence as principal and name is revealed to the third person; and unnamed or partially disclosed | s.179-s.183 [refer to appendix]. |

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|  |  |  | agents, and this will necessarily be the case where the third party is a company. It is obvious that for the purposes of those paragraphs it is sufficient if the agent acting for the third party was aware of the existence of the representations even if that agent's own principal was not. It will not normally matter that the third party's agent gained the relevant knowledge before being appointed. Equally, if the third party is aware of the representation, it will not matter if the agent appointed to effect the |  |  |  |  | principals, those whose existence as principals is revealed to the third person but whose names are not revealed to the third person.<br><br><b>Liabilities Based on Actual and Apparent Authority</b><br><br>5.2 — A principal and a third person are mutually liable in all contracts made by an agent acting in behalf of the principal within the agent's actual or apparent authority, as if the contracts had been made by the principal in person, with the exceptions noted in Sections 5.3, 5.4 and 5.5. |  |
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|  |  |  | <p>transaction is not. The key principle is that the third party needs to show reliance on the representation, and one cannot rely if one does not know. That principle will need to guide the situation where a third party uses multiple agents in a transaction (as will be common where the third party is a company). It follows that it would not normally be sufficient that an agent of the third party who was not in any way engaged in the transaction was aware of the representation, if the parties so engaged were not. As to the position where</p> |  |  |  |  |  |  |
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|                                            |                                           |               | the third party's agent knows that the other agent lacks actual authority, see below, para.8-051. |                                        |               |               |                                                                                                                                                                                                                                                                                                                   |                                  |                                  |
| <b>Presumption of Contract to Contrary</b> |                                           |               |                                                                                                   |                                        |               |               |                                                                                                                                                                                                                                                                                                                   |                                  |                                  |
| No provision.                              | No provision.                             | No provision. | No provision.                                                                                     | No provision.                          | No provision. | No provision. | <b>Presumption of intention to create a legally binding contract.</b><br><br>3 — Where an electronic agent has acted on behalf of a person for the purposes of the making, formation or creation of a contract, there is a rebuttable presumption that that person intended to create a legally binding contract. | No provision.                    | s.184-s.191 [refer to appendix]. |
| <b>Powers of Attorney</b>                  |                                           |               |                                                                                                   |                                        |               |               |                                                                                                                                                                                                                                                                                                                   |                                  |                                  |
| No provision.                              | <b>Temporary modification relating to</b> | No provision. | <b>Powers of attorney</b>                                                                         | <b>Execution of powers of attorney</b> | No provision. | No provision. | No provision.                                                                                                                                                                                                                                                                                                     | <b>Implied Actual Authority:</b> |                                  |

|  |                                                                                        |  |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          |  |  |  |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      |  |
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|  | <p><b>powers of attorney and outbreak of COVID-19</b></p> <p>218A--<br/>[Repealed]</p> |  | <p>2-039 — power of attorney is “a formal instrument by which one person empowers another to represent him, or act in his stead for certain purposes”. It may confer general or particular powers. Before 1971 it was not necessary that such an instrument be a deed, though an unsealed document might not often be called a power of attorney and if the authority to execute deeds was to be conferred it would require to be conferred by deed under the rule stated in the next Article. Now, however, the Powers of</p> | <p>1 — (1) An instrument creating a power of attorney shall be executed as a deed by the donor of the power.</p> <p><b>Effect of general power of attorney in specified form</b></p> <p>1o — (1) Subject to subsection (2) of this section, a general power of attorney in the form set out in Schedule 1 to this Act, or in a form to the like effect but expressed to be made under this Act, shall operate to confer—</p> <p>(a) on the donee of the power; or</p> <p>(b) if there is more than one donee, on the donees acting jointly or acting</p> |  |  |  | <p><b>Power of Attorney</b></p> <p>3.6 —When agency is created by a formal power of attorney, implied actual authority shall be strictly construed under the following two rules:</p> <p>(i) Unless otherwise agreed, general expressions used in delegating actual authority to an agent are limited in application to acts done to execute the specific transactions to which the authority primarily relates.</p> <p>(ii) Specific authorization of particular acts implies that more general</p> |  |
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|  |  |  | <p>Attorney Act 1971 s.1(1), as amended by the Law of Property (Miscellaneous Provisions) Act 1989, requires that instruments creating powers of attorney be executed as deeds: the requirements are given in the next Article. The Act does not define the term “power of attorney”: presumably what is referred to is a formal grant of power, especially of general power to represent a person in all matters. It is difficult to believe that it is intended to affect any conferring of authority which could previously have been effected</p> | <p>jointly or severally, as the case may be, authority to do on behalf of the donor anything which he can lawfully do by an attorney.</p> <p>(2) [F16Subject to section 1 of the Trustee Delegation Act 1999, this section] does not apply to functions which the donor has as a trustee or personal representative or as a tenant for life or statutory owner within the meaning of the Settled Land Act 1925.</p> |  |  |  | <p>authority is not intended.</p> |  |
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|               |                                                                                                                                                                                                  |               | without a deed. Nor does the Act state what is to happen if a power of attorney is executed other than by deed. But where an appointment purports to be by deed, and the document is for some reason ineffective as a deed, the appointment may sometimes be valid as an appointment in writing. |                                                                                                                                                                                             |               |               |                                                                                                                                                                                                   |                                                                                                                                                                                               |  |
| <b>Seals</b>  |                                                                                                                                                                                                  |               |                                                                                                                                                                                                                                                                                                  |                                                                                                                                                                                             |               |               |                                                                                                                                                                                                   |                                                                                                                                                                                               |  |
| No provision. | <b>Legal requirement that signature or seal be witnessed</b><br>227--(1) A legal requirement for a signature or a seal to be witnessed is met by means of a witness's electronic signature if, — | No provision. | <b>Exercise of authority on behalf of corporations</b><br>2-038 — Until 1960 the basic rule was that a corporation must contract under seal: thus a corporation could only contract using agents who had themselves been appointed under                                                         | <b>Execution of instruments etc. by donee of power of attorney.</b><br>7— (1) If the donee of a power of attorney is an individual, he may, if he thinks fit—<br>(a) execute any instrument | No provision. | No provision. | <b>Signatures, etc.</b><br>4— A signature, seal, attestation or notarisation shall not be denied legal effect, validity, enforceability or admissibility solely because it is in electronic form. | <b>Sealed Contract or Negotiable Instruments</b><br>5.3 —In the absence of specific statutory authorization, a principal is not liable on a sealed contract or conveyance nor on a negotiable |  |

|  |                                                                                                                                                                                                                                                                                                                                                                                                                             |  |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    |                                                                                                                                                                                                                                                                                                                                                                                                                              |  |  |  |                                                                                        |  |
|--|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--|--|--|----------------------------------------------------------------------------------------|--|
|  | <p>(a) in the case of the witnessing of a signature, the signature to be witnessed is an electronic signature that complies with section 226; and</p> <p>(b) in the case of the witnessing of a signature or a seal, the electronic signature of the witness—</p> <p>(i) adequately identifies the witness and adequately indicates that the signature or seal has been witnessed; and</p> <p>(ii) is as reliable as is</p> |  | <p>seal. But the rule had many exceptions and was abolished completely by the Corporate Bodies Contracts Act 1960, whereby a corporation can make contracts by means of any person acting under its authority, express or implied, in the same manner as a private person. Thus a corporation can appoint an agent by parol where a private person could do so, by means of any person acting under its authority, express or implied. Companies formed under the relevant companies legislation had long been subject to much more informal requirements, and that generally remains the case</p> | <p>with his own signature, and]</p> <p>(b) do any other thing in his own name, by the authority of the donor of the power; and any instrument executed or thing done in that manner shall, subject to subsection (1A) of this section, be as effective as if executed by the donee in any manner which would constitute due execution of that instrument by the donor or, as the case may be, as if done by the donee in</p> |  |  |  | <p>instrument signed by his agent unless the principal is therein named as a party</p> |  |
|--|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--|--|--|----------------------------------------------------------------------------------------|--|

|  |                                                                                                                                                                                                                                                                                                                                                                                                                                    |  |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 |                         |  |  |  |  |  |  |
|--|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------|--|--|--|--|--|--|
|  | <p>appropriate given the purpose for which, and the circumstances in which, the witness's signature is required.</p> <p>(2) However, a legal requirement for a signature or seal to be witnessed, if that signature or seal relates to information legally required to be given to a person, is met by means of a witness's electronic signature only if that person consents to receiving the witness's electronic signature.</p> |  | <p>under the Companies Act 2006. Where writing or other formalities are required by a statute, those requirements will generally be tracked where the party is a company. In circumstances where authority must be exercised by a board or other committee, normally the board will have actual authority only where the decision results from a properly called and held meeting. Similarly, if the matter requires prior approval by shareholders, normally a resolution will have validity only where the relevant meeting was properly called and held.</p> | the name of the donor]. |  |  |  |  |  |  |
|--|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------|--|--|--|--|--|--|

2.4.4 Below are some of our thoughts from review of the above:

(i) Common traits

We discerned some common traits on agency subject matter covered by the above (where their coverage concerned agency in general). The definitions or language might not be exactly the same but they are similar:

- (a) “agent”
- (b) “authority”
- (c) “principal”
- (d) “ratification”
- (e) “revocation”
- (f) “sub-agent”
- (g) “powers of attorney”

Differences in approach or language or terminology exist though. Some illustrations:

- (a) “manifest assent” is used in the definition of agency in Bowstead and Reynolds on Agency and in the Restatement (Third) of Agency. The CA 1950 together with others adopt the more traditional language of “consent” in relation to agency. We have discussed this further in Paragraph 5.0 of this Report.
- (b) “apparent authority” appears variously including in Bowstead and Reynolds on Agency and in the Restatement (Third) of Agency but not in the CA 1950. We have discussed this further in Paragraphs 4.0 and 5.0.

- (c) “estoppel” appears variously including in Bowstead and Reynolds on Agency and in the Restatement (Third) of Agency but not in the CA 1950. We have discussed this further in Paragraphs 4.0 and 5.0.
- (d) capacity of an agent appears variously including in Bowstead and Reynolds on Agency and in the Restatement (Third) of Agency. It also appears in the CA 1950. We have discussed this further in Paragraphs 4.0 and 5.0. On a related subject, we have also discussed disability in agency in the context of persons with capacity but subject to disability in Paragraph 6.0.
- (e) agent as fiduciary appears variously including in Bowstead and Reynolds on Agency and in the Restatement (Third) of Agency. We have discussed this further in Paragraphs 4.0 and 5.0.
- (f) the use of seals in agency. This appears in the PCAC. We have discussed this further in Paragraph 6.0.
- (g) We have discussed other matters in Paragraphs 4.0 and 5.0 too.
- (ii) Artificial intelligence and technology
  - (a) Our comparison above shows that various jurisdictions have introduced provisions relating to artificial intelligence and technology in the context of contract or agency. The CA 1950 does not contain similar provisions for obvious reasons. We have discussed artificial intelligence and technology in the context of agency in Paragraph 7.0.
- (iii) Powers of attorney
  - (a) We have discussed differences in approach to powers of attorney in Paragraph 6.0. A comparison of legislation and approach between jurisdictions shows some differences.

#### 2.4.5 Further discussion below

Our further thoughts and conclusions arising from the comparison above appear below.

### 2.5 Foreign Committee Reports on Agency

2.5.1 We referenced the Third Indian Law Commission's East India (Contract Law) Report to understand the drafting context and rationale of the CA 1950 which is based on the ICA 1872.<sup>13</sup>

2.5.2 Additionally, we have reviewed post-independence reports from the Law Commission of India, including the 13th Report (1958), 97th Report (1984), and 103rd Report (1984), to identify potential issues in the current legislation for reference in drafting reforms.<sup>14</sup> Among these reports, only the 13th Report (1958) in Part II: Proposals Relating to Section provides a detailed examination of the ICA 1872. It offers insights and recommendations on various provisions, including agency law.<sup>15</sup> Much of the recommendations on agency law focus on drafting matters, the most salient recommendations being:

- (i) A recommendation concerning the capacity to act as principal and agent under sections 183 and 184 of the ICA 1872 (sections 135 and 136 of the CA 1950). The Law Commission of India proposed consolidating both provisions into a single revised section clarifying that while any person may act as an agent between a principal and third parties, persons who are not of the age of majority or of sound mind cannot be held liable either to the principal or to third parties. The revised provision also clarified that a principal's capacity to appoint an agent should correspond to their own legal capacity to perform the act or enter into the contract, thereby extending the section to include legal persons such as corporations. We

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<sup>13</sup> House of Commons, n 5.

<sup>14</sup> Law Commission of India, *13th Report* (n 11), *97th Report (1984)*, and *103rd Report (1984)*.

<sup>15</sup> Law Commission of India, n 11, 62–73.

have considered some aspects of this recommendation, see Paragraph 5.2.4.

- (ii) A recommendation concerning the definitions of express and implied authority under section 182 of the ICA 1872 (section 140 of the CA 1950).<sup>16</sup> The Law Commission of India observed that the provision is not comprehensive, as it omits certain circumstances in which authority may be implied, particularly agency of necessity. It proposed an amendment clarifying that implied authority may arise from the relationship between the parties, the necessities of the case, or any other agreed means. It also noted that while section 189 of the ICA 1872 (section 142 of the CA 1950) provides for the extension of agency by necessity, it does not address cases where necessity itself creates the agency.<sup>17</sup> We have not taken on board these recommendations, considering also the changes which we have made to the meaning of agency and the introduction of manifest assent.
- (iii) A recommendation concerning the delegation of authority under section 190 of the ICA 1872 (section 143 of the CA 1950). The Law Commission of India proposed a redrafted provision clarifying that an agent may not delegate their powers or duties without the express or implied consent of the principal, particularly where the agency involves personal confidence or skill. The revised formulation also sought to codify the common law exceptions to the non-delegation rule, including delegation by custom or usage of trade, necessity arising from unforeseen emergencies, the inherent nature of the agency requiring sub-agency, and ministerial acts not involving discretion or judgment. We have not adopted these recommendations, we think that the proposals are overly prescriptive and the provisions in the draft Bill should adequately address matters of delegation. The provisions in the draft Bill are crafted in a broader fashion referring to restrictions in written law as well as the common law.

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<sup>16</sup> Law Commission of India, n 11 [141] and 88.

<sup>17</sup> Ibid.

- (iv) A recommendation concerning the duty of an agent in appointing a sub-agent under section 194 of the ICA 1872 (section 147 of the CA 1950). The Law Commission of India proposed replacing the word "naming" with "appointing" to more accurately reflect the agent's responsibility in selecting a sub-agent, as supported by authoritative commentary such as Pollock & Mulla. We have used the language "appoint" in relation to agents and sub-agents in the draft Bill but not because of the recommendation but rather because we think that the language would be the more appropriate language. We have also defined "appoint" in the draft Bill to clarify its broader intent.
- (v) A recommendation concerning the knowledge required for valid ratification under section 198 of the ICA 1872 (section 151 of the CA 1950). The Law Commission of India proposed the insertion of an exception that allows ratification even where the principal's knowledge of the facts is materially defective, provided the principal intends to ratify the act and accept the risk regardless of the circumstances. Additionally, an explanation was recommended to clarify that ratification does not require knowledge of the legal effect of the act or of collateral circumstances affecting its nature. We have adopted something similar in the draft Bill but not in such detail which we think to be unnecessary and overly prescriptive. The circumstances towards informed ratifications should allow discretion to the courts.
- (vi) A recommendation concerning the termination of agency under section 201 of the ICA 1872 (section 154 of the CA 1950).<sup>18</sup> The Law Commission recommended expanding the provision to include additional grounds for termination, including the expiry of a fixed period, destruction of a material part of the subject matter, adjudication of the agent as insolvent, dissolution of the principal if it is a firm or corporation, and the occurrence of an event rendering the agency unlawful or agreed to

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<sup>18</sup> Law Commission of India, n 11, 90.

terminate authority.<sup>19</sup> We have adopted provisions in the Bill similar to the recommendation albeit not to the letter.

- (vii) A recommendation concerning an agent's conflict of interest under section 215 of the ICA 1872 (section 168 of the CA 1950). The Law Commission of India proposed omitting the current requirement that for a principal to repudiate a transaction where an agent has dealt on their own account, there must be either dishonest concealment or disadvantage to the principal. The Commission viewed these conditions as unduly restrictive and inconsistent with the fiduciary nature of the agency relationship. Adopting the English position, it recommended that the principal's right to repudiate should arise solely from the agent's failure to obtain prior consent and to disclose all material circumstances, regardless of whether the transaction was dishonest or caused disadvantage. We have not adopted the rather prescriptive approach in section 168 of the CA 1950 but have adopted an approach more in line with English common law principles and more broadly worded. We have not adopted the recommendation which we consider to be also too specifically worded and prefer discretion given to the courts.
- (viii) A recommendation concerning the forfeiture of an agent's remuneration in cases of misconduct under section 220 of the ICA 1872 (section 173 of the CA 1950). The Law Commission of India proposed the inclusion of an explanation defining the types of misconduct that would disentitle an agent from remuneration. These include entering into transactions that are unlawful on their face or to the agent's knowledge, violating fiduciary duties even where the principal adopts the transaction, and accepting or agreeing to accept bribes or secret commissions. We have provided in the draft Bill for the courts in their discretion to allow the agent a proportion of the remuneration if it would be fair and reasonable in the circumstances. We think that a forfeiture *in toto* could be unduly harsh in some cases. We

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<sup>19</sup> Ibid.

do not see the need to define misconduct. This would be too prescriptive and should be left to the discretion of the courts.

- (ix) A recommendation concerning the consequences of notice given to an agent under section 229 of the ICA 1872 (section 182 of the CA 1950). The Law Commission of India proposed the inclusion of an exception where the agent having participated in a fraud on the principal, deliberately withholds material information. We have inserted a similar exception in the draft Bill.
- (x) A recommendation for a new section 237A to provide for the doctrine of agency by estoppel, to the effect that a principal is bound by representations made through words or conduct that lead third parties to reasonably rely on an agent's apparent authority.<sup>20</sup> We considered a provision on estoppel in the draft Bill but have decided that specific provisions on estoppel would be unduly complex.
- (xi) A recommendation for a new section 187A to expressly state that an agent may enter into contracts or perform acts on behalf of the principal unless the act requires personal discretion or skill or is legally required to be performed by the principal.<sup>21</sup> We have inserted a provision in the draft Bill which expressly provides that an agent may not be appointed if prohibited by written law or common law or equity. It should be similar in effect to this recommendation.
- (xii) A recommendation to reinforce fiduciary duties, new sections 216A and 218A were to explicitly prohibit an agent from accepting bribes or secret commissions, requiring them to compensate the principal for any resulting loss and account for undisclosed profits or benefits obtained through agency.<sup>22</sup> We do not think that this is necessary and the matter should be adequately addressed by the general principles applying to agents and by the common law. Also, agents at common law are not necessarily

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<sup>20</sup> Law Commission of India, n 11, 93.

<sup>21</sup> Law Commission of India, n 11, 88.

<sup>22</sup> Law Commission of India, n 11, 91–92.

fiduciaries.<sup>23</sup> See, *UBS AG v Kommunale Wasserwerke Leipzig* on bribery affecting agents and agents not having to be fiduciaries, as an illustration.<sup>24</sup>

We ought to say that the recommendations of the 13<sup>th</sup> Report were not implemented in India. We have though considered them for purposes of this Report.

2.5.3 We have also examined the Draft Code of Contract drafted by Harvey McGregor in 1971 for the English Law Commission. The annotated version provides an analysis of codification possibilities as well as the strengths, weaknesses, and underlying principles of the common law system. The Draft Code of Contract covers agency law.

2.5.4 We have also made reference to Michael Conant's Proposed Code of Agency Contracts in relation to proposals for agency law provisions.<sup>25</sup>

2.5.5 Also, Singapore's Report of the Law Reform Committee on Powers of Attorney.<sup>26</sup> This Report compares the laws of the UK, New South Wales, Tasmania, British Columbia, Hong Kong, Malaysia, and Singapore on powers of attorney. It provides a comparative analysis and draft provisions.

#### 2.5.6 Conclusion

- (i) We have specifically discussed the recommendations of the 13<sup>th</sup> Report as the 13<sup>th</sup> Report referred to potential changes to the ICA 1872, which is similar to the CA 1950.
- (ii) Others too as above were also considered when we evaluated potential changes to Malaysian agency law and in respect of proposals in the draft Bill.

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<sup>23</sup> William Bowstead and Francis Reynolds, n 12, [6-037].

<sup>24</sup> [2017] EWCA Civ 1567.

<sup>25</sup> M. Conant, Proposed Code of Agency Contracts, *Malaya Law Review* Vol. 13 No. 1.

<sup>26</sup> The Law Reform Committee ("LRC") of the Singapore Academy of Law, *Report on Powers of Attorney* (September 2009).

## 2.6 Malaysian and Commonwealth Case Law on Agency

2.6.1 We have considered cases in Malaysia on agency and also a selection of some cases on agency from the Commonwealth particularly, England and Australia.

2.6.2 We decided, after reviewing the cases on agency which have come to our attention that we should focus only on particular cases and particular aspects of agency law:<sup>27</sup>

(i) *Jeremy John Figgins v Kenneison Brothers Sdn Bhd & Anor*<sup>28</sup>

(a) The traditional approach in Malaysia to agency is the concept of consent. This is reflected in section 168 of the CA 1950 which provides that:

“If an agent deals on his own account in the business of the agency, without first obtaining the consent of his principal and acquainting him with all material circumstances which have come to his own knowledge on the subject, the principal may repudiate the transaction, if the case shows either that any material fact has been dishonestly concealed from him by the agent, or that the dealings of the agent have been disadvantageous to him.”

(b) Manifest assent derives from the Restatement (Third) of Agency which defined agency as:

“the fiduciary relationship that arises when one person (a “principal”) manifests assent to another person (an “agent”) that the agent shall act on the principal's behalf and subject to the

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<sup>27</sup> The cases considered but not discussed in detail in the main body of this Report include: *The United States of America v Shearn Delamore & Co and Drew & Napier & Ors* [2007] 8 MLJ 654 (HC) on the distinction between a sub-agent and a substituted agent; *Medicon Plastic Industries Sdn Bhd v Syarikat Cosa Sdn Bhd* [1993] 2 MLJ 416 (SC) on the personal liability of an agent acting for a foreign principal; *Dorothy Kwong Choon v Ampang Motors Ltd & Anor* [1969] 2 MLJ 68 (CA), which held a dealer under a hire purchase agreement to be the finance company's agent; *Negara Traders Ltd v Pesuruhjaya Ibu Kota, Kuala Lumpur* [1969] 1 MLJ 123 (HC) on a principal's liability for an agent's unauthorised illegal acts, applying principles from *Lloyd v Grace, Smith & Co* [1912] AC 716 (HL); *Cheng Keng Hong v Government of the Federation of Malaya* [1966] 2 MLJ 33 (HC) on apparent authority; *Mahesan v Malaysian Government* [1975] 1 MLJ 77 (FC) on a principal's right to claim damages from both the agent and a third party; and *Wong Mun Wai v Wong Tham Fatt* [1987] 2 MLJ 249 (HC) on an agent's breach of duty by self-dealing.

<sup>28</sup> [2016] MLJU 1449

principal's control, and the agent manifests assent or otherwise consents so to act.”

- (c) Use of the term has been adopted in Bowstead and Reynolds on Agency which defines agency as:

“(1) Agency is the fiduciary relationship which exists between two persons, one of whom expressly or impliedly manifests assent that the other should act on his behalf so as to affect his legal relations with third parties, and the other of whom similarly manifests assent so to act or so acts pursuant to the manifestation. The one on whose behalf the act or acts are to be done is called the principal. The one who is to act is called the agent. Any person other than the principal and the agent may be referred to as a third party”.

- (d) The High Court of Malaya in *Jeremy John Figgins* cited the definition of agency in Bowstead and Reynolds on Agency:

“[83] At p. 1 of the book Bowstead & Reynolds on Agency, Nineteenth Edition by Peter Watts, LL.B. (Hons) (Cantuar), LL.M. (Cantab) and F. M. B. Reynolds, Q.C. (Hon.), D.C.L., F.B.A., the learned authors stated as follows:

“AGENCY AND AUTHORITY

(1) Agency is the fiduciary relationship which exists between two persons, one of whom expressly or impliedly manifests assent that the other should act on his behalf so as to affect his relations with third parties, and the e behalf the act or acts are to be done is called the principal. The one who is to act is called the agent. Any person other than the principal and the agent may be referred to as a third party.

(2) In respect of the acts to which the principal so assents, the agent is said to have authority to act; and this authority constitutes a power to affect the principal's legal relations with third parties.

(3) Where the agent's authority results from a manifestation of assent that he should represent or act for the principal expressly or impliedly made by the principal to the agent himself, the authority is called actual authority, express or implied. But the agent may also have authority resulting from such a manifestation made by the principal to a third party; such authority is called apparent authority.

(4) A person may have the same fiduciary relationship with a principal where he acts on behalf of that principal but has no authority, and hence no power, to affect the principal's relations with third parties. Because of the fiduciary relationship such a person may also be called an agent."

(e) We looked into a number of Commonwealth jurisdictions in respect of the use of "manifest assent" in the context of agency. We were unable to find cases in Singapore and India which used the term "manifest assent" in agency. We did though, find a considerable number of cases in England where manifest assent was used in the context of agency. Also, Australia, where manifest assent has been used. Some cases have specifically cited the definition of agency in Bowstead and Reynolds on Agency including, the reference to manifest assent. Others have referred to manifest assent as a matter of course, seemingly assumed that manifest assent forms part of the test for agency.

(f) We note that manifest assent may infer a broader meaning than consent in agency although the point may be arguable.

(ii) *Playboy Enterprises International, Inc v Zillion Choice Sdn Bhd & Anor*<sup>29</sup>

- (a) The High Court of Malaya considered “apparent authority” from the perspective of agency. In considering this, the High Court approved of the definition of “apparent authority” in §2.03 of the Restatement (Third) of Agency:

“[45] Now, under the law of Illinois, a party (the agent) may bind his principal by his words or actions if he has either actual or apparent authority. According to Restatement (Third) of Agency §2.03 (2006): Apparent authority is the power held by an agent or other actor to affect a principal’s legal relations with a third party when a third party reasonably believes the actor has authority to act on behalf of the principal and that belief is traceable to the principal’s manifestations.’ In *Weil, Freiburg & Thomas, PC v Sara Lee Corp* 577 NE 2d 1344, 1350 (Ill App Ct 1991), ‘Apparent authority arises when a principal creates, by its words or conduct, the reasonable impression in a third party that the agent has the authority to perform certain acts on its behalf’

[46] Based on authorities cited above, the thing that one should know and clearly understand is that the ‘belief is traceable to the principal’s manifestations’ or ‘when a principal creates, by its words or conduct, the reasonable impression in a third party that the agent has the authority to perform certain acts on its behalf’.

[47] It seems to me that the law on apparent authority applicable in Illinois is no different from that applicable in Malaysia. The leading authority which has been applied by the Malaysian courts is the *Freeman & Lockyer (a firm) v Buckhurst Park Properties (Mangal) Ltd and another* [1964] 2QB480 (‘*Freeman case*’). The difference between an actual and an apparent or ostensible

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<sup>29</sup> [2011] 2 MLJ 59

authority and the principles applicable thereto are clearly explained by Diplock LJ as follows:

An ‘apparent’ or ‘ostensible’ authority, on the other hand, is a legal relationship between the principal and the contractor created by a representation, made by the principal to the contractor, intended to be and in fact acted upon by the contractor, that the agent has authority to enter on behalf of the principal into a contract of a kind within the scope of the ‘apparent’ authority, so as to render the principal liable to perform any obligations imposed upon him by such contract.”

- (b) Bowstead and Reynolds on Agency has also considered “apparent authority” taking into account the definition in the Restatement (Third) of Agency:

“the power held by an agent or other actor to affect a principal's legal relations with third parties when a third party reasonably believes the actor has authority to act on behalf of the principal and that belief is traceable to the principal's manifestations.”

- (c) For a recent example of an English decision on apparent authority, see *Sanlam General Insurance Ghana Ltd v Sustainable Growth Fund II SCSP SICAV-SIF [2025]* applying the House of Lords’ decision in *Armagas Ltd v Mundogas (The Ocean Frost)*.<sup>30</sup>
- (d) There are numerous cases in the Commonwealth and also in Malaysia on apparent authority which we do not see the need to cite for purposes of this Report.

- (iii) We also *considered* case law on estoppel in the context of agency.

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<sup>30</sup> [2025] EWHC 559 (Comm); [1986] 1 AC 731.

- (a) We noted the definition of estoppel in the Restatement (Third) of Agency:

“A person who has not made a manifestation that an actor has authority as an agent and who is not otherwise liable as a party to a transaction purportedly done by the actor on that person's account is subject to liability to a third party who justifiably is induced to make a detrimental change in position because the transaction is believed to be on the person's account, if (1) the person intentionally or carelessly caused such belief, or (2) having notice of such belief and that it might induce others to change their positions, the person did not take reasonable steps to notify them of the facts.”

- (b) We also noted the reference to estoppel in para 2-101 of Bowstead and Reynolds on Agency:

“A person may be held liable as principal where it cannot be said that he has made a manifestation or representation as to the authority of another to that other or to a third party as required in Articles 7, 8, 72 or 83, but he is affected in an agency context by the operation of the doctrine of estoppel.”

- (c) Bowstead and Reynolds on Agency does not agree with the definition of estoppel in the Restatement (Third) of Agency. The work also discusses the differing views on the relationship of estoppel with apparent authority.

- (d) The 13<sup>th</sup> Report of Indian Law Commission had proposed the insertion of a new section 237A into the ICA 1872:

- (e) “237A. Agency by estoppel.

Where any person, by words or conduct, represents or permits it to be represented that another person has authority to act on his

behalf, he is bound by the acts of such other person with respect to any one dealing with him as an agent on the faith of such representation, to the same extent as if such other person had the authority which he was so represented to have.”

- (f) We see disparate approaches taken in the Restatement (Third) of Agency, Bowstead and Reynolds on Agency and the 13<sup>th</sup> Report.
- (g) We think that the law on estoppel in the context of agency is too expansive and complex to easily provide for specific provisions on estoppel in the draft Bill. A passing reference to estoppel appears in the draft but this would be an area best addressed through case law.

(iv) *Ambank (M) Bhd v Metroplex Sdn Bhd*<sup>31</sup>

- (a) Section 136 of the CA 1950 provides this on the legal capacity of the principal:

“Any person who is of the age of majority according to the law to which he is subject, and who is of sound mind, may employ an agent.”

- (b) Section 137 of the CA 1950 provides this on the legal capacity of the agent:

“As between the principal and third persons, any person may become an agent; but no person who is not of the age of majority and of sound mind can become an agent, so as to be responsible to his principal according to the provisions in that behalf herein contained.”

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<sup>31</sup> [2012] 8 MLJ 832

- (c) It is clear that a principal requires legal capacity which accords with the general common law position.<sup>32</sup> Section 136 enunciates this.
- (d) Section 137 seems to accord with the general common law position up to a point. It says that any person may become an agent which seems to infer albeit not explicitly that a person does not require legal capacity in order to be an agent. Section 137 then goes on to say that persons who are minors or of unsound mind would not be liable to the principal. This approach does not entirely accord with the common law position, see Bowstead and Reynolds on Agency below on paragraph 2-012. The Indian Law Commission (see below) also proposed some changes to the ICA 1872 equivalent of section 137 although still at variance to the common law position to some degree.
- (e) The High Court of Malaya reiterated the requirements in sections 136 and 137 of the CA 1950 for agents.<sup>33</sup>
- (f) The provisions of sections 136 and 137 of the CA 1950 are different from the English common law position. Bowstead and Reynolds on Agency provides:  
  

“But the personal liability of the agent upon any contract of agency, and upon any contract entered into with a third party, is dependent on the agent’s capacity to contract personally.”
- (g) The decision of the High Court of Malaya reflects Malaysian law in section 137 of the CA 1950 differs from the position taken by the English courts in English common law.
- (h) An example of the English position can be seen in the case of *Mercantile Union Guarantee Corporation Ltd v Ball* [1937] 3 All

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<sup>32</sup> William Bowstead and Francis Reynolds, n 12, [2-006], [2-007].

<sup>33</sup> [2012] 8 MLJ 832, [19].

ER 1, the UK Court of Appeal held that a hire-purchase agreement for a motor lorry entered into by an infant haulage contractor was not enforceable against the infant, as it was a trading contract and not one for 'necessaries' or otherwise beneficial to the infant, thereby illustrating the common law's strict approach to the contractual liability of minors.

- (i) Also, rules (1) and (2) of Article 5 of Bowstead and Reynolds on Agency:

“Rule (1) No need for capacity to contract

The rationale for Rule (1) seems to be that the agent is a mere instrument and that it is the principal who bears the risk of inadequate representation. An early example was the married woman, who could act as agent, though she had no contractual capacity till 1882: indeed it was her lack of capacity that led to her being held to be an agent for her husband. Thus a minor may act as agent provided that the minor has sufficient understanding to consent to the agency and to do the act required. A person who cannot read may be an agent to sign a written contract. Persons lacking all understanding of what they are doing cannot act as agent, but a lesser degree of mental incapacity would not preclude the conferral of actual authority, even if the principal were unaware of the incapacity. Agency by an alien enemy would often be void on grounds of public policy. Statutes sometimes require certain qualifications in persons who act as agents, e.g. solicitors, and company directors. When this is so, persons who act without such qualifications may commit offences by doing so, and may not be entitled to remuneration, reimbursement or indemnity; the matter is discussed under Articles 61 and 63. But they will nevertheless bind their principals unless the statute also expressly or impliedly invalidates their acts.

## Rule (2) Agent's own liability regulated by capacity to contract

A minor's liability to a principal, or on the contract which the minor has made with a third party (where this involves personal liability) is regulated by the minor's capacity to contract. Where the agency is not contractual, the minor may nevertheless be subject to the non-contractual rights and duties of an agent. The extent to which an agent who is a minor would be subject to fiduciary duties is beyond the scope of this work. A minor cannot be an express trustee: but it has been held that a minor can be a resulting trustee of personalty, and there seems no reason why a minor should not be a constructive trustee. It has been held that a restitutionary claim against a minor is controlled by the minor's contractual capacity. 81 Whether this is good law or not, an equitable claim, whether in rem or in personam, may not be so controlled, and there is also a statutory jurisdiction to order the minor to transfer property where it is just and equitable to do so. 83 A minor is liable in tort provided that the tortious action is not merely a way of evading a contractual immunity"

- (j) § 3.05 of the Restatement (Third) of Agency provides that an agent should have legal capacity:

"Any person may ordinarily be empowered to act so as to affect the legal relations of another. The actor's capacity governs the extent to which, by so acting, the actor becomes subject to duties and liabilities to the person whose legal relations are affected or to third parties."

- (k) We note that the 13<sup>th</sup> Report of Indian Law Commission proposed a change to the ICA 1872 equivalent of section 137 of the CA 1950, the proposal being:
- (l) "184. Who may be an agent.

(m) As between the principal and third persons any person may become an agent, but no person who is not of the age of majority and of sound mind can become an agent)—

(i) So as to be responsible to his principal, or

(ii) So as to be personally bound to third persons in respect of contracts entered into by him on behalf of his principal,

According to the provisions in that behalf herein contained.”

(n) The rationale for this change was:

“Section 184 permits a minor (as well as a person of unsound mind) to become an agent as between the principal and third persons without being responsible to his principal. There may be cases where an agent may incur a personal liability upon the contract towards third persons. But in our opinion an agent who is minor or a person of unsound mind should be exonerated from such liability. According to Bowstead, the personal liability of the agent upon the contract of agency and upon any contract entered into by him with any third person is dependent on his capacity to contract on his own behalf. We agree with this view and recommend that section 184 should be modified accordingly.”

(v) We have also reviewed English cases relating to whether an agent is always a fiduciary and whether an agent needs to have authority to affect the principal’s relations with third parties. We note the passage in paragraph 92 of the *UBS AG v Kommunale Wasserwerke Leipzig*:

“...There are no doubt many forms of non-fiduciary agency, just as there are forms of fiduciary agency in which the agent has no authority to affect the principal's relations with third parties...”

(vi) We have also reviewed other cases like *Halton International Inc v Guernroy Limited* [2005] EWHC 1968 and *Tigris International NV v China Southern Airlines Company Limited* [2014] EWCA Civ 1649.

(vii) We have also noted these passages from *Bowstead and Reynolds on Agency*:

“A person may have the same fiduciary relationship with a principal where that person acts on behalf of that principal but has no authority to affect the principal’s relations with third parties. Because of the fiduciary relationship such a person may also be called an agent.”<sup>34</sup>

“Hence it is said that there may be a “non-fiduciary agent”, and that in some functions an acknowledged agent may not act as fiduciary at all. Rather than talk of a “non-fiduciary agent” it seems better to say that where an agent does not act in a fiduciary capacity (e.g. because simply carrying out specific instructions), this is a reflection of the scope of the agent’s duties and the boundaries of the equitable rules.”<sup>35</sup>

(viii) An agent then in English law does not always need to be a fiduciary nor must an agent have authority to affect the principal’s relations with third parties.

(ix) § 1.01 of Restatement (Third) of Agency on the meaning of “agency” refers to a fiduciary relationship:

“Agency is the fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act.”

(x) Article 1, paragraph 1-015 of *Bowstead and Reynolds on Agency* also refers to a fiduciary relationship in agency:

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<sup>34</sup> William Bowstead and Francis Reynolds, n 12, [1-001(4)].

<sup>35</sup> William Bowstead and Francis Reynolds, n 12, [6-037].

“Since the paradigm agent has received special powers which enable the agent to change the legal position of another, the law also imposes special duties of a fiduciary nature towards that other. These duties are not necessarily contractual (though of course they may be) for it is not necessary that there be any contract between principal and agent. Rather, they originate from equity, and are connected with the duties imposed by equity on express trustees. Consequently, their application is not confined to agents.”

- (xi) Although “the statement in Bowstead and Reynolds on Agency that “agency is a contract made between principal and agent ... like every other contract, the rights and duties of the principal and agent are dependent upon the terms of the contract between them, whether express or implied” should be treated with reserve, not least because agency need not be contractual, and the notion of fiduciary obligation is independent of contract”.<sup>36</sup>
- (xii) Part X of the CA 1950 is silent on an agent being in the position of a fiduciary nor does it state that an agent must have authority to affect the principal’s relations with third parties or vice versa. Part X though, refers throughout to the authority of an agent.

### 2.6.3 Our approach then:

- (i) We are *inclined* to introduce “manifest assent” into Malaysian legislation in the context of agency. We think that the introduction of the term would accord with its use as discussed. This is reflected in the draft Bill further below. We have noted the use of manifest assent in English and Australian cases in the context of agency, the use of the term in Bowstead and Reynolds on Agency in the meaning of agency and the citation of Bowstead and Reynolds on Agency in English, Australian and a Malaysian court of the meaning of agency in that work referencing manifest assent. We also note the references to the Restatement (Third) of

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<sup>36</sup> William Bowstead and Francis Reynolds, n 12, [6-035].

Agency on manifest assent in *Bowstead and Reynolds on Agency* and various cases.

- (ii) Part X of the CA 1950 does not provide for apparent authority (also known as ostensible authority). We think that the reference in *Playboy Enterprises International, Inc v Zillion Choice Sdn Bhd & Anor* and in *Bowstead and Reynolds on Agency* to apparent authority merits legislative provision in the draft Bill on the subject. The legislative provision has considered *Bowstead and Reynolds on Agency* and also the provision in the Restatement (Third) of Agency. The provisions on apparent authority in the draft Bill are not extensive and are intended to allow the common law to augment it:

- (iii) “Apparent authority

**8. (1)** An agent or other actor has apparent authority when he has the power to affect a principal’s legal relations with third parties where a third party reasonably believes that the agent or other actor has authority to act on behalf of the principal and that belief results from the principal’s manifestations—

- (a) a person does not have to be an actual agent of a principal in order to have apparent authority;
- (b) a person who does not have actual authority may have apparent authority;
- (c) an expression in this Act to the authority of a person, whether as having or not having authority or words to similar effect refer to actual authority and not to apparent authority, in the absence of a specific reference to apparent authority or unless the context requires otherwise.

The other actor refers to a person who is not an actual agent. Agent when used elsewhere in this section or for purposes of apparent authority includes such an actor.

(2) An agent with apparent authority who acts purportedly on behalf of a principal with legal consequences for the principal binds the principal, as to those acts within his apparent authority, to the third party. The principal must ratify the act of the agent in order to enforce any contract arising from those acts.

(3) The provisions of this section do not limit the operation of the doctrine of estoppel.”

- (iv) We considered above whether the doctrine of estoppel should be incorporated into the draft Bill. Our conclusion was that it should only be mentioned in passing to the effect that the provisions on apparent authority would not limit the application of the doctrine. We take the view that this is an aspect best served by the common law.
- (v) On the legal capacity of an agent, we think that section 137 of the CA 1950 should be redrafted so as to make clear that an agent does not have to have legal capacity and also to incorporate provisions absolving minors and persons with mental incapacity from liability to the principal and in respect of the contract entered into by the agent. In this respect, we have considered the proposal of the Indian Law Commission to amend section 184 of the ICA 1872 and have not adopted wholly the position in the English common law. We have sought to provide though some exceptions in the case of minors and persons with mental incapacity, having considered some aspects of the English common law but not replicating them *in toto*. Our thoughts on this is that the provisions absolving liability should not allow minors and persons with mental incapacity with a sufficient degree of capacity from being able to take advantage of those provisions. We have also clarified in the draft Bill the point in time when that sufficient degree of capacity becomes pertinent in the context of such liability. We have noted that minors may still be subject to some degree of liability at common law.<sup>37</sup> We have also noted legal developments in various jurisdictions where minors have been entrusted or are proposed to

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<sup>37</sup> William Bowstead and Francis Reynolds, n 12, [2-008].

be entrusted with important aspects of decision making.<sup>38</sup> We have also noted that the state of mind of a person with mental incapacity may vary from time to time.<sup>39</sup>

- (vi) On an agent not having to be a fiduciary or to have authority to affect the principal's legal relations with third parties, we have decided to adopt substantially in the draft Bill, the English common law position as discussed above.
- (vii) As with the draft Bill generally, we think that it is important to say that the provisions in the draft Bill are intended to be complemented by case law and other relevant legal writings and materials. In this respect, we note that many Malaysian cases have directly considered the English common law without specific consideration of the CA 1950.<sup>40</sup> For example, *T Sivam Tharmalingan v Public Bank* referenced the definition of agency in *Bowstead and Reynolds on Agency* which mentioned manifest assent without discussion of the CA 1950.<sup>41</sup> Other Malaysian cases in the context of provisions of CA 1950 other than Part X have also adopted a similar approach.<sup>42</sup> The approach of complementing the draft Bill with case law and other relevant legal writings and materials is consistent with the approach taken in these Malaysian cases. The draft Bill expressly states that its provisions are not intended to be a code and that the common law may apply.

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<sup>38</sup> UK Government, '16-year-olds to be given right to vote through seismic Government election reforms' (17 July 2025)<https://www.gov.uk/government/news/16-year-olds-to-be-given-right-to-vote-through-seismic-government-election-reforms> accessed 25 July 2025.

<sup>39</sup> UK Law Commission, *Wills: Report* (Law Com No 417, 2024) para 2.5.

<sup>40</sup> For example, *Royal Insurance Group v David* [1976] 1 MLJ 128.

<sup>41</sup> [2018] 5 MLJ 711, [59].

<sup>42</sup> M F Cheong, 'Migration of the Indian Contract Act 1872' in Krishnaprasad, N Venkatesan, S Swaminathan and U Varottil, *Foundations of Indian Contract Law* (Oxford University Press 2024) 77.

## 2.7 Other Laws Relating to Agency in Malaysia

### 2.7.1 Agency law found in other written law

#### (i) Power of Attorney

A power of attorney is a formal instrument by which one person empowers another to represent him or act in his stead for certain purposes.<sup>43</sup> It establishes a principal-agent relationship, enabling structured decision-making in the principal's absence.<sup>44</sup>

##### (a) Position in Peninsular Malaysia

The Powers of Attorney Act 1949 governs powers of attorney, alongside the CA 1950 and the National Land Code 2020.<sup>45</sup> Local case law, such as *K Balasubramaniam v MBF Finance Bhd & Ors* supplements the Powers of Attorney Act 1949, and in the instance of this case, cites decisions from jurisdictions where the legislation is in pari materia, such as the New Zealand case of *Wellington Steam Ferry*.<sup>46</sup>

- i. The Powers of Attorney Act 1949 governs the authentication or attestation and deposit requirements of powers of attorney which requires that instruments creating powers of attorney be deposited in the office of a Senior Assistant Registrar of the High Court of Malaya. The Act also provides for irrevocability under sections 6 and 7, derived from the repealed sections 126 and 127 of the UK Law of Property Act 1925.<sup>47</sup>

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<sup>43</sup> *Wee Tiang Peck v Teoh Poh Tin* [1995] 1 MLJ 446 (MYHC), 453.

<sup>44</sup> *Ibid.*

<sup>45</sup> Laws of Malaysia, Powers of Attorney Act 1949, Act 424; Laws of Malaysia, National Land Code 2020, Act 828 ("NLC"); CA 1950 (n 1).

<sup>46</sup> [2005] 1 CLJ 793 (MYFC). The Court held that a winding-up order does not cancel a power of attorney (citing *Wellington Steam Ferry Co Ltd (In Liquidation) v Wellington Deposit, Mortgage, and Building Assoc Ltd*).

<sup>47</sup> Law of Property Act 1925 (UK), ss 126–127 (repealed by Powers of Attorney Act 1971 (UK)).

- ii. The CA 1950 governs the principal-agent relationship based on contract principles but does not specifically refer to powers of attorney.<sup>48</sup>
- iii. The National Land Code 2020 regulates land-related powers of attorney, including registration requirements and restrictions on non-citizens or foreign companies.<sup>49</sup>

(b) Position in Sabah

The Powers of Attorney Act 1949 does not apply to Sabah. Powers of attorney are governed arguably by the reception of English law under the Civil Law Act 1956 (“CLA 1956”), the CA 1950, and the Sabah Land Ordinance. Judicial uncertainty remains regarding the applicability of the Powers of Attorney Act 1971, in UK legislation, under section 5 of the CLA 1956.

- i. There are conflicting High Court of Sabah and Sarawak decisions on the applicability of the UK Powers of Attorney Act 1971 and section 5 of the CLA 1956.<sup>50</sup> More recent decisions have taken the view that the CA 1950 supersedes the English law on powers of attorney received under section 5 of the CLA 1956.<sup>51</sup>
- ii. Although sections 85 and 98 of the Sabah Land Ordinance provide for certain registration requirements, the Courts have ruled that powers of attorney do not require registration for legitimacy. Registration at the Magistrates' Court and Lands and Surveys Department is merely a procedural step and an administrative requirement of the land office.<sup>52</sup>

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<sup>48</sup> CA 1950 (n 1), ss 135–191.

<sup>49</sup> NLC (n 45), ss 309–310 (registration), s 311 (enquiry powers), s 433F (foreign restriction).

<sup>50</sup> *Chon Ah Jee & Ors v Lim Tian Huat & Anor* [2012] 10 CLJ 261 (MYHC). The High Court decided that s 5 of the CLA 1956 applied, while in *Nur Azlin binti Razak @ Abd Razi v Kamunri Naho & Ors* [2021] 1 LNS 681 (MYHC) and *Joddari @ Jaddari bin Abd Karim v The Personal Representative of The Estate of Sangkang bin Abu Saman (deceased) & Ors* [2022] MLJU 140 (MYHC) rejected it, favouring the application of the CA 1950.

<sup>51</sup> *Nur Azlin binti Razak* (n 50), 97; *Joddari @ Jaddari bin Abd Karim* (n 50), 60.

<sup>52</sup> *Lee Chee Kiang v Johnson Tan Teck Seng & Anor* [2011] 8 MLJ 297, 3650. The High Court stated that in Sabah, there is no proper system of registration for powers of attorney as in West Malaysia. Registration at the magistrate’s Court is merely a practice that provides comfort to those relying on it. Similarly, registration or notation in the Central Land Office is a

- iii. An issue in one of the conflicting cases, *Chon Ah Jee*, was whether a power of attorney remains irrevocable after the donor's winding-up or death.<sup>53</sup> As mentioned in this case, in Peninsular Malaysia, the winding-up would not affect the power of attorney, as it would be saved by the exceptions provided in Section 6 of the Powers of Attorney Act 1949, as also decided by the Federal Court in *K Balasubramaniam*.<sup>54</sup>

(c) Position in Sarawak

The Powers of Attorney Act 1949 also does not apply to Sarawak. Powers of attorney here are governed by common law principles, the CA 1950, and the Sarawak Land Code 1958.

- i. Pre-1949 English common law applies under section 3 of the CLA 1956, as confirmed in *Salut Rugo v Bayan Gisau*, which includes principles on irrevocability.<sup>55</sup>
- ii. The Sarawak Land Code requires the registration of powers of attorney in land transactions.<sup>56</sup>

(d) Legal issues and reform considerations

- i. The Powers of Attorney Act 1949 substantive law provisions on powers of attorney centre on irrevocability, which must be for valuable consideration. Otherwise, it only provides for attestation requirements for a power of attorney and for powers of attorney to be deposited in the office of Senior Assistant Registrar of the High Court of Malaya. The provisions on irrevocability could be better clarified

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procedural step required by the Lands and Surveys Department before processing documents containing signatures executed under a power of attorney.

<sup>53</sup> *Chon Ah Jee* (n 50), [22]–[25].

<sup>54</sup> *Chon Ah Jee* (n 50), [23]; *K Balasubramaniam* (n 46), [46]–[47].

<sup>55</sup> [2016] MLJU 09 (MYHC). The Court confirmed that pre-1949 English law applies to powers of attorney under s 3(1)(c) of the Civil Law Act 1956. The Court also referred to English cases such as *Smart v Sanders* and *Walsh v Whitcomb* to establish legal principles.

<sup>56</sup> *KHK Development Sdn Bhd v Majlis Perbandaran Padawan* [2021] MLJU 97 (MYHC), 79. The High Court affirmed that registration is required for powers of attorney used in land transactions.

particularly as to the circumstances as to when that irrevocability could lapse.

- ii. Section 5 of the Powers of Attorney Act 1949 provides for the deposit of revocation of a power and when a power of attorney ceases to be valid. If the Powers of Attorney Act 1949 is to be superseded by the new legislative provisions applicable to Peninsular Malaysia, Sabah and Sarawak, the new legislative provisions should provide also, for revocation and protection against revocation, particularly if the requirements for deposit of power of attorney as in the Powers of Attorney Act 1949 are dispensed with. In this connection, we note the provisions on revocation and protection against revocation in section 5 of the Powers of Attorney Act 1971.
- iii. Sabah: it is uncertain whether section 5 of the CLA 1956 and consequently the Powers of Attorney Act 1971 applies.<sup>57</sup> Further, the question of as to whether irrevocable powers of attorney survive the donor's winding-up or death.<sup>58</sup>
- iv. Sarawak: Sarawak applies section 3(1) of the CLA 1956, which is a differing approach from Sabah.
- v. Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents ("Hague Convention"): The Hague Convention provides for a simplified legalisation process of certain governmental, official and some other documents. Malaysia is not currently a party to the Convention. The deposit of powers of attorney even where executed and attested abroad, under the Powers of Attorney Act 1949 or for land registry purposes do not require legalisation. We do not think that a provision on the Hague Convention is necessary.

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<sup>57</sup> See n 50–51.

<sup>58</sup> See n 53.

(e) Conclusion

There is no unified law in Malaysia on powers of attorney. Also, the application of English law in Sabah and Sarawak has been approached differently in cases. There are also aspects of power of attorney law in Malaysia which should be clarified or reformed. The laws on agency considered in this Report should in our view include provisions on powers of attorney in the new legislation proposed below:

- i. The Powers of Attorney Act 1949 contains requirements for deposit with the Senior Assistant Registrar of the High Court of Malaya. There is no similar requirement in Sabah or Sarawak, in England and Wales and in Singapore.<sup>59</sup> The registration requirements or practice in Sabah and Sarawak relate to land matters, Peninsular Malaysia requires registration for land matters in the National Land Code.<sup>60</sup> The requirement in England for powers of attorney relates also to registration involving land matters.<sup>61</sup> Likewise, for Singapore in relation to land matters. We have considered arguments for and against retaining a requirement to deposit a power of attorney as under the Powers of Attorney Act 1949:

- A requirement to deposit should be retained to mitigate fraud and to facilitate proof of the existence of the power of attorney: The requirement of deposit though is a procedural requirement and does not oblige the Senior Assistant Registrar of the High Court to inquire into the veracity of the power of attorney. A fraudulent power of attorney or one obtained by improper means may still be deposited with the Senior Assistant Registrar. The deposit of a power of attorney does not preclude the validity or existence of the power of attorney from being questioned in a court of law. As stated in *Letchumanan Chettiar Alagappan @ L Allagappan (sebagai pelaksana wasiat/executor kepada SL Alameloo Achi*

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<sup>59</sup> See n 52; Conveyancing and Law of Property Act 1886 (Singapore); Powers of Attorney Act 1971 (UK).

<sup>60</sup> Land Ordinance (Sabah, Cap. 68), ss 88, 95; Land Code (Sarawak, Cap. 81 [1958 Ed.], s 189; NLC (n 45), ss 309–310.

<sup>61</sup> Land Registration Rules 2003 (UK), r 61.

*alias Sona Lena Alamelu Acho, si mati) & Anor v Secure Plantation Sdn Bhd*, "the registration of a power of attorney is a procedural requirement for the creation of a valid power of attorney. But it does not follow that once registered a power of attorney is valid or genuine."<sup>62</sup> We have considered registries where registration is not of a mandatory nature, for example, the National Wills Register in the UK which may offer the public the ability to search for the existence or purported existence of a particular will. There may be some advantage to a similar facility for powers of attorney although, of course, it would not assure the veracity of a power of attorney, as is also the case, currently.

- The process as employed in Peninsular Malaysia for the deposit of powers of attorney is now relatively seamless. The deposit is effected by electronic means, online and not unusually on the same day. Access to the internet is important in Peninsular Malaysia for this purpose. Sabah and Sarawak do not currently require the deposit of powers of attorney and do not have a system at this time for deposit. We think that this should be considered if the deposit of powers of attorney in whatever form throughout Malaysia is to be contemplated.
- Sabah and Sarawak do not currently require the deposit of a power of attorney as expressed above. Likewise, Singapore and England and Wales. We are not aware of particular difficulties having been presented by this requirement not being there.
- We should be clear that our discussion does not extend to powers of attorney being required to be registered in relation to land matters. Registration of powers of attorney for land matters invariably apply in Singapore, England and Wales, Peninsular Malaysia, Sabah and Sarawak. We do not intend to consider obviating such a requirement in respect of land matters.

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<sup>62</sup> [2017] MLJU 379, [38]

- We do not think that a mandatory deposit regime for powers of attorney would be useful as it does not add to the veracity of powers of attorney. We do think though that a voluntary regime for the deposit of powers of attorney may offer some useful way of searching for powers of attorney in a similar way to wills in the UK and the National Wills Register. As Sabah and Sarawak do not currently have a system for deposit of powers of attorney, it would be useful for the introduction of a voluntary regime nationwide to be through regulation introduced by the Minister when this is appropriate rather than through a legislative provision in the draft Bill proper.
- ii. In England and Wales, a power of attorney must be executed as a deed under the Powers of Attorney Act 1971.<sup>63</sup> It is validly executed as a deed if signed in the presence of a witness who attests the signature or, if signed at the direction of the individual, in their presence with two attesting witnesses, and if delivered as a deed, in accordance with the Law of Property (Miscellaneous Provisions) Act 1989.<sup>64</sup> In Peninsular Malaysia, a power of attorney must be executed before and authenticated in the appropriate form by designated persons, such as a Magistrate, Notary Public, Commissioner for Oaths, advocate and solicitor, or other specified officials, depending on where it is executed.<sup>65</sup> We think that some requirement for attestation by designated persons should be retained in new legislation on powers of attorney, having regard to the importance of such an instrument. We have reviewed the persons who may be designated persons, however.
  - iii. Irrevocability provisions in the Powers of Attorney Act 1949 present some issues:

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<sup>63</sup> Powers of Attorney Act 1971 (UK), s 1(1).

<sup>64</sup> Law of Property (Miscellaneous Provisions) Act 1989 (“LPMPA 1989”) (UK), s 1(3).

<sup>65</sup> Powers of Attorney Act 1949 (n 45), s 3(1).

- There was no reason why a distinction should be drawn between powers given for valuable consideration and other powers.
  - It was not clear what exactly was intended in providing “irrevocability” and “in favour of a purchaser.”<sup>66</sup>
- iv. The Powers of Attorney Act 1971 contains clearer provisions on irrevocability as compared to those in the Powers of Attorney Act 1949 by clearly indicating that as long as the donee has ownership interest or the obligation to him remains undischarged, the donor cannot revoke the power of attorney unilaterally. It also avoids difficulties as regards ‘purchaser’, and ‘valuable consideration’, which have been omitted altogether.<sup>67</sup>
- v. We think that the provisions on powers of attorney in any new legislation on agency should provide for an improved provision on irrevocability of powers of attorney using the Powers of Attorney Act 1971 as a reference point.
- We had discussed earlier on, the need for a provision on revocation and protection of persons in the event of revocation, particularly if the Powers of Attorney Act 1949 were to be repealed and replaced with new legislative provisions and consequently, section 5 of the Powers of Attorney Act 1949 being repealed. We mentioned too, the provisions of section 5 of the Powers of Attorney Act 1971. We think that those provisions would be an appropriate reference for new legislative provisions relating to revocation and protection of persons in the event of revocation.
  - In England and Wales, the Powers of Attorney Act 1971 and its predecessor provision in the Law of Property Act 1925 provide

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<sup>66</sup> Singapore Law Reform Committee, n 42, [184].

<sup>67</sup> Powers of Attorney Act 1971 (UK), s 4; Raof N and Abdullah N, 'A Review on Irrevocable Power of Attorney: Malaysia and United Kingdom Compared' in *Proceedings of the International Law Conference (iN-LAC 2018) - Law, Technology and the Imperative of Change in the 21st Century* (SCITEPRESS 2020) 331–340.

expressly that documents signed under powers of attorney may be signed in the name of the attorney and not necessarily in the name of the donor.<sup>68</sup> In Singapore, the Conveyancing and Law of Property Act 1886 provides that a donee may execute in his own name, signature, and seal.<sup>69</sup> An express provision to this effect in the new legislation should be introduced as documents signed under power of attorney in Malaysia are commonly signed in the name of the attorney and no legislation provide for this in Malaysia unless legislation received under section 5 of the CLA 1956.<sup>70</sup>

- vi. We should mention that we have not considered in connection with new legislation on powers of attorney, the subject of living wills or enduring powers of attorney. We believe that this is an area best addressed separately although we have inserted a provision in the draft Bill relating to the legal capacity of a principal which anticipates the possible introduction of living wills and enduring powers of attorney.
- vii. We have discussed the Hague Convention, see paragraph 6.1.1(d) above.

(ii) Seals

- (a) The importance of seals in Malaysian contract law is significantly reduced by section 10(1) of the CA 1950 which provides that all contracts require consideration. This differs from the English position where deeds do not require consideration.<sup>71</sup> That is aside from the growing dispensation of the requirement for physical seals or alternative means to execute deeds in various

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<sup>68</sup> Ibid, s 8; Law of Property Act 1925 (UK), s 123.

<sup>69</sup> Conveyancing and Law of Property Act 1886 (Singapore), s 45.

<sup>70</sup> Singapore Law Reform Committee, n 42, [184].

<sup>71</sup> HG Beale, *Cheshire, Fifoot and Furmston's Law of Contract* (16th edn, Oxford University Press 2012) c 3, 2.

jurisdictions.<sup>72</sup> The Uniform Commercial Code provides that a seal on a contract for the sale of goods does not make it a sealed instrument, and laws on sealed instruments do not apply.<sup>73</sup>

- (b) The Malaysian position on seals, is illustrated in *Chin Chen Fui v Majlis Perbandaran Sandakan & Anor*.<sup>74</sup> The High Court of Sabah and Sarawak considered whether a corporation must execute contracts under seal for enforceability. It was held that after the CA 1950 was extended to Sabah on 1st July 1974, the common law requirement for sealing had been displaced. The Court held that under the Act, a contract is only void or voidable in circumstances expressly provided by the statute, and the absence of a seal is not one of them. While section 10(2) of the Act preserves certain statutory formalities, it does not incorporate the common law sealed contract rule.
- (c) In contrast, the common law of England maintains the sealed contract rule unless expressly overridden by statute. In *A R Wright & Son Ltd v Romford Borough Council*, the Court affirmed that the sealed contract rule remains in force specific exceptions apply. For example, section 74(2) of the Law of Property Act 1925, which allows a corporation to appoint an agent to sign agreements on its behalf, but only for contracts that would be valid even without a seal.<sup>75</sup>
- (d) Michael Conant's Proposed Code of Agency Contracts avers to the common law approach to contracts under seal, proposing section 5.3 which states that a principal is not liable for sealed contracts

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<sup>72</sup> UK Law Commission, *Transfer of Land: Formalities for Deeds and Escrows* (Working Paper No 93, 1985). In this Working Paper, the Law Commission observed that sealing had become a largely symbolic formality, often performed by solicitors rather than the grantor. It cited views from 1937 describing seals as a "legal fiction" and noted Lord Wilberforce's criticism of the doctrine as outdated, advocating for its abolition in line with other jurisdictions; also see Law of Property (Miscellaneous Provisions) Act 1989, s 1 (UK); Companies Act 1989, s 36A (UK) (now incorporated into Companies Act 2006, s 44); Uniform Commercial Code (US), § 2-203a; Companies Act 2016, s 66 (Malaysia).

<sup>73</sup> Uniform Commercial Code (US), § 2-203a.

<sup>74</sup> [1995] MLJU 434 (MYHC), 15.

<sup>75</sup> [1957] 1 QB 431; Law of Property Act 1925 (UK), s 74(2).

signed by an agent unless expressly named as a party. Section 5.15 extends this principle to undisclosed principals, who are generally not liable unless a statute abrogates the common law rule, though extrinsic evidence may establish intent, and restitution principles may impose liability for benefits received.

- (e) At common law, an agent may not execute documents under seal unless the instrument authorising the agent is also executed as a deed. This rule, known as the 'sealed authority rule', was confirmed in the case of *Powell v London and Provincial Bank*.<sup>76</sup> A similar requirement is reflected in section 47 of the UK Companies Act 2006, which states that a company can authorise an attorney to execute deeds or other documents on its behalf, but this authority must be granted through a deed.<sup>77</sup> Similarly, section 67(3) of the Malaysian Companies Act 2016 ("CA 2016") provides that a company may empower the execution of deeds by an authorised person on behalf of a company if empowered by an instrument executed by the company as a deed.<sup>78</sup>

(f) Conclusion

We are of the view that the law on seals relating to agency should be simplified so that there should be no distinction in general between a document under seal and one which is not, executed by an agent. Also, the authority for an agent to execute a document under seal should not require that the authority itself should also be under seal. This is an unnecessarily arcane requirement.

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<sup>76</sup> [1893] 2 Ch 555, 561–562.

<sup>77</sup> Companies Act 2006 (UK), s 47.

<sup>78</sup> Laws of Malaysia, Companies Act 2016, Act 777, s 64(3) ("CA 2016").

### 2.7.2 Sectoral Legislation

#### (i) Insurance

- (a) Insurance involves agency relationships. The Financial Services Act 2013 (“FSA 2013”), which replaced the Insurance Act 1996, regulates Malaysia’s insurance sector under the auspices of Bank Negara Malaysia. The FSA 2013 governs licensed insurers, insurance agents, approved insurance brokers, and their representatives. Insurance agents and brokers navigate on agency situations. While the CA 1950 provides general agency principles, the FSA 2013 augment these rules through specific licensing, regulatory requirements, and obligations related to pre-contractual disclosure, misrepresentation, and the attribution of an agent’s knowledge and statements to the insurer.<sup>79</sup>

#### (ii) Consumer protection

- (a) Consumer protection laws in Malaysia recognise agency relationships in transactions involving goods and services. The CPA 1999 establishes protections for consumers against unfair practices, misleading representations, and unconscionable conduct by suppliers or their agents.<sup>80</sup> Under the Act, a "supplier" includes a person acting as an agent for another who is not supplying in trade.<sup>81</sup>
- (b) Under the CPA 1999, where an offence under the Act is committed by an agent or an employee of an agent, the principal shall be deemed to have committed that offence unless it is proven that the

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<sup>79</sup> Laws of Malaysia, Financial Services Act 2013, Act 758.

<sup>80</sup> Laws of Malaysia, Consumer Protection Act 1999, Act 599 (“CPA 1999”).

<sup>81</sup> *Ibid*, s 3(1).

offence occurred without the principal's knowledge and that reasonable precautions were taken to prevent it.<sup>82</sup>

(iii) Sale of goods

(a) Sale of Goods Act 1957

Agency plays a crucial role in the sale of goods, where mercantile agents may act on behalf of buyers or sellers in negotiating contracts, arranging deliveries, or receiving payments. Under the Sale of Goods Act 1957, an agent's authority can bind the principal in commercial transactions, impacting the transfer of ownership, warranties, and contractual obligations.<sup>83</sup> Similarly, the UK Sale of Goods Act 1979 is received into Sabah and Sarawak under section 5 of the CLA 1956.<sup>84</sup>

(b) Carriage of Goods by Sea Act 1950

In maritime trade, agents such as shipping agents, freight forwarders, and chartering brokers represent shipowners, carriers, or cargo owners in arranging transport, issuing bills of lading, and handling port formalities. The Carriage of Goods by Sea Act 1950 acknowledges the role of agency in facilitating international shipping and ensuring compliance with contractual and regulatory requirements. In Sarawak and Sabah, maritime matters are governed separately under the Merchant Shipping Ordinance 1960 of Sarawak and the Merchant Shipping Ordinance 1960 of North Borneo (Sabah).

(iv) Regulated professions and agents

In Malaysia, there are various professions regulated by specific legislation. These professionals often act as in agency capacity. Below is an overview of some regulated professions:

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<sup>82</sup> Ibid, s 144.

<sup>83</sup> Laws of Malaysia, Sales of Goods Act 1957 Act 382, ss 4, 7, 23, 27, 28, 29.

<sup>84</sup> Heng Long Motor Trading Co v Osman Bin Abdullah [1994] 2 MLJ 456, 464.

(a) Legal practitioners

Lawyers act as agents for their clients in legal matters. The Legal Profession Act 1976 governs Advocates and Solicitors of the High Court of Malaya. In Sabah and Sarawak, Advocates are regulated by the Advocates Ordinance (Cap. 2) and Advocates Ordinance (Cap. 110) respectively.<sup>85</sup> Their conduct is further governed by laws, rulings, and directives issued by the relevant Bar Association or Law Society. Lawyers owe a fiduciary duty to act in their clients' best interests, to the exclusion of all other adverse interest, except those duly disclosed by the lawyer and willingly accepted by the client.<sup>86</sup>

(b) Accountants

Accountants in Malaysia are generally not considered agents except in limited situations. The profession is regulated under the Accountants Act 1967 through the Malaysian Institute of Accountants (MIA), while the Financial Reporting Act 1997 establishes the Malaysian Accounting Standards Board (MASB) to set accounting standards.<sup>87</sup> MIA also issues By-Laws (On Professional Ethics, Conduct and Practice), outlining ethical and professional obligations.<sup>88</sup> An accountant may act as an agent only when holding a tax agent license under the Income Tax Act 1967, which allows them to represent clients before the Inland Revenue Board (IRB) in tax filings, audits, and appeals.<sup>89</sup>

(c) Estate agents

Estate agents facilitate property transactions, acting as intermediaries between buyers and sellers or landlords and tenants. In Malaysia, the

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<sup>85</sup> Laws of Malaysia, Legal Profession Act 1976, Act 166; Advocates Ordinance (Cap 2, Sabah); Advocates Ordinance (Cap 110, Sarawak).

<sup>86</sup> *Vellasamy a/l Pennusamy & Ors v Gurbachan Singh a/l Bagawan Singh & Ors* [2010] 5 MLJ 437, [162]–[163].

<sup>87</sup> Laws of Malaysia, Accountants Act 1967, Act 94; Laws of Malaysia, Financial Reporting Act 1997, Act 558, s 3.

<sup>88</sup> Malaysian Institute of Accountants, *By-Laws (On Professional Ethics, Conduct and Practice) of the Malaysian Institute of Accountants*, <<https://mia.org.my/storage/2024/12/By-Laws-updated-Nov2024-%E2%80%93Effective-15-December-2024.pdf>> accessed 27 March 2025.

<sup>89</sup> Laws of Malaysia, Income Tax Act 1967, Act 53, s 153(3).

Valuers, Appraisers, Estate Agents and Property Managers Act 1981 governs the registration and practice of estate agents.<sup>90</sup> This Act establishes the Board of Valuers, Appraisers, Estate Agents and Property Managers, which oversees the profession and ensures compliance with established standards.<sup>91</sup> Estate agents are required to obtain practical experience and pass a Professional Competence Test as prescribed by the Board. They owe a fiduciary duty to render service to their clients with absolute fidelity, uphold integrity, and conduct business with fairness and goodwill.<sup>92</sup>

(d) Company secretaries

Company secretaries play a crucial role in corporate governance, ensuring that companies comply with statutory and regulatory requirements. The Companies Act 2016 requires that every company must appoint at least one company secretary who is a natural person residing in Malaysia and is a member of a professional body recognised by the Ministry of Domestic Trade and Consumer Affairs under the Fourth Schedule of the Act.<sup>93</sup> They must also adhere to the Companies Commission of Malaysia's Code of Ethics, which upholds transparency, integrity, accountability, and good corporate governance.<sup>94</sup> In various circumstances, they act in an agency capacity, representing companies in dealings with regulators, certifying documents, submitting statutory filings, and executing resolutions.

(v) Conclusion

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<sup>90</sup> Laws of Malaysia, Valuers, Appraisers, Estate Agents and Property Managers Act 1981, Act 242.

<sup>91</sup> Ibid, s 9.

<sup>92</sup> Board of Valuers, Appraisers, Estate Agents and Property Managers, *General Code of Conduct and Ethics for Registered Valuers, Appraisers, Estate Agents and Property Managers*, <<https://lppeh.gov.my/WP2016/code-of-conduct>> accessed 21 March 2025.

<sup>93</sup> CA 2016 (n 77), s 235.

<sup>94</sup> Companies Commission of Malaysia, *Code of Ethics for Company Directors and Company Secretaries* (2023) <[https://www.ssm.com.my/Pages/Publication/Booklet/document/Code%20of%20Ethics%20\(FINAL\)%20V1.pdf](https://www.ssm.com.my/Pages/Publication/Booklet/document/Code%20of%20Ethics%20(FINAL)%20V1.pdf)> accessed 21 March 2025.

We have considered these and do not think the objective of revising agency law in contracts should extend to specifically regulating each sector, which may already be subject to its own sectoral regulation as illustrated by way of example above or to rules on agency law peculiar to that sector.

We have also considered the CARs and whether similar provisions should be introduced in relation to commercial agents not regulated by sectoral regulation. We do not think that commercial agents already subject to sectoral regulation or to regulation under specific sectoral industry or professional legislation should be subject to an additional layer of regulation along the lines of CARs.

We do not also see the point of introducing legislation along the lines of CARs for other commercial agents as commercial agents would likely be subject to some form of regulation in many areas if their activities were material. That enabling powers should be introduced to allow for regulations to regulate commercial agents not already subject to sectoral regulation but not to otherwise provide specifically for legislative provisions in this respect. In this respect, see the earlier discussion in paragraph 3.4.5.

### 2.7.3 Disabled person

In the UK's Practice Guide 8: Execution of Deeds, it states that for a deed to be validly executed it needs to be signed by each individual in the presence of a witness who attests the signature.<sup>95</sup> It states that when a person is physically unable to sign the deed because of an illness or disability, it may be validly executed by an individual if it is signed at their direction and in their presence and the presence of two witnesses who each attest the signature.<sup>96</sup> The name of the

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<sup>95</sup> Practice Guide 8: Execution of Deeds ("PG8"), 2.1.1, 2.1.2; LPMPA 1989 (n 63), c 34, s 1(3).

<sup>96</sup> PG8 (n 95), 2.4.; LPMPA 1989, s 1(3)(a)(ii).

person unable to sign can be typed out or handwritten in the space provided by the person authorised signature.<sup>97</sup>

In the Isle of Man's Land Registry Practice Guide, the requirement is that the execution of an instrument by an individual which is related to a dealing of registered land must be attested by at least one witness who must subscribe his name, address and description to the instrument.<sup>98</sup> It then goes on to establish rules on execution by a person who is disabled who may not be able to sign the document as a result of illness or disability but may be able to make a mark by hand, foot or mouth.<sup>99</sup> It details the clause that should be included and states that the execution of a deed should be verified either by the sworn affidavit of the attesting witness giving the reason why the document has been executed in that manner or by a certificate by an advocate to the same effect.<sup>100</sup> Then it includes execution by a person who is unable to physically sign or make a mark as a result of illness or disability. In this case, a deed may be validly executed by the individual if it is signed at their direction and in their presence and in the presence of a witness who should attest the signature.<sup>101</sup>

## **2.8 Electronic Means, Electronic Form, Electronic Transactions, etc.; Smart Contracts; Artificial Intelligence Systems ("AI Systems")**

### **2.8.1 Overview**

- (i) An overlap obviously exists between matters electronic (electronic means, electronic form, electronic transactions, etc.), smart contracts and AI systems.
- (ii) Smart contracts and AI systems could, of course, form part of matters electronic while smart contracts could be AI systems.<sup>102</sup>

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<sup>97</sup> PG8 (n 95), 2.4.

<sup>98</sup> Land Registry Practice Guide (Isle of Man), Execution of Land Registry Forms, Part B: Execution by individuals, 1 (Rule 101(1)).

<sup>99</sup> Ibid, 3 (Rule 102(2)).

<sup>100</sup> Ibid.

<sup>101</sup> Ibid, 4.

<sup>102</sup> Guernsey Committee for Economic Development 'Legislation Relating to Electronic Agent' No 4.

- (iii) Matters electronic, may also include things other than transactions and AI systems; such as, electronic approaches to taking oaths and affirmations in sworn statements, like statutory declarations and the attestation of documents by a witness.
- (iv) The current law in Malaysia may already allow for and recognise some of these things when done electronically but others may, simply not be recognised, particularly when written laws prescribe a particular approach which does not contemplate things being done electronically or virtually.<sup>103</sup> There are others too, where the position may be debatable or unclear.<sup>104</sup>
- (v) To quite some degree, the position on general commercial transactions has been clarified in legislation, particularly, the Electronic Commerce Act 2006 (“ECA 2006”), and Digital Signature Act 1997 (“DSA 1997”).<sup>105</sup> Some other legislation has also provided for express recognition of the use of electronic means, the CA 2016, being an example.<sup>106</sup> Legislation, though, is dependent on scope of coverage and definitions. The DSA 1997, for example, contemplates recognition of only certain digital signatures and not in general.<sup>107</sup> The CA 2016, on the other hand, does not define the meaning of “electronic”, the UK Companies Act 2006 on the other hand, having the meaning of “electronic means” defined by way of a statutory instrument. Examples of other legislation contemplating matters electronic are discussed further below. Others, which we had alluded to earlier, do not contemplate matters electronic at all.
- (vi) In this paragraph 7.0, we have considered examples of legislation, both locally as well as overseas, on approaches taken to matters electronic and AI systems.

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<sup>103</sup> Laws of Malaysia, Statutory Declaration Act 1960, Act 13, s 2 and sch; Malaysian Rules of Courts 2012, O.41 r.1; NLC (n 45), sch 5; Powers of Attorney Act 1949 (n 45), sch 1.

<sup>104</sup> Malaysian Bar, *Rules and Rulings of the Bar Council Malaysia* (updated 16 December 2024), r 14.11.

<sup>105</sup> Laws of Malaysia, Electronic Commerce Act 2006 (“ECA 2006”), Act 658; Laws of Malaysia, Digital Signature Act 1997 (“DSA 1997”), Act 562.

<sup>106</sup> CA 2016 (n 77), s 308.

<sup>107</sup> DSA 1997 (n 105).

- (vii) We have also considered the approach which may be or are taken in connection with matters electronic at common law.
- (viii) Our approach is within the context of the agency law being considered by us.

## 2.8.2 Legislation and law on matters electronic generally

### (i) Scope

We have looked at Malaysian and overseas legislation touching on matters electronic. In particular, we have focused on the approach taken in some of that legislation, their coverage and some of the definitions. Our focus differs with different legislation.

### (ii) Malaysian ECA 2006:

This Act was to provide for legal recognition of electronic messages in commercial transactions, the use of the electronic messages to fulfil legal requirements and to enable and facilitate commercial transactions through the use of electronic means and other matters connected with them. It defines “electronic” as “the technology of utilizing electrical, optical, magnetic, electromagnetic, biometric, photonic or other similar technology”.<sup>108</sup>

### (iii) Malaysian CA 2016:

This Act was to provide for the registration, administration and dissolution of companies and corporations and to provide for related matters. There is no definition of “electronic means” in this Act.<sup>109</sup>

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<sup>108</sup> ECA 2006 (n 105), s 5.

<sup>109</sup> CA 2016 (n 77).

(iv) Ontario Electronic Commerce Act 2000:

This Act was to provide for the legal recognition of electronic information and documents and focuses on electronic transactions.<sup>110</sup>

It approaches electronic transactions by recognising in law certain matters electronic. These are not restricted to contracts and extend to other matters like sworn statements, attestation, signatures, seals, notarisations, powers of attorney and other documents and directions. It also touches on electronic agents which is discussed below.

It defines the following:

- (a) “electronic” includes created, recorded, transmitted or stored in digital form or in other intangible form by electronic, magnetic or optical means or by any other means that has capabilities for creation, recording, transmission or storage similar to those means and “electronically” has a corresponding meaning; (“électronique”, “par voie électronique”).
- (b) “electronic signature” means electronic information that a person creates or adopts in order to sign a document and that is in, attached to or associated with the document; (“signature électronique”).

(v) Electronic Transactions (Guernsey) Law 2000:

This legislation facilitates electronic business, the use of electronic documents and process and the storage of information in electronic form. It confirms that information and documents (contract, signature, seal, attestation) will not be denied legal effect, validity, enforceability or admissibility solely because they are in electronic form and that legal requirements or form can be met electronically. It defines “signature in electronic form” as being “a signature wholly or partly in electronic form attached to or logically associated with information in electronic or non-

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<sup>110</sup> Electronic Commerce Act 2000 (“ECA 2000”) (Ontario).

electronic form, and references to a signature being in electronic form will be construed accordingly”.

(vi) New Zealand CCLA 2017:<sup>111</sup>

This Act is not focused specifically on matters electronic.<sup>112</sup> It primarily deals with contracts, the sale of goods, electronic transactions, the carriage of good and various other commercial matters, including mercantile agents and bills of lading. It does though contain a segment addressing matters electronic. It is quite extensive and provides more detail on the formation of electronic contracts relative to the approach taken in the Ontario law and the Guernsey law.

It defines the following:

- (a) “electronic” includes electrical, digital, magnetic, optical, electromagnetic, biometric, and photonic.
- (b) “electronic communication” means a communication by electronic means.
- (c) “electronic signature”, in relation to information in electronic form, means a method used to identify a person and to indicate that person’s approval of that information.
- (d) “information” includes information (whether in its original form or otherwise) that is in the form of a document, a signature, a seal, data, text, images, sound, or speech.

(vii) Common law

The Malaysian and Commonwealth courts have often taken into account changes in technology when approaching matters of contract and other

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<sup>111</sup> Contract and Commercial Law Act 2017 (New Zealand) (“CCLA 2017”).

<sup>112</sup> Ibid.

areas.<sup>113</sup> Many aspects of agency involving, matters electronic, may be recognised and enforced by the courts without specific legislation. On the other hand, there would be particular areas where matters electronic would not be recognised or indeed permitted. For example, legislation relating to sworn statements and certain statutory attestations.<sup>114</sup>

(viii) Conclusion

We think that new legislation proposed on agency law should specifically touch on matters electronic affecting agency. We are aware that some existing Malaysian legislation, including, those discussed above, may already cover many aspects of agency. Also, the common law, which has been prepared to recognise many aspects of technological development in the context of law, including, in contract law.<sup>115</sup> There are aspects too, where matters electronic, are still restricted or not permitted. New legislation to cover matters electronic specifically in the context of agency is preferred to provide a ready reference to consider this aspect in the context of agency and to extend the application of matters electronic beyond aspects of the law currently permitted in respect of such matters.

2.8.3 We have considered the approach to be taken in the new legislation. We do not think that the rather more extensive approach to “electronic” in the New Zealand CCLA 2017 would be the ideal approach to legislation of a limited nature relating only to agency. We might have been more minded to reference the New Zealand CCLA 2017 in matters electronic if the subject matter of this Report were to be contract law generally.<sup>116</sup> We have preferred instead the approach taken in the Guernsey law and in the Ontario law, which in our view, provides a more succinct approach to matters electronic, curated, of course, to agency.<sup>117</sup>

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<sup>113</sup> *Brinkibon Ltd v Stahag Stahl* [1983] 2 AC 34; In *Reflex Media, Inc. & Anor v Endeavor Standard Sdn Bhd & Anor* [2025] MLJU 844, the High Court of Malaya held that the defendants, though not physically present in the U.S., had established sufficient presence there by actively offering online dating services through websites that facilitated commercial transactions with U.S. residents. Recognising the practical realities of the digital age, the court affirmed that a fixed place of business is no longer necessary to establish jurisdiction, and that carrying on business may be constituted by sustained online commercial activity targeted at a foreign jurisdiction.

<sup>114</sup> Laws of Malaysia, National Land Code 2020, Act 828, s 211.

<sup>115</sup> *Brinkibon* (n 112).

<sup>116</sup> CCLA 2017 (n 13), Part 4.

<sup>117</sup> Electronic Transactions (Electronic Agents) (Guernsey) Ordinance, 2019 (“ETO 2019”); ECA 2000 (n 110).

#### 2.8.4 Legislation and law on AI systems and also smart contracts

##### (i) AI systems and also smart contracts

We discussed in paragraph 7.2, matters electronic in general. We concluded that there should be specific provisions to address matters electronic generally in the context of agency.

We also considered whether AI systems and also smart contracts should merit additional provisions in the context of agency.

There is little doubt that the nature of AI systems and also smart contracts would be such that they would come within the meaning of electronic, even as a general understanding of the term.<sup>118</sup>

AI systems have a broad ambit. Smart contracts may not stand as a separate matter to consider. Undoubtedly, they would be electronic in nature but they could also be an AI system.<sup>119</sup>

##### (ii) What is a smart contract?

The concept of a contract is a legally binding promise between parties.<sup>120</sup> Smart contracts are embedded in blockchains, and enables the contractual terms of an agreement to be enforced automatically without the intervention of a trusted third party. The original definition of smart contract by Szabo is, “a set of promises, specified in digital form, including protocols within which the parties perform on these promises.”<sup>121</sup> The US Department of Commerce through the National Institute of Standards and Technology, defined a smart contract as “a collection

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<sup>118</sup> Cambridge Dictionary, Definition of “electronic”: (especially of equipment), using, based on, or used in a system of operation that involves the control of electric current by various devices: an electronic keyboard / game; electronic components / devices.

<sup>119</sup> Guernsey Committee for Economic Development, ‘Legislation Relating to Electronic Agents’ (2018) No 4.

<sup>120</sup> Hugh E. Willis, ‘Restatement of the Law of Contracts of the American Law Institute’, (1932) 7 Ind. L. J. 429, 430 (“A contract is the legal obligation created by the law as the result of a promise or set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty.”).

<sup>121</sup> Nick Szabo, ‘Smart Contracts: Building Blocks for Digital Markets’, [1996].

of code and data (sometimes referred to as functions and state) that is deployed to a Blockchain (e.g. Ethereum)”.<sup>122</sup>

The definition of smart contracts as proposed by the founder of Ethereum, Vitalik Buterin, is “systems which automatically move digital assets according to arbitrary pre-specified rules.”<sup>123</sup> Ethereum’s (the biggest smart contract platform in the world) blockchain is specifically programmed for the creation of smart contracts.<sup>124</sup>

### (iii) Laws on smart contracts

There is currently no Malaysian case law relating to smart contracts. However, Malaysia has legislation particularly the ECA 2006 which may be capable of encompassing smart contracts in particular circumstances.<sup>125</sup> Malaysian contract law should be capable of accommodating smart contracts based on the current Malaysian contract law regime and having regard too to the ECA 2006. The UK Law Commission have stated in their report on “Smart legal contracts” that “our findings conclude that the current legal framework is clearly able to facilitate and support the use of smart legal contracts. Current legal principles can apply to smart legal contracts in much the same way as they do to traditional contracts, albeit with an incremental and principled development of the common law in specific contexts. In general, difficulties associated with applying the existing law to smart legal contracts are not unique to them and could equally arise in the context of traditional contracts. In addition, even though some types of smart legal contract may give rise to novel legal issues and factual scenarios, existing legal principles can accommodate them”.<sup>126</sup> Likewise too, in our view, with Malaysia.

The Singapore Court of Appeal in *Quoine Pte Ltd v B2C2 Ltd* has provided some guidance on how smart contract disputes may potentially be resolved.<sup>127</sup>

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<sup>122</sup> Yaga, D., Mell, P., Roby, N., & Scarfone, K., ‘Blockchain Technology Overview’ (2018) National Institute of Standards and Technology Internal Report 8202. Gaithersburg, MD: National Institute of Standards and Technology.

<sup>123</sup> Vitalik Buterin, Ethereum Whitepaper (2014).

<sup>124</sup> Larissa Lee, ‘New Kids on the Blockchain: How Bitcoin’s Technology Could Reinvent the Stock Market’, (2016) 12 HASTINGS BUS. L.J. 81, 115. Indeed, Ethereum developed a method of creating stages of execution in a contract within its blockchain, as opposed to Bitcoin’s binary execution method.

<sup>125</sup> ECA 2006 (n 105).

<sup>126</sup> UK Law Commission ‘Smart legal contracts Advice to Government’ (Nov 2021), Law Com No 401, para 1.26.

<sup>127</sup> [2020] SGCA(I) 02 (Singapore Court of Appeal).

The Guernsey law has been considered by the States in the Legislation Relating to Electronic Agents (Billet d'État XXIII, 24 October 2018) in the context of smart contracts. It was thought that the provisions on “electronic agent” in Electronic Transactions (Guernsey) Law 2000 (akin to an AI system) should be capable of encompassing a smart contract. A smart contract then, could also be an AI system.<sup>128</sup>

We do not think that any legislation which we propose needs to specifically address smart contracts although other aspects of legislation which we may propose in this Report would likely also encompass smart contracts.

(iv) What is an AI system?

- (a) Artificial intelligence manifests as a definition in various legislation throughout the world whether using the term “artificial intelligence” itself or an approximation of it or using some other terms like “automated system” and “electronic agent” which contain features substantially similar to “artificial intelligence”. We have discussed these more extensively below.
- (b) Artificial Intelligence (AI) was defined by emeritus Stanford Professor John McCarthy in 1955 as “the science and engineering of making intelligent machines”.<sup>129</sup>
- (c) Artificial intelligence has been characterised into categories, strong AI and weak AI, being such a characterisation. Weak AI is “the concept that whatever the program is meant to do, it is merely trying to replicate or duplicate that function, and for most tasks that is sufficient.”<sup>130</sup> Strong AI is “an actual instantiation of that thing, which in this case is intelligence.”<sup>131</sup> There is no legal definition of weak AI and strong AI although the nature of the artificial intelligence

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<sup>128</sup> States of Deliberation of the Island of Guernsey, Committee for Economic Development, *Legislation Relating to Electronic Agents*, Billet d'État XXIII (24 October 2018).

<sup>129</sup> John McCarthy, ‘What is Artificial Intelligence?’ (Computer Science Department, Stanford University, 2007) at 2.

<sup>130</sup> Ibid.

<sup>131</sup> Ibid.

may be taken into account in addressing legal issues concerning artificial intelligence.<sup>132</sup>

(v) Artificial intelligence and legal personality.

AI systems present considerable difficulties in the context of contract and agency law.

Arguments have been presented on how to characterise AI systems. Mistake has been one approach while agency has been another where the AI systems has been treated as an agent within an agency context.<sup>133</sup>

Ordinarily, an agent must have legal personality.<sup>134</sup> The difficulty with an AI system being characterised as an agent is being able to say that it is a legal person.<sup>135</sup>

Legal personality refers to the recognition of any being as having rights and duties under the law.<sup>136</sup> While traditionally applied to humans, they also include, legal persons, like corporations recognised as separate legal entities distinct from their members.<sup>137</sup>

There are various theories regarding corporate personality.<sup>138</sup> The fiction theory, supported by jurists such as Von Savigny, Blackstone, Coke and Salmond, argues the legal personality of entities other than human beings

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<sup>132</sup> [2020] SGCA(I) 02 (Singapore Court of Appeal).

<sup>133</sup> Daniel Seng, Tan Cheng Han SC, 'Artificial Intelligence and Agents', [October 2021] NUS Law Working Paper 2021/019, NUS Centre for Technology, Robotics, Artificial Intelligence & the Law Working Paper 21/02, 6; Matthew Oliver, 'Contracting by Artificial Intelligence: Open Offers, Unilateral Mistakes, and Why Algorithms are not Agents' (2021) Australian National University Journal of Law and Technology, Vol 2(1), 45, 50.

<sup>134</sup> CA 1950 (n 1), s 137. This section implies that an agent must have legal personality, as only those of the age of majority and sound mind can act as agents.

<sup>135</sup> Daniel Seng, Tan Cheng Han SC, (n 138).

<sup>136</sup> P J Fitzgerald, *Salmond on Jurisprudence* (12th edn, Universal Law Publishing Co Pvt Ltd, New Delhi 2009) 61, stating:

A person is any being whom the law regards as capable of rights or duties. Any being that is so capable is a person, whether a human being or not, and no being that is not so capable is a person, even though he may be a man. People are the substances of which rights and duties are the attributes. It is only in this respect that a person possesses juridical significance, and this is the exclusive point of view from which personality receives legal recognition.

<sup>137</sup> Meir Dan-Cohen, *Rights, Persons and Organisations: A Legal Theory for Bureaucratic Society* (University of California Press 1987).

<sup>138</sup> Halyani Hassan, Zuhairah Ariff Abd Ghadas and Nasarudin Abdul Rahman, 'The Myth of Corporate Personality: A Comparative Legal Analysis of the Doctrine of Corporate Personality of Malaysian and Islamic Laws' (2012) 6(11) *Australian Journal of Basic and Applied Sciences* 191.

is the result of a fiction. In fiction theory, rights and duties attached to corporations as artificial persons totally depend on how much the law imputes to it.<sup>139</sup>

Sir Frederick Pollock denied that English law applied the fiction theory but rather adopted the concession theory in explaining the nature of corporate personality. The concession theory takes a similar view, holding that the state grants legal personality as a matter of legal policy.<sup>140</sup> The concession theory shifts focus to the legal source of its powers.<sup>141</sup>

Legal personality of entities has historically been complex.<sup>142</sup>

The separate legal personality of companies in England was fraught with argument and controversy in the 19<sup>th</sup> century. It was not until valiant efforts were made in legislation and *Salomon v A Salomon & Co Ltd*,<sup>143</sup> that the matter of the separate legal personality of companies incorporated under English companies legislation was finally settled. The position of companies incorporated under Malaysian companies legislation is now too regarded as trite law, separate legal personality applying.<sup>144</sup> What of an AI system which does not contain most of the attributes of a legal person. It cannot sue or be sued. It cannot hold assets. It cannot be held liable for its actions and to be accountable for any defects in its actions which may result in loss, damage or injury to persons. In general law, as AI systems stand, be they weak AI or strong AI, they are incapable of acquiring the attributes normally required of legal personality, at least presently.

It is of course possible for legal personality to be attributed to an AI system even though it might be incapable of acquiring the attributes of legal personality.<sup>145</sup> We do not think that we should embroil ourselves in a

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<sup>139</sup> Ibid, 192.

<sup>140</sup> Ibid, 192.

<sup>141</sup> Ibid, 192.

<sup>142</sup> Daniel Seng and Tan Cheng Han (n 133), 12, no 15.

<sup>143</sup> [1897] AC 22 (HL).

<sup>144</sup> CA 2016 (n 77), s. 20; Laws of Malaysia, Limited Liability Partnership Act 2012, Act 74, s 3.

<sup>145</sup> Simon Chesterman, 'Artificial Intelligence and the Limits of Legal Personality' (2020) 69 *International and Comparative Law Quarterly*, 822.

quagmire by discussing the grant of legal personality to artificial intelligence. Rather, the treatment of AI systems in the context of this Report can be addressed without considering the need or otherwise for an AI system to carry legal personality.

(vi) Artificial intelligence in the context of contract and in agency

- (a) The role of artificial intelligence and its characterisation in contract and agency has presented differing perspectives. One approach has been to characterise contracts as traceable back to the decisions of their programmers.<sup>146</sup> Another, has been to characterise the AI system as an agent in contract.<sup>147</sup> We should add that there are precursors to artificial intelligence and blockchain technology. Common examples include, inventory management systems that autonomously issue purchase orders when stock level fall below a set threshold and algorithmic trading bots that use preset criteria to execute trades. Some of the principles considered in connection with artificial intelligence and smart contracts may also have been relevant to these automated contracts of sorts.
- (b) The Singapore Court of Appeal, in *Quoine Ltd v B2C2* adopted the first approach, applied the contract principle of unilateral mistake to the contract in play.<sup>148</sup> The AI system in that case would not have been characterised as strong AI. Other arguments that artificial intelligence in the context of contracts should present as mistake in contract law also appear elsewhere.
- (c) There have been arguments as to whether an AI system should be characterised as an agent as in *Thaler v Commissioner of Patents*.<sup>149</sup> We find this approach to be difficult without statutory intervention. As discussed earlier on, an AI system should not ordinarily be capable of being an agent as it would lack legal personality. It would

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<sup>146</sup> Matthew Oliver, 45, 68, (see n 135).

<sup>147</sup> Daniel Seng, Tan Cheng Han SC, 6, No 7 (n 133).

<sup>148</sup> [2020] SGCA(I) 02 (Singapore Court of Appeal).

<sup>149</sup> [2022] FCAFC 62 (Federal Court of Australia), [36], [39]; Daniel Seng and Tan Cheng Han (n 138), 2.

then not be capable of assuming responsibility or recompensing anyone for its acts or defects. A notional principal would be held responsible for the acts of the AI systems, including, its defects and transgressions. That principal might not have played a part in the creation or programming of the AI system and yet the principal would be liable and responsible for the defects and transgressions of the AI system acting as a so-called agent. The persons responsible for the defects and transgressions would not be liable in any way based on normal rules of agency unless they should happen to be a principal; whether the principal may have recourse against such persons, for example, in tort, may be another matter, yet to be clarified in case law. We do not think that an AI system should be characterised as an agent even if this were possible without statutory intervention.

- (d) Commentaries suggest that both *Thaler* and *Quoine* should not be considered be definitive but instead raise important issue that remain unanswered and that there should be clear guidance, whether through legislation or case law.<sup>150</sup> We think that an AI system can be characterised as if it were an agent through statutory intervention but subject to certain limitations. Obviously, an AI system acting as an agent cannot be wholly equated with a legal personality acting as an agent. Also, we do not think that we should venture into whether an AI system is weak AI or strong AI nor as we had discussed before, should it be necessary to grant legal personality to the AI system. Rather, we should propose notional rules in new legislation along these lines:

- i. We have considered the legislation in Ontario and in Guernsey discussed earlier but particularly in the context of electronic agents.<sup>151</sup> The Ontario Electronic Commerce Act 2000 and Guernsey legislation has provided that an electronic agent

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<sup>150</sup> Lokman Bin Mohamed Rafi Hakim, 'Do Algorithms Dream of Mistaken Contracts? Supreme Court Case Summary: *Quoine Pte Ltd v B2C2 Ltd*' (2020) *Singapore Law Journal (Lexicon)*, 6;

<sup>151</sup> ECA 2000 (n 110), s 20; ETO 2019 (n 117).

(which by its definition is similar to an AI system) may be an agent in a contractual and transactional scenario. The legislation though, focuses on contract and transactions and documents and does not provide for the ramifications of any defect in the electronic agent except to a limited degree in respect of mistakes in the Ontario legislation.<sup>152</sup>

- ii. We think that any new legislation should also address the scenario of a defective AI system. We have considered particularly the EU Directive on artificial intelligence product liability with a view to addressing liabilities arising from such defect.<sup>153</sup> We are mindful of the similarities of the EU Directive with the Malaysian CPA 1999.<sup>154</sup> That Act though does not provide specifically for product liability arising from AI systems and the position regarding liability arising from AI systems defects remain uncertain. We should also add that there is currently no Malaysian case law relating to AI systems product liability or indeed any other form of liability. There seems to be a dearth of case law in other jurisdictions too. We think that the dearth of case law both in Malaysia and elsewhere provides a compelling argument that there should be legislative intervention to address this. We ought to add that we are aware that ascribing liability along the lines of the EU Directive to economic operators may discourage innovation. The Malaysian CPA 1999 though already tracks the earlier iteration of the EU Directive which had not addressed artificial intelligence system.<sup>155</sup> We do not think that the argument of discouraging innovation should be an impediment to ascribing liability in our proposed legislation along the lines of the EU Directive as after

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<sup>152</sup> ECA 2000 (n 110), s 21.

<sup>153</sup> Directive (EU) 2024/2853 of the European Parliament and of the Council of 23 October 2024 on liability for defective products and repealing Council Directive 85/374/EEC.

<sup>154</sup> CPA 1999 (n 80).

<sup>155</sup> Rahmah Ismail and others, 'Product Liability Law under the Malaysian Consumer Protection Act 1999: Justice for Consumers?' (2015) 9(6) *International Business Management* 1291. Part X of the CPA 1999 is based on the European Product Liability Directive (85/374/EEC).

all, a similar approach had already been taken to product liability arising from other products in the Malaysian CPA 1999. We are also aware of an argument that Malaysia is not yet at the same stage as the European Union in terms of artificial intelligence knowledge and that any legislation touching on artificial intelligence at this stage would be premature. We again do not think that this should be an impediment. Liabilities arising from artificial intelligence is an area which should be addressed presently and agency law, among others. Artificial intelligence knowledge and support can be augmented from elsewhere, as necessary. We should also mention that the EU Directive places requirements on defendants to provide particular evidence to mitigate the difficulties in collating evidence in an area as complex as artificial intelligence. Further, a similar argument could have been presented in relation to various products covered by the Malaysian CPA 1999. We ought to also add that that EU legislation on artificial intelligence and legislation in other jurisdictions on artificial intelligence are considerably more wide ranging than what we have proposed in the draft Bill which really is substantially only an update on the Malaysian CPA 1999 which was based on an earlier iteration of the EU Directive which had not specifically addressed artificial intelligence. The draft Bill also provides powers to the Minister to make regulations including, certain powers to exempt and limit liability. These allow for greater flexibility in encouraging the development of the artificial intelligence industry while also allowing for some rights of recourse by persons dealing with an electronic agent (artificial intelligence) in agency like circumstances.

We also considered the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Automated Contracting (2024) (“MLAC”), noting that Malaysia, among others, had previously considered the

UNCITRAL Model Law on Electronic Commerce (1996) when framing the ECA 2006.<sup>156</sup> The MLAC differs from the approach which we have taken in our proposed legislation in Appendix I below. The approach taken in Part IV of the draft Bill is to ascribe liability to economic operators in the event of loss, damage or injury arising from a defect in an electronic agent product. The approach on liability in such an event tracks largely the approach taken to product liability in AI systems in the EU Directive. The MLAC, on the other hand, provides that the starting position is to attribute an action carried out by an “automated system” in accordance with what was agreed by the parties. If no agreement was reached, then the action carried out by the automated system would be attributed to the person who uses the system for that purpose.<sup>157</sup> MLAC broadly defines an “automated system” as meaning a computer that is capable of carrying out actions without the necessary review or intervention of a natural person, which approximates the definition of “electronic agent” in the draft Bill.<sup>158</sup> We think that the approach of ascribing liability to economic operators rather than the approach in the MLAC, is preferred.

We understand from discussions with various ministries and agencies of the government particularly, the National AI Office, that the government is looking into an overall review of artificial intelligence. We note the advantage of a comprehensive review of artificial intelligence with the opportunity of broad feedback from stakeholders of all aspects of artificial intelligence. We also note an argument that provisions in Part IV of the Bill particularly those relating to electronic agents and electronic agent products should be deferred until a later point in time when such provisions can form part of a more comprehensive and

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<sup>156</sup> A. Palanissamy, ‘Legal Issues in e-Commerce and e-Contracting – An Overview of Initiatives in Malaysia’ (2013) 3(2) International Journal of e-Education, e-Business, e-Management and e-Learning 119.

<sup>157</sup> UNCITRAL, *Model Law on Automated Contracting* (2024), Annex IV, art 2.

<sup>158</sup> Ibid.

overarching legislation on artificial intelligence. We have considered this too but think that introducing legislation on artificial intelligence matters in the context of agency at this time would be much preferred in the interests of providing clarity to the law at this opportune time and relatively expeditiously as part of a review into the reform of contract law. The legislative process for any area let alone in an area like artificial intelligence may be protracted. We do not think that awaiting generic legislation on artificial intelligence would be the best approach. We similarly take the view that awaiting case law to address many of the uncertain areas arising from artificial intelligence in the context of agency would be something too protracted. Further, generic legislation on artificial intelligence may not focus on the peculiar aspects of agency law.

iii. A summary of some aspects of the Guernsey and Ontario legislation on electronic agents acting as agents and some related definitions is set out below:

- The Guernsey legislation sets out the legal effect of actions carried out by means of an electronic agent and defines “electronic agent” as “a computer program or electronic or other automated means used independently to initiate an action or to respond in whole or in part to information or actions in electronic form or communicated by electronic means, without review or action by a natural person”.<sup>159</sup>
- The Ontario legislation sets out provisions addressing the involvement of electronic agents and errors in transactions involving electronic agents. It defines “electronic agent” as “a computer program or any other electronic means used to initiate an act or to respond to

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<sup>159</sup> ETO 2019 (n 117), s 6.

electronic documents or acts, in whole or in part, without review by an individual at the time of the response or act; (“agent électronique”).<sup>160</sup>

We have also considered, the definition of “electronic agent” and “electronic record” in the United States Code which provides: <sup>161</sup>

“electronic agent” means a computer program or other automated means used independently to initiate an action or respond to electronic records or performances in whole or in part without review or action by an individual at time of the action or response.

“electronic record” means a contract or other record created, generated, sent, communicated, received, or stored by electronic means.

iv. The EU Directive on liability for defective products:<sup>162</sup>

It provides for certain liabilities arising from defective AI systems. It ascribes liability to certain categories of persons, including manufacturers and in some cases, importers, authorised representatives and service providers, such persons known as economic operators. It also provides for evidential presumptions and the obligation for a defendant to produce certain evidence, having regard to the complexities of any such claims. It also provides for member states to augment the Directive with further legislation. The approach taken in the Directive bears similarities to the Malaysian CPA 1999 but with the latter not addressing specifically AI systems. The Directive does not use the terminology, AI system or some

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<sup>160</sup> ECA 2000 (n 110), s 1(1).

<sup>161</sup> The Code of Laws of the United States of America, Title 15, s 7006 (15 U.S. Code § 7006).

<sup>162</sup> Directive (EU) 2024/2853 of the European Parliament and of the Council of 23 October 2024 on liability for defective products and repealing Council Directive 85/374/EEC.

similar term. It refers instead to “product”. A selection of definitions used in the Directive appears below:

- “product” means all movables, even if integrated into, or inter-connected with, another movable or an immovable; it includes electricity, digital manufacturing files, raw materials and software.
- “digital manufacturing file” means a digital version of, or digital template for, a movable which contains the functional information necessary to produce a tangible item by enabling the automated control of machinery or tools.

v. The definitions of artificial intelligence and artificial intelligence system as considered by us appear below:

- In the UK Artificial Intelligence (Regulation) Bill [HL], “artificial intelligence” and “AI” mean technology enabling the programming or training of a device or software to— (a) (b) (c) perceive environments through the use of data; interpret data using automated processing designed to approximate cognitive abilities; and make recommendations, predictions or decisions; with a view to achieving a specific objective. AI includes generative AI, meaning deep or large language models able to generate text and other content based on the data on which they were trained.<sup>163</sup>
- In the EU Artificial Intelligence Act 2024, “artificial intelligence system” or “AI system” means a machine-based system that is designed to operate with varying levels of autonomy and that may exhibit adaptiveness after deployment, and that, for explicit or implicit objectives,

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<sup>163</sup> Artificial Intelligence (Regulation) Bill [HL], Private Members' Bill (Starting in the House of Lords), Originated in the House of Lords, Session 2023-24 (UK).

infers, from the input it receives, how to generate outputs such as predictions, content, recommendations, or decisions that can influence physical or virtual environments.<sup>164</sup>

vi. We have decided to approach the new legislation for artificial intelligence in this way:

- The acts of an AI system should be equated in general with that of an agent in an appropriate circumstance with the principal liable for the acts of the AI system.
- The principal would not be liable though if the acts of the AI system are due to a defect, in which case, the persons responsible for the manufacture, development, and distribution of the AI system would be the ones liable.
- The legislative provisions will not provide that the AI system will carry legal personality.
- The approach then to be taken where there is no defect in the AI system is to treat the matter as a matter of agency law.
- The approach to be taken where there is a defect is to provide for the liability of persons who may have been responsible in some way for the defective AI system, with liability expanded in scope beyond the scope of the EU Product Liability Directive,<sup>165</sup> with liability being quantified based on the rules of tortious liability and with provision for the production of evidence and evidential presumptions considering the complexity of the collation

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<sup>164</sup> Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024, laying down harmonised rules on artificial intelligence and amending Regulations (EC) No 300/2008, (EU) No 167/2013, (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1139 and (EU) 2019/2144 and Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828 (“Artificial Intelligence Act”).

<sup>165</sup> Directive (EU) 2024/2853 of the European Parliament and of the Council of 23 October 2024 on liability for defective products and repealing Council Directive 85/374/EEC.

of evidence in these circumstances and with other procedural and related matters.

- We propose to use the term “electronic agent” in the new legislation to characterise an AI system with adjustments made after considering the definitions of electronic agent in the Ontario and Guernsey legislation and the definitions of “artificial intelligence” and “computer”, in the UK Artificial Intelligence (Regulation) Bill.<sup>166</sup>
- In addressing the definition of a “computer” for the purposes of the new legislation, we have also drawn from existing Malaysian written laws, particularly the Computer Crimes Act 1997, the Evidence Act 1950, and the National Land Code.<sup>167</sup>
- In defining the term “computer program” in the new legislation, we have drawn from the EU Computer Program Directive, which provides that a computer program shall include programs in any form, including those which are incorporated into hardware, and preparatory design material leading to the development of a computer program, provided that the nature of the preparatory work is such that a computer program can result from it at a later stage.<sup>168</sup>
- We have used the definitions in the various overseas and Malaysian legislation to augment “electronic agent” and related definitions in our proposed legislation. We have also taken into account the definition of “product” in the EU Directive and created a definition “electronic agent

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<sup>166</sup> ECA 2000 (n 110), s 1; ETO 2019 (n 117), s 6; Artificial Intelligence (Regulation) Bill (HL) (UK) (n 164), s 7.

<sup>167</sup> Laws of Malaysia, Computer Crimes Act 1997, Act 563, s 2; Laws of Malaysia, Evidence Act 1950, Act 56, s 3; NLC (n 45), sch 14 s 5A.

<sup>168</sup> Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs.

product”, the product of our enhanced definition of “electronic agent” and the EU Directive definition of “product”.

(vii) Conclusion

- (a) We think that provisions specific to AI systems should be provided for in addition to provisions on matters electronic in general, considering the complexity and the dearth in case law and legislation in Malaysia on AI Systems. It would also help clarify the position of agency law in the context of AI systems.
- (b) We do not think that the approach to new legislation should be restricted to a mere mention that an AI system would be an agent. This would manifest in enormous difficulties. The AI system is incapable of assuming responsibility and liability. It has no legal personality. It would be inequitable for the principal to assume liability if the AI system is defective and others who manufactured, programmed or distributed them, among others, may have contributed in some way to the defect. New legislation would need to address these.
- (c) The new legislation which we would propose should track substantially our discussions in paragraph 7.3. In summary, the approach to artificial intelligence and agency should then be:
  - i. An agent in accordance with normal rules of agency but subject to the peculiarities of an AI system acting as agent unless it does something resulting in loss, damage, or injury arising from a defect in the AI system. Where there is no defect, the principal will be liable even though the AI system is in itself incapable of being liable or to be sued;
  - ii. If the AI system is defective resulting in loss, damage, or injury, the persons who contributed to the defect should instead of the

principal, be held liable, we have used the term “economic operators” in our proposed legislation for those persons too albeit with some modifications;

- iii. Rules should be drawn up to address difficulties in obtaining and substantiating evidence including, obligations on the part of the defendant to provide some of that evidence and for certain presumptions to apply;
  - iv. The approach to damages including, apportionment among defendants, if not more than one should be specified;
  - v. Some protection should be given against liability, for example, to mitigate against incentives to technological improvements;
  - vi. The Minister and the Rules Committee (court rules) should be able to make additional regulations and rules to augment the primary legislation ;
  - vii. provisions on artificial intelligence liability and proceedings.
- (d) We should add that we considered whether the Minister should be given broad powers to alter the provisions on artificial intelligence in the new legislation in order to cater for changes in technology and to allow convenient adjustments to be made. In this respect, we considered the feasibility of introducing “Henry VIII clauses” to empower the Minister to modify the provisions in the legislation to accommodate changes in technology. We concluded that changes of such a nature would be best approached through the parliamentary process to allow for more extensive consultation and scrutiny of the proposed changes, having regard to the complexities of artificial intelligence. We also think that in any event, rules on statutory interpretation relating to the presumption that an updating

construction is to be given would also assist changes in technology in the context of the new legislation.<sup>169</sup>

## 2.9 Limitations on Liability and Indemnities

### 2.9.1 Overview

- (i) We considered restricting provisions limiting liability and indemnities for the benefit of agents. In this respect, see our proposals in the draft Bill in clause 5 in relation to agency generally and in clause 26 in relation to artificial intelligence (electronic agents).
- (ii) We had initially considered an absolute prohibition on certain limitations of liability and indemnities along the lines of section 40 of the New Zealand Trusts Act 2019. On further consideration, we thought that limitations based on reasonableness and some other criteria would be the better approach. There could be quite appropriate reasons for limitations to be necessary. We did not want a prohibition to deter persons from acting as agents or to constrain the development of artificial intelligence, a reasonableness and other criteria instead as our recommended approach.

### 2.9.2 Legislation

- (i) Some excerpts of legislation considered by us:

- (a) Unfair Contract Terms Act 1977 (UK)

- i. **“2. Negligence liability**

- (1) A person cannot by reference to any contract term or to a notice... exclude or restrict his liability for death or personal injury resulting from negligence. (2) In the case of other loss or damage, a person

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<sup>169</sup> Oliver Jones and Francis Bennion, *Bennion on Statutory Interpretation* (6th edn, LexisNexis 2013) XVIII 797–815; R (on the application of Quintavalle) v Human Fertilisation and Embryology Authority Copy Citation [2005] UKHL 28.

cannot so exclude or restrict his liability for negligence except in so far as the term or notice satisfies the requirement of reasonableness.”

ii. **“3. Liability arising in contract**

(1) This section applies as between contracting parties where one of them deals on the other's written standard terms of business.

(2) As against that party, the other cannot by reference to any contract term— (a) when himself in breach of contract, exclude or restrict any liability of his in respect of the breach; or (b) claim to be entitled... to render a contractual performance substantially different from that which was reasonably expected of him... except in so far as... the contract term satisfies the requirement of reasonableness.”

iii. **“11. The "reasonableness" test**

(1) ...the requirement of reasonableness... is that the term shall have been a fair and reasonable one to be included having regard to the circumstances which were, or ought reasonably to have been, known to or in the contemplation of the parties when the contract was made.”

iv. **Schedule 2 - "Guidelines" for Application of Reasonableness Test**

The matters to which regard is to be had... are any of the following which appear to be relevant—

(a) the strength of the bargaining positions of the parties...;

(b) whether the customer received an inducement to agree to the term...;

(c) whether the customer knew or ought reasonably to have known of the existence and extent of the term...;

(d) ...whether it was reasonable at the time of the contract to expect that compliance with that condition would be practicable;

(e) whether the goods were manufactured, processed or adapted to the special order of the customer.

(b) Consumer Rights Act 2015 (UK)

i. **“62. Requirement for contract terms and notices to be fair**

(1) An unfair term of a consumer contract is not binding on the consumer. ... (4) A term is unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer.”

ii. **“65. Bar on exclusion or restriction of negligence liability**

(1) A trader cannot by a term of a consumer contract or by a consumer notice exclude or restrict liability for death or personal injury resulting from negligence.”

(c) Trusts Act 2019 (New Zealand)

i. **“40. Trustee's liability may not be limited or excluded**

The terms of a trust must not limit or exclude a trustee's liability for any breach of trust arising from the trustee's dishonesty, wilful misconduct, or gross negligence.”

ii. **“41. Trustee's indemnity may not be limited or extended**

The terms of a trust must not give a trustee any indemnity against the trust property for liability for any breach of trust arising from the trustee's dishonesty, wilful misconduct, or gross negligence.”

iii. **“42. Effect of non-compliant term**

To the extent that a term of a trust is inconsistent with section 40 or 41, the term is invalid.”

## **2.10 Private International Law**

2.10.1 The CA 1950 does not provide explicitly on the circumstances when the CA 1950 would not apply by reason of the application of foreign law or vice versa. The application of foreign law or of the CA 1950 would then presumably be determined by rules of private international law which in Malaysia would be largely through case law.

2.10.2 The application or otherwise of the CA 1950 relative to foreign law might have been less important in a less globalised world without the role of the internet and technology in the making of contracts across borders.

2.10.3 These matters do not just apply to contracts generally but also to the formation of agencies and things related.

2.10.4 We note that it is not unusual in more recent legislation in various jurisdictions for there to be specific provisions on the circumstances in which particular provisions in statute related to contracts and transactions might or might not apply to matters not governed by the law of the statute. Expressed provisions permeate the New Zealand CCLA 2017 in this regard. For example:

- (i) section 19 of the New Zealand CCLA 2017 provides that Subpart 1 of Part 2 of the New Zealand CCLA 2017 on the contractual privity does not apply to any promise, contract or deed or any part of a promise, contract or deed that is governed by a law other than New Zealand law;
- (ii) section 60 of the New Zealand CCLA 2017 provides that certain provisions in Subpart 4 of Part 2 of the New Zealand CCLA 2017 on frustrated contracts applies to a contract governed by New Zealand law and the contract has become impossible to perform or has otherwise been frustrated and the parties have been discharged from performance.
- (iii) The ETO 2019, section 4 provides that:

“The provisions of this Act are without prejudice to the operation and application of the rules of private international law (and accordingly the legal effect, validity, enforceability and admissibility of a contract or any provision thereof will continue to be determined by the system of law applicable to the contract or that provision, or governing its legal effect, validity, enforceability or admissibility, according to the rules of private international law)”.

- (iv) We think that modern circumstances require that the proposed legislation should, as far as possible, provide in the interests of clarity the circumstances in which the legislation should apply and rules and presumptions on the governing law. Also, there are certain provisions in the proposed legislation, for example, AI system liability, where the provisions of the legislation should apply even where foreign law may apply to the agency.
- (v) The draft Bill in Appendix I incorporates expressed provisions to address issues of private international law, the application of Malaysian law and the application of the legislation in circumstances where foreign law may apply.

## **2.11 Bill, Policy Statement and Consultation Questions**

2.11.1 We have set out below in Appendix I, II, III, IV and V our proposals for a draft Bill on agency law, the policy statements accompanying the Bill, the comparative matrix for the Bill, the summary of the dialogue between us and National University Singapore and consultation questions for feedback from Stakeholders Focus Groups and other interested parties.

### **2.11.2 Approach**

- (i) We have considered the above and propose the following legislative provisions in the form of a draft Bill. The draft Bill assumes standalone legislation on agency law. Modifications would of course be required should the provisions in the draft Bill be included as part of legislation covering a wider ambit of contract law.

- (ii) We arrived at the draft Bill having considered the preceding matters in this Report.
- (iii) We also considered whether the draft Bill should primarily track the existing provisions in Part X of the CA 1950 with drafting modifications or changes to the existing provisions augmented by additional subject areas to be provided, for example, on powers of attorney, seals, electronic transactions and artificial intelligence:
  - (a) The addition of electronic transactions and artificial intelligence, in particular, would make it difficult for the provisions of the draft Bill to be incorporated into Part X of the CA 1950 as the other provisions of the CA 1950 do not address these areas. Interpretative and construction issues could arise. The New Zealand CCLA 2017, for example, introduces a separate segment addressing electronic and technology matters applicable to the rest of the legislation;<sup>170</sup>
  - (b) The CA 1950 is drafted as a quasi code, its provisions being relatively short and espousing brief principles and rules, augmented by some illustrations. The drafting approach is different from the approach in most legislation which contains considerably more detailed provisions. The provisions of the draft Bill are approached very differently from the approach in Part X and in the CA 1950 generally. The nature of some of the additional subject matter included in the provisions including, artificial intelligence, electronic and technology matters, powers of attorney and others require a drafting approach substantially different from the drafting approach taken in the CA 1950. We think that from a drafting perspective, the provisions of the draft Bill should be incorporated into separate legislation from the CA 1950. Inconsistencies in interpretation and construction could also arise if incorporated into Part X.

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<sup>170</sup> CCLA 2017 (n 111), Part 4.

- (c) The draft Bill is also drafted along the lines of more modern legislation, intended to make reading of the legislation easier. The CA 1950 is based on the ICA 1872 which was drafted in the 19<sup>th</sup> century;
- (d) In considering our approach in paragraphs (i) to (iii), we have factored the law reform objectives of our review.

The CA 1950 did not expressly provide for the interrelationship between the legislation and the common law. As discussed above, the Malaysian courts have in practice often applied the common law, sometimes without reference to the CA 1950. The draft Bill is drafted to expressly say that its provisions are not a code and that the common law may apply in tandem with the provisions of the draft Bill.

2.11.3 The policy statements in Appendix II are intended to accompany the draft Bill and track substantially the provisions of the draft Bill.

2.11.4 The comparative matrix comparing and explaining the differences between the proposals in the draft Bill and the provisions in the CA 1950, among others, appear in Appendix III. The comparative matrix also includes thoughts and rationale to proposals in the draft Bill additional to those in this Report above. These thoughts and rationale form part of this Report.

2.11.5 A summary of the dialogue between us and the National University of Singapore appears in Appendix IV. This was an opportunity for us to discuss matters of agency law for consideration in our proposals. We have taken into account these matters and explained our reasons for our approach in this Report although not specifically referring to the dialogue as the matters had already been considered and taken into account earlier on by us.

2.11.6 The questions in Appendix V for feedback from stakeholders and other interested persons are crafted to request feedback on the current Part X of the CA 1950, the draft Bill and more specific questions on particular areas which may overlap with the contents of the draft Bill. The questions assume access by the stakeholders

and other interested persons to this Report and would have to be modified if otherwise.

## **Appendix I: Draft Bill on Agency Law**

We set out below, our proposals for a draft Bill on agency law. The draft Bill is provisional in nature and its provisions may be incorporated into more expansive legislation incorporating other aspects of law. We have presented the draft Bill on the basis of standalone legislation on agency law in order to provide a clearer perspective of our views and recommendations on the approach to be taken in the reform of agency law.

A BILL

*intituled*

An Act to re-enact, revise and update the law relating to agency and to provide for related matters.

[ ]

**ENACTED** by the Parliament of Malaysia as follows:

PART I

PRELIMINARY PROVISIONS

### **Short title and commencement**

1. (1) This Act may be cited as the Agency Act 2026.

(2) This Act comes into operation on a date to be appointed by the Minister by notification in the Gazette and the Minister may appoint different dates for the coming into operation of different provisions of this Act.

### **Interpretation**

2. (1) In this Act, unless the context otherwise requires—

“advocate” means a person entitled to practise as an advocate or as an advocate and solicitor under the law in force in any part of Malaysia;

“agency” means an agency as referred to in section 3;

“agent” means an agent as referred to in section 3;

“arrangement” means an arrangement which carries legal consequences.

"artificial intelligence"

(a) means technology enabling the programming or training of a device or software to—

(i) perceive environments through the use of data;

(ii) interpret data using automated processing designed to approximate cognitive abilities; and

(iii) make recommendations, predictions, or decisions,

with a view to achieving a specific objective;

(b) includes, generative artificial intelligence, meaning deep or large language models able to generate text, images, audio, and other content based on the data on which it was trained;

"artificial intelligence system" means a machine-based system that is designed to operate with varying levels of autonomy and that may exhibit adaptiveness after deployment, and that, for explicit or implicit objectives, infers, from the input it receives, how to generate outputs such as predictions, content, recommendations, or decisions that can influence physical or virtual environments;

“common law” means the common law and includes, the common law as applied in Malaysia;

“computer” means any digital, electronic, magnetic, optical, electrochemical, or other device for the recording, storage, retrieval, or processing of data or information, or a group

of such interconnected or related devices, performing logical, arithmetic, storage, or display functions, and includes, any data storage or communications facility operating together with such device, or group of such interconnected or related devices; and it includes, the necessary input and output and databases of a computer; but it does not include, any device which is non-programmable or which does not contain any data storage facility;

“computer program” means programs in any form, including those which are incorporated into a computer or into any hardware and includes preparatory design work leading to the development of a computer program provided that the nature of the preparatory work is such that a computer program can result from it at a later stage;

“contract” includes, any contract, transaction or other act, document, record, notice or instrument which produces legal consequences, oral, written or otherwise;

“electronic” includes, created, recorded, transmitted or stored in digital form or in other intangible form by electronic, magnetic or optical means or by any other means that has capabilities for creation, recording, transmission or storage similar to those means, including, by a computer, by computer program, by artificial intelligence or by an artificial intelligence system; and “electronically” has a corresponding meaning;

“electronic agent” includes, a computer program or an artificial intelligence system or an electronic or other automated means used independently to initiate an action or respond to electronic records or performances in whole or in part, without review or action by a natural person;

“electronic record” means a contract or other record created, generated, sent, communicated, received, or stored by electronic means;

“equity” means the law of equity as applied in Malaysia;

“legal capacity” includes, any of the criteria for legal capacity specified in this Act or the capacity to enter into and perform any contract or otherwise to affect legal relations with third parties;

“mental incapacity” means a person who lacks capacity to enter into and perform any contract or otherwise to affect legal relations with a third party as he is unable to make a decision for himself in relation to that matter because of an impairment of, or a disturbance in the functioning of the mind or brain, whether permanent or temporary and “mental capacity” and “lack of mental capacity” carry corresponding meanings;

“principal” means a principal as referred to in section 3;

“sub-agent” means a sub-agent as referred to in section 10;

“terms” in relation to an agency, means any or all of the following, as varied from time to time, as the context requires—

(a) express written terms of the agency;

(b) express oral terms of the agency;

(c) express terms of the agency in any other form.

(2) This Act—

(a) is not an exhaustive code of the law relating to agency or agents; and

(b) is intended to be complemented by the rules of the common law and equity except where otherwise indicated or where those rules are inconsistent with the provisions of this Act.

(3) If there is any inconsistency between the provisions of this Act and those of any other written law, the provisions of that other written law prevail, unless this Act provides or intends otherwise.

(4) The terms “appoint”, “appointment” and words of similar effect when used in connection with an agent and the creation of an agency include, a person who becomes an agent and an agency created in any way contemplated by this Act and the common law and equity, where this applies.

(5) The provisions of this Act do not apply to an agency governed by a law other than Malaysian law unless this Act provides otherwise. The law governing an agency is presumed (unless the contrary is expressed or intended) to be Malaysian law if—

- (a) the agent is appointed to perform acts substantially in Malaysia; or
- (b) the agent is solely or principally, a resident of Malaysia; or
- (c) the contract or acts to be entered into or performed by the agent are substantially governed by the laws of Malaysia; or
- (d) the principal is solely or principally, a resident of Malaysia; or
- (e) the agent or the principal has a place of business in Malaysia and the agency involves the business or operations of that place of business; or
- (f) the agent or the principal is established under the laws of Malaysia; or
- (g) the contract or acts to be entered into or performed by the agent substantially involve as parties to the contract or acts, residents of Malaysia, the residence of the principal and the agent to be taken into account.

## PART II

### AGENCY

#### Division 1

##### General Provisions

##### **Agency defined**

3. An agency is the relationship (whether or not, fiduciary) which exists between two persons—

- (a) one of whom expressly or impliedly manifests assent that the other should act on his behalf with or without authority to affect his legal relations with third parties; and

(b) the other of whom similarly manifests assent so to act or so acts pursuant to the manifestation.

The one on whose behalf the act is to be done is the principal. The one who is to act is the agent. A third party is a person other than the principal or the agent.

### **Other elements of agency**

4. (1) An agent and principal may be a natural person or any other person with legal capacity to act as agent or principal, as may apply.

(2) An agency may be created without consideration.

(3)(a) An agency may not be created if prohibited by any written law or by common law or by equity.

(b) If any written law provides that any agency may only be created subject to specified conditions or formalities, no agency may be created until those conditions or formalities are met.

(4) Legal capacity—

(a) shall subject to subsection (3)(b), be subject to the operation and application of the rules of private international law (and accordingly, legal capacity will be determined by the system of law applicable to legal capacity, according to the rules of private international law);

(b) of an individual in Malaysia, whether as agent or principal, entering into or creating an agency relationship governed by the laws of Malaysia will be determined by the laws of Malaysia.

(5) Legal capacity of an agent or principal where the laws of Malaysia apply will—

(a) if an individual, cease on death, mental incapacity or bankruptcy;

- (b) if a legal person, cease on winding up or dissolution or if it ceases to have the power and capacity to perform the matter at hand.

The legal capacity of an agent or principal at a point in time is construed accordingly. Nothing in this subsection (5) requires that an agent must have legal capacity.

(6) A principal must have legal capacity in order to appoint an agent.

(7) The following apply to an agent in the context of legal capacity—

- (a) Any person may be an agent regardless of legal capacity;
- (b) An agent's lack of legal capacity does not preclude the agent from performing acts as agent including, any which have legal consequences on the principal. The principal is bound to third parties by the acts of such an agent as if the agent had legal capacity. To avoid doubt, no agency relationship may be created where the purported agent lacks legal personality except under the provisions of Division 2 of Part IV;
- (c) Despite the provisions of paragraph (b), an agent who is a minor or who lacks mental capacity is not—
  - (i) responsible to his principal; or
  - (ii) personally bound to third parties in respect of any acts on behalf of his principal including, contracts or any other acts which may have legal consequences.

In this paragraph (c), a minor and a person who lacks mental capacity does not include a minor or a person with a degree of mental incapacity who has at the material time a sufficient understanding to consent to the agency and to do the act required by the agency.

(8) The following apply to the loss of legal capacity following the creation of an agency—

- (a) An agent's actual authority terminates when his principal loses legal capacity but only when the agent has notice of the loss of legal capacity;

(b) The termination of the agency is effective as against a third party dealing with the agent when the third party has notice of the loss of the legal capacity of the principal;

(c) An agent's actual authority will remain effective despite his principal losing his legal capacity where—

(i) a power of attorney conferring authority on the agent (the attorney) is irrevocable or not subject to revocation under the provisions of Part III;

(ii) an instrument makes an agent's actual authority effective upon the principal's loss of capacity or that instrument is irrevocable despite such loss, written law permitting.

Subparagraphs (i) and (ii) are separate and independent from each other and each subparagraph does not limit the scope and effect of the other.

(9) The provisions of this Act, when referring to an agent include, a reference to an attorney under a power of attorney and a reference to an agency includes, an agency established by power of attorney, unless the context or the nature of an attorney or power of attorney otherwise requires.

## Division 2

### Limitations and authority

#### **Agency arrangements and limitations**

5. (1) The provisions of this Part contain expressed provisions on what an agent can and cannot do. An agent may act in a way which is different from what it can do in those expressed provisions if it is within, in any event, the actual authority of the agent as specified in subsection 7(1). An agent's acts may also be validated or allowed by other provisions of this Act. To avoid doubt but without limiting the application of subsections 2(2) and 2(3), the common law and other written laws may be taken into consideration when determining the authority and obligations of an agent and other matters relating to the nature or relationship of the agency. Nothing in this subsection (1) precludes the application of subsections (2) to (3).

(2) The following provisions apply to an agent where an agent limits or excludes his liability or obtains an indemnity for any breach of his duties and obligations arising from his dishonesty, wilful misconduct, or gross negligence. When these provisions refer to limitation or exclusion or indemnity, they intend to include any contract or arrangement in whatever form. These provisions do not preclude any additional prohibitions or restrictions on such exclusions or limitations under any other written law—

- (a) no such limitation or exclusion or indemnity may have the effect of excluding or limiting liability or claims or providing an indemnity unless that limitation or exclusion or indemnity is a fair and reasonable one having regard to the circumstances which were, or ought reasonably to have been, known to or contemplated by the parties to the contract or arrangement when made;
- (b) no such limitation or exclusion or indemnity may have the effect of allowing any third parties not a party to any contract or arrangement for the creation of the agency to benefit or acquire rights from any provisions in any such contract or arrangement which exclude or limit liability or claims or which may provide an indemnity;
- (c) no such limitation or exclusion or indemnity may have the effect of making a right or remedy or its enforcement subject to a restrictive or onerous condition;
- (d) no such limitation or exclusion or indemnity may have the effect of allowing the principal to be put at a disadvantage as a result of pursuing such a right or remedy;
- (e) no such limitation or exclusion or indemnity may have the effect of excluding or restricting rules of evidence or procedure;
- (f) a limitation or exclusion or indemnity separate from or secondary to or otherwise related to the limitation or exclusion or indemnity referred to in paragraphs (a) to (e) purporting to have the effect of excluding or limiting or providing an indemnity in relation to any of the matters which would otherwise have been prohibited by such subparagraphs are prohibited.

(3) Subsections (1) and (2) apply to an agency created before the date of commencement of this Act to the extent that it relates to the liability of an agent accrued on or after such date.

(4) The Minister may make regulations to—

- (a) exempt any business or profession regulated by written law from the application of subsection (2);
- (b) limit or modify the application of subsection (2) in respect of any business or profession regulated by written law.

## **General**

**6.** An agent must observe these provisions if he does not have actual authority to the contrary or is otherwise allowed to act differently under other provisions of this Act—

(1) an agent must exercise the care and skill that is reasonable in the circumstances, having regard, in particular—

- (a) to any special knowledge or experience that the agent has or that the agent holds out as having; and
- (b) if the person acts as an agent in the course of a business or profession, to any special knowledge or experience that it is reasonable to expect of a person acting in the course of that kind of business or profession;

(2) an agent must not exercise his authority directly or indirectly for the agent's own benefit;

(3) an agent must take instructions from his principal, where reasonably possible, where circumstances are such that an agent would reasonably be expected to look to the principal for instructions;

(4) an agent must additionally, also take any other instructions from his principal;

(5) an agent, in the absence of instructions from his principal or of terms, must conduct the agency in accordance with the custom of an agency of that nature at the place where the agent conducts the agency;

(6) an agent must not bind or commit the principal or himself to a future exercise or non-exercise of a discretion;

(7) an agent must avoid a conflict between the interests of the agent and the interests of the principal;

(8) an agent must not delegate his duties and obligations to another;

(9) if an agent acts for more than one principal, he must consider whether he is able to properly discharge his duties as an agent for more than one principal;

(10) if an agent acts for more than one principal, he must not be unfairly partial to one principal or group of principals to the detriment of the others;

(11) an agent must not make a profit from the agency or deal on his own account in the business of the agency;

(12) an agent must not take any reward for acting as an agent, but this does not affect the right of an agent to be reimbursed for the agent's legitimate expenses and disbursements;

(13) an agent must render proper accounts to the principal on demand;

(14) an agent must pay to his principal all sums received on account of the principal, but he may retain from sums received on account of the principal, all moneys due to him in respect of advances made or expenses properly incurred by him in conducting the business of the agency and any remuneration payable to him for acting as agent;

(15) if there is more than one agent, the agents must act unanimously.

(16) an agent cannot personally enforce contracts entered into by him on behalf of his principal, nor is he personally bound by them. An agent shall be presumed to be able to act to the contrary and to be personally bound—

(a) where a contract is made by him for the sale or purchase of goods for a merchant resident abroad;

(b) where he does not disclose the name of his principal; and

(c) where the principal, though disclosed, cannot be sued.

### **Actual authority**

7. (1) An agent has actual authority—

(a) when the authority is to act so as to affect the principal's legal relations with third parties; and

(b) it results from a manifestation of assent that the agent should represent or act for the principal, expressly or impliedly made by the principal to the agent.

(2) Actual authority may be express or implied.

(3) The agent must have reasonably understood and believed from the principal's manifestations that the agent was to represent or act on the principal's behalf in accordance with the manifestations.

(4) An agent has actual authority in the following matters. These matters do not limit the circumstances in which an agent may have actual authority under subsections (1) and (2)—

(a) all the authority to carry out the agency in accordance with its terms;

(b) all the authority to carry out any acts or matters incidental to paragraph (a);

(c) all the authority to carry out any acts or matters necessary in order to do the act authorised;

(d) if the authority is to carry on a business, all the authority to carry out any acts or matters necessary for the business or usually done in the course of conducting such business;

(e) all the authority, in an emergency, to carry out any acts or matters for the purpose of protecting his principal from loss or damage as the agent would have done, if a person of ordinary prudence, in similar circumstances;

(f) the authority to act if the nature of the agency or ordinary custom of the business allows the agent to act in that way. These may include, in such circumstances, the authority to appoint another to carry out acts which the agent is required to perform in an agency.

(5) An agent is only authorised to carry out lawful acts and the principal is not liable to the agent to indemnify the agent against an act which is unlawful. This act includes, an act to be performed by a third party and any express or implied promise to indemnify against such an act.

(6) A principal is only bound by the acts of his agent to the extent that such acts are within the authority of the agent. If such acts include, acts which are not within the authority of the agent, the principal is only bound by the acts within the authority of the agent if the acts within the authority of the agent can be separated from the acts not within the authority of the agent. The provisions of this subsection are subject to the provisions of section 9.

(7) A principal shall be regarded to have notice of any information obtained, received or held by his agent in the course of the business of the agency, as between the principal and third parties. This is unless—

(a) the ordinary custom of the business or the applicable law to an agency of that nature infers or provides to the contrary;

(b) the information is obtained, received or held by the agent wholly or primarily in a different capacity;

(c) the information is withheld by the agent from the principal in connection with a fraud on the principal.

### **Apparent authority**

**8.** (1) An agent or other actor has apparent authority when he has the power to affect a principal's legal relations with third parties where a third party reasonably believes that the agent or other actor has authority to act on behalf of the principal and that belief results from the principal's manifestations—

(a) a person does not have to be an actual agent of a principal in order to have apparent authority;

(b) a person who does not have actual authority may have apparent authority;

(c) an expression in this Act to the authority of a person, whether as having or not having authority or words to similar effect refer to actual authority and not to apparent authority, in the absence of a specific reference to apparent authority or unless the context requires otherwise.

The other actor refers to a person who is not an actual agent. Agent when used elsewhere in this section or for purposes of apparent authority includes such an actor.

(2) An agent with apparent authority who acts purportedly on behalf of a principal with legal consequences for the principal binds the principal, as to those acts within his apparent authority, to the third party. The principal must ratify the act of the agent, in order for the principal to enforce any contract arising from those acts.

(3) The provisions of this section do not limit the operation of the doctrine of estoppel.

### **Rights of an agent**

9. (1) Subject to the terms of the agency, an agent is only entitled to payment for the performance of any act when the act has been completed but an agent may withhold moneys received by him on account of goods sold even though all the goods consigned to the agent for sale have not been sold or the sale is not yet completed.

(2) An agent, guilty of misconduct in the business of the agency, is not entitled to any remuneration in respect of the part of the business, the subject of the misconduct. Despite this provision, the court in its discretion may allow the agent a proportion of the remuneration if it would be fair and reasonable to do so in the circumstances.

(3) Subject to the terms of the agency, an agent is entitled to retain property (whether movable or immovable) of the principal held by the agent, until amounts due for commission, disbursement and services in respect of the agency have been paid or accounted for to the agent. Amounts due are to be reasonable if not specifically provided in the terms of the agency.

(4) A principal—

(a) shall indemnify his agent against the consequences of acts of the agent performed lawfully and in good faith, within his authority, even if prejudicial to the rights of third parties;

(b) is liable to compensate his agent where the principal has undertaken to the agent to perform acts to facilitate the performance of the duties and obligations of the agent and the agent suffers injury due to the principal's lack of care and skill.

### Division 3

#### Sub-agents

#### **General rules**

**10.** The following apply—

(1) a sub-agent properly appointed by the agent, binds a principal for his acts with a third party as if directly appointed by the principal. This does not mean that the sub-agent is actually appointed by the principal.

(2) an agent is responsible to the principal for the acts of the sub-agent.

(3) the sub-agent may not act beyond the authority of the agent.

(4) the authority of the sub-agent may be limited, expressly or impliedly by the agent. The responsibility of the agent to his principal is not affected by any such limitation.

(5) the terms of appointment of a sub-agent by the agent do not bind the principal.

(6) a sub-agent is responsible to the agent for his acts but will also be responsible to the principal for the sub-agent's dishonesty, wilful misconduct or gross negligence, in addition to any responsibility of the agent to his principal.

(7) an agent who appoints a sub-agent without authority is responsible for all the acts of the sub-agent as if the agent were the principal and the sub-agent, the agent. The principal is not responsible for the acts of the sub-agent in such a case and the sub-agent is not his agent.

(8) a sub-agent's authority terminates when the authority of the agent terminates. The provisions of section 13 apply as between the agent and the sub-agent.

(9) an agent may not appoint a sub-agent where the law does not allow the agent to make such an appointment.

### **Agent and not a sub-agent**

**11.** If an agent is authorised to appoint another to act for the principal in the business of the agency, that person appointed is an agent of the principal and not a sub-agent. That person will have the same authority to act for the principal as the agent authorised to name that person unless to the contrary in the agency created between the principal and the agent authorised to name. Any prohibitions or limitations in this Act which apply to the agent authorised to name apply also to that person.

## **Division 4**

### **Ratification and termination**

#### **Rules on ratification**

**12. (1)** A principal may ratify the acts of an agent where the agent acts beyond his authority including, where an agent acts without authority but with apparent authority. A ratification means that the agent would be regarded as having acted within his authority. Where an agent has acted without authority but with apparent authority, the agent would, after ratification, be regarded as having acted with actual authority. A principal is not obliged to ratify, subject to the provisions of subsection 8(2). A principal may through his conduct, ratify the acts of an agent.

(2) Ratification is not possible if the rights of a third party would be adversely affected.

(3) Valid ratification by the principal must be with his full knowledge of all material facts and circumstances unless the principal has sufficient knowledge that he is doing so without full knowledge of the material facts and circumstances.

(4) Ratification is ratification of the whole of the transaction to which the act ratified relates. No ratification of part of a transaction is permitted.

### **Rules on termination**

**13.** (1) Subject to subsection 4(8), an agency terminates—

(a) when the principal terminates the agency, which may be by conduct of the principal;

(b) when the agent terminates the agency, which may be by conduct of the agent;

(c) when—

(i) the principal dies;

(ii) the principal is bankrupt or if a legal person, is subject to winding up or dissolution;  
or

(iii) the principal loses his legal capacity;

(d) when—

(i) the agent dies; or

(ii) the agent is bankrupt or if a legal person, is subject to winding up or dissolution;

(e) when the subject matter of the agency comes to an end.

(2) The following apply to the termination of an agency, subject to any terms or other arrangements to the contrary—

(a) a principal—

- (i) cannot terminate the authority of an agent when the agent has an interest in any property (whether movable or immovable) which is a subject matter of the agency;
- (ii) cannot terminate the authority of an agent for acts and obligations already performed or incurred under the agency; or
- (iii) subject to subsection (2)(a)(i), may terminate the authority of an agent before the agent has exercised his authority to bind the principal.

(3) Compensation is payable by the principal or agent terminating the agency to the other if the terms provide that the agency is to be for a period of time and the agency is terminated before that period expires, unless in accordance with the terms or other arrangements of the agency or where there is sufficient cause.

(4) A principal or agent terminating the agency must give reasonable notice, having regard to the facts and circumstances, subject to the terms or other arrangements of the agency. Damages will be payable by the principal or agent terminating the agency to the other otherwise.

(5) The agent must, on behalf of the representatives of the principal, take all reasonable steps to protect and preserve the interests of the principal entrusted in the agent, where an agency is terminated because of the principal's death, incapacity or bankruptcy or if a legal person, because of its winding up or dissolution.

(6) Subject to subsection 4(8), an agent, as regards himself, will continue to have authority to act until he receives notice of his termination of authority or such termination becomes known to him. A third party is entitled to assume that the authority of an agent has not been terminated until such termination becomes known to him.

## Division 5

### Third parties

#### **Effect of agency**

**14.** (1) A contract entered into through an agent, and obligations arising from the acts of an agent, may be enforced in the same way and carry the same legal consequences as if the contracts entered into and acts carried out were by the principal in person.

(2) (a) If an agent contracts with a person who does not know and has no reason to suspect that he is an agent, the principal of the agent may require performance of the contract, but in such an event, the other contracting party would have the same rights as against the principal, as he would have had against the agent.

(b) The other contracting party, may refuse to perform the contract if he discovers the identity of the principal before the contract is completed and he can prove that he would not have entered into the contract if he had known the identity of the principal.

(3) If a party contracts with another, not knowing nor having reasonable ground to suspect that the other is an agent, the principal, if he requires performance of the contract, can only do so subject to the rights and obligations of the agent and the other party to the contract.

(4) A person dealing with an agent who is personally liable may hold the agent or his principal or both of them, liable.

(5) A person contracting with an agent cannot—

(a) hold the agent liable if he induces the agent to act on the belief that only his principal will be liable;

(b) hold the principal liable if he induces the principal to act on the belief that only his agent will be liable.

(6) A person who represents himself to be authorised agent of another, when unauthorised, and induces a third party to deal with him as agent, is liable to compensate the other for any

loss or damage incurred in the dealing, unless the person purported to be the principal ratifies his acts as agent.

(7) A person, actually acting on his own account, but who purports to enter into a contract as an agent is not entitled to require performance of the contract.

(8) A principal is bound to a third party by the acts or obligations of his agent acting without the authority of the principal, if the principal has by his actions induced the third party into believing that his agent was acting within his authority.

(9) A misrepresentation made, or fraud committed by an agent acting in the course (but not otherwise) of the agency business for his principal, has the same effect on agreements made by such an agent as if the principal had made or committed such misrepresentation or fraud.

### PART III

#### POWERS OF ATTORNEY

##### **Execution and attestation**

15. (1) A power of attorney must be executed by the donor of the power.

(2) A power of attorney need not be executed under seal or as a deed and may be executed under hand.

(3) The execution of a power of attorney by the donor in Malaysia must be attested by—

(a) an advocate;

(b) a notary public in Malaysia;

(c) a commissioner for oaths;

(d) a district officer; or

(e) a magistrate.

(4) The execution of a power of attorney by the donor outside Malaysia for use in Malaysia or in relation to any matter governed by Malaysian law must be attested by—

- (a) a person licensed to practice law in the place in which the donor executes the power of attorney;
- (b) a notary public appointed to exercise the functions of a notary public in the place in which the donor executes the power of attorney;
- (c) a consular officer of Malaysia; or
- (d) if executed in the Kingdom of Saudi Arabia, by the Malaysian Pilgrimage Commissioner.

(5) The person attesting the execution of the power of attorney by the donor must—

- (a) specify the capacity in which he is attesting the power of attorney;
- (b) certify that the person executing the power of attorney is the donor;
- (c) certify that the power of attorney has been executed by the donor voluntarily; and
- (d) certify that the contents of the power of attorney has been explained to the donor by the person attesting the execution.

(6) The donee of a power of attorney may, if he thinks fit, execute any instrument or do any other act in his own name by the authority of the donor of the power.

(7) Every instrument executed or act done by the donee in his own name under subsection (6) shall have the same effect as if it had been executed or done by the donee in the name of the donor.

(8) To avoid doubt, a power of attorney may be executed and attested in accordance with the provisions of Division 1 of Part IV.

#### **Other legal requirements preserved**

**16.** The provisions of this Part—

- (1) is without prejudice to any requirement in, or having effect under, any other written law as to the witnessing of or registration of instruments creating powers of attorney; and
- (2) to the extent not inconsistent with its provisions, do not affect the rules relating to the execution of instruments by bodies corporate.

**Proof of power of attorney**

**17.** (1) A power of attorney and its contents may be proved by means of a copy which—

- (a) is a reproduction of the original made with a photographic or other device for reproducing documents in facsimile or electronically; and
- (b) contains the following certificate signed by the donor of the power or the person attesting the power of attorney under section 15—
  - (i) if the original consists of a single page, a certificate at the end of the page to the effect that the copy is a true and complete copy of the original; and
  - (ii) if the original consists of two or more pages, a certificate at the end of each page of the copy to the effect that it is a true and complete copy of the corresponding page of the original.

(2) If a copy of a power of attorney has been made which complies with subsection (1), the contents of the power of attorney may also be proved by means of a copy of that copy if the further copy itself complies with subsection (1), taking references in it to the original as references to the copy from which the further copy is made.

**Irrevocability of power of attorney**

**18.** (1) A power of attorney is irrevocable if—

- (a) it expressly states that it cannot be revoked; and
- (b) it is given to secure—

(i) a legal or proprietary interest of the donee; or

(ii) an obligation owed to the donee.

(2) A power of attorney may provide that it is only irrevocable for a specified period of time.

(3) As long as the power of attorney remains irrevocable under its terms or as long as the interest or obligation exists, the power of attorney cannot be revoked—

(a) by the donor without the donee's consent;

(b) if a natural person, by the donor's death, incapacity or bankruptcy; or

(c) if a legal person, by the winding up or dissolution of the entity.

(4) If the power of attorney is linked to a proprietary interest, it may be exercised by the person holding that interest and any successor in title, unless provided otherwise in the power of attorney.

**Protection of donee and third parties where power of attorney is revoked.**

**19.** (1) A donee of a power of attorney who acts in pursuance of the power when revoked is not liable to the donor or to any other person if the donee did not know that the power had been revoked at the time of the act.

(2) A transaction is valid as if the power was still in existence, in favour of a person who deals with the donee of the power, where such person is unaware that the power of attorney has been revoked.

(3) If the instrument creating a power is expressed to be irrevocable and to be given by way of security, any person who deals with the donee shall be entitled to assume that the power cannot be revoked by the donor unless such person knows that the power has been revoked with the consent of the donee.

(4) Without prejudice to subsection (3), a person shall be treated as knowing that a power of attorney has been revoked if he knows of an event which has the effect of revoking the power (such as, the death or incapacity of the donor).

(5) A power of attorney is revoked in any circumstances where an agency would terminate under the provisions of section 13.

(6) This section applies whenever the power of attorney was created but only as to acts and transactions after the commencement of this Act.

### **Non-applicability of section 5 of the Civil Law Act 1956**

**20.** The provisions of section 5 of the Civil Law Act 1956 shall not apply to powers of attorney, if those provisions had applied to any part of Malaysia immediately before the commencement of this Act.

### **Deposit of powers of attorney**

**21.** (1) The Minister may make regulations—

- (a) for the deposit of powers of attorney with such person as the Minister may prescribe;
- (b) for the manner in which the powers of attorney are to be deposited, kept, searched and accessed;
- (c) to give effect to any other matters necessary or expedient in this connection.

(2) The deposit of powers of attorney—

- (a) will not be mandatory;
- (b) may be made in respect of powers of attorney created before or after the commencement of this Act, powers of attorney deposited under the Powers of Attorney Act 1949 excepted;
- (c) is not proof of the validity, veracity or enforceability of a power of attorney.

(3) For purposes of this section, powers of attorney include, any revocation, variation or other document related to a power of attorney.

## PART IV

### ELECTRONIC AND ELECTRONIC AGENTS

#### Division 1

##### Recognition of electronic means in agency

##### **Agency documents**

22. (1) The following are not invalid, unenforceable, inadmissible, or without legal effect solely because they or any of them are in electronic form or carried out or effected by electronic means—

(a) any power of attorney, statement, certificate, consent, instructions, directions, and any document or matter related to agency or any of the matters contemplated by or which could arise under this Act;

(b) any signature, seal, attestation or notarisation related to subsection (1)(a);

(c) any statutory declaration or other statement made under oath related to subsection (1)(a);

(d) any information referred to related to subsection (1), but not contained, in other information in electronic form.

(2) If a written law or the common law requires in connection with any matter related to this Act—

(a) that any information or a record, notice, instrument or document of any description including, any of those in subsection (1), to be in writing, a document in electronic form satisfies that law;

(b) a signature, seal, attestation or notarisation, a signature, seal, attestation or notarisation in electronic form satisfies that law;

(c) a person to retain a document that is in the form of paper, an article or other material, retention of a copy of the document in electronic form satisfies that law;

(d) a person to retain a document that is in electronic form, retention of a copy of the document satisfies that law;

(e) a statement or declaration to be made under oath or in a statutory declaration, a sworn document or statutory declaration in electronic form satisfies that law.

(3) The provisions of section 17 must also be complied with despite the provisions of subsection (2).

(4) If a written law or the common law requires or allows in connection with any matter related to this Act, any information or document to be given, produced, served, sent or delivered (whatever the expression used to describe the act), giving, producing, serving, sending or delivering the information, the document or a copy of them in electronic form or by electronic means satisfies that law. A requirement may be in the form of an obligation or as a result of the law imposing consequences in the event that the requirement is not met.

(5) To avoid doubt, a person may witness or attest the signing of a document by electronic means and the statutory declaration or a declaration to be made under oath may be made before a person appearing by electronic means.

### **No obligation to use electronic form or means**

23. Section 22 does not compel a person to do or accept anything in electronic form or by electronic means.

## **Division 2**

### **Provisions on electronic agents**

### **Interpretation of Division**

**24.** (1) The provisions of this Division apply despite—

- (a) any provisions of Part II to the contrary;
- (b) an electronic agent lacking legal personality.

(2) The provisions of this Division shall apply, but without prejudice to the provisions of section 25 and 26(1) or unless the context otherwise requires—

- (a) to any matter involving defective or allegedly defective electronic agent or electronic agent products which have been used, operated, manufactured or imported in or into Malaysia;
- (b) where the electronic agent has acted or has purportedly acted on behalf of any person in Malaysia or who ordinarily resides in Malaysia or has a place of residence in Malaysia or purportedly so; or
- (c) where a person dealing with the electronic agent is in Malaysia or ordinarily resides in or has a place of residence in Malaysia;
- (d) where the terms of any contract governing the use or operation of the electronic agent is governed by the laws of Malaysia.
- (e) Where the terms of any contract governing the use or operation of the electronic agent is governed by a law other than the laws of Malaysia but where the use or operation of the electronic agent involves its use or operation in Malaysia or there is otherwise a close connection with Malaysia; or
- (f) The use or operation of the electronic agent affects persons in Malaysia.

The application of these provisions do not preclude a person from claiming damages and compensation and other remedies under any other written law or the common law under the laws of other jurisdictions including, for matters or claims not addressed by the provisions of this Division. Contract in this subsection (2) includes any secondary or related contract and any other instrument or arrangement (written, oral or otherwise) related to a contract.

(3) In this Division, unless the context otherwise requires—

“authorised representative” means any natural or legal person established within Malaysia who has received a written mandate from a manufacturer to act on that manufacturer’s behalf in relation to specified tasks;

“component” means any item, whatever, tangible or intangible, raw material or related service, that is integrated into, or inter-connected with, an electronic agent;

“data” means any digital representation of acts, facts or information and any compilation of such acts, facts or information, including, in the form of sound, visual or audiovisual recording;

“digital manufacturing file” means a digital version of, or digital template for, a movable which contains the functional information necessary to produce a tangible item by enabling the automated control of machinery or tools;

“distributor” means any natural or legal person in the supply chain who makes an electronic agent product available on the market, other than the manufacturer or importer of that electronic agent product;

“economic operator” means a manufacturer of an electronic agent product or component, a provider of a related service, an authorised representative, an importer, a service provider or a distributor;

“electronic agent product” means in relation to an electronic agent, all movables, even if integrated into, or inter-connected with, another movable or an immovable; it includes, electricity, digital manufacturing files, raw materials and software;

“importer” means any natural or legal person who places an electronic agent product from a third country on the Malaysia market;

“manufacturer” means any natural or legal person who—

(a) develops, manufactures or produces an electronic agent product;

(b) has a product designed or manufactured, or who, by putting their name, trademark or other distinguishing features on that product, present themselves as its manufacturer; or

(c) develops, manufactures or produces an electronic agent product for their own use;

“manufacturer’s control” means that—

(a) the manufacturer of an electronic agent product performs or, with regard to actions of a third party, authorises or consents to—

(i) the integration, inter-connection or supply of a component, including, software updates or upgrades; or

(ii) the modification of the electronic agent, including, substantial modifications;

(b) the manufacturer of an electronic agent product has the ability to supply software updates or upgrades, themselves or via a third party;

“making available on the market” means any supply of an electronic agent product for distribution, consumption or use on the Malaysian market in the course of a commercial activity, whether in return for payment or free of charge;

“placing on the market” means the first making available of an electronic agent product on the Malaysian market;

“putting into service” means the first use of an electronic agent product in Malaysia in the course of a commercial activity, whether in return for payment or free of charge, in circumstances in which that product has not been placed on the market prior to its first use;

“related service” means a digital service that is integrated into, or inter-connected with, a product in such a way that its absence would prevent the product from performing one or more of its functions;

“service provider” means any natural or legal person offering, in the course of a commercial activity, at least two of the following services: warehousing, packaging, addressing and dispatching of an electronic agent product, without having ownership of that electronic agent product, excluding postal services, parcel delivery services and any other postal services or freight transport services;

“substantial modification” means a modification of an electronic agent product after it has been placed on the market or put into service—

- (a) that is considered substantial under any relevant written law on product safety; or
- (b) where any relevant written law on product safety lay down no threshold on what is to be considered a substantial modification, that—
  - (i) changes the electronic agent product’s original performance, purpose or type, without that change having been foreseen in the manufacturer’s initial risk assessment; and
  - (ii) changes the nature of the hazard, creates a new hazard or increases the level of risk.

“trade secret” means information which meets all of the following requirements—

- (a) it is secret in the sense that it is not, as a body or in the precise configuration and assembly of its components, generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question;
- (b) it has commercial value because it is secret;
- (c) it has been subject to reasonable steps under the circumstances, by the person lawfully in control of the information, to keep it secret.

## **Recognition of electronic agents**

**25.** (1) A contract or any of its provisions is not invalid, unenforceable, inadmissible, or without legal effect solely because its making, formation, creation, delivery or performance involved the action or use of one or more electronic agents.

(2) An action executing, performing or terminating a contract is not invalid, unenforceable, inadmissible, or without legal effect solely because it involved the action of one or more electronic agents.

(3) A contract may be made, formed or created by the interaction of electronic agents, acting on behalf of the parties, even where no natural person was aware of, or had reviewed, the electronic agents' actions or the resulting terms.

(4) A contract may be made, formed or created by the interaction of an electronic agent, acting on behalf of one party, and a natural person (acting for himself or another) regardless of whether each party has reviewed or is aware of, the relevant information, the electronic agent's actions, or the resulting terms.

(5) An electronic agent may act on behalf of one or more parties in the same matter or transaction.

(6) Where an electronic agent acts on behalf of a person in relation to any matter which could have been performed by a person as an agent, including, for the purposes of the making, formation or creation of a contract, the electronic agent is presumed, unless the contrary is shown, to be acting as agent for that person and in the case of making, formation or creation of a contract, that that person intended to create a legally binding contract. Where an electronic agent acts in consequence of or at the direction or action of acts of other electronic agents, such electronic agent is presumed, unless the contrary is shown, to be acting as agent for the person for whom any such other electronic agents acts on behalf of.

## **Responsibility and liability for an electronic agent**

**26.** (1) Subject to the provisions of the subsections of this section following and subsection 25(6), an electronic agent who acts on behalf of a person in relation to a matter as contemplated

by subsection 25(6) shall be treated as an agent of that person and that person shall be treated as the principal with the principal liable for the acts of his agent in accordance with the provisions of Part II (the application of Part II to be subject to the context of this Division) even if the electronic agent cannot ordinarily in law act as an agent.

(2) The provisions of subsection (1) are modified or superseded where the electronic agent is defective in relation to its acts including, in the making, formation or creation of a contract or other matters to which the electronic agent has been tasked. An electronic agent is defective where the electronic agent product is defective in that the electronic agent product does not operate or function or provide for the safety in a way that a person is entitled to reasonably expect of an electronic agent product of that nature. All circumstances shall be taken into account in assessing whether the electronic agent is defective or not, including—

- (a) the presentation and characteristics of the electronic agent product, including, its labelling, design, technical features, composition and packaging and the instructions for its assembly, installation, use and maintenance;
- (b) reasonably foreseeable use of the electronic agent product;
- (c) the effect of the electronic agent product on any ability to continue to learn or acquire new features after it is placed on the market or put into service;
- (d) the reasonably foreseeable effect on the electronic agent product on other products that can be expected to be used together with the electronic agent product, including, by means of inter-connection;
- (e) the moment in time when the electronic agent product was placed on the market or put into service or, where the manufacturer retains control over the electronic agent product after that moment, the moment in time when the electronic agent product left the control of the manufacturer;
- (f) relevant product safety and security requirements and standards, including, safety and security and relevant cybersecurity requirements and standards;

- (g) any recall of the electronic agent product or of the class including, the electronic agent product or any other relevant intervention relating to product safety by the Government or a person or authority exercising powers under any written law or exercising a regulatory function or by an economic operator as specified in subsection (3);
- (h) the specific needs of the group of users for whose use the electronic agent product is intended;
- (i) if the purpose of the electronic agent product is to prevent damage or mistakes, any failure of the electronic agent product to fulfil that purpose;
- (j) requirements and guidance in other written law or by a person or authority exercising powers under any written law or exercising a regulatory function.

(3) In relation to a defective electronic agent, the following are economic operators, being those who could be liable arising from the defective electronic agent—

- (a) the manufacturer of the defective electronic agent product, which shall also be liable for any damage caused by a defective component where it was integrated into, or inter-connected with, an electronic agent product within that manufacturer's control;
- (b) the manufacturer of a defective component, where that component was integrated into, or inter-connected with, the electronic agent product within the manufacturer's control and caused that electronic agent product to be defective;
- (c) if the manufacturer of the electronic agent product or component is established outside Malaysia—
  - (i) the importer of the defective electronic agent product or component;
  - (ii) the authorised representative of the manufacturer; and
  - (iii) if there is no such importer or authorised representative within Malaysia, any service provider;

(d) any natural or legal person which substantially modifies the electronic agent product outside the manufacturer's control and then makes it available on the market or puts the electronic agent product into service, such natural or legal person shall be considered a manufacturer for purposes of subsection (3)(a).

(4) Each of the economic operators specified in each of paragraphs (a) to (c) (including, any person considered a manufacturer under paragraph (d) of subsection (3)) shall be treated as liable for purposes of subsection (5) in a separate and independent capacity even if the same person may be an economic operator in more than one capacity.

(5) The liability for the acts of a defective electronic agent shall not lie with the principal as specified in subsection (1) but shall lie with the economic operators (which may include, a principal in the capacity of an economic operator) specified in subsection (3). The liability of economic operators is to compensate any natural or legal person (including, its successors in title) which suffers loss or damage caused by the defective electronic agent. To avoid doubt, nothing in this Division is intended to preclude a claim against the principal for remedies or liabilities not within the scope of liability under this subsection (5) arising from any contract or other act of the electronic agent for and on behalf of the principal. The types of damage to be compensated are—

(a) death or personal injury, including, medically recognised damage to psychological health;

(b) liability, loss or damage suffered by a user of the defective electronic agent or a third party, of a financial or economic nature;

(c) destruction or corruption of data;

(d) damage to, or destruction of, any property (movable or immovable), except—

(i) the defective electronic agent product itself;

(ii) an electronic agent product damaged by a defective component that is integrated into, or inter-connected with, that electronic agent product by the manufacturer of that electronic agent product or within that manufacturer's control.

(6) If an economic operator cannot be identified, each distributor of the defective electronic agent product is liable as if it were an economic operator.

(7) The liability to compensation and damages shall be determined in accordance with the principles of the law of tort unless the claim is based on the law of contract. The provisions of section 28A of the Civil Law Act 1956 do not apply in respect of a claim made under this Division. Liability and damages shall take into account the common law.

(8) Nothing in this Division shall preclude a principal from claiming compensation and damages from an economic operator arising from any loss, damage or injury which the principal may suffer in connection with the acts of a defective electronic agent.

(9) The following provisions apply in respect of any contract or arrangement which excludes or limits liability or claims which arise from or relate to defective electronic agents. These provisions do not preclude any additional prohibitions or restrictions on such exclusions or limitations under any other written law. These provisions apply to any contract or arrangement, whether governed by the laws of Malaysia or the laws of any other jurisdiction and in any event, to any of the circumstances in subsection 24(2)—

- (a) no contract or arrangement may have the effect of excluding or limiting liability or claims unless that exclusion or limitation is a fair and reasonable one having regard to the circumstances which were, or ought reasonably to have been, known to or contemplated by the parties to the contract or arrangement when made;
- (b) no contract or arrangement may have the effect of allowing any third parties not a party to the contract or arrangement to benefit or acquire rights from any provisions in the contract or arrangement which exclude or limit liability or claims;
- (c) no contract or arrangement may have the effect of making a right or remedy or its enforcement subject to a restrictive or onerous condition;
- (d) no contract or arrangement may have the effect of allowing a person dealing with the electronic agent to be put at a disadvantage as a result of pursuing such a right or remedy;

- (e) no contract or arrangement may have the effect of excluding or restricting rules of evidence or procedure;
- (f) a contract or arrangement separate from or secondary to or otherwise related to the contract or arrangement referred to in paragraphs (a) to (e) purporting to have the effect of excluding or limiting the matters which would otherwise have been prohibited by such paragraphs are prohibited;
- (g) despite paragraphs (a) to (f), a contract or arrangement may contain exclusions or limitations on liability or claims to the extent allowed by any written law or by a person or authority exercising any power under any written law.

### **Multiple economic operators**

27. (1) If two or more economic operators are liable for the same damage, they are liable jointly and severally.

(2) The liability of an economic operator may be reduced or disallowed where the damage is caused both by the defectiveness of the electronic agent product and by the fault of the claimant for compensation and damages.

(3) If more than one economic operator is liable for the same damage, an economic operator which has compensated a claimant for compensation and damages shall be entitled to pursue remedies against other economic operators liable for the defective electronic agent product.

(4) An economic operator must not, in relation to a claimant for compensation and damages, limit or exclude its liability.

(5) The Court may apportion the liability of each economic operator in the event that they are defendants in the same action instituted by a claimant.

### **Evidence**

28. (1) A claimant for compensation and damages must prove the defectiveness of the electronic agent product and the causal link between that defectiveness and that damage.

(2) If a claimant has presented in proceedings before the Court facts and evidence sufficient to support the plausibility of the claim, the defendant is required to disclose relevant evidence at the defendant's disposal. The claimant must also disclose to the defendant relevant evidence at the claimant's disposal.

(3) Any disclosure of evidence must be necessary and proportionate and may take into account legitimate interest including, the protection of confidential information and trade secrets.

(4) The Courts may require that appropriate measures are taken to protect information disclosed as a trade secret or as an alleged trade secret.

(5) The Courts may require evidence to be presented in an easily accessible and understandable manner.

(6) The defectiveness of an electronic agent product shall be presumed—

(a) if the defendant fails to comply with subsection (2) or with any disclosure of evidence required under the rules of Court;

(b) if the claimant demonstrates that the electronic agent product does not comply with written law or the requirements of persons or authorities exercising a regulatory function;

(c) if the claimant demonstrates that the damage was caused by an obvious malfunction of the electronic agent product during reasonably foreseeable use or under ordinary circumstances.

(7) The causal link between the defectiveness of an electronic agent product and the damage shall be presumed where it has been established that a product is defective and that the damage caused is of a kind typically consistent with the defect in question.

(8) A Court shall presume the defectiveness of the electronic agent product or the causal link between its defectiveness and the damage, or both where despite the disclosure of evidence in accordance with subsection (2) and taking into account all the relevant circumstances of the case—

(a) the claimant faces excessive difficulties, in particular due to technical or scientific complexity, in proving the defectiveness of the electronic agent product or the causal link between its defectiveness and the damage, or both; and

(b) the claimant demonstrates that it is likely that the electronic agent product is defective or that there is a causal link between the defectiveness of the electronic agent product and the damage, or both.

(9) Any presumption is rebuttable.

(10) An economic operator shall not be liable to compensation or damage for a defective electronic agent product in any of the following circumstances, subject to any modifications made or to additional circumstances prescribed by the Minister in regulations made under section 29—

(a) in the case of a manufacturer or importer, that it did not place the electronic agent product on the market or put it into service;

(b) in the case of a distributor, that it did not make the product available on the market;

(c) that it is probable that the defectiveness that caused the damage did not exist at the time the electronic agent product was placed on the market, put into service or, in the case of a distributor, made available on the market, or that that defectiveness came into being after that moment;

(d) that the defectiveness that caused the damage is due to compliance of the electronic agent product with legal requirements;

(e) that the objective state of scientific or technical knowledge at the time of the electronic agent product was placed on the market or put into service or during the period in which the product was within the manufacturer's control was not such that the defectiveness could be discovered;

(f) in the case of a manufacturer of a defective component, that the defectiveness of the electronic agent product in which that component has been integrated is attributable to

the design of that electronic agent product or to the instruction given by the manufacturer of that electronic agent product to the manufacturer of that component;

(g) in the case of a person modifying an electronic agent product, that the defectiveness that caused the damage is related to a part of the electronic agent product not affected by modification.

(11) An economic operator shall not be exempted from liability under subsection (10) where the defectiveness of an electronic agent product is due to any of the following, provided within a manufacturer's control—

(a) a related service;

(b) software, including, software updates or upgrades;

(c) a lack of software updates or upgrades necessary to maintain safety or to mitigate mistakes;

(d) a substantial modification of the electronic agent product.

### **Power to make regulations**

**29.** The Minister may make regulations (which, to avoid doubt, may apply or be restricted only to a particular class, sector, industry, circumstances or criteria)—

(1) for or with respect to the manner in which compensation or damages to be awarded under this Division may be determined having regard to the provisions of subsection 26(7);

(2) for or with respect to the manner in which compensation or damages may be apportioned between economic operators having regard to the provisions of subsection 27(5);

(3) for or with respect to the manner in which any claim may be made under the provisions of this Division in the event of a concurrent claim under any other written law or the laws of another jurisdiction;

(4) for or with respect to matters related to evidence required to be tendered or produced under the provisions of this Division;

(5) to prescribe any circumstances in which an economic operator may not be liable to compensation or damage for a defective electronic agent product additional to those specified in subsection 28(10);

(6) to modify any such circumstances as prescribed in regulations made under subsection (5) or to any of the circumstances specified in subsection 28(10);

(7) for or with respect to all matters and things required or authorised by the provisions of this Division to be provided, for the carrying out of, or giving full effect to, the provisions of this Division;

(8) for or with respect to any penalties of a fine not exceeding fifty thousand ringgit or imprisonment for a term not exceeding three years or to both for contravention of subsidiary legislation made under this Act, the penalties to be provided for in the subsidiary legislation.

### **Court rules**

**30.** The Rules Committee constituted under the Courts of Judicature Act 1964 may, subject to and in accordance with the provisions of that Act relating to the making of rules, make rules—

(1) with respect to the proceedings and the practice and procedure of the Court in relation to the provisions of this Division;

(2) with respect to any matter or thing in relation to the provisions of this Division required, permitted or expedient to be prescribed by rules;

(3) without limiting the generality of the provisions of this section, with respect to Court fees and costs.

## **PART V**

### **MISCELLANEOUS**

## **Seals**

**31.** (1) An agent does not have to be appointed or authorised by a document under seal in order to execute or perform any other act under or requiring a seal as an agent. This subsection applies despite subsection 67(3) of the Companies Act 2016.

(2) A document required to be executed by an agent under seal may be executed as such but otherwise without compliance with any additional formalities or matters required at common law and shall be treated as valid as if no distinction exists at common law between execution by an agent under seal and execution under hand.

(3) An agent may execute a document required to be under seal under hand.

(4) The provisions of subsections (2) and (3) do not affect any requirement imposed by any written law.

## **Disability and other limitations**

**32.** (1) An individual physically incapable of signing or marking a document of any nature, may direct another to execute the document on his behalf. The direction and execution must be in the presence of a witness. The document must state that it was executed at the direction of the physically incapable person on his behalf, in both instances, in the presence of the witness.

(2) An individual unable to execute a document of any nature as a result of illness or disability but is able to make a mark by hand, foot or mouth, must execute the document in the presence of a witness who provides a sworn statutory declaration giving the reason why the document has been executed in that manner or otherwise by an advocate who provides a certificate to the same effect.

(3) The documents in subsections (1) and (2) apply to all documents including, any relating to the appointment of an agent, the creation of an agency and any directions, consents and other matters relating to the agency.

(4) Any document executed in accordance with subsections (1) and (2) shall be presumed to be validly executed by the individual unless the contrary is proved.

(5) The provisions of subsections (1), (2) and (3) do not affect any requirement in any written law or any other valid way of executing a document or giving directions or instructions or expressing consent at common law.

(6) To avoid doubt, the provisions of Division 1 of Part IV apply to the execution and witnessing of any document to be executed under this section and any direction or other matter required in this connection.

### **Private international law**

33. The provisions of this Act, unless otherwise provided, do not affect the operation and application of the rules of private international law. Accordingly, the legal effect, validity, enforceability and admissibility of an agency or matters related will continue to be determined by the law applicable under those rules.

## **PART VI**

### **TRANSITIONAL, SAVINGS AND RELATED PROVISIONS**

#### **Repeal**

34. Part X of the Contracts Act 1950 and the Powers of Attorney Act 1949 are repealed.

#### **Savings**

35. Despite section 34—

(1) a person who, was, immediately before the commencement of this Act, a duly appointed agent continues as an agent on and after the date of the commencement of this Act, subject to the terms of the appointment and the terms of the agency and subsection (7);

(2) a person who, was, immediately before the commencement of this Act, a duly appointed attorney under a power of attorney continues as an attorney on and after the date of commencement of this Act, subject to the terms of the appointment and the terms of the power of attorney and subsection (7);

(3) a power of attorney executed and attested in accordance with the Powers of Attorney Act 1949 before the commencement of this Act but which has not as yet been deposited under the Powers of Attorney Act 1949 at the date of such commencement may continue to be deposited under the Powers of Attorney Act 1949 as if the Powers of Attorney Act 1949 had not been repealed and such power of attorney had been created and duly deposited under the Powers of Attorney Act 1949 immediately before the commencement of this Act;

(4) a power of attorney and any revocation, variation or other document related to the power of attorney deposited under the Powers of Attorney Act 1949 will continue to be available to search of such documents;

(5) this Act applies to all agencies and powers of attorney, whether created before, on or after commencement of this Act;

(6) the commencement of this Act does not affect the validity, invalidity, effect, or consequences of anything done or suffered by an agent or attorney or otherwise in relation to the law of agency or powers of attorney before such commencement;

(7) any right, interest, title, immunity, duty, privilege, obligation or liability acquired, accrued or incurred before the commencement of this Act or any legal proceedings or remedy in respect of any such right, interest, title, immunity, duty, privilege, obligation or liability shall not be affected by this Act and remains in force as if this Act had not been enacted;

(8) the provisions of this Act shall apply to any act, omission or matter arising in relation to an agency or power of attorney on or after the date of commencement of this Act even if that agency or power of attorney was created before such date. To avoid doubt, in relation to an agency or power of attorney created before such date—

(a) the terms of appointment of an agent or attorney and the terms of the agency or power of attorney shall, in respect of any act, omission or matter arising on or after the date of commencement of this Act, be read and interpreted as if such terms contained a provision that the scope and application of such terms were to be subject to any mandatory requirement, prohibition or limitation imposed by the provisions of this Act;

(b) a power of attorney, if irrevocable before such date shall remain irrevocable in accordance with the terms of the power of attorney and shall be treated as if it were a power of attorney which is irrevocable under section 18.

## Appendix II: Policy Statements

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| Proposed Policy Statement 1 | <p>Providing a new Act on agency law. The new Act is to supersede the provisions of Part X of the Contracts Act 1950 and the Powers of Attorney Act 1949. It introduces legislation:</p> <ul style="list-style-type: none"> <li>(a) drafted along more modern and reader friendly lines relative to the 19<sup>th</sup> century drafting style of the Contracts Act 1950 which was based on the Indian Contract Act 1872;</li> <li>(b) which dispenses with the illustrations in the Contracts Act 1950 which had appeared in the Indian Contracts Act 1872 and which are unnecessary and in the case of the actual illustrations in the Contracts Act 1950 based on outdated examples;</li> <li>(c) to improve the clarity and approach to the drafting of provisions on the law of agency;</li> <li>(d) to provide for new areas which commercially or technologically had not been pertinent in the Contracts Act 1950 or the Indian Contracts Act 1872, for example, things done in connection with agency in electronic form or by electronic means and the treatment of agency in the context of artificial intelligence;</li> <li>(e) to provide a unified legislation on powers of attorney to apply to Peninsular Malaysia, Sabah and Sarawak and to clarify on some matters relating to powers of attorney, including a new non-mandatory system for the deposit of such instruments;</li> <li>(f) to update the law relating to the requirement for the use of seals in connection with agency and to dispense with the requirement for seals at common law and in connection with companies incorporated or registered under the Companies Act 2016;</li> <li>(g) to provide in relation to the creation of an agency, the manner in which principals with legal capacity but suffering from disabilities or infirmities may employ or give directions to an agent;</li> <li>(h) to provide for the circumstances in which the provisions of the Act may apply and as to the circumstances in which Malaysian or other law may apply to agency;</li> <li>(i) to clarify that the provisions of the Act are not in the nature of</li> <li>(j) a code and exhaustive as to all matters relating to agency law.</li> </ul> |
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| Proposed Policy Statement 2  | <p>Providing definitions for use in the Act generally:</p> <p>“advocate”, “agency”, “agent”, “arrangement”, “artificial intelligence”, “artificial intelligence system”, “common law”, “computer”, “computer program”, “contract”, “electronic”, “electronic agent”, “electronic record”, “equity”, “legal capacity”, “mental capacity”, “principal”, “sub-agent” and “terms”.</p>                                                                                                                                                                                                    |
| Proposed Policy Statement 3  | <p>Providing interpretation provisions:</p> <ul style="list-style-type: none"> <li>(a) on the non-exhaustive nature of the Act in relation to agency and agents;</li> <li>(b) the application of the provisions of the Act relative to other provisions in written law;</li> <li>(c) terms of agency which may be imposed additionally to the provisions in the Act;</li> <li>(d) general provisions on the application of the provisions of the Act to agency governed by a law other than Malaysian law and on certain presumptions on the application of Malaysian law.</li> </ul> |
| Proposed Policy Statement 4  | Providing for the general characteristics and elements of agency, agent and principal.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |
| Proposed Policy Statement 5  | Providing for the general duties of agents.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                           |
| Proposed Policy Statement 6  | Providing for the modification or waiver of the duties and obligations of an agent and for limitations on exemption and indemnity clauses for the benefit of agents.                                                                                                                                                                                                                                                                                                                                                                                                                  |
| Proposed Policy Statement 7  | Providing for the general authority of an agent.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      |
| Proposed Policy Statement 8  | Providing for the general rights of an agent.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                         |
| Proposed Policy Statement 9  | Providing for general rules in relation to sub-agents and for some circumstances where a person is an agent and not a sub-agent.                                                                                                                                                                                                                                                                                                                                                                                                                                                      |
| Proposed Policy Statement 10 | Providing rules for the ratification of the acts of an agent and its ramifications.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   |
| Proposed Policy Statement 11 | Providing rules for the termination of an agency and related matters.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 |
| Proposed Policy Statement 12 | Providing for the effects of an agency, agent and principal relative to third parties.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |
| Proposed Policy Statement 13 | <p>Providing uniform provisions for powers of attorney for application to Peninsular Malaysia, Sabah and Sarawak particularly:</p> <ul style="list-style-type: none"> <li>(a) on execution and attestation requirements;</li> </ul>                                                                                                                                                                                                                                                                                                                                                   |

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|                              | <ul style="list-style-type: none"> <li>(b) other written law specifying requirements for witnessing or registration of powers of attorney not being affected;</li> <li>(c) rules relating to the execution of instruments by bodies corporate not being affected, if not inconsistent;</li> <li>(d) on proving a power of attorney;</li> <li>(e) on irrevocability of a power of attorney;</li> <li>(f) on revocation of a power of attorney and protection of persons in the event of a revocation;</li> <li>(g) on the non-application of section 5 of the Civil Law Act 1956 to powers of attorney, if the provisions should otherwise apply; and</li> <li>(h) for the establishment for a new, non-mandatory system for the deposit of powers of attorney.</li> </ul>                                                                                                                                                                                                                                                                                                                                                             |
| Proposed Policy Statement 14 | Providing for recognition and use in connection with agency, documents relating to agency, signature, seal and attestation relating to agency, in electronic form or by electronic means, as an option.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               |
| Proposed Policy Statement 15 | <p>Providing for:</p> <ul style="list-style-type: none"> <li>(a) the recognition of artificial intelligence (electronic agents) in acts, documents, records, notices and instruments with legal consequences;</li> <li>(b) the treatment of electronic agents as agents with the principal liable in accordance with the rules of agency except where the electronic agent is defective and causes, loss, damage and injury;</li> <li>(c) the liability, in the case of a defective electronic agent, of the principal being substituted with the liability of economic operators;</li> <li>(d) economic operators being: <ul style="list-style-type: none"> <li>(i) the manufacturer of the electronic agent product;</li> <li>(ii) the manufacturer of a defective component;</li> <li>(iii) if the manufacturer is outside Malaysia, the importer or the authorised representative or in their absence, a service provider;</li> <li>(iv) a person who substantially modifies the electronic agent product outside the manufacturer's control and makes it available on the market or puts it into service;</li> </ul> </li> </ul> |

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|                              | <p>(e) the liability of economic operators, where more than one, including, for the apportionment of liability;</p> <p>(f) evidential matters including, disclosure requirements in evidence, evidential presumptions and circumstances limiting liability;</p> <p>(g) the power of the Minister to make regulations in connection with claims and proceedings relating to defective electronic agent products;</p> <p>(h) the power of the Rules Committee under the Courts of Judicature Act 1964 to make rules relating to proceedings and the practice and procedure of the Courts on claims relating to defective electronic agent products.</p> |
| Proposed Policy Statement 16 | <p>Providing for:</p> <p>(a) an agent to be able to execute or perform an act under seal without the need for the principal to authorise these under seal;</p> <p>(b) the distinction between acts of an agent under seal and those not under seal being dispensed with and with the agent being able to execute a document without being subject to any special requirements applicable to documents under seal at common law;</p> <p>(c) the provisions in both paragraphs (a) and (b) not affecting any written law except, in the case of paragraph (a), subsection 67(3) of the Companies Act 2016.</p>                                          |
| Proposed Policy Statement 17 | <p>Providing for the execution of documents and other matters relating to the employment of an agent, the creation of an agency and any directions, consents and other matters relating to the agency by an individual (with legal capacity) but suffering from a physical incapacity, illness or disability which may impede or prevent that person from executing documents and providing directions, consents and other matters in the usual way.</p>                                                                                                                                                                                              |
| Proposed Policy Statement 18 | <p>Providing for the recognition of rules of private international law where the contrary is not provided in the Act.</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             |
| Proposed Policy Statement 19 | <p>Providing for the repeal of Part X of the Contracts Act 1950 and the Powers of Attorney Act 1949.</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              |
| Proposed Policy Statement 20 | <p>Providing for saving and transitional provisions relating to agency, including, powers of attorney.</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                            |

**Appendix III: Comparative Matrix**

Table 1—Agency Provisions

| No. | Existing Provision (Contracts Act 1950)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               | Proposed Provisions (Draft Agency Bill)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        | Justification/Remarks                                                     |
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| 1.  | <p><b>Overview</b></p> <p>Part X (and generally, the Contracts Act 1950):</p> <ul style="list-style-type: none"> <li>➤ Is drafted to set out certain basic rules on the law of agency.</li> <li>➤ Is drafted to include illustrations to illustrate and augment the intention of those rules.</li> <li>➤ Is not drafted to contain detail on how the basic rules should be approached presumably on the basis that the detail would be augmented by the illustrations and also because the matters set out in the basic rules form generally, some of the basic principles of agency law not necessarily requiring more detailed provision.</li> <li>➤ Is drafted more along the lines of a quasi code setting out some basic rules and principles rather than being drafted along the lines of more conventional legislation.</li> <li>➤ Is largely extracted from the Indian Contract Act 1872, the drafting style and in particular, the illustrations being rather dated and is not drafted in the way of modern legislative drafting.</li> <li>➤ Does not offer simplicity and clarity of approach relative to more modern legislation.</li> <li>➤ Is not drafted to allow for a seamless incorporation of additional areas for incorporation into the law of agency which require more extensive provisions and explanations than the mere setting out of some basic rules and principles which is largely the case with Part X. These additional areas include, electronic and artificial intelligence matters, powers of attorney and disability matters.</li> <li>➤ Does not specify expressly the relationship with the common law and the application of foreign and private international law.</li> </ul> | <p><b>Introduction</b></p> <p>The Draft Agency Bill adopts a different drafting approach to the drafting approach to the Contracts Act 1950 and in particular, Part X of that Act. The different drafting approach was taken considering matters including, those set out under “Overview” in the first column of this table.</p> <ul style="list-style-type: none"> <li>➤ The Draft Agency Bill is drafted along the lines of more conventional legislation using modern legislative drafting styles and language, taking into account readability and ease of understanding. The approach to the drafting is also necessitated by the inclusion of additional subject matter areas not covered by Part X of the Contracts Act 1950 e.g. artificial intelligence, electronic and technology, powers of attorney, among others. The nature of the subject matter obviates an approach presenting only basic rules, detailed legislative provisions would be required which differ substantially from the legislative approach taken in Part X. Incorporating some of the additional subject matter or a different drafting approach into Part X in substitution of the current provisions may also present issues in interpretation and construction relative to the other parts of the Contracts Act 1950.</li> <li>➤ The Draft has in many instances replicated the provisions of Part X. The replicated provisions may have been redrafted in a more modern and simplified form, or consolidated or modified to some degree or in combination with any of these. The replicated provisions may also have been modified for clarity or to take into account common law rules or case law or the approach taken in major works on agency e.g. Bowstead and Reynolds on Agency and the American Restatement of the Law of Agency (having considered</li> </ul> | <p>See “Overview” and “Introduction” in Columns 1 and 2 respectively.</p> |

| No. | Existing Provision (Contracts Act 1950) | Proposed Provisions (Draft Agency Bill)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     | Justification/Remarks |
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|     |                                         | <p>its application in Commonwealth jurisdictions).</p> <ul style="list-style-type: none"> <li>➤ The Draft sets out the main areas relating to agency law under: <ul style="list-style-type: none"> <li>• Basic characteristics and elements of agency</li> <li>• The general duties of an agent which may be modified, waived, excluded or implied</li> <li>• Modification to terms of an agency and restrictions on exemption and indemnity clauses</li> <li>• The general authority of an agent</li> <li>• The rights of an agent</li> <li>• Sub agents</li> <li>• Ratification and termination of agency</li> <li>• Third parties and agency.</li> </ul> </li> <li>➤ The Draft introduces provisions not previously covered or covered expressly in Part X. The provisions may simply be to clarify existing provisions or to introduce some new concepts or approaches. Also, new subject matter. Their rationale is explained further below. Examples of provisions introduced include: <ul style="list-style-type: none"> <li>• The introduction of manifest assent as compared with the more traditional use of consent in agency, which Part X uses.</li> <li>• The introduction of express provisions on apparent authority, not found in Part X.</li> <li>• A mention of the doctrine of estoppel but not with a view to specific provision.</li> <li>• Clarifying that an agent need not be a fiduciary or be authorised to bind his principal as to legal matters.</li> <li>• Modifying the provisions on the legal capacity of an agent, considering common law rules and proposals of the 13<sup>th</sup> Report of the Indian Law Commission.</li> <li>• The limitation on provisions limiting the liability of or indemnities for the benefit of agents.</li> <li>• Various other modifications or clarifications to</li> </ul> </li> </ul> |                       |

| No.                                                      | Existing Provision (Contracts Act 1950) | Proposed Provisions (Draft Agency Bill)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          | Justification/Remarks                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   |
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|                                                          |                                         | <p>agency law or provisions.</p> <ul style="list-style-type: none"> <li>• New subject matter, artificial intelligence, electronic and technology, powers of attorney, disability and seals.</li> <li>• Express provisions on the application of Malaysian and foreign law and rules of private international law.</li> <li>• Express provisions on the Draft not being a code and on the application of the common law and other written law.</li> </ul> <p>➤ The approach to the Draft, while having considered provisions of Part X of the CA 1950 are drafted for greater simplicity and readability. It is also not as prescriptive in some respects as Part X and its provisions are crafted to allow for greater application of common law principles.</p> <p>➤ Further details of the rationale to the provisions in the Draft appear in this Report.</p> |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                         |
| General Provisions Not Present in the Contracts Act 1950 |                                         |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                  |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                         |
| 2.                                                       |                                         | <p><b>Interpretation</b></p> <p>2.(1) In this Act, unless the context otherwise requires—</p> <p>“advocate” means a person entitled to practise as an advocate or as an advocate and solicitor under the law in force in any part of Malaysia;</p> <p>“agency” means an agency as referred to in section 3;</p> <p>“agent” means an agent as referred to in section 3;</p> <p>“arrangement” means an arrangement which carries legal consequences.</p> <p>"artificial intelligence"</p> <p>(a) means technology enabling the programming or training of a device or software to—</p>                                                                                                                                                                                                                                                                             | <p>The inclusion of an Interpretation section aligns the Draft with modern legislative drafting practices, seen in jurisdictions like New Zealand, Guernsey, and Ontario, which provide detailed statutory definitions to promote certainty.</p> <p>These definitions are necessary to provide clarity and precision for new concepts introduced in the Draft, many of which are absent from the Contracts Act 1950, which lacks a dedicated interpretation section and relies on dated illustrative methods.</p> <p>Definitions such as “artificial intelligence,” “electronic agent,” and “electronic record” are new to Malaysian agency law and reflect the Draft's expansion into areas previously excluded from Part X, including technology,</p> |

| No. | Existing Provision (Contracts Act 1950) | Proposed Provisions (Draft Agency Bill)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               | Justification/Remarks                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        |
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|     |                                         | <p>(i) perceive environments through the use of data;</p> <p>(ii) interpret data using automated processing designed to approximate cognitive abilities; and</p> <p>(iii) make recommendations, predictions, or decisions,</p> <p>with a view to achieving a specific objective;</p> <p>(b) includes, generative artificial intelligence, meaning deep or large language models able to generate text, images, audio, and other content based on the data on which it was trained;</p> <p>"artificial intelligence system" means a machine-based system that is designed to operate with varying levels of autonomy and that may exhibit adaptiveness after deployment, and that, for explicit or implicit objectives, infers, from the input it receives, how to generate outputs such as predictions, content, recommendations, or decisions that can influence physical or virtual environments;</p> <p>"common law" means the common law and includes, the common law as applied in Malaysia;</p> <p>"computer" means any digital, electronic, magnetic, optical, electrochemical, or other device for the recording, storage, retrieval, or processing of data or information, or a group of such interconnected or related devices, performing logical, arithmetic, storage, or display functions, and includes, any data storage or communications facility operating together with such device, or group of such interconnected or related devices; and it includes, the necessary input and output and databases of a computer; but it does not include,</p> | <p>automation, and digital transactions.</p> <p>The term "agent" is now expressly linked to its statutory use in Section 3, improving clarity. This mirrors the approach in Guernsey's Law of Agency 2015, which tightly links definitions with operative provisions</p> <p>The term "actual authority" incorporates the concept of a "manifestation of assent", in line with the Restatement (Third) of Agency (as cited in Section 7.0). This replaces the more ambiguous use of "consent" under the Contracts Act 1950 and provides a clearer doctrinal basis for determining when authority exists.</p> <p>Definitions of "legal capacity" and "mental incapacity" allow for the integration of disability-related legal considerations, absent in the Contracts Act but identified in the Draft as necessary for a more inclusive agency framework. [modification of provisions from [xx]]</p> <p>We think that the broader definitional scope anticipates the need for terms that support cross-border commercial contexts and the application of private international law rules.</p> |

| No. | Existing Provision (Contracts Act 1950) | Proposed Provisions (Draft Agency Bill)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        | Justification/Remarks |
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|     |                                         | <p>any device which is non-programmable or which does not contain any data storage facility;</p> <p>“computer program” means programs in any form, including those which are incorporated into a computer or into any hardware and includes preparatory design work leading to the development of a computer program provided that the nature of the preparatory work is such that a computer program can result from it at a later stage;</p> <p>“contract” includes, any contract, transaction or other act, document, record, notice or instrument which produces legal consequences, oral, written or otherwise;</p> <p>“electronic” includes, created, recorded, transmitted or stored in digital form or in other intangible form by electronic, magnetic or optical means or by any other means that has capabilities for creation, recording, transmission or storage similar to those means, including, by a computer, by computer program, by artificial intelligence or by an artificial intelligence system; and “electronically” has a corresponding meaning;</p> <p>“electronic agent” includes, a computer program or an artificial intelligence system or an electronic or other automated means used independently to initiate an action or respond to electronic records or performances in whole or in part, without review or action by a natural person;</p> <p>“electronic record” means a contract or other record created, generated, sent, communicated, received, or stored by electronic means;</p> <p>“equity” means the law of equity as applied in Malaysia;</p> |                       |

| No. | Existing Provision (Contracts Act 1950) | Proposed Provisions (Draft Agency Bill)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                | Justification/Remarks |
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|     |                                         | <p>“legal capacity” includes, any of the criteria for legal capacity specified in this Act or the capacity to enter into and perform any contract or otherwise to affect legal relations with third parties;</p> <p>“mental incapacity” means a person who lacks capacity to enter into and perform any contract or otherwise to affect legal relations with third party as he is unable to make a decision for himself in relation to that matter because of an impairment of, or a disturbance in the functioning of the mind or brain, whether permanent or temporary and “mental capacity” and “lack of mental capacity” carry corresponding meanings ;</p> <p>“principal” means a principal as referred to in section 3;</p> <p>“terms” in relation to an agency, means any or all of the following, as varied from time to time, as the context requires—</p> <p>(a) express written terms of the agency;</p> <p>(b) express oral terms of the agency;</p> <p>(c) express terms of the agency in any other form.</p> <p><b>Actual authority</b><br/> <b>7.</b> (1) An agent has actual authority—</p> <p>(a) when the authority is to act so as to affect the principal’s legal relations with third parties; and</p> <p>(b) it results from a manifestation of assent that the agent should represent or act for the principal, expressly or impliedly made by the principal to the agent.</p> <p><b>General rules</b><br/> <b>10.</b> The following apply—</p> |                       |

| No. | Existing Provision (Contracts Act 1950) | Proposed Provisions (Draft Agency Bill)                                                                                                                                                                                                                                                                                | Justification/Remarks                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          |
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|     |                                         | (9) an agent may not appoint a sub-agent where the law does not allow the agent to make such an appointment.                                                                                                                                                                                                           |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |
| 3.  |                                         | <b>Interpretation</b><br>2. (2) This Act—<br>(a) is not an exhaustive code of the law relating to agency or agents; and<br>(b) is intended to be complemented by the rules of the common law and equity except where otherwise indicated or where those rules are inconsistent with the provisions of this Act.        | <p>Clause 2(2) of the Draft Bill sets out provisions that clarify the non-exhaustive nature of the Draft Bill in relation to the law of agency and expressly allows the application of common law and equity in tandem with the provisions of the Draft Bill.</p> <p>It is not a complete code, which maintains space for judicial development and responds to concerns raised at the NUS Roundtable Dialogue about over-codification.</p> <p>A rigid or exhaustive code would stifle development, especially in areas like AI, where legal principles are still emerging.</p> |
| 4.  |                                         | <b>Interpretation</b><br>2. (3) If there is any inconsistency between the provisions of this Act and those of any other written law, the provisions of that other written law prevail, unless this Act provides or intends otherwise.                                                                                  | <p>Clause 2(3) of the Draft Bill clarifies that other written laws will prevail in the event of inconsistency, unless this Draft Bill provides or intends otherwise.</p>                                                                                                                                                                                                                                                                                                                                                                                                       |
| 5.  |                                         | <b>Interpretation</b><br>2. (4) The terms “appoint”, “appointment” and words of similar effect when used in connection with an agent and the creation of an agency include, a person who becomes an agent and an agency created in any way contemplated by this Act and the common law and equity, where this applies. | <p>The provisions in Part X had used the terminology “employ” in the context of a person being made an agent. We have changed the terminology, in the Draft Bill, to “appoint” as we think that to appoint would be a more appropriate and current terminology. We have also added an interpretation provision on “appoint” to provide clarity on its meaning and to words of similar effect.</p>                                                                                                                                                                              |

| No. | Existing Provision (Contracts Act 1950) | Proposed Provisions (Draft Agency Bill)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          | Justification/Remarks                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              |
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| 6.  |                                         | <p><b>Interpretation</b></p> <p>2.(5) The provisions of this Act do not apply to an agency governed by a law other than Malaysian law unless this Act provides otherwise. The law governing an agency is presumed (unless the contrary is expressed or intended) to be Malaysian law if—</p> <ul style="list-style-type: none"> <li>(a) the agent is appointed to perform acts substantially in Malaysia; or</li> <li>(b) the agent is solely or principally, a resident of Malaysia; or</li> <li>(c) the contract or acts to be entered into or performed by the agent are substantially governed by the laws of Malaysia; or</li> <li>(d) the principal is solely or principally, a resident of Malaysia; or</li> <li>(e) the contract or acts to be entered into or performed by the agent substantially involve as parties to the contract or acts, residents of Malaysia, the residence of the principal and the agent to be taken into account.</li> </ul> | <p>Clause 2(5) clarifies that the Draft Bill does not apply to agencies governed by a law other than Malaysian law unless otherwise provided. A presumption is introduced to determine when Malaysian law is presumed to apply, based on factors such as the place of performance, residence of the agent or principal, and the governing law of the acts involved.</p> <p>This provision does not appear in Part X of the CA 1950.</p>                                                                                            |
| 7.  |                                         | <p><b>General</b></p> <p>6. An agent must observe these provisions if he does not have actual authority to the contrary or is otherwise allowed to act differently under other provisions of this Act—</p> <ul style="list-style-type: none"> <li>(6) an agent must not bind or commit the principal or himself to a future exercise or non-exercise of a discretion;</li> <li>(9) if an agent acts for more than one principal, he must consider whether he is able to properly discharge his duties as an agent for more than one principal;</li> </ul>                                                                                                                                                                                                                                                                                                                                                                                                        | <p>Clause 6 introduces general duties that does not have an equivalent in Part X of the CA 1950.</p> <p>This includes obligations such as not binding the principal or agent to a future exercise of discretion, ensuring impartiality when acting for multiple principals, prohibiting rewards beyond reimbursement of legitimate expenses, and requiring unanimity when multiple agents act.</p> <p>These general duties are based on common law rules relating to agents. This is drafted based on Bowstead &amp; Reynolds.</p> |

| No. | Existing Provision (Contracts Act 1950) | Proposed Provisions (Draft Agency Bill)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     | Justification/Remarks                                                                                                                                                                                                                                                                                                                                                                                                             |
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|     |                                         | <p>(10) if an agent acts for more than one principal, he must not be unfairly partial to one principal or group of principals to the detriment of the others;</p> <p>(12) an agent must not take any reward for acting as an agent, but this does not affect the right of an agent to be reimbursed for the agent's legitimate expenses and disbursements;</p> <p>(15) if there is more than one agent, the agents must act unanimously.</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                | <p>An analogy has also been drawn with the duties of trustees as set out in the New Zealand's Trustee Act 1956. Agents and trustees commonly have similar duties and obligations.</p>                                                                                                                                                                                                                                             |
| 8.  |                                         | <p><b>Agency arrangements and limitations</b></p> <p>5. (1) The provisions of this Part contain expressed provisions on what an agent can and cannot do. An agent may act in a way which is different from what it can do in those expressed provisions if it is within, in any event, the actual authority of the agent as specified in subsection 7(1). An agent's acts may also be validated or allowed by other provisions of this Act. Nothing in this subsection (1) precludes the application of subsections (2) to (3).</p> <p>(2) The following provisions apply to an agent where an agent limits or excludes his liability or obtains an indemnity for any breach of his duties and obligations arising from his dishonesty, wilful misconduct, or gross negligence. When these provisions refer to limitation or exclusion or indemnity, they intend to include any contract or arrangement in whatever form. These provisions do not preclude any additional prohibitions or restrictions on such exclusions or limitations under any other written law—</p> <p>(a) no such limitation or exclusion or indemnity may have the effect of excluding or limiting liability or claims or providing an indemnity unless that limitation or exclusion or indemnity is a fair and reasonable one having regard to the circumstances which were, or ought reasonably to have been, known to or contemplated by the</p> | <p>The proposed provision provides that duties and obligations of an agent may be modified or waived by consent of principal, and expressly prohibits terms that limit, exclude or indemnify an agent from liability for breach arising from dishonesty, wilful misconduct or gross negligence.</p> <p>It also introduces a duty of disclosure for agents in non-regulated professional contexts, promoting informed consent.</p> |

| No. | Existing Provision (Contracts Act 1950) | Proposed Provisions (Draft Agency Bill)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                           | Justification/Remarks |
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|     |                                         | <p>parties to the contract or arrangement when made;</p> <p>(b) no such limitation or exclusion or indemnity may have the effect of allowing any third parties not a party to any contract or arrangement for the creation of the agency to benefit or acquire rights from any provisions in any such contract or arrangement which exclude or limit liability or claims or which may provide an indemnity;</p> <p>(c) no such limitation or exclusion or indemnity may have the effect of making a right or remedy or its enforcement subject to a restrictive or onerous condition;</p> <p>(d) no such limitation or exclusion or indemnity may have the effect of allowing the principal to be put at a disadvantage as a result of pursuing such a right or remedy;</p> <p>(e) no such limitation or exclusion or indemnity may have the effect of excluding or restricting rules of evidence or procedure;</p> <p>(f) a limitation or exclusion or indemnity separate from or secondary to or otherwise related to the limitation or exclusion or indemnity referred to in paragraphs (a) to (e) purporting to have the effect of excluding or limiting or providing an indemnity in relation to any of the matters which would otherwise have been prohibited by such subparagraphs are prohibited.</p> <p>(3) Subsections (1) and (2) apply to an agency created before the date of commencement of this Act to the extent that it relates to the liability of an agent accrued on or after such date.</p> |                       |

| No.                                        | Existing Provision (Contracts Act 1950)                                                                                                                                                                                                                                                                                                                                                    | Proposed Provisions (Draft Agency Bill)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        | Justification/Remarks                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       |
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| <b>Appointment and Authority of Agents</b> |                                                                                                                                                                                                                                                                                                                                                                                            |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             |
| 9.                                         | <p><b>“Agent” and “principal”</b><br/>135. An “agent” is a person employed to do any act for another or to represent another in dealings with third persons. The person for whom such act is done, or who is so represented, is called the “principal”.</p> <p><b>“Consent”</b><br/>13. Two or more persons are said to consent when they agree upon the same thing in the same sense.</p> | <p><b>Agency defined</b><br/>3. An agency is the relationship (whether or not, fiduciary) which exists between two persons—</p> <p>(1) one of whom expressly or impliedly manifests assent that the other should act on his behalf with or without authority to affect his legal relations with third parties; and</p> <p>(2) the other of whom similarly manifests assent so to act or so acts pursuant to the manifestation.</p> <p>The one on whose behalf the act is to be done is the principal. The one who is to act is the agent. A third party is a person other than the principal or the agent.</p> | <p>The provision in Clause 3 of the Draft Bill is a modification to the approach taken in the CA 1950. CA 1950 also use consent in its terminology on agency rather than manifest assent.</p> <p>The modification in the approach is based on developments in agency case law in England and in Australia and also the statement in Bowstead &amp; Reynolds on the meaning of agency, cited by a Malaysian case. The statement in Bowstead &amp; Reynolds derives from the statement on the meaning of agency in the American Restatement. The English and Australian cases have cited Bowstead &amp; Reynolds or used the test of manifest assent without specific reference to Bowstead &amp; Reynolds.</p> <p>Provision makes clear that an agency doesn’t have to involve a fiduciary relationship or authority being given to an agent to affect the principal’s legal relations. These reflect the common law position. Bowstead &amp; Reynolds, UBS case. CA 1950 is silent on these matters. American Restatement mentions an agency as involving a fiduciary relationship. This position has not been adopted.</p> |
| 10.                                        | <p><b>Who may employ agent</b><br/>136. Any person who is of the age of majority according to the law to which he is subject, and who is of sound mind, may employ an agent.</p>                                                                                                                                                                                                           | <p><b>Other elements of agency</b><br/>4. (1) An agent and principal may be a natural person or any other person with legal capacity to act as agent or principal, as may apply.</p>                                                                                                                                                                                                                                                                                                                                                                                                                           | <p>In respect of legal capacity of an agent, the current provision in Section 137 of the CA 1950 states that an agent may be anyone. However, it also goes on to say that a person not of the age of majority or of sound mind can become an agent so as to be responsible to the principal. The provision does not entirely accord with the common law and lacks clarity as mentioned by the in the Indian Law Commission 13<sup>th</sup> Report.</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      |
| 11.                                        | <p><b>Who may be an agent</b><br/>137. As between the principal and third persons, any person may become an agent; but no person who is not of the age of majority and of sound mind can become an agent, so as to be responsible to his principal according to the provisions in that behalf herein contained.</p>                                                                        | <p>(3)(a) An agency may not be created if prohibited by any written law or by common law or by equity.</p> <p>(b) If any written law provides that any agency may only be created subject to specified conditions or formalities, no agency may be created until those conditions or formalities are met.</p>                                                                                                                                                                                                                                                                                                  |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             |

| No. | Existing Provision (Contracts Act 1950) | Proposed Provisions (Draft Agency Bill)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 | Justification/Remarks                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                           |
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|     |                                         | <p>(4) Legal capacity—</p> <p>(a) shall subject to subsection (3)(b), be subject to the operation and application of the rules of private international law (and accordingly, legal capacity will be determined by the system of law applicable to legal capacity, according to the rules of private international law);</p> <p>(b) an individual in Malaysia, whether as agent or principal, entering into or creating an agency relationship governed by the laws of Malaysia will be determined by the laws of Malaysia.</p> <p>(5) Legal capacity of an agent or principal where the laws of Malaysia apply will—</p> <p>(a) if an individual, cease on death, mental incapacity or bankruptcy;</p> <p>(b) if a legal person, cease on winding up or dissolution or if it ceases to have the power and capacity to perform the matter at hand.</p> <p>The legal capacity of an agent or principal at a point in time is construed accordingly.</p> <p>(6) A principal must have legal capacity in order to appoint an agent.</p> <p>(7) The following apply to an agent in the context of legal capacity—</p> <p>(a) Any person may be an agent regardless of legal capacity;</p> <p>(b) An agent's lack of legal capacity does not preclude the agent from performing acts as agent including, any which have legal consequences on the principal. The principal is bound to third parties by the acts of such an agent as if the agent had legal capacity. To</p> | <p>Bowstead &amp; Reynolds states that an agent need not have legal capacity except in some very narrow circumstances. The common law as discussed in the work does not obviate a person becoming an agent merely because of unsound mind or because of minority. It has to in essence amount to a fundamental lack of understanding of the agency. The work also discusses the possibility of liability on the part of a minor.</p> <p>The Indian Law Commission 13<sup>th</sup> Report proposed a redraft of the Indian Contracts Act equivalent of Section 137 but substantially retained the test of unsound mind and minority.</p> <p>The American Restatement provides that an agent should have legal capacity. We have not adopted this approach.</p> <p>Adopting the test of unsound mind and minority is too extensive in obviating their liability. Developments in various jurisdictions show an increased recognition of minors being capable of making important decisions. Persons of unsound mind may also not always be of unsound mind.</p> <p>The new provision clarifies Section 137 in respect of the legal capacity of an agent while also providing for liability in the case of some minors and persons with mental</p> |

| No. | Existing Provision (Contracts Act 1950) | Proposed Provisions (Draft Agency Bill)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             | Justification/Remarks                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          |
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|     |                                         | <p>avoid doubt, no agency relationship may be created where the purported agent lacks legal personality except under the provisions of Division 2 of Part IV;</p> <p>(c) Despite the provisions of paragraph (b), an agent who is a minor or who lacks mental capacity is not—</p> <p>(i) responsible to his principal; or</p> <p>(ii) personally bound to third parties in respect of any acts on behalf of his principal including, contracts or any other acts which may have legal consequences.</p> <p>In this paragraph (c), a minor and a person who lacks mental capacity does not include a minor or a person with a degree of mental incapacity who has at the material time a sufficient understanding to consent to the agency and to do the act required by the agency.</p> <p>(8) The following apply to the loss of legal capacity following the creation of an agency—</p> <p>(a) An agent’s actual authority terminates when his principal loses legal capacity but only when the agent has notice of the loss of legal capacity;</p> <p>(b) The termination of the agency is effective as against a third party dealing with the agent when the third party has notice of the loss of the legal capacity of the principal;</p> <p>(c) An agent’s actual authority will remain effective despite his principal losing his legal capacity where—</p> <p>(i) a power of attorney conferring authority on the agent (the attorney) is irrevocable</p> | <p>incapacity. The provision also specifies the point in time to which the state of mind of the minor or person with mental incapacity should be considered in the context of liability. The common law position as well as the proposal of the Indian Law Commission 13<sup>th</sup> Report have been considered.</p> <p>The definition of “legal capacity” also provides recognition of instruments such as, living wills and enduring powers of attorney should laws be introduced to provide for them.</p> |

| No. | Existing Provision (Contracts Act 1950)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                  | Proposed Provisions (Draft Agency Bill)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                           | Justification/Remarks                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                         |
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|     |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          | <p>or not subject to revocation under the provisions of Part III;</p> <p>(ii) an instrument makes an agent's actual authority effective upon the principal's loss of capacity or that instrument is irrevocable despite such loss, written law permitting.</p> <p>Subparagraphs (i) and (ii) are separate and independent from each other and each subparagraph does not limit the scope and effect of the other.</p> <p>(9) The provisions of this Act, when referring to an agent include, a reference to an attorney under a power of attorney and a reference to an agency includes, an agency established by power of attorney, unless the context or the nature of an attorney or power of attorney otherwise requires.</p> |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               |
| 12. | <b>Consideration not necessary</b><br>138. No consideration is necessary to create an agency.                                                                                                                                                                                                                                                                                                                                                                                                                                                                            | <b>Other elements of agency</b><br><b>4.</b> (2) An agency may be created without consideration.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                  | The substance of Section 138 CA 1950 is retained and modified with modern and simplified language.                                                                                                                                                                                                                                                                                                                                                                                                                                                                            |
| 13. | <b>Agent's authority may be expressed or implied</b><br>139. The authority of an agent may be expressed or implied.                                                                                                                                                                                                                                                                                                                                                                                                                                                      | <b>Actual authority</b><br><b>7.</b> (2) Actual authority may be express or implied.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              | The substance of Sections 139 and 140 CA 1950 is retained and modified with broader language.<br><br>The illustration is dispensed with as it is outdated and may fetter the court's dynamic interpretation in changing circumstances (and all other illustrations in the CA 1950).<br><br>The usage of "actual authority" instead of "authority" is derived from Bowstead & Reynolds to provide for better clarity on the law on agency. This is to distinguish from "apparent authority" and other circumstances where a principal may be bound, e.g. doctrine of estoppel. |
| 14. | <b>Definitions of express and implied authority</b><br>140. An authority is said to be express when it is given by words spoken or written. An authority is said to be implied when it is to be inferred from the circumstances of the case; and things spoken or written, or the ordinary course of dealing, may be accounted circumstances of the case.<br><b>ILLUSTRATION</b><br><i>A owns a shop in Kajang, living himself in Kuala Lumpur, and visiting the shop occasionally. The shop is managed by B, and he is in the habit of ordering goods from C in the</i> |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               |

| No. | Existing Provision (Contracts Act 1950)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          | Proposed Provisions (Draft Agency Bill)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                | Justification/Remarks                                                                                                                                                                                                      |
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|     | <i>name of A for the purpose of the shop, and of paying for them out of A's funds with A's knowledge. B has an implied authority from A to order goods from C in the name of A for the purposes of the shop.</i>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        |                                                                                                                                                                                                                            |
| 15. | <p><b>Extent of agent's authority</b></p> <p>141. (1) An agent having an authority to do an act has authority to do every lawful thing which is necessary in order to do the act.</p> <p>(2) An agent having an authority to carry on a business has authority to do every lawful thing necessary for the purpose, or usually done in the course of conducting such business.</p> <p><i>ILLUSTRATIONS</i></p> <p>(a) <i>A is employed by B, residing in London, to recover at Teluk Intan a debt due to B. A may adopt any legal process necessary for the purpose of recovering the debt, and may give a valid discharge for the same.</i></p> <p>(b) <i>A constitutes B his agent to carry on his business of a shipbuilder. B may purchase timber and other materials, and hire workmen, for the purpose of carrying on the business.</i></p> | <p><b>Actual authority</b></p> <p>7.(4) An agent has actual authority in the following matters. These matters do not limit the circumstances in which an agent may have actual authority under subsections (1) and (2)—</p> <p>(c) all the authority to carry out any acts or matters necessary in order to do the act authorised;</p> <p>(d) if the authority is to carry on a business, all the authority to carry out any acts or matters necessary for the business or usually done in the course of conducting such business;</p> | <p>The substance of Section 141 CA 1950 is retained but modified with added clarity on agent's authority.</p> <p>The illustrations are dispensed with.</p>                                                                 |
| 16. | <p><b>Agent's authority in an emergency</b></p> <p>142. An agent has authority, in an emergency, to do all such acts for the purpose of protecting his principal from loss as would be done by a person of ordinary prudence, in his own case, under similar circumstances.</p> <p><i>ILLUSTRATIONS</i></p> <p>(a) <i>An agent for sale may have goods repaired if it be necessary.</i></p> <p>(b) <i>A consigns provisions to B at Taiping, with directions to send them immediately to C at Parit Buntar. B may sell the provisions at Taiping, if they will not bear the journey to</i></p>                                                                                                                                                                                                                                                   | <p><b>Actual authority</b></p> <p>7. (4) An agent has actual authority in the following matters. These matters do not limit the circumstances in which an agent may have actual authority under subsections (1) and (2)—</p> <p>(e) all the authority, in an emergency, to carry out any acts or matters for the purpose of protecting his principal from loss or damage as the agent would have done, if a person of ordinary prudence, in similar circumstances;</p>                                                                 | <p>The substance of Section 142 CA 1950 is retained with clearer and more precise language and integrated into the agent's general authority for clarity and consistency.</p> <p>The illustrations are dispensed with.</p> |

| No. | Existing Provision (Contracts Act 1950)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                         | Proposed Provisions (Draft Agency Bill)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                  | Justification/Remarks                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                           |
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|     | <i>Parit Buntar without spoiling.</i>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                           |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 |
| 17. | <p><b>Liability of principal inducing belief that agent's unauthorized acts were authorized</b></p> <p>190. When an agent has, without authority, done acts or incurred obligations to third persons on behalf of his principal, the principal is bound by those acts or obligations if he has by his words or conduct induced such third persons to believe that those acts and obligations were within the scope of the agent's authority.</p> <p><i>ILLUSTRATIONS</i></p> <p>(a) <i>A consigns goods to B for sale, and gives him instructions not to sell under a fixed price. C, being ignorant of B's instructions, enters into a contract with B to buy the goods at a price lower than the reserved price. A is bound by the contract.</i></p> <p>(b) <i>A entrusts B with negotiable instruments endorsed in blank. B sells them to C in violation of private orders from A. The sale is good.</i></p> | <p><b>Apparent authority</b></p> <p><b>8.</b> (1) An agent or other actor has apparent authority when he has the power to affect a principal's legal relations with third parties where a third party reasonably believes that the agent or other actor has authority to act on behalf of the principal and that belief results from the principal's manifestations—</p> <p>(a) a person does not have to be an actual agent of a principal in order to have apparent authority;</p> <p>(b) a person who does not have actual authority may have apparent authority;</p> <p>(c) an expression in this Act to the authority of a person, whether as having or not having authority or words to similar effect refer to actual authority and not to apparent authority, in the absence of a specific reference to apparent authority or unless the context requires otherwise.</p> <p>The other actor refers to a person who is not an actual agent. Agent when used elsewhere in this section or for purposes of apparent authority includes such an actor.</p> <p>(2) An agent with apparent authority who acts purportedly on behalf of a principal with legal consequences for the principal binds the principal, as to those acts within his apparent authority, to the third party. The principal must ratify the act of the agent in order for the principal to enforce any contract arising from those acts.</p> <p>(3) The provisions of this section do not limit the operation of the doctrine of estoppel.</p> | <p>The provision in Section 190 CA 1950 is redrafted to include the terminology "apparent authority" and for clearer language. This approach is based on the American Restatement approved by Bowstead &amp; Reynolds and the Malaysian case of <i>Playboy Enterprises International, Inc v Zillion Choice Sdn Bhd &amp; Anor.</i></p> <p>The provision on the doctrine of estoppel, does not appear in Part X of the CA 1950. It is only as a passing reference that the provisions on apparent authority do not limit the application of the doctrine of estoppel. Consideration has been made of the recommendation of the Indian Law Commission 13<sup>th</sup> Report but has not been adopted. The complexity of the doctrine of estoppel as discussed in Bowstead &amp; Reynolds and the difficulty in reducing the rules into legislative form has also been taken into account. Also noted that Bowstead &amp; Reynolds does not agree with the approach taken in respect of the doctrine of estoppel in the American Restatement.</p> |

| No.               | Existing Provision (Contracts Act 1950)                                                                                                                                                                                                                                                                             | Proposed Provisions (Draft Agency Bill)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             | Justification/Remarks                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              |
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| <b>Sub-agents</b> |                                                                                                                                                                                                                                                                                                                     |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    |
| 18.               | <b>When agent cannot delegate</b><br>143. An agent cannot lawfully employ another to perform acts which he has expressly or impliedly undertaken to perform personally, unless by the ordinary custom of trade a sub-agent may, or, from the nature of the agency, a sub-agent must, be employed.                   | <b>General</b><br>6. An agent must observe these provisions if he does not have actual authority to the contrary or is otherwise allowed to act differently under other provisions of this Act—<br>(8) an agent must not delegate his duties and obligations to another;<br><br><b>Actual authority</b><br>7. (4) An agent has actual authority in the following matters. These matters do not limit the circumstances in which an agent may have actual authority under subsections (1) and (2)—<br>(f) the authority to act if the nature of the agency or ordinary custom of the business allows the agent to act in that way. These may include, in such circumstances, the authority to appoint another to carry out acts which the agent is required to perform in an agency. | The substance of Section 143 CA 1950 is retained. The provision reiterates the general rule against delegation by an agent except in particular circumstances. The provision is crafted more broadly than in Section 143 in that if the agent has actual authority or is otherwise allowed to delegate under other provisions of the Act, then he may delegate. The particular circumstances specified in Section 143 allowing delegation continue to be further specified in the provision.<br><br>An agent may have actual authority both expressed and inferred from the circumstances. The definition of agency and the use of manifest assent would be some of the considerations. Actual authority does not refer only to authority expressly given by the principal. Actual authority is different from apparent authority. |
| 19.               | <b>“Sub-agent”</b><br>144. A “sub-agent” is a person employed by, and acting under the control of, the original agent in the business of the agency.                                                                                                                                                                | <b>Interpretation</b><br>2. (1) In this Act, unless the context otherwise requires—<br>“sub-agent” means a sub-agent as referred to in section 10;                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                  | The authority of a sub-agent is clarified in a more defined manner in Section 10 of the Draft Bill.<br><br>Section 10 is similar to Sections 145 and 146 CA 1950. Bowstead & Reynolds has also been considered.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    |
| 20.               | <b>Representation of principal by sub-agent properly appointed</b><br>145.(1) Where a sub-agent is properly appointed, the principal is, so far as regards third persons, represented by the sub-agent, and is bound by and responsible for his acts, as if he were an agent originally appointed by the principal. | <b>General rules</b><br>10. The following apply—<br>(1) a sub-agent properly appointed by the agent, binds a principal for his acts with a third party as if directly appointed by the principal. This does not mean that the sub-agent is actually appointed by the principal.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     | The substance of Section 145(1) CA 1950 is retained with clearer language and a clarification that the sub-agent is not directly appointed by the principal.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       |

| No. | Existing Provision (Contracts Act 1950)                                                                                                                                                                                                                                                                                                                                                                                                                                                   | Proposed Provisions (Draft Agency Bill)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                  | Justification/Remarks                                                                                                                                                                                                                                                                                                                                                                                                             |
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|     | <b>Agent's responsibility for sub-agent</b><br>(2) An agent is responsible to the principal for the acts of the subagent.                                                                                                                                                                                                                                                                                                                                                                 | <b>General rules</b><br><b>10.</b> The following apply—<br><br>(2) an agent is responsible to the principal for the acts of the sub-agent.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               | The proposed provision substantially retains Section 145(2).                                                                                                                                                                                                                                                                                                                                                                      |
|     | <b>Sub-agent's responsibility</b><br>(3) A sub-agent is responsible for his acts to the agent, but not to the principal, except in case of fraud or wilful wrong.                                                                                                                                                                                                                                                                                                                         | <b>General rules</b><br><b>10.</b> The following apply—<br><br>(3) the sub-agent may not act beyond the authority of the agent.<br><br>(4) the authority of the sub-agent may be limited, expressly or impliedly by the agent. The responsibility of the agent to his principal is not affected by any such limitation.<br><br>(5) the terms of appointment of a sub-agent by the agent do not bind the principal.<br><br>(6) a sub-agent is responsible to the agent for his acts but will also be responsible to the principal for the sub-agent's dishonesty, wilful misconduct or gross negligence, in addition to any responsibility of the agent to his principal. | The substance of Section 145(3) CA 1950 is retained with modifications.<br><br>It clarifies the extent of sub-agent's authority, the limitation of such authority, confirms that the terms of appointment between the agent and sub-agent do not bind the principal and reword the sub-agent's responsibilities in case of "fraud or wilful wrong" in broader terms to include dishonesty, wilful misconduct or gross negligence. |
| 21. | <b>Agent's responsibility for sub-agent appointed without authority</b><br>146. Where an agent, without having authority to do so, has appointed a person to act as a sub-agent, the agent stands towards that person in the relation of a principal to an agent, and is responsible for his acts both to the principal and to third persons; the principal is not represented by or responsible for the acts of the person so employed, nor is that person responsible to the principal. | <b>General rules</b><br><b>10.</b> The following apply—<br><br>(7) an agent who appoints a sub-agent without authority is responsible for all the acts of the sub-agent as if the agent were the principal and the sub-agent, the agent. The principal is not responsible for the acts of the sub-agent in such a case and the sub-agent is not his agent.                                                                                                                                                                                                                                                                                                               | The substance of Section 146 CA 1950 is retained and modified with clearer and more structured language.                                                                                                                                                                                                                                                                                                                          |
| 22. | <b>Relation between principal and person duly appointed by agent to act in business of agency</b><br>147. Where an agent, holding an express or implied                                                                                                                                                                                                                                                                                                                                   | <b>Agent and not a sub-agent</b><br><b>11.</b> If an agent is authorised to appoint another to act for the principal in the business of the agency, that person appointed is an agent of the principal and not a sub-agent.                                                                                                                                                                                                                                                                                                                                                                                                                                              | The substance of Section 147 CA 1950 is retained and modified with clearer language. The authority held by the sub-agent is clarified to be clearer to the reader.                                                                                                                                                                                                                                                                |

| No. | Existing Provision (Contracts Act 1950)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     | Proposed Provisions (Draft Agency Bill)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                            | Justification/Remarks                                                                |
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|     | <p>authority to name another person to act for the principal in the business of the agency, has named another person accordingly, that person is not a sub-agent, but an agent of the principal for such part of the business of the agency as is entrusted to him.</p> <p><i>ILLUSTRATIONS</i></p> <p><i>(a) A directs B, his advocate, to sell his estate by auction, and to employ an auctioneer for the purpose. B names C, an auctioneer, to conduct the sale. C is not a sub-agent, but is A's agent for the conduct of the sale.</i></p> <p><i>(b) A authorizes B, a merchant in Taiping, to recover the moneys due to A from C &amp; Co. B instructs D, and advocate, to take legal proceedings against C &amp; Co. for the recovery of the money. D is not a sub-agent, but is advocate for A.</i></p>                                                                                                                                                                                                             | <p>That person will have the same authority to act for the principal as the agent authorised to name that person unless to the contrary in the agency created between the principal and the agent authorised to name. Any prohibitions or limitations in this Act which apply to the agent authorised to name apply also to that person.</p>                                                                                                                                                                                                                                                                                                                                                       | <p>The illustrations are dispensed with.</p>                                         |
| 23. | <p><b>Agent's duty in naming such person</b></p> <p>148. In selecting such an agent for his principal, an agent is bound to exercise the same amount of discretion as a man of ordinary prudence would exercise in his own case; and, if he does this, he is not responsible to the principal for the acts or negligence of the agent so selected.</p> <p><i>ILLUSTRATIONS</i></p> <p><i>(a) A instructs B, a merchant, to buy a ship for him. B employs a ship surveyor of good reputation to choose a ship for A. The surveyor makes the choice negligently and the ship turns out to be unseaworthy and is lost. B is not, but the surveyor is, responsible to A.</i></p> <p><i>(b) A consigns goods to B, a merchant for sale. B, in due course, employs an auctioneer in good credit to sell the goods of A, and allows the auctioneer to receive the proceeds of the sale. The auctioneer afterwards becomes insolvent without having accounted for the proceeds. B is not responsible to A for the proceeds.</i></p> | <p><b>General</b></p> <p><b>6.</b> An agent must observe these provisions if he does not have actual authority to the contrary or is otherwise allowed to act differently under other provisions of this Act—</p> <p>(1) an agent must exercise the care and skill that is reasonable in the circumstances, having regard, in particular—</p> <p>(a) to any special knowledge or experience that the agent has or that the agent holds out as having; and</p> <p>(b) if the person acts as an agent in the course of a business or profession, to any special knowledge or experience that it is reasonable to expect of a person acting in the course of that kind of business or profession;</p> | <p>The proposed provisions are derived from CA 1950 and Bowstead &amp; Reynolds.</p> |

| No.                 | Existing Provision (Contracts Act 1950)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               | Proposed Provisions (Draft Agency Bill)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      | Justification/Remarks                                                                                                                                                                                                                                                                 |
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| <b>Ratification</b> |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              |                                                                                                                                                                                                                                                                                       |
| 24.                 | <b>Right of person as to acts done for him without his authority.</b><br><b>Effect of ratification</b><br>149. Where acts are done by one person on behalf of another but without his knowledge or authority, he may elect to ratify or to disown the acts. If he ratifies them, the same effects will follow as if they had been performed by his authority.                                                                                                                                                                                         | <b>Rules on ratification</b><br>12.(1) A principal may ratify the acts of an agent where the agent acts beyond his authority including, where an agent acts without authority but with apparent authority. A ratification means that the agent would be regarded as having acted within his authority. Where an agent has acted without authority but with apparent authority, the agent would, after ratification, be regarded as having acted with actual authority. A principal is not obliged to ratify, subject to the provisions of subsection 8(2). A principal may through his conduct, ratify the acts of an agent. | The substance of the Sections 149 and 150 is retained and consolidated with clearer and simplified language. A reference to apparent authority is also made.<br><br>The illustrations are dispensed with.                                                                             |
| 25.                 | <b>Ratification may be expressed or implied</b><br>150. Ratification may be expressed or may be implied in the conduct of the person on whose behalf the acts are done.<br><br><i>ILLUSTRATIONS</i><br><i>(a) A, without authority, buys goods for B. Afterwards B sells them to C on his own account; B's conduct implies a ratification of the purchase made for him by A.</i><br><br><i>(b) A, without B's authority, lends B's money to C. Afterwards B accepts interest on the money from C. B's conduct implies a ratification of the loan.</i> |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              |                                                                                                                                                                                                                                                                                       |
| 26.                 | <b>Knowledge requisite to valid ratification</b><br>151. No valid ratification can be made by a person whose knowledge of the facts of the case is materially defective.                                                                                                                                                                                                                                                                                                                                                                              | <b>Rules on ratification</b><br>12.(3) Valid ratification by the principal must be with his full knowledge of all material facts and circumstances unless the principal has sufficient knowledge that he is doing so without full knowledge of the material facts and circumstances.                                                                                                                                                                                                                                                                                                                                         | The substance of Section 151 CA 1950 is retained but modified with clearer and more precise language. In particular, the provision expressly allows ratification without full knowledge of the material facts and circumstances where the principal has sufficient knowledge of this. |
| 27.                 | <b>Effect of ratifying unauthorized act forming part of a transaction</b><br>152. A person ratifying any unauthorized act done on his behalf ratifies the whole of the transaction of which the act                                                                                                                                                                                                                                                                                                                                                   | <b>Rules on ratification</b><br>12. (4) Ratification is ratification of the whole of the transaction to which the act ratified relates. No ratification of part of a transaction is permitted.                                                                                                                                                                                                                                                                                                                                                                                                                               | The substance of Section 152 CA 1950 is retained but modified with clearer language. The proposed provision further clarifies that no partial ratification is permitted.                                                                                                              |

| No.                            | Existing Provision (Contracts Act 1950)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                  | Proposed Provisions (Draft Agency Bill)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              | Justification/Remarks                                                                                                                                                                                                                                                                                                                                                                                                                |
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|                                | formed a part.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                           |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      |                                                                                                                                                                                                                                                                                                                                                                                                                                      |
| 28.                            | <p><b>Ratification of unauthorized act cannot injure third person</b></p> <p>153. An act done by one person on behalf of another, without that other person's authority, which, if done with authority, would have the effect of subjecting a third person to damages, or of terminating any right or interest of a third person, cannot, by ratification, be made to have that effect.</p> <p><i>ILLUSTRATIONS</i></p> <p>(a) A, not being authorized thereto by B, demands on behalf of B, the delivery of a chattel, the property of B, from C, who is in possession of it. This demand cannot be ratified by B, so as to make C liable for damages for his refusal to deliver.</p> <p>(b) A holds a lease from B, terminable on three month's notice. C, an unauthorized person, gives notice of termination to A. The notice cannot be ratified by B, so as to be binding on A.</p> | <p><b>Rules on ratification</b></p> <p>12. (2) Ratification is not possible if the rights of a third party would be adversely affected.</p>                                                                                                                                                                                                                                                                                                                                                                                                          | <p>The substance of 153 CA 1950 is retained but modified with clearer and simplified language.</p> <p>The illustrations are dispensed with.</p>                                                                                                                                                                                                                                                                                      |
| <b>Revocation of Authority</b> |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      |                                                                                                                                                                                                                                                                                                                                                                                                                                      |
| 29.                            | <p><b>Termination of agency</b></p> <p>154. An agency is terminated by the principal revoking his authority; or by the agent renouncing the business of the agency; or by the business of the agency being completed; or by either the principal or agent dying or becoming of unsound mind; or by the principal being adjudicated or declared a bankrupt or an insolvent.</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                           | <p><b>Rules on termination</b></p> <p>13.(1) Subject to subsection 4(8), an agency terminates—</p> <p>(a) when the principal terminates the agency, which may be by conduct of the principal;</p> <p>(b) when the agent terminates the agency, which may be by conduct of the agent;</p> <p>(c) when—</p> <p>(i) the principal dies;</p> <p>(ii) the principal is bankrupt or if a legal person, is subject to winding up or dissolution; or</p> <p>(iii) the principal loses his legal capacity;</p> <p>(d) when—</p> <p>(i) the agent dies; or</p> | <p>The substance of Section 154 CA 1950 is retained with modifications.</p> <p>It restates the grounds/occasions for termination in a more structured manner. It further introduces “ceases to have legal capacity” to replace the more restrictive language of “unsound mind”. It also expands the provision to expressly refer to legal persons/entities as well as expanding on the circumstances where there is termination.</p> |

| No. | Existing Provision (Contracts Act 1950)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                            | Proposed Provisions (Draft Agency Bill)                                                                                                                                                                                                                                                                                                             | Justification/Remarks                                                                                                                                 |
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|     |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    | (ii) the agent is bankrupt or if a legal person, is subject to winding up or dissolution;<br>(e) when the subject matter of the agency comes to an end.                                                                                                                                                                                             |                                                                                                                                                       |
| 30. | <b>Termination of agency, where agent has an interest in subject-matter</b><br>155. Where the agent has himself an interest in the property which forms the subject-matter of the agency, the agency cannot, in the absence of an express contract, be terminated to the prejudice of such interest.<br><br><i>ILLUSTRATIONS</i><br><i>(a) A gives authority to B to sell A's land, and to pay himself, out of the proceeds, the debts due to him from A. A cannot revoke this authority, nor can it be terminated by his unsoundness of mind or death.</i><br><br><i>(b) A consigns 1,000 bales of cotton to B, who has made advances to him on such cotton, and desires B to sell the cotton, and to repay himself out of the price the amount of his own advances. A cannot revoke this authority nor is it terminated by his unsoundness of mind or death.</i> | <b>Rules on termination</b><br>13.(2) The following apply to the termination of an agency, subject to any terms or other arrangements to the contrary—<br>(a) a principal—<br>(i) cannot terminate the authority of an agent when the agent has an interest in any property (whether movable or immovable) which is a subject matter of the agency; | The substance of Section 155 CA 1950 is retained and modified with clearer and more structured language.<br><br>The illustrations are dispensed with. |
| 31. | <b>When principal may revoke agents' authority</b><br>156. The principal may, save as is otherwise provided by the last preceding section, revoke the authority given to his agent at any time before the authority has been exercised so as to bind the principal.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                | <b>Rules on termination</b><br>13.(2) The following apply to the termination of an agency, subject to any terms or other arrangements to the contrary—<br>(a) a principal—<br>(iii) subject to subsection (2)(a)(i), may terminate the authority of an agent before the agent has exercised his authority to bind the principal.                    | The substance of Section 156 CA 1950 is retained and modified with clearer and more structured language.                                              |

| No. | Existing Provision (Contracts Act 1950)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      | Proposed Provisions (Draft Agency Bill)                                                                                                                                                                                                                                                                                                                                     | Justification/Remarks                                                                                                                                                                                                                                                                            |
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| 32. | <p><b>Revocation where authority has been partly exercised</b><br/>157. The principal cannot revoke the authority given to his agent after the authority has been partly exercised, so far as regards such acts and obligations as arise from acts already done in the agency.</p> <p><i>ILLUSTRATIONS</i><br/>(a) A authorizes B to buy 1,000 bales of cotton on account of A, and to pay for it out of A's money remaining in B's hands. B buys 1, 000 bales of cotton in his own name, so as to make himself personally liable for the price. A cannot revoke B's authority so far as regards payment for the cotton.</p> <p>(b) A authorizes B to buy 1,000 bales of cotton on account of A, and to pay for it out of A's money remaining in B's hands. B buys 1,000 bales of cotton in A's name, and so as not to render himself personally liable for the price. A can revoke B's authority to pay for the cotton.</p> | <p><b>Rules on termination</b><br/>13.(2) The following apply to the termination of an agency subject to any terms or other arrangements to the contrary—<br/>(a) a principal—<br/>(ii) cannot terminate the authority of an agent for acts and obligations already performed or incurred under the agency; or</p>                                                          | <p>The substance of Section 157 CA 1950 is retained and modified with clearer and more structured language.</p> <p>The illustrations are dispensed with.</p>                                                                                                                                     |
| 33. | <p><b>Compensation for revocation by principal or renunciation by agent</b><br/>158. Where there is an express or implied contract that the agency should be continued for any period of time, the principal must make compensation to the agent, or the agent to the principal, as the case may be, for any previous revocation or renunciation of the agency without sufficient cause.</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 | <p><b>Rules on termination</b><br/>13.(3) Compensation is payable by the principal or agent terminating the agency to the other if the terms provide that the agency is to be for a period of time and the agency is terminated before that period expires, unless in accordance with the terms or other arrangements of the agency or where there is sufficient cause.</p> | <p>The substance of Section 158 CA 1950 is retained and modified with clearer and simplified language.</p>                                                                                                                                                                                       |
| 34. | <p><b>Notice of revocation or renunciation</b><br/>159. Reasonable notice must be given of such revocation or renunciation; otherwise the damage thereby resulting to the principal or the agent, as the case may be, must be made good to the one by the other.</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                         | <p><b>Rules on termination</b><br/>13.(4) A principal or agent terminating the agency must give reasonable notice, having regard to the facts and circumstances, subject to the terms or other arrangements of the agency. Damages will be payable by the principal or agent terminating the agency to the other otherwise.</p>                                             | <p>The substance of Section 159 CA 1950 is retained and modified with clearer and simplified language.</p> <p>It further adds a reference to “facts and circumstances” and clarifies that notice is “subject to terms of the agency” to better cope with practical and commercial realities.</p> |

| No. | Existing Provision (Contracts Act 1950)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                           | Proposed Provisions (Draft Agency Bill)                                                                                                                                                                                                                                                                                                                                                             | Justification/Remarks                                                                                                                                         |
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| 35. | <p><b>Revocation and renunciation may be expressed or implied</b></p> <p>160. Revocation and renunciation may be expressed or may be implied in the conduct of the principal or agent, respectively.</p> <p><i>ILLUSTRATION</i><br/> <i>A empowers B to let A's house. Afterwards A lets it himself. This is an implied revocation of B's authority.</i></p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      | <p><b>Rules on termination</b></p> <p><b>13.(1)</b> Subject to subsection 4(8), an agency terminates—</p> <p>(a) when the principal terminates the agency, which may be by conduct of the principal;</p> <p>(b) when the agent terminates the agency, which may be by conduct of the agent;</p>                                                                                                     | <p>The substance of Section 160 CA 1950 is retained and modified with simplified and more structured language.</p> <p>The illustration is dispensed with.</p> |
| 36. | <p><b>When termination of agent's authority takes effect as to agent, and as to third persons</b></p> <p>161. The termination of the authority of an agent does not, so far as regards the agent, take effect before it becomes known to him, or, so far as regards third persons, before it becomes known to them.</p> <p><i>ILLUSTRATIONS</i></p> <p>(a) <i>A directs B to sell goods for him, and agrees to give B 5 per cent commission on the price fetched by the goods. A afterwards, by letter, revokes B's authority. B, after the letter is sent, but before he receives it, sells the goods for RM100. The sale is binding on A, and B is entitled to RM5 as his commission.</i></p> <p>(b) <i>A, at Port Dickson, by letter directs B to sell for him some cotton lying in a warehouse in Kelang, and afterwards, by letter, revokes his authority to sell, and directs B to send the cotton to Port Dickson. B, after receiving the second letter, enters into a contract with C, who knows of the first letter, but not of the second, for the sale to him of the cotton. C pays B the money, with which B absconds. C's payment is good as against A.</i></p> <p>(c) <i>A directs B, his agent, to pay certain money to C. A dies, and D takes out probate to his will. B, after A's death, but before hearing of it, pays the money to C. The payment is good as against D, the executor.</i></p> | <p><b>Rules on termination</b></p> <p><b>13.(6)</b> Subject to subsection 4(8), an agent, as regards himself, will continue to have authority to act until he receives notice of his termination of authority or such termination becomes known to him. A third party is entitled to assume that the authority of an agent has not been terminated until such termination becomes known to him.</p> | <p>The substance of Section 161 CA 1950 is retained and modified with clearer and more precise language.</p> <p>The illustrations are dispensed with.</p>     |

| No.                              | Existing Provision (Contracts Act 1950)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                            | Proposed Provisions (Draft Agency Bill)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                | Justification/Remarks                                                                                                                                                                                                                                                                                                                                                                                               |
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| 37.                              | <b>Agent's duty on termination of agency by principal's death or insanity</b><br>162. When an agency is terminated by the principal dying or becoming of unsound mind, the agent is bound to take, on behalf of the representatives of his late principal, all reasonable steps for the protection and preservation of the interests entrusted to him.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             | <b>Rules on termination</b><br><b>13.(5)</b> The agent must, on behalf of the representatives of the principal, take all reasonable steps to protect and preserve the interests of the principal entrusted in the agent, where an agency is terminated because of the principal's death, incapacity or bankruptcy or if a legal person, because of its winding up or dissolution.                                                                                                                                                                                                                                      | The substance of Section 162 CA 1950 is retained and consolidated into the structured rules on termination, with further modifications.<br><br>The provision further expands the scope of the agent's post-termination duties in occasions of legal incapacity and to cover legal persons/entities, which is in consistent with earlier provisions.                                                                 |
| 38.                              | <b>Termination of sub-agent's authority</b><br>163. The termination of the authority of an agent causes the termination (subject to the rules herein contained regarding the termination of an agent's authority) of the authority of all sub-agents appointed by him.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             | <b>General rules</b><br><b>10.</b> The following apply—<br><br>(8) a sub-agent's authority terminates when the authority of the agent terminates. The provisions of section 13 apply as between the agent and the sub-agent.                                                                                                                                                                                                                                                                                                                                                                                           | The substance of Section 163 CA 1950 is retained and modified with clearer and simplified language.                                                                                                                                                                                                                                                                                                                 |
| <b>Agent's duty to Principal</b> |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        |                                                                                                                                                                                                                                                                                                                                                                                                                     |
| 39.                              | <b>Agent's duty in conducting principal's business</b><br>164. An agent is bound to conduct the business of his principal according to the directions given by the principal, or, in the absence of any such directions, according to the custom which prevails in doing business of the same kind at the place where the agent conducts the business. When the agent acts otherwise, if any loss be sustained, he must make it good to his principal, and, if any profit accrues, he must account for it.<br><br><i>ILLUSTRATIONS</i><br><i>(a) A, an agent engaged in carrying on for B a business, in which it is the custom to invest from time to time, at interest, the moneys which may be in hand, omits to make the investment. A must make good to B the interest usually obtained by such investments.</i><br><br><i>(b) B, a broker, in whose business it is not the custom to sell on credit, sells goods of A on credit to C, whose credit at the time was very high. C, before payment, becomes</i> | <b>General</b><br><b>6.</b> An agent must observe these provisions if he does not have actual authority to the contrary or is otherwise allowed to act differently under other provisions of this Act—<br><br>(4) an agent must additionally, also take any other instructions from his principal;<br><br>(5) An agent must observe these provisions if he does not<br><br><b>Interpretation</b><br><b>2.(2)</b> This Act—<br><br>(b) is intended to be complemented by the rules of the common law and equity except where otherwise indicated or where those rules are inconsistent with the provisions of this Act. | Part of the substance of Section 164 CA 1950 regarding agent's duty to take instructions is retained with clearer and structured language.<br><br>The consequences of an agent not complying with this provision are not expressly set out relative to its counterpart in Section 164. A specific provision is not necessary as it can be addressed by the common law.<br><br>The illustrations are dispensed with. |

| No. | Existing Provision (Contracts Act 1950)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                  | Proposed Provisions (Draft Agency Bill)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        | Justification/Remarks                                                                                                                                                                                                                                                                                                                                                                                                       |
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|     | <i>insolvent. B must make good the loss to A.</i>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |                                                                                                                                                                                                                                                                                                                                                                                                                             |
| 40. | <p><b>Skill and diligence required from agent</b></p> <p>165. An agent is bound to conduct the business of the agency with as much skill as is generally possessed by persons engaged in similar business, unless the principal has notice of his want of skill. The agent is always bound to act with reasonable diligence, and to use such skill as he possesses; and to make compensation to his principal in respect of the direct consequences of his own neglect, want of skill, or misconduct, but not in respect of loss or damage which are indirectly or remotely caused by such neglect, want of skill, or misconduct.</p> <p><b>ILLUSTRATIONS</b></p> <p>(a) <i>A, a merchant in Kuala Lumpur, has an agent, B, in London, to whom a sum of money is paid on A's account, with orders to remit. B retains the money for a considerable time. A, in consequence of not receiving the money, becomes insolvent. B is liable for the money and interest from the day on which it ought to have been paid, according to the usual rate, and for any further direct loss— as, e. g., by variation of rate of exchange—but not further.</i></p> <p>(b) <i>A, an agent for the sale of goods, having authority to sell on credit, sells to B on credit, without making the proper and usual enquiries as to the solvency of B. B, at the time of the sale, is insolvent. A must make compensation to his principal in respect of any loss thereby sustained.</i></p> <p>(c) <i>A, an insurance broker employed by B to effect an insurance on a ship, omits to see that the usual clauses are inserted in the policy. The ship is afterwards lost. In consequence of the omission of the clauses nothing can be recovered from the underwriters. A is bound to make good the loss to B.</i></p> <p>(d) <i>A, a merchant in England, directs B, his agent at</i></p> | <p><b>General</b></p> <p>6. An agent must observe these provisions if he does not have actual authority to the contrary or is otherwise allowed to act differently under other provisions of this Act—</p> <p>(1) an agent must exercise the care and skill that is reasonable in the circumstances, having regard, in particular—</p> <p>(a) to any special knowledge or experience that the agent has or that the agent holds out as having; and</p> <p>(b) if the person acts as an agent in the course of a business or profession, to any special knowledge or experience that it is reasonable to expect of a person acting in the course of that kind of business or profession;</p> <p><b>Rights of an agent</b></p> <p>9. (2) An agent, guilty of misconduct in the business of the agency, is not entitled to any remuneration in respect of the part of the business, the subject of the misconduct. Despite this provision, the court in its discretion may allow the agent a proportion of the remuneration if it would be fair and reasonable to do so in the circumstances.</p> <p><b>Interpretation</b></p> <p>2.(2) This Act—</p> <p>(b) is intended to be complemented by the rules of the common law and equity except where otherwise indicated or where those rules are inconsistent with the provisions of this Act.</p> | <p>Part of the substance of Section 165 CA 1950 on the skill and diligence required from agents is retained with clearer and structured language.</p> <p>The obligation to compensate for direct consequences of neglect or misconduct is not specifically provided unlike in Section 165. A specific provision is unnecessary as that can be addressed by the common law.</p> <p>The illustrations are dispensed with.</p> |

| No. | Existing Provision (Contracts Act 1950)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        | Proposed Provisions (Draft Agency Bill)                                                                                                                                                                                                                                                                                                                                                                                         | Justification/Remarks                                                                                                                                                                                                                                                                              |
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|     | <i>Kelang, who accepts the agency, to send him 100 bales of cotton by a certain ship. B, having it in his power to send the cotton, omits to do so. The ship arrives safely in England. Soon after her arrival the price of cotton rises. B is bound to make good to A the profit which he might have made by the 100 bales of cotton at the time the ship arrived, but not any profit he might have made by the subsequent rise.</i>                                                                                                                                                                          |                                                                                                                                                                                                                                                                                                                                                                                                                                 |                                                                                                                                                                                                                                                                                                    |
| 41. | <b>Agent's accounts</b><br>166. An agent is bound to render proper accounts to his principal on demand.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        | <b>6.</b> An agent must observe these provisions if he does not have actual authority to the contrary or is otherwise allowed to act differently under other provisions of this Act—<br><br>(13) an agent must render proper accounts to the principal on demand;                                                                                                                                                               | The substance of Section 166 CA 1950 is retained and incorporated as part of the general duties. The general duties mentioned expressly that those duties may be modified if an agent has actual authority to the contrary or is otherwise allowed to act differently under the Bill.              |
| 42. | <b>Agent's duty to communicate with principal</b><br>167. It is the duty of an agent, in cases of difficulty, to use all reasonable diligence in communicating with his principal, and in seeking to obtain his instructions.                                                                                                                                                                                                                                                                                                                                                                                  | <b>General</b><br><b>6.</b> An agent must observe these provisions if he does not have actual authority to the contrary or is otherwise allowed to act differently under other provisions of this Act—<br><br>(3) an agent must take instructions from his principal, where reasonably possible, where circumstances are such that an agent would reasonably be expected to look to the principal for instructions;             | The substance of Section 167 CA 1950 is retained and incorporated as part of the general duties, making it subject to modification, waiver or exclusion under the Act.<br><br>It is also modified for better clarity.                                                                              |
| 43. | <b>Right of principal when agent deals, on his own account, in business of agency without principal's consent</b><br>168. If an agent deals on his own account in the business of the agency, without first obtaining the consent of his principal and acquainting him with all material circumstances which have come to his own knowledge on the subject, the principal may repudiate the transaction, if the case shows either that any material fact has been dishonestly concealed from him by the agent, or that the dealings of the agent have been disadvantageous to him.<br><br><i>ILLUSTRATIONS</i> | <b>General</b><br><b>6.</b> An agent must observe these provisions if he does not have actual authority to the contrary or is otherwise allowed to act differently under other provisions of this Act—<br><br>(2) an agent must not exercise his authority directly or indirectly for the agent's own benefit;<br><br>(7) an agent must avoid a conflict between the interests of the agent and the interests of the principal; | The provisions reflect basic common law principles, Section 168 and 169 CA 1950 also reflect in broad terms the approach taken in the common law.<br><br>The provisions are crafted for greater simplicity with the remainder left to the common law.<br><br>The illustrations are dispensed with. |

| No. | Existing Provision (Contracts Act 1950)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             | Proposed Provisions (Draft Agency Bill)                                                                                                                                                                                                                                                                                                                                                          | Justification/Remarks                             |
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|     | <p>(a) A directs B to sell A's estate. B buys the estate for himself in the name of C. A, on discovering that B has bought the estate for himself, may repudiate the sale, if he can show that B has dishonestly concealed any material fact, or that the sale has been disadvantageous to him.</p> <p>(b) A directs B to sell A's estate. B, on looking over the estate before selling it, finds a mine on the estate which is unknown to A. B informs A that he wishes to buy the estate for himself, but conceals the discovery of the mine. A allows B to buy, in ignorance of the existence of the mine. A, on discovering that B knew of the mine at the time he bought the estate, may either repudiate or adopt the sale at his option.</p> | (11) an agent must not make a profit from the agency or deal on his own account in the business of the agency;                                                                                                                                                                                                                                                                                   |                                                   |
| 44. | <p><b>Principal's right to benefit gained by agent dealing on his own account in business of agency</b></p> <p>169. If an agent, without the knowledge of his principal, deals in the business of the agency on his own account instead of on account of his principal, the principal is entitled to claim from the agent any benefit which may have resulted to him from the transaction.</p> <p><i>ILLUSTRATION</i><br/>A directs B, his agent, to buy a certain house for him. B tells A it cannot be bought, and buys the house for himself. A may, on discovering that B has bought the house, compel him to sell it to A at the price he gave for it.</p>                                                                                     |                                                                                                                                                                                                                                                                                                                                                                                                  |                                                   |
| 45. | <p><b>Agent's right of retainer out of sums received on principal's account</b></p> <p>170. An agent may retain, out of any sums received on account of the principal in the business of the agency, all moneys due to himself in respect of advances made or expenses properly incurred by him in conducting such business, and also such remuneration as may be payable to him for acting as agent.</p>                                                                                                                                                                                                                                                                                                                                           | <p><b>General</b></p> <p>6. An agent must observe these provisions if he does not have actual authority to the contrary or is otherwise allowed to act differently under other provisions of this Act—</p> <p>(14) an agent must pay to his principal all sums received on account of the principal, but he may retain from sums received on account of the principal, all moneys due to him</p> | The substance of Section 170 CA 1950 is retained. |

| No. | Existing Provision (Contracts Act 1950)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             | Proposed Provisions (Draft Agency Bill)                                                                                                                                                                                                                                                                                                                                                       | Justification/Remarks                                                                                                                                                                                                                          |
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| 46. | <b>Agent's duty to pay sums received for principal</b><br>171. Subject to the deductions specified in section 170, the agent is bound to pay to his principal all sums received on his account.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     | in respect of advances made or expenses properly incurred by him in conducting the business of the agency and any remuneration payable to him for acting as agent;                                                                                                                                                                                                                            | The substance of Section 171 CA 1950 is retained and incorporated as part of the general duties, making it subject to modification, waiver or exclusion under the Draft Bill.<br><br>It is also modified with clearer and simplified language. |
| 47. | <b>When agent's remuneration becomes due</b><br>172. In the absence of any special contract, payment for the performance of any act is not due to the agent until the completion of the act; but an agent may detain moneys received by him on account of goods sold, although the whole of the goods consigned to him for sale may not have been sold, or although the sale may not be actually complete.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          | <b>Rights of an agent</b><br><b>9. (1)</b> Subject to the terms of the agency, an agent is only entitled to payment for the performance of any act when the act has been completed but an agent may withhold moneys received by him on account of goods sold even though all the goods consigned to the agent for sale have not been sold or the sale is not yet completed.                   | The substance of Section 172 CA 1950 is retained and modified for clarity and consistency.                                                                                                                                                     |
| 48. | <b>Agent not entitled to remuneration for business misconducted</b><br>173. An agent who is guilty of misconduct in the business of the agency is not entitled to any remuneration in respect of that part of the business which he has misconducted.<br><br><i>ILLUSTRATIONS</i><br><i>(a) A employs B to recover RM100,000 from C, and to lay it out on good security. B recovers the RM100,000 and lays out RM90, 000 on good security, but lays out RM10,000 on security which he ought to have known to be bad, whereby A loses RM2,000. B is entitled to remuneration for recovering the RM100,000 and for investing the RM90,000. He is not entitled to any remuneration for investing the RM10,000, and he must make good the RM2,000 to A.</i><br><br><i>(b) A employs B to recover RM1,000 from C. Through B's misconduct the money is not recovered. B is entitled to no remuneration for his services, and must make good the loss.</i> | <b>Rights of an agent</b><br><b>9. (2)</b> An agent, guilty of misconduct in the business of the agency, is not entitled to any remuneration in respect of the part of the business, the subject of the misconduct. Despite this provision, the court in its discretion may allow the agent a proportion of the remuneration if it would be fair and reasonable to do so in the circumstances | The proposed provision substantially retains Section 173 CA 1950.<br><br>The illustrations are dispensed with.                                                                                                                                 |
| 49. | <b>Agent's lien on principal's property</b><br>174. In the absence of any contract to the contrary, an agent                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        | <b>Rights of an agent</b>                                                                                                                                                                                                                                                                                                                                                                     | The substance of Section 174 CA 1950 is retained with modifications for more precise language and to ensure                                                                                                                                    |

| No.                              | Existing Provision (Contracts Act 1950)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   | Proposed Provisions (Draft Agency Bill)                                                                                                                                                                                                                                                                                                                                                   | Justification/Remarks                                                                                                                                                       |
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|                                  | is entitled to retain goods, papers, and other property, whether movable or immovable, of the principal received by him, until the amount due to himself for commission, disbursements, and services in respect of the same has been paid or accounted for to him.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        | <b>9.</b> (3) Subject to the terms of the agency, an agent is entitled to retain property (whether movable or immovable) of the principal held by the agent, until amounts due for commission, disbursement and services in respect of the agency have been paid or accounted for to the agent. Amounts due are to be reasonable if not specifically provided in the terms of the agency. | consistency.<br><br>It also introduces a reasonableness standard for amounts due not specified in the agency terms.                                                         |
| <b>Principal's duty to Agent</b> |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                           |                                                                                                                                                                                                                                                                                                                                                                                           |                                                                                                                                                                             |
| 50.                              | <p>175. The employer of an agent is bound to indemnify him against the consequences of all lawful acts done by the agent in exercise of the authority conferred upon him.</p> <p><i>ILLUSTRATIONS</i></p> <p>(a) <i>B, at Kelang, under instructions from A, of Taiping, contracts with C to deliver certain goods to him. A does not send the goods to B, and C sues B for breach of contract. B informs A of the suit, and A authorizes him to defend the suit. B defends the suit, and is compelled to pay damages and costs, and incurs expenses. A is liable to B for such damages, costs and expenses.</i></p> <p>(b) <i>B, a broker at Taiping, by the orders of A, a merchant there, contracts with C for the purchase of 10 casks of oil for A. Afterwards A refuses to receive the oil, and C sues B. B informs A, who repudiates the contract altogether. B defends, but unsuccessfully, and has to pay damages and costs, and incurs expenses. A is liable to B for such damages, costs and expenses.</i></p> | <p><b>Rights of an agent</b></p> <p><b>9.</b> (4) A principal—</p> <p>(a) shall indemnify his agent against the consequences of acts of the agent performed lawfully and in good faith, within his authority, even if prejudicial to the rights of third parties;</p>                                                                                                                     | <p>The substance of Sections 175 and 176 CA 1950 have been consolidated and modified with clearer and simplified language.</p> <p>The illustrations are dispensed with.</p> |
| 51.                              | <p><b>Agent to be indemnified against consequences of acts done in good faith</b></p> <p>176. Where one person employs another to do an act, and the agent does the act in good faith, the employer is liable to indemnify the agent against the consequences of that act, though it cause an injury to the rights of third persons.</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                  |                                                                                                                                                                                                                                                                                                                                                                                           |                                                                                                                                                                             |

| No. | Existing Provision (Contracts Act 1950)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                            | Proposed Provisions (Draft Agency Bill)                                                                                                                                                                                                                                                                  | Justification/Remarks                                                                                                                                                                                                        |
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|     | <p><i>ILLUSTRATIONS</i></p> <p><i>(a) A, a decree-holder and entitled to execution of B's goods, requires the officer of the court to seize certain goods, representing them to be the goods of B. The officer seizes the goods, and is sued by C, the true owner of the goods. A is liable to indemnify the officer for the sum which he is compelled to pay to C, in consequence of obeying A's directions.</i></p> <p><i>(b) B, at the request of A, sells goods in the possession of A, but which A had no right to dispose of. B does not know this, and hands over the proceeds of the sale to A. Afterwards C, the true owner of the goods, sues B and recovers the value of the goods and costs. A is liable to indemnify B for what he has been compelled to pay to C and for B's own expenses.</i></p>                                                                                                   |                                                                                                                                                                                                                                                                                                          |                                                                                                                                                                                                                              |
| 52. | <p><b>Non-liability of employer of agent to do a criminal act</b></p> <p>177. Where one person employs another to do an act which is criminal, the employer is not liable to the agent, either upon an express or an implied promise, to indemnify him against the consequences of that act.</p> <p><i>ILLUSTRATIONS</i></p> <p><i>(a) A employs B to beat C, and agrees to indemnify him against all consequences of the act. B thereupon beats C, and has to pay damages to C for so doing. A is not liable to indemnify B for those damages.</i></p> <p><i>(b) B, the proprietor of a newspaper, publishes, at A's request, a libel upon C in the paper, and A agrees to indemnify B against the consequences of the publication, and all costs and damages of any action in respect thereof. B is sued by C and has to pay damages, and also incurs expenses. A is not liable to B upon the indemnity.</i></p> | <p>7. (5) An agent is only authorised to carry out lawful acts and the principal is not liable to the agent to indemnify the agent against an act which is unlawful. This act includes, an act to be performed by a third party and any express or implied promise to indemnify against such an act.</p> | <p>The substance of Section 177 CA 1950 is retained with broader language to cover not just criminal acts but all unlawful acts, including acts performed by a third party.</p> <p>The illustrations are dispensed with.</p> |
| 53. | <b>Compensation to agent for injury caused by principal's</b>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      | <b>Rights of an agent</b>                                                                                                                                                                                                                                                                                | The substance of Section 178 CA 1950 is retained and                                                                                                                                                                         |

| No.                                                    | Existing Provision (Contracts Act 1950)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        | Proposed Provisions (Draft Agency Bill)                                                                                                                                                                                                                                                                                                       | Justification/Remarks                                                                                                                                                                                                              |
|--------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
|                                                        | <p><b>neglect</b><br/>178. The principal must make compensation to his agent in respect of injury caused to the agent by the principal's neglect or want of skill.</p> <p><i>ILLUSTRATION</i><br/><i>A employs B as a bricklayer in building a house, and puts up the scaffolding himself. The scaffolding is unskillfully put up, and B is in consequence hurt. A must make compensation to B.</i></p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                        | <p>9. (4) A principal—</p> <p>(b) is liable to compensate his agent where the principal has undertaken to the agent to perform acts to facilitate the performance of the duties and obligations of the agent and the agent suffers injury due to the principal's lack of care and skill.</p>                                                  | <p>modified with clearer and simplified language taking into account the omission of the illustration. The provisions of Section 178 without the illustration are somewhat oblique.</p> <p>The illustration is dispensed with.</p> |
| <b>Effect of Agency on Contract with Third Persons</b> |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |                                                                                                                                                                                                                                                                                                                                               |                                                                                                                                                                                                                                    |
| 54.                                                    | <p><b>Enforcement and consequences of agent's contracts</b><br/>179. Contracts entered into through an agent, and obligations arising from acts done by an agent, may be enforced in the same manner, and will have the same legal consequences as if the contracts had been entered into and the acts done by the principal in person.</p> <p><i>ILLUSTRATIONS</i><br/><i>(a) A buys goods from B, knowing that he is an agent for their sale, but not knowing who is the principal. B's principal is the person entitled to claim from A the price of the goods, and A cannot, in a suit by the principal, set-off against that claim a debt due to himself from B.</i></p> <p><i>(b) A, being B's agent, with authority to receive money on his behalf, receives from C a sum of money due to B. C is discharged of his obligation to pay the sum in question to B.</i></p> | <p><b>Effect of agency</b><br/>14. (1) A contract entered into through an agent, and obligations arising from the acts of an agent, may be enforced in the same way and carry the same legal consequences as if the contracts entered into and acts carried out were by the principal in person.</p>                                          | <p>The proposed provision substantially retains Section 179 CA 1950.</p> <p>The illustrations are dispensed with.</p>                                                                                                              |
| 55.                                                    | <p><b>Principal how far bound when agent exceeds authority</b><br/>180. When an agent does more than he is authorized to do, and when the part of what he does, which is within his authority, can be separated from the part which is beyond his authority, so much only of what he does as is within his authority is binding as between him and his principal.</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          | <p><b>Actual authority</b><br/>7. (6) A principal is only bound by the acts of his agent to the extent that such acts are within the authority of the agent. If such acts include, acts which are not within the authority of the agent, the principal is only bound by the acts within the authority of the agent if the acts within the</p> | <p>The substance of Sections 180 and 181 CA 1950 is retained and consolidated with clearer and simplified language.</p> <p>The illustrations are dispensed with.</p>                                                               |

| No. | Existing Provision (Contracts Act 1950)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                         | Proposed Provisions (Draft Agency Bill)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                | Justification/Remarks                                                                                                                                   |
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|     | <p><i>ILLUSTRATION</i><br/> <i>A, being owner of a ship and cargo, authorizes B to procure an insurance for RM4,000 on the ship. B procures a policy for RM4,000 on the ship, and another for the like sum on the cargo. A is bound to pay the premium for the policy on the ship, but not the premium for the policy on the cargo.</i></p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     | <p>authority of the agent can be separated from the acts not within the authority of the agent. The provisions of this subsection are subject to the provisions of section 9.</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      |                                                                                                                                                         |
| 56. | <p><b>Principal not bound when excess of agent's authority is not separable</b><br/> 181. Where an agent does more than he is authorized to do, and what he does beyond the scope of his authority cannot be separated from what is within it, the principal is not bound to recognise the transaction.</p> <p><i>ILLUSTRATION</i><br/> <i>A authorizes B to buy 500 sheep for him. B buys 500 sheep and 200 lambs for one sum of RM6,000. A may repudiate the whole transaction.</i></p>                                                                                                                                                                                                                                                                                                                                                                                       |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        |                                                                                                                                                         |
| 57. | <p><b>Consequences of notice given to agent</b><br/> 182. Any notice given to or information obtained by the agent, provided it be given or obtained in the course of the business transacted by him for the principal, shall, as between the principal and third parties, have the same legal consequence as if it had been given to or obtained by the principal.</p> <p><i>ILLUSTRATIONS</i><br/> <i>(a) A is employed by B to buy from C certain goods, of which C is the apparent owner, and buys them accordingly. In the course of the treaty for the sale, A learns that the goods really belonged to D, but B is ignorant of that fact. B is not entitled to set-off a debt owing to him from C against the price of the goods.</i></p> <p><i>(b) A is employed by B to buy from C goods of which C is the apparent owner. A was, before he was so employed, a</i></p> | <p><b>Actual authority</b><br/> 7. (7) A principal shall be regarded to have notice of any information obtained, received or held by his agent in the course of the business of the agency, as between the principal and third parties. This is unless—</p> <ul style="list-style-type: none"> <li>(a) the ordinary custom of the business or the applicable law to an agency of that nature infers or provides to the contrary;</li> <li>(b) the information is obtained, received or held by the agent wholly or primarily in a different capacity;</li> <li>(c) the information is withheld by the agent from the principal in connection with a fraud on the principal.</li> </ul> | <p>The substance of Section 182 CA 1950 is retained and modified with clearer and simplified language.</p> <p>The illustrations are dispensed with.</p> |

| No. | Existing Provision (Contracts Act 1950)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                         | Proposed Provisions (Draft Agency Bill)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             | Justification/Remarks                                                                                                             |
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|     | <i>servant of C, and then learnt that the goods really belonged to D, but B is ignorant of that fact. In spite of the knowledge of his agent, B may set-off against the price of the goods a debt owing to him from C.</i>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     |                                                                                                                                   |
| 58. | <p><b>Agent cannot personally enforce, nor be bound by, contracts on behalf of principal</b></p> <p>183. In the absence of any contract to that effect, an agent cannot personally enforce contracts entered into by him on behalf of his principal, nor is he personally bound by them. Such a contract shall be presumed to exist in the following cases:</p> <ul style="list-style-type: none"> <li>(a) where the contract is made by an agent for the sale or purchase of goods for a merchant resident abroad;</li> <li>(b) where the agent does not disclose the name of his principal; and</li> <li>(c) where the principal, though disclosed, cannot be sued.</li> </ul>                                                                                                                | <p><b>General</b></p> <p>6. An agent must observe these provisions if he does not have actual authority to the contrary or is otherwise allowed to act differently under other provisions of this Act—</p> <p>(16) an agent cannot personally enforce contracts entered into by him on behalf of his principal, nor is he personally bound by them. An agent shall be presumed to be able to act to the contrary and to be personally bound—</p> <ul style="list-style-type: none"> <li>(a) where a contract is made by him for the sale or purchase of goods for a merchant resident abroad;</li> <li>(b) where he does not disclose the name of his principal; and</li> <li>(c) where the principal, though disclosed, cannot be sued.</li> </ul> | The proposed provisions substantially retains Section 183 CA 1950, with minor modifications for consistency.                      |
| 59. | <p><i>Presumption of contract to contrary</i></p> <p><b>Rights of parties to a contract made by agent not disclosed</b></p> <p>184. (a) If an agent makes a contract with a person who neither knows, nor has reason to suspect, that he is an agent, his principal may require the performance of the contract; but the other contracting party has, as against the principal, the same rights as he would have had as against the agent if the agent had been principal.</p> <p>(b) If the principal discloses himself before the contract is completed, the other contracting party may refuse to fulfil the contract, if he can show that, if he had known who was the principal in the contract, or if he had known that the agent was not a principal, he would not have entered into</p> | <p><b>Effect of agency</b></p> <p>14. (1) A contract entered into through an agent, and obligations arising from the acts of an agent, may be enforced in the same way and carry the same legal consequences as if the contracts entered into and acts carried out were by the principal in person.</p> <p>(2) (a) If an agent contracts with a person who does not know and has no reason to suspect that he is an agent, the principal of the agent may require performance of the contract, but in such an event, the other contracting party would have the same rights as against the principal, as he would have had against the agent.</p>                                                                                                   | The proposed provisions substantially retains Section 184 CA 1950, with minor modifications with clearer and simplified language. |

| No. | Existing Provision (Contracts Act 1950)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      | Proposed Provisions (Draft Agency Bill)                                                                                                                                                                                                                                                                                                         | Justification/Remarks                                                                                                                                 |
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|     | the contract.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |                                                                                                                                                                                                                                                                                                                                                 |                                                                                                                                                       |
| 60. | <p><b>Performance of contract with agent supposed to be principal</b></p> <p>185. Where one man makes a contract with another, neither knowing nor having reasonable ground to suspect that the other is an agent, the principal, if he requires the performance of the contract, can only obtain the performance subject to the rights and obligations subsisting between the agent and the other party to the contract.</p> <p><i>ILLUSTRATION</i><br/> <i>A, who owes RM500 to B, sells RM1,000 worth of rice to B. A is acting as agent for C, in the transaction, but B has no knowledge nor reasonable ground of suspicion that that is the case. C cannot compel B to take the rice without allowing him to set-off A's debt.</i></p> | <p><b>Effect of agency</b></p> <p><b>14. (3)</b> If a party contracts with another, not knowing nor having reasonable ground to suspect that the other is an agent, the principal, if he requires performance of the contract, can only do so subject to the rights and obligations of the agent and the other party to the contract.</p>       | The substance of Section 185 CA 1950 is retained and modified with clearer and simplified language.                                                   |
| 61. | <p><b>Right of person dealing with agent personally liable</b></p> <p>186. In cases where the agent is personally liable, a person dealing with him may hold either him or his principal, or both of them, liable.</p> <p><i>ILLUSTRATION</i><br/> <i>A enters into a contract with B to sell him 100 bales of cotton, and afterwards discovers that B was acting as agent for C. A may sue either B or C, or both, for the price of the cotton.</i></p>                                                                                                                                                                                                                                                                                     | <p><b>Effect of agency</b></p> <p><b>14. (4)</b> A person dealing with an agent who is personally liable may hold the agent or his principal or both of them, liable.</p>                                                                                                                                                                       | <p>The substance of Section 186 CA 1950 is retained and modified with clearer and simplified language.</p> <p>The illustration is dispensed with.</p> |
| 62. | <p><b>Consequence of inducing agent or principal to act on belief that principal or agent will be held exclusively liable</b></p> <p>187. When a person who has made a contract with an agent induces the agent to act upon the belief that the principal only will be held liable, or induces the principal to act upon the belief that the agent only will be held liable, he cannot afterwards hold liable the agent or principal, respectively.</p>                                                                                                                                                                                                                                                                                      | <p><b>Effect of agency</b></p> <p><b>14. (5)</b> A person contracting with an agent cannot—</p> <p>(a) hold the agent liable if he induces the agent to act on the belief that only his principal will be liable;</p> <p>(b) hold the principal liable if he induces the principal to act on the belief that only his agent will be liable.</p> | The substance of Section 187 CA 1950 is retained and modified with clearer and more structured language.                                              |

| No. | Existing Provision (Contracts Act 1950)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                            | Proposed Provisions (Draft Agency Bill)                                                                                                                                                                                                                                                                                                            | Justification/Remarks                                                                                                                            |
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| 63. | <b>Liability of pretended agent</b><br>188. A person untruly representing himself to be the authorized agent of another, and thereby inducing a third person to deal with him as such agent, is liable, if his alleged employer does not ratify his acts, to make compensation to the other in respect of any loss or damage which he has incurred by so dealing.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                  | <b>Effect of agency</b><br><b>14. (6)</b> A person who represents himself to be authorised agent of another, when unauthorised, and induces a third party to deal with him as agent, is liable to compensate the other for any loss or damage incurred in the dealing, unless the person purported to be the principal ratifies his acts as agent. | The substance of Section 188 CA 1950 is retained and modified with clearer and simplified language.                                              |
| 64. | <b>Person falsely contracting as agent not entitled to performance</b><br>189. A person with whom a contract has been entered into in the character of agent is not entitled to require the performance of it if he was in reality acting, not as agent, but on his own account.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   | <b>Effect of agency</b><br><b>14. (7)</b> A person, actually acting on his own account, but who purports to enter into a contract as an agent is not entitled to require performance of the contract.                                                                                                                                              | The substance of Section 189 CA 1950 is retained and modified with clearer and simplified language.                                              |
| 65. | <b>Liability of principal inducing belief that agent's unauthorized acts were authorized</b><br>190. When an agent has, without authority, done acts or incurred obligations to third persons on behalf of his principal, the principal is bound by those acts or obligations if he has by his words or conduct induced such third persons to believe that those acts and obligations were within the scope of the agent's authority.<br><br><i>ILLUSTRATIONS</i><br>(a) A consigns goods to B for sale, and gives him instructions not to sell under a fixed price. C, being ignorant of B's instructions, enters into a contract with B to buy the goods at a price lower than the reserved price. A is bound by the contract.<br><br>(b) A entrusts B with negotiable instruments endorsed in blank. B sells them to C in violation of private orders from A. The sale is good. | <b>Effect of agency</b><br><b>14. (8)</b> A principal is bound to a third party by the acts or obligations of his agent acting without the authority of the principal, if the principal has by his actions induced the third party into believing that his agent was acting within his authority.                                                  | The substance of Section 190 CA 1950 is retained and modified with clearer and simplified language.<br><br>The illustrations are dispensed with. |

| No. | Existing Provision (Contracts Act 1950)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               | Proposed Provisions (Draft Agency Bill)                                                                                                                                                                                                                                                                                             | Justification/Remarks                                                                                                                                   |
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| 66. | <p><b>Effect, on agreement, of misrepresentation or fraud by agent</b></p> <p>191. Misrepresentations made, or frauds committed, by agents acting in the course of their business for their principals, have the same effect on agreements made by such agents as if such misrepresentations or frauds had been made or committed by the principals; but misrepresentations made, or frauds committed, by agents, in matters which do not fall within their authority, do not affect their principals.</p> <p><i>ILLUSTRATIONS</i></p> <p>(a) <i>A, being B's agent for the sale of goods, induces C to buy them by a misrepresentation, which he was not authorized by B to make. The contract is voidable, as between B and C, at the option of C.</i></p> <p>(b) <i>A, the captain of B's ship, signs bills of lading without having received on board the goods mentioned therein. The bills of lading are void as between B and the pretended consignor.</i></p> | <p><b>Effect of agency</b></p> <p><b>14.</b> (9) A misrepresentation made, or fraud committed by an agent acting in the course (but not otherwise) of the agency business for his principal, has the same effect on agreements made by such an agent as if the principal had made or committed such misrepresentation or fraud.</p> | <p>The substance of Section 191 CA 1950 is retained and modified with clearer and simplified language.</p> <p>The illustrations are dispensed with.</p> |

Table 2—Powers of Attorney

| No. | Existing Provisions (Powers of Attorney Act 1949) | Proposed Provision (Draft Agency Bill)                                                                                                                                                                                                                                                                                                                       | Remarks/Justification                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   |
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| 1.  |                                                   | <p><b>Other elements of agency</b></p> <p><b>4.</b> (9) The provisions of this Act, when referring to an agent include, a reference to an attorney under a power of attorney and a reference to an agency includes, an agency established by power of attorney, unless the context or the nature of an attorney or power of attorney otherwise requires.</p> | <p>Provisions of powers of attorney do not exist in Part X of the CA 1950. The current law on powers of attorney is a combination of general rules of contract as in the CA 1950, the common law and the PAA 1949 (as regards Peninsular Malaysia). The application of the law of powers of attorney includes the application of English law received under Section 3 and 5 of the CLA, the former to Sarawak and the latter arguably to Sabah. The provision in the Draft on powers of attorney introduces a single unified legislation applying to all of Malaysia and superseding, among others, the PAA 1949.</p>                                                                                                                                                                                                                                                   |
| 2.  |                                                   | <p><b>Execution and attestation</b></p> <p><b>15.</b> (1) A power of attorney must be executed by the donor of the power.</p> <p>(2) A power of attorney need not be executed under seal or as a deed and may be executed under hand.</p>                                                                                                                    | <p>The approach to the provisions has considered the UK PAA 1971 and the Singapore Conveyancing and Law of Property Act 1886. The requirements for attestation in PAA 1949 continue to be adopted but with modifications. Mandatory deposit of powers of attorney as required in the PAA 1949 no longer apply as it does not add to the veracity of the power of attorney. However, the Minister may make regulation for a voluntary deposit regime for powers of attorney having considered a similar approach with wills in UK. The regulation approach and takes into account that Sabah and Sarawak does not currently have a regime for deposit of powers of attorney.</p> <p>Provisions relating to apostille certification have not been included as Malaysia is not currently a party of the Hague Convention Abolishing the Requirement of Legislation for</p> |

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| 3. | <p><b>Authentication of powers of attorney</b></p> <p><b>3. (1)</b> No instrument purporting to create a power of attorney executed after the commencement of this Act shall have any validity to create such power within *Peninsular Malaysia unless—</p> <p>(a) if executed within *Peninsular Malaysia, the instrument is executed before, and is authenticated in the appropriate form set out in the First Schedule hereto by—</p> <p>(i) a Magistrate;</p> <p>(ii) a Justice of Peace;</p> <p>(iii) a Land Administrator;</p> <p>(iv) a Notary Public;</p> <p>(v) a Commissioner for Oaths;</p> <p>(vi) an advocate and solicitor; or</p> <p>(vii) an officer, acting in the course of his employment, of a company carrying on the business of banking in *Peninsular Malaysia and incorporated by or under any written law in force in *Peninsular Malaysia; or</p> <p>(b) if executed outside *Peninsular Malaysia, the execution of such instrument is authenticated, in such form as may be accepted by the Registrar, by—</p> <p>(i) a Notary Public;</p> <p>(ii) a Commissioner for Oaths;</p> <p>(iii) any Judge;</p> <p>(iv) a Magistrate;</p> <p>(v) a British Consul or Vice-Consul;</p> | <p><b>Execution and attestation</b></p> <p><b>15. (3)</b> The execution of a power of attorney by the donor in Malaysia must be attested by—</p> <p>(a) an advocate;</p> <p>(b) a notary public in Malaysia;</p> <p>(c) a commissioner for oaths;</p> <p>(d) a district officer; or</p> <p>(e) a magistrate.</p> <p>(4) The execution of a power of attorney by the donor outside Malaysia for use in Malaysia or in relation to any matter governed by Malaysian law must be attested by—</p> <p>(a) a person licensed to practice law in the place in which the donor executes the power of attorney;</p> <p>(b) a notary public appointed to exercise the functions of a notary public in the place in which the donor executes the power of attorney;</p> <p>(c) a consular officer of Malaysia; or</p> <p>(d) if executed in the Kingdom of Saudi Arabia, by the Malaysian Pilgrimage Commissioner.</p> <p>(5) The person attesting the execution of the power of attorney by the donor must—</p> <p>(a) specify the capacity in which he is attesting the power of attorney;</p> | <p>The proposed provisions now refer to “Malaysia” instead of “Peninsular Malaysia,” reflecting the legislative intention to provide a unified and modernised regime governing powers of attorney applicable across Peninsular Malaysia, Sabah, and Sarawak.</p> <p>The substance of Section 3 of Powers of Attorney Act 1949 on authentication/attestation requirement is retained with modifications to simplify those categories of attesting witness both within and outside Malaysia.</p> <p>Additionally, it introduces requirement for the attesting party to certify the donor’s identity, voluntariness, and understanding of the contents, thereby strengthening the safeguards around the execution process.</p> <p>The proposed provisions are drafted with reference to and modified from Section 3 of the Powers of Attorney Act 1949.</p> |

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|    | <p>(vi) a representative of Her Britannic Majesty;</p> <p>(vii) on and after Merdeka Day, any Consular Officer of Malaysia;</p> <p>(viii) in the case of an instrument executed in the Kingdom of Saudi Arabia, the Malaysian Pilgrimage Commissioner; or</p> <p>(ix) in the case of an instrument executed in the Republic of Singapore, an advocate and solicitor of the Supreme Court of the Republic; or an officer, acting in the course of his employment, of a company carrying on the business of banking in the Republic and incorporated by or under any written law of the Republic.</p> <p>(2) Notwithstanding anything to the contrary contained in any written law in force at the commencement of this Act, an instrument purporting to create a power of attorney duly executed and authenticated in accordance with this section shall be deemed to be properly and validly executed and attested for all or any of the purposes for which a power of attorney may be used under any such written law.</p> | <p>(b) certify that the person executing the power of attorney is the donor;</p> <p>(c) certify that the power of attorney has been executed by the donor voluntarily; and</p> <p>(d) certify that the contents of the power of attorney has been explained to the donor by the person attesting the execution.</p>                                                                                                                                                                                                                                                          |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              |
| 4. |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             | <p><b>Execution and attestation</b></p> <p><b>15.</b> (6) The donee of a power of attorney may, if he thinks fit, execute any instrument or do any other act in his own name by the authority of the donor of the power.</p> <p>(7) Every instrument executed or act done by the donee in his own name under subsection (6) shall have the same effect as if it had been executed or done by the donee in the name of the donor.</p> <p>(8) To avoid doubt, a power of attorney may be executed and attested in accordance with the provisions of Division 1 of Part IV.</p> | <p>There is no equivalent of the proposed provisions in the PAA 1949. This provision is inserted to further introduce a new rule allowing the donee to execute instruments or perform acts in their own name under the authority of the donor, with such acts having the same legal effect as if performed in the donor's name. This provision clarifies the law particularly in parts of Malaysia where this provision of English law does not currently apply and aligns with common practice on the execution of powers of attorney.</p> <p>The proposed provisions are drafted with reference to Section 7 of the UK Powers of Attorney Act 1971 and</p> |

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|    |  |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             | Section 45 of Singaporean Conveyancing and Law of Property Act 1886.                                                                                                                                                                                                                     |
| 5. |  | <p><b>Other legal requirements preserved</b></p> <p><b>16.</b> The provisions of this Part—</p> <ul style="list-style-type: none"> <li>(1) is without prejudice to any requirement in, or having effect under, any other written law as to the witnessing of or registration of instruments creating powers of attorney; and</li> <li>(2) to the extent not inconsistent with its provisions, do not affect the rules relating to the execution of instruments by bodies corporate.</li> </ul>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              |                                                                                                                                                                                                                                                                                          |
| 6. |  | <p><b>Proof of power of attorney</b></p> <p><b>17.</b> (1) A power of attorney and its contents may be proved by means of a copy which—</p> <ul style="list-style-type: none"> <li>(a) is a reproduction of the original made with a photographic or other device for reproducing documents in facsimile or electronically; and</li> <li>(b) contains the following certificate signed by the donor of the power or the person attesting the power of attorney under section 15— <ul style="list-style-type: none"> <li>(i) if the original consists of a single page, a certificate at the end of the page to the effect that the copy is a true and complete copy of the original; and</li> <li>(ii) if the original consists of two or more pages, a certificate at the end of each page of the copy to the effect that it is a true and complete copy of the corresponding page of the original.</li> </ul> </li> </ul> <p>(2) If a copy of a power of attorney has been made which complies with subsection (1), the contents of the power of attorney may also be proved by means of a copy of that copy if the further copy itself complies with subsection (1),</p> | <p>The proposed provisions provide a clear statutory basis for how a power of attorney may be proved after the repeal of the deposit or filing requirement. The proposed provisions are drafted with reference to and modified from Section 3 of the UK Powers of Attorney Act 1971.</p> |

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| 7. | <p><b>Powers of attorney given for valuable consideration</b></p> <p>6. (1) If a power of attorney, given for valuable consideration, is in the instrument creating the power expressed to be irrevocable, then, in favour of a purchaser—</p> <p>(a) the power shall not be revoked at any time, either by anything done by the donor of the power without the concurrence of the donee of the power, or by the death, marriage, mental disorder, unsoundness of mind, or bankruptcy of the donor of the power; and</p> <p>(b) any act done at any time by the donee of the power, in pursuance of the power, shall be as valid as if anything done by the donor of the power without the concurrence of the donee of the power, or the death, marriage, mental disorder, unsoundness of mind, or bankruptcy of the donor of the power, had not been done or happened; and</p> <p>(c) neither the donee of the power, nor the purchaser, shall at any time be prejudicially affected by notice of anything done by the donor of the power, without the concurrence of the donee of the power, or of the death, marriage, mental disorder, unsoundness of mind, or bankruptcy of the donor of the power</p> <p>(2) This section applies to powers of attorney created by instruments executed either before or after the commencement of this Act.</p> | <p><b>Irrevocability of power of attorney</b></p> <p><b>18.</b> (1) A power of attorney is irrevocable if—</p> <p>(a) it expressly states that it cannot be revoked; and</p> <p>(b) it is given to secure—</p> <p>(i) a legal or proprietary interest of the donee; or</p> <p>(ii) an obligation owed to the donee.</p> <p>(2) A power of attorney may provide that it is only irrevocable for a specified period of time.</p> <p>(3) As long as the power of attorney remains irrevocable under its terms or as long as the interest or obligation exists, the power of attorney cannot be revoked—</p> <p>(a) by the donor without the donee’s consent;</p> <p>(b) if a natural person, by the donor’s death, incapacity or bankruptcy; or</p> <p>(c) if a legal person, by the winding up or dissolution of the entity.</p> <p>(4) If the power of attorney is linked to a proprietary interest, it may be exercised by the person holding that interest and any successor in title, unless provided otherwise in the power of attorney.</p> | <p>The proposed provisions consolidate and modernise the rules relating to irrevocability of powers of attorney under Sections 6 and 7 of the Powers of Attorney Act 1949.</p> <p>It replaces the requirement of “valuable consideration” and the concept of “purchaser” with clearer statutory criteria based on whether the power is expressed to be irrevocable and whether it secures a legal or proprietary interest or an obligation owed to the donee.</p> <p>It also clarifies the position as regards Sabah and Sarawak. The proposed provisions are drafted with reference to, and modified from, from the Section 4 of UK Powers of Attorney Act 1971.</p> |
|    | <p><b>Powers of attorney expressed to be irrevocable for a fixed time</b></p> <p>7. If a power of attorney, whether given for a valuable consideration or not, is in the instrument creating the power expressed to be irrevocable for a fixed time therein specified, then, in favour of a purchaser—</p> <p>(a) the power shall not be revoked, for and during that</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       |

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|    | <p>fixed time, either by anything done by the donor of the power without the concurrence of the donee of the power, or by the death, marriage, mental disorder, unsoundness of mind, or bankruptcy of the donor of the power; and</p> <p>(b) any act done within that fixed time, by the donee of the power, in pursuance of the power, shall be as valid as if anything done by the donor of the power without the concurrence of the donee of the power, or the death, marriage, mental disorder, unsoundness of mind, or bankruptcy of the donor of the power, had not been done or happened; and</p> <p>(c) neither the donee of the power, nor the purchaser, shall at any time be prejudicially affected by notice either during or after that fixed time of anything done by the donor of the power during that fixed time, without the concurrence of the donee of the power, or of the death, marriage, mental disorder, unsoundness of mind, or bankruptcy of the donor of the power within that fixed time.</p> |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                           |
| 8. | <p><b>Revocation</b></p> <p>5. Every instrument purporting to create a power of attorney of which a true copy or an office copy has been deposited in the office of the Registrar or a Senior Assistant Registrar in accordance with this Act or any law repealed by this Act whether before or after the commencement of this Act, shall, so far as the said instrument is valid and so far as may be compatible with the terms of the instrument, continue in force until notice in writing of the revocation thereof by the donor, or of the renunciation thereof by the donee, has been deposited in every office in which the office copy or true copy thereof has been so deposited, or either the donor or the donee has died or the donee has become of unsound mind, or the donor has been adjudged to be of unsound mind or a receiving order has been made against him in bankruptcy.</p>                                                                                                                       | <p><b>Protection of donee and third parties where power of attorney is revoked.</b></p> <p><b>19.</b> (1) A donee of a power of attorney who acts in pursuance of the power when revoked is not liable to the donor or to any other person if the donee did not know that the power had been revoked at the time of the act.</p> <p>(2) A transaction is valid as if the power was still in existence, in favour of a person who deals with the donee of the power, where such person is unaware that the power of attorney has been revoked.</p> <p>(3) If the instrument creating a power is expressed to be irrevocable and to be given by way of security, any person who deals with the donee shall be entitled to assume that the power cannot be revoked by the donor unless such person knows that the power has been revoked with the consent of the donee.</p> | <p>The proposed provisions replace the deposit-based revocation under Section 5 of the Powers of Attorney Act 1949 with general rules of termination under Section 12 of the Draft Bill, aligning powers of attorney with standard agency principles.</p> <p>It also introduces protections for donees and third parties who act without knowledge of the revocation.</p> <p>The proposed provisions are drafted with reference to and modified from Section 5 of the UK Powers of Attorney Act 1971.</p> |

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|     |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        | <p>(4) Without prejudice to subsection (3), a person shall be treated as knowing that a power of attorney has been revoked if he knows of an event which has the effect of revoking the power (such as, the death or incapacity of the donor).</p> <p>(5) A power of attorney is revoked in any circumstances where an agency would terminate under the provisions of section 13.</p> <p>(6) This section applies whenever the power of attorney was created but only as to acts and transactions after the commencement of this Act.</p>                                                                                                                                       |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |
| 9.  |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        | <p><b>Non-applicability of section 5 of the Civil Law Act 1956</b></p> <p>20. The provisions of section 5 of the Civil Law Act 1956 shall not apply to powers of attorney, if those provisions had applied to any part of Malaysia immediately before the commencement of this Act.</p>                                                                                                                                                                                                                                                                                                                                                                                         | <p>The proposed provision clarifies that Section 5 of the Civil Law Act 1956 which permits the application of English law in the absence of local provisions shall not apply to powers of attorney following the commencement of this Act to ensure unified application of the new Act across Malaysia.</p>                                                                                                                                                                                                                                                                                                                                                                                                                    |
| 10. | <p><b>Deposit of power of attorney</b></p> <p>4. (1) Except as hereinafter provided no instrument purporting to create a power of attorney shall, after the commencement of this Act, have any validity to create such power within *Peninsular Malaysia until—</p> <p>(a) a true copy of the said instrument duly compared therewith and marked by the Senior Assistant Registrar with the words “true copy”; or</p> <p>(b) where the original instrument is deposited in the registry of the Supreme Court in Singapore, an office copy of such instrument, has been deposited in the office of a Senior Assistant Registrar.</p> <p><b>Translation</b></p> <p>(2) If the instrument whereof a true copy or an office copy is so deposited is in any language other than the national language or English there shall also at the same time be deposited a translation into the national language or English thereof certified by an interpreter attached to the</p> | <p><b>Deposit of powers of attorney</b></p> <p>21. (1) The Minister may make regulations—</p> <p>(a) for the deposit of powers of attorney with such person as the Minister may prescribe;</p> <p>(b) for the manner in which the powers of attorney are to be deposited, kept, searched and accessed;</p> <p>(c) to give effect to any other matters necessary or expedient in this connection.</p> <p>(2) The deposit of powers of attorney—</p> <p>(a) will not be mandatory;</p> <p>(b) may be made in respect of powers of attorney created before or after the commencement of this Act, powers of attorney deposited under the Powers of Attorney Act 1949 excepted;</p> | <p>The deposit requirement under Section 4 Powers of Attorney Act 1949 (applicable only to Peninsular Malaysia) is proposed to be dispensed with. The entire framework relating to such deposit, including the requirements for certified translations and prescribed fees, is no longer retained. The current law is that a deposit does not add to the veracity of a power of attorney.</p> <p>The requirements for powers of attorney to be registered or lodged under land laws e.g. the National Land Code, the Sarawak Land Code and the Sabah Land Code are not affected by this dispensation.</p> <p>This proposed removal is guided by the approach in the United Kingdom, where a similar filing requirement was</p> |

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|  | <p>Court qualified to interpret in the language in which the instrument is written, or, if there be no such interpreter, a translation into the national language or English verified by a statutory declaration of some person qualified to translate from the language in which the instrument is written into the national language or English to the effect that such translation is to the best of his knowledge and belief a true translation.</p> <p><b>Fees</b></p> <p>(3) There shall be payable in respect of the deposit of documents under this section such fees as may from time to time be prescribed.</p> <p><b>Exception</b></p> <p>(4) Subsection (1) shall not apply to instruments executed and used for the sole purpose of carrying out transactions in the office of a Registrar of Titles or a Land Administrator or a Chief Inspector or Senior Inspector of Mines, provided they are attested in accordance with any law for the time being in force regarding the attestation of such instruments</p> | <p>(c) is not proof of the validity, veracity or enforceability of a power of attorney.</p> <p>(3) For purposes of this section, powers of attorney include, any revocation, variation or other document related to a power of attorney.</p> | <p>abolished under Section 2 of the Powers of Attorney Act 1971 and later repealed by Section 152(4), Schedule 7 of the UK Supreme Court Act 1981. Singapore, Sabah and Sarawak do not also require deposit or filing of powers of attorney other than in respect of land registry matters.</p> |
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Table 3—Electronic Agents

|                                                        |  | Provision (Draft Agency Bill)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          | Remarks/Justification                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              |
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| Division 1 - Recognition of electronic means in agency |  |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    |
|                                                        |  | <p><b>Agency documents</b></p> <p>22. (1) The following are not invalid, unenforceable, inadmissible, or without legal effect solely because they or any of them are in electronic form or carried out or effected by electronic means—</p> <ul style="list-style-type: none"> <li>(a) any power of attorney, statement, certificate, consent, instructions, directions, and any document or matter related to agency or any of the matters contemplated by or which could arise under this Act;</li> <li>(b) any signature, seal, attestation or notarisation related to subsection (1)(a);</li> <li>(c) any statutory declaration or other statement made under oath related to subsection (1)(a);</li> <li>(d) any information referred to related to subsection (1), but not contained, in other information in electronic form.</li> </ul> <p>(2) If a written law or the common law requires in connection with any matter related to this Act—</p> <ul style="list-style-type: none"> <li>(a) that any information or a record, notice, instrument or document of any description including, any of those in subsection (1), to be in writing, a document in electronic form satisfies that law;</li> <li>(b) a signature, seal, attestation or notarisation, a signature, seal, attestation or notarisation in electronic form satisfies that law;</li> <li>(c) a person to retain a document that is in the form of paper, an article or other material, retention of a copy of the document in electronic form satisfies that law;</li> <li>(d) a person to retain a document that is in electronic form, retention of a copy of the document satisfies that law;</li> </ul> | <p>There is no equivalent in Part X of the CA 1950. As the CA 1950 was adopted at a time when electronic and technology was not a factor in legislation.</p> <p>New provisions have been inserted to cater to matters electronic specifically in the context of agency.</p> <p>These new provisions are to provide for adaptation of the law to modern technologies such that the law is wider and more flexible in usage of electronic means.</p> <p>Agency matters involving electronic means or electronic form and electronically related matters generally were drafted by taking into account legislation like the Malaysian Electronic Commerce Act 2006, Electronic Transactions (Electronic Agents) (Guernsey) Ordinance, 2019, Electronic Transactions (Guernsey) Law 2000 and Ontario's Electronic Commerce Act, 2000, New Zealand's Contract and Commercial Law Act 2017, the UK Law Commission 'Smart legal contracts Advice to Government (2021) and the EU Directive 2024/2853.</p> |

|                                                     |  | Provision (Draft Agency Bill)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                         | Remarks/Justification                                                                                                                           |
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|                                                     |  | <p>(e) a statement or declaration to be made under oath or in a statutory declaration, a sworn document or statutory declaration in electronic form satisfies that law.</p> <p>(3) The provisions of section 17 must also be complied with despite the provisions of subsection (2).</p> <p>(4) If a written law or the common law requires or allows in connection with any matter related to this Act, any information or document to be given, produced, served, sent or delivered (whatever the expression used to describe the act), giving, producing, serving, sending or delivering the information, the document or a copy of them in electronic form or by electronic means satisfies that law. A requirement may be in the form of an obligation or as a result of the law imposing consequences in the event that the requirement is not met.</p> <p>(5) To avoid doubt, a person may witness or attest the signing of a document by electronic means and the statutory declaration or a declaration to be made under oath may be made before a person appearing by electronic means.</p> |                                                                                                                                                 |
|                                                     |  | <p><b>No obligation to use electronic form or means</b></p> <p>23. Section 22 does not compel a person to do or accept anything in electronic form or by electronic means.</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        |                                                                                                                                                 |
| <b>Division 2 - Provisions on electronic agents</b> |  |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       |                                                                                                                                                 |
|                                                     |  | <p><b>Interpretation of Division</b></p> <p>24. (1) The provisions of this Division apply despite—</p> <p>(a) any provisions of Part II to the contrary;</p> <p>(b) an electronic agent lacking legal personality.</p> <p>(2) The provisions of this Division shall apply, but without prejudice to the provisions of section 25 and 26(1) or unless the context otherwise requires—</p> <p>(a) to any matter involving defective or allegedly defective electronic agent or electronic agent products which have been used, operated, manufactured or imported in or into Malaysia;</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              | To provide for definitions of new terms used in the Bill to provide for usage of new technological developments mainly artificial intelligence. |

|  |  | Provision (Draft Agency Bill)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          | Remarks/Justification |
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|  |  | <p>(b) where the electronic agent has acted or has purportedly acted on behalf of any person in Malaysia or who ordinarily resides in Malaysia or has a place of residence in Malaysia or purportedly so; or</p> <p>(c) where a person dealing with the electronic agent is in Malaysia or ordinarily resides in or has a place of residence in Malaysia;</p> <p>(d) where the terms of any contract governing the use or operation of the electronic agent is governed by the laws of Malaysia.</p> <p>(e) Where the terms of any contract governing the use or operation of the electronic agent is governed by a law other than the laws of Malaysia but where the use or operation of the electronic agent involves its use or operation in Malaysia or there is otherwise a close connection with Malaysia; or</p> <p>(f) The use or operation of the electronic agent affects persons in Malaysia.</p> <p>The application of these provisions do not preclude a person from claiming damages and compensation and other remedies under any other written law or the common law under the laws of other jurisdictions including, for matters or claims not addressed by the provisions of this Division. Contract in this subsection (2) includes any secondary or related contract and any other instrument or arrangement (written, oral or otherwise) related to a contract.</p> <p>(3) In this Division, unless the context otherwise requires—</p> <p>“authorised representative” means any natural or legal person established within Malaysia who has received a written mandate from a manufacturer to act on that manufacturer’s behalf in relation to specified tasks;</p> <p>“component” means any item, whatever, tangible or intangible, raw material or related</p> |                       |

|  |  | Provision (Draft Agency Bill)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       | Remarks/Justification |
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|  |  | <p>service, that is integrated into, or inter-connected with, an electronic agent;</p> <p>“data” means any digital representation of acts, facts or information and any compilation of such acts, facts or information, including, in the form of sound, visual or audiovisual recording;</p> <p>“digital manufacturing file” means a digital version of, or digital template for, a movable which contains the functional information necessary to produce a tangible item by enabling the automated control of machinery or tools;</p> <p>“distributor” means any natural or legal person in the supply chain who makes an electronic agent product available on the market, other than the manufacturer or importer of that electronic agent product;</p> <p>“economic operator” means a manufacturer of an electronic agent product or component, a provider of a related service, an authorised representative, an importer, a service provider or a distributor;</p> <p>“electronic agent product” means in relation to an electronic agent, all movables, even if integrated into, or inter-connected with, another movable or an immovable; it includes, electricity, digital manufacturing files, raw materials and software;</p> <p>“importer” means any natural or legal person who places an electronic agent product from a third country on the Malaysia market;</p> <p>“manufacturer” means any natural or legal person who—</p> <p>(a) develops, manufactures or produces an electronic agent product;</p> <p>(b) has a product designed or manufactured, or who, by putting their name, trademark or other distinguishing features on that product, present themselves as its manufacturer; or</p> |                       |

|  |  | Provision (Draft Agency Bill)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                | Remarks/Justification |
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|  |  | <p>(c) develops, manufactures or produces an electronic agent product for their own use;<br/> “manufacturer’s control” means that—</p> <p>(a) the manufacturer of an electronic agent product performs or, with regard to actions of a third party, authorises or consents to—</p> <p>(i) the integration, inter-connection or supply of a component, including, software updates or upgrades; or</p> <p>(ii) the modification of the electronic agent, including, substantial modifications;</p> <p>(b) the manufacturer of an electronic agent product has the ability to supply software updates or upgrades, themselves or via a third party;</p> <p>“making available on the market” means any supply of an electronic agent product for distribution, consumption or use on the Malaysian market in the course of a commercial activity, whether in return for payment or free of charge;</p> <p>“placing on the market” means the first making available of an electronic agent product on the Malaysian market;</p> <p>“putting into service” means the first use of an electronic agent product in Malaysia in the course of a commercial activity, whether in return for payment or free of charge, in circumstances in which that product has not been placed on the market prior to its first use;</p> <p>“related service” means a digital service that is integrated into, or inter-connected with, a product in such a way that its absence would prevent the product from performing one or more of its functions;</p> <p>“service provider” means any natural or legal person offering, in the course of a commercial activity, at least two of the following services:</p> |                       |

|  |  | Provision (Draft Agency Bill)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       | Remarks/Justification |
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|  |  | <p>warehousing, packaging, addressing and dispatching of an electronic agent product, without having ownership of that electronic agent product, excluding postal services, parcel delivery services and any other postal services or freight transport services;</p> <p>“substantial modification” means a modification of an electronic agent product after it has been placed on the market or put into service—</p> <ul style="list-style-type: none"> <li>(a) that is considered substantial under any relevant written law on product safety; or</li> <li>(b) where any relevant written law on product safety lay down no threshold on what is to be considered a substantial modification, that— <ul style="list-style-type: none"> <li>(i) changes the electronic agent product’s original performance, purpose or type, without that change having been foreseen in the manufacturer’s initial risk assessment; and</li> <li>(ii) changes the nature of the hazard, creates a new hazard or increases the level of risk.</li> </ul> </li> </ul> <p>“trade secret” means information which meets all of the following requirements—</p> <ul style="list-style-type: none"> <li>(a) it is secret in the sense that it is not, as a body or in the precise configuration and assembly of its components, generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question;</li> <li>(b) it has commercial value because it is secret;</li> <li>(c) it has been subject to reasonable steps under the circumstances, by the person lawfully in control of the information, to keep it secret.</li> </ul> |                       |

|  |  | Provision (Draft Agency Bill)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        | Remarks/Justification                                                                                                            |
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|  |  | <p><b>Recognition of electronic agents</b></p> <p><b>25.</b> (1) A contract or any of its provisions is not invalid, unenforceable, inadmissible, or without legal effect solely because its making, formation, creation, delivery or performance involved the action or use of one or more electronic agents.</p> <p>(2) An action executing, performing or terminating a contract is not invalid, unenforceable, inadmissible, or without legal effect solely because it involved the action of one or more electronic agents.</p> <p>(3) A contract may be made, formed or created by the interaction of electronic agents, acting on behalf of the parties, even where no natural person was aware of, or had reviewed, the electronic agents' actions or the resulting terms.</p> <p>(4) A contract may be made, formed or created by the interaction of an electronic agent, acting on behalf of one party, and a natural person (acting for himself or another) regardless of whether each party has reviewed or is aware of, the relevant information, the electronic agent's actions, or the resulting terms.</p> <p>(5) An electronic agent may act on behalf of one or more parties in the same matter or transaction.</p> <p>(6) Where an electronic agent acts on behalf of a person in relation to any matter which could have been performed by a person as an agent, including, for the purposes of the making, formation or creation of a contract, the electronic agent is presumed, unless the contrary is shown, to be acting as agent for that person and in the case of making, formation or creation of a contract, that that person intended to create a legally binding contract. Where an electronic agent acts in consequence of or at the direction or action of acts of other electronic agents, such electronic agent is presumed, unless the contrary is shown, to be acting as agent for the person for whom any such other electronic agents acts on behalf of.</p> | <p>To provide for the recognition of the law of modern technology mainly the use of artificial intelligence in various ways.</p> |
|  |  | <p><b>Responsibility and liability for an electronic agent</b></p> <p><b>26.</b> (1) Subject to the provisions of the subsections of this section following and subsection 25(6), an electronic</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                  | <p>To provide for the responsibilities and liabilities of an electronic agent when it is defective.</p>                          |

|  |  | Provision (Draft Agency Bill)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              | Remarks/Justification                                                                                                                                                                                                                                                                                                                               |
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|  |  | <p>agent who acts on behalf of a person in relation to a matter as contemplated by subsection 25(6) shall be treated as an agent of that person and that person shall be treated as the principal with the principal liable for the acts of his agent in accordance with the provisions of Part II (the application of Part II to be subject to the context of this Division) even if the electronic agent cannot ordinarily in law act as an agent.</p> <p>(2) The provisions of subsection (1) are modified or superseded where the electronic agent is defective in relation to its acts including, in the making, formation or creation of a contract or other matters to which the electronic agent has been tasked. An electronic agent is defective where the electronic agent product is defective in that the electronic agent product does not operate or function or provide for the safety in a way that a person is entitled to reasonably expect of an electronic agent product of that nature. All circumstances shall be taken into account in assessing whether the electronic agent is defective or not, including—</p> <ul style="list-style-type: none"> <li>(a) the presentation and characteristics of the electronic agent product, including, its labelling, design, technical features, composition and packaging and the instructions for its assembly, installation, use and maintenance;</li> <li>(b) reasonably foreseeable use of the electronic agent product;</li> <li>(c) the effect of the electronic agent product on any ability to continue to learn or acquire new features after it is placed on the market or put into service;</li> <li>(d) the reasonably foreseeable effect on the electronic agent product on other products that can be expected to be used together with the electronic agent product, including, by means of inter-connection;</li> <li>(e) the moment in time when the electronic agent product was placed on the market or put into service or, where the manufacturer retains</li> </ul> | <p>Provisions on product liability of electronic agent is based on the EU legislation on artificial intelligence but there is already in existence similar provisions in the Malaysian Consumer Protection Act 1999 based on an earlier version of the EU Directive, which has not addressed the issue of artificial intelligence specifically.</p> |

|  |  | Provision (Draft Agency Bill)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                            | Remarks/Justification |
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|  |  | <p>control over the electronic agent product after that moment, the moment in time when the electronic agent product left the control of the manufacturer;</p> <p>(f) relevant product safety and security requirements and standards, including, safety and security relevant cybersecurity requirements and standards;</p> <p>(g) any recall of the electronic agent product or of the class including, the electronic agent product or any other relevant intervention relating to product safety by the Government or a person or authority exercising powers under any written law or exercising a regulatory function or by an economic operator as specified in subsection (3);</p> <p>(h) the specific needs of the group of users for whose use the electronic agent product is intended;</p> <p>(i) if the purpose of the electronic agent product is to prevent damage or mistakes, any failure of the electronic agent product to fulfil that purpose;</p> <p>(j) requirements and guidance in other written law or by a person or authority exercising powers under any written law or exercising a regulatory function.</p> <p>(3) In relation to a defective electronic agent, the following are economic operators, being those who could be liable arising from the defective electronic agent—</p> <p>(a) the manufacturer of the defective electronic agent product, which shall also be liable for any damage caused by a defective component where it was integrated into, or inter-connected with, an electronic agent product within that manufacturer's control;</p> <p>(b) the manufacturer of a defective component, where that component was integrated into, or inter-connected with, the electronic agent product within the manufacturer's control and</p> |                       |

|  |  | Provision (Draft Agency Bill)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      | Remarks/Justification |
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|  |  | <p>caused that electronic agent product to be defective;</p> <p>(c) if the manufacturer of the electronic agent product or component is established outside Malaysia—</p> <p>(i) the importer of the defective electronic agent product or component;</p> <p>(ii) the authorised representative of the manufacturer; and</p> <p>(iii) if there is no such importer or authorised representative within Malaysia, any service provider;</p> <p>(d) any natural or legal person which substantially modifies the electronic agent product outside the manufacturer's control and then makes it available on the market or puts the electronic agent product into service, such natural or legal person shall be considered a manufacturer for purposes of subsection (3)(a).</p> <p>(4) Each of the economic operators specified in each of paragraphs (a) to (c) (including, any person considered a manufacturer under paragraph (d) of subsection (3) shall be treated as liable for purposes of subsection (5) in a separate and independent capacity even if the same person may be an economic operator in more than one capacity.</p> <p>(5) The liability for the acts of a defective electronic agent shall not lie with the principal as specified in subsection (1) but shall lie with the economic operators (which may include, a principal in the capacity of an economic operator) specified in subsection (3). The liability of economic operators is to compensate any natural or legal person (including, its successors in title) which suffers loss or damage caused by the defective electronic agent. To avoid doubt, nothing in this Division is intended to preclude a claim against the principal for remedies or liabilities not within the scope of liability under this subsection (5) arising from any contract or other act of the electronic agent for and on behalf of the principal. The types of damage to be compensated are—</p> |                       |

|  |  | Provision (Draft Agency Bill)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    | Remarks/Justification |
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|  |  | <p>(a) death or personal injury, including, medically recognised damage to psychological health;</p> <p>(b) liability, loss or damage suffered by a user of the defective electronic agent or a third party, of a financial or economic nature;</p> <p>(c) destruction or corruption of data;</p> <p>(d) damage to, or destruction of, any property (movable or immovable), except—</p> <p>(i) the defective electronic agent product itself;</p> <p>(ii) an electronic agent product damaged by a defective component that is integrated into, or inter-connected with, that electronic agent product by the manufacturer of that electronic agent product or within that manufacturer's control.</p> <p>(6) If an economic operator cannot be identified, each distributor of the defective electronic agent product is liable as if it were an economic operator.</p> <p>(7) The liability to compensation and damages shall be determined in accordance with the principles of the law of tort unless the claim is based on the law of contract. The provisions of section 28A of the Civil Law Act 1956 do not apply in respect of a claim made under this Division. Liability and damages shall take into account the common law.</p> <p>(8) Nothing in this Division shall preclude a principal from claiming compensation and damages from an economic operator arising from any loss, damage or injury which the principal may suffer in connection with the acts of a defective electronic agent.</p> <p>(9) The following provisions apply in respect of any contract or arrangement which excludes or limits liability or claims which arise from or relate to defective electronic agents. These provisions do not preclude any additional prohibitions or restrictions on such exclusions or limitations under any other written law. These provisions apply to any contract or arrangement, whether governed by the laws of Malaysia or the laws of any other</p> |                       |

|  |  | Provision (Draft Agency Bill)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              | Remarks/Justification |
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|  |  | <p>jurisdiction and in any event, to any of the circumstances in subsection 24(2)—</p> <p>(a) no contract or arrangement may have the effect of excluding or limiting liability or claims unless that exclusion or limitation is a fair and reasonable one having regard to the circumstances which were, or ought reasonably to have been, known to or contemplated by the parties to the contract or arrangement when made;</p> <p>(b) no contract or arrangement may have the effect of allowing any third parties not a party to the contract or arrangement to benefit or acquire rights from any provisions in the contract or arrangement which exclude or limit liability or claims;</p> <p>(c) no contract or arrangement may have the effect of making a right or remedy or its enforcement subject to a restrictive or onerous condition;</p> <p>(d) no contract or arrangement may have the effect of allowing a person dealing with the electronic agent to be put at a disadvantage as a result of pursuing such a right or remedy;</p> <p>(e) no contract or arrangement may have the effect of excluding or restricting rules of evidence or procedure;</p> <p>(f) a contract or arrangement separate from or secondary to or otherwise related to the contract or arrangement referred to in paragraphs (a) to (e) purporting to have the effect of excluding or limiting the matters which would otherwise have been prohibited by such paragraphs are prohibited;</p> <p>(g) despite paragraphs (a) to (f), a contract or arrangement may contain exclusions or limitations on liability or claims to the extent allowed by any written law or by a person or authority exercising any power under any written law.</p> |                       |

|  |  | Provision (Draft Agency Bill)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               | Remarks/Justification                                                                                                                                                                                                                |
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|  |  | <p><b>Multiple economic operators</b></p> <p><b>27.</b> (1) If two or more economic operators are liable for the same damage, they are liable jointly and severally.</p> <p>(2) The liability of an economic operator may be reduced or disallowed where the damage is caused both by the defectiveness of the electronic agent product and by the fault of the claimant for compensation and damages.</p> <p>(3) If more than one economic operator is liable for the same damage, an economic operator which has compensated a claimant for compensation and damages shall be entitled to pursue remedies against other economic operators liable for the defective electronic agent product.</p> <p>(4) An economic operator must not, in relation to a claimant for compensation and damages, limit or exclude its liability.</p> <p>(5) The Court may apportion the liability of each economic operator in the event that they are defendants in the same action instituted by a claimant.</p>                         | <p>To provide for the liability of one or multiple economic operators in the operation of an electronic agent.</p>                                                                                                                   |
|  |  | <p><b>Evidence</b></p> <p><b>28.</b> (1) A claimant for compensation and damages must prove the defectiveness of the electronic agent product and the causal link between that defectiveness and that damage.</p> <p>(2) If a claimant has presented in proceedings before the Court facts and evidence sufficient to support the plausibility of the claim, the defendant is required to disclose relevant evidence at the defendant's disposal. The claimant must also disclose to the defendant relevant evidence at the claimant's disposal.</p> <p>(3) Any disclosure of evidence must be necessary and proportionate and may take into account legitimate interest including, the protection of confidential information and trade secrets.</p> <p>(4) The Courts may require that appropriate measures are taken to protect information disclosed as a trade secret or as an alleged trade secret.</p> <p>(5) The Courts may require evidence to be presented in an easily accessible and understandable manner.</p> | <p>To provide for evidence requirements to claim for damages arising from the defectiveness of an electronic agent.</p> <p>Also to provide for the presumption of defectiveness of an electronic agent in certain circumstances.</p> |

|  |  | Provision (Draft Agency Bill)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 | Remarks/Justification |
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|  |  | <p>(6) The defectiveness of an electronic agent product shall be presumed—</p> <ul style="list-style-type: none"> <li>(a) if the defendant fails to comply with subsection (2) or with any disclosure of evidence required under the rules of Court;</li> <li>(b) if the claimant demonstrates that the electronic agent product does not comply with written law or the requirements of persons or authorities exercising a regulatory function;</li> <li>(c) if the claimant demonstrates that the damage was caused by an obvious malfunction of the electronic agent product during reasonably foreseeable use or under ordinary circumstances.</li> </ul> <p>(7) The causal link between the defectiveness of an electronic agent product and the damage shall be presumed where it has been established that a product is defective and that the damage caused is of a kind typically consistent with the defect in question.</p> <p>(8) A Court shall presume the defectiveness of the electronic agent product or the causal link between its defectiveness and the damage, or both where despite the disclosure of evidence in accordance with subsection (2) and taking into account all the relevant circumstances of the case—</p> <ul style="list-style-type: none"> <li>(a) the claimant faces excessive difficulties, in particular due to technical or scientific complexity, in proving the defectiveness of the electronic agent product or the causal link between its defectiveness and the damage, or both; and</li> <li>(b) the claimant demonstrates that it is likely that the electronic agent product is defective or that there is a causal link between the defectiveness of the electronic agent product and the damage, or both.</li> </ul> <p>(9) Any presumption is rebuttable.</p> <p>(10) An economic operator shall not be liable to compensation or damage for a defective electronic agent product in any of the following circumstances, subject to</p> |                       |

|  |  | Provision (Draft Agency Bill)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              | Remarks/Justification |
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|  |  | <p>any modifications made or to additional circumstances prescribed by the Minister in regulations made under section 29—</p> <ul style="list-style-type: none"> <li>(a) in the case of a manufacturer or importer, that it did not place the electronic agent product on the market or put it into service;</li> <li>(b) in the case of a distributor, that it did not make the product available on the market;</li> <li>(c) that it is probable that the defectiveness that caused the damage did not exist at the time the electronic agent product was placed on the market, put into service or, in the case of a distributor, made available on the market, or that that defectiveness came into being after that moment;</li> <li>(d) that the defectiveness that caused the damage is due to compliance of the electronic agent product with legal requirements;</li> <li>(e) that the objective state of scientific or technical knowledge at the time of the electronic agent product was placed on the market or put into service or during the period in which the product was within the manufacturer's control was not such that the defectiveness could be discovered;</li> <li>(f) in the case of a manufacturer of a defective component, that the defectiveness of the electronic agent product in which that component has been integrated is attributable to the design of that electronic agent product or to the instruction given by the manufacturer of that electronic agent product to the manufacturer of that component;</li> <li>(g) in the case of a person modifying an electronic agent product, that the defectiveness that caused the damage is related to a part of the electronic agent product not affected by modification.</li> </ul> <p>(11) An economic operator shall not be exempted from liability under subsection (10) where the defectiveness of an electronic agent product is due to any of the following, provided within a manufacturer's control—</p> |                       |

|  |  | Provision (Draft Agency Bill)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                           | Remarks/Justification                                                                                                                              |
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|  |  | <p>(a) a related service;</p> <p>(b) software, including, software updates or upgrades;</p> <p>(c) a lack of software updates or upgrades necessary to maintain safety or to mitigate mistakes;</p> <p>(d) a substantial modification of the electronic agent product.</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              |                                                                                                                                                    |
|  |  | <p><b>Power to make regulations</b></p> <p>29. The Minister may make regulations (which, to avoid doubt, may apply or be restricted only to a particular class, sector, industry, circumstances or criteria)—</p> <p>(1) for or with respect to the manner in which compensation or damages to be awarded under this Division may be determined having regard to the provisions of subsection 26(7);</p> <p>(2) for or with respect to the manner in which compensation or damages may be apportioned between economic operators having regard to the provisions of subsection 27(5);</p> <p>(3) for or with respect to the manner in which any claim may be made under the provisions of this Division in the event of a concurrent claim under any other written law or the laws of another jurisdiction;</p> <p>(4) for or with respect to matters related to evidence required to be tendered or produced under the provisions of this Division;</p> <p>(5) to prescribe any circumstances in which an economic operator may not be liable to compensation or damage for a defective electronic agent product additional to those specified in subsection 28(10);</p> <p>(6) to modify any such circumstances as prescribed in regulations made under subsection (5) or to any of the circumstances specified in subsection 28(10);</p> <p>(7) for or with respect to all matters and things required or authorised by the provisions of this Division to be provided, for the carrying out of, or giving full effect to, the provisions of this Division;</p> <p>(8) for or with respect to any penalties of a fine not exceeding fifty thousand ringgit or imprisonment for a</p> | Provisions have been drafted to provide for the power of the Minister to make regulations, including certain powers to exempt and limit liability. |

|  |  | Provision (Draft Agency Bill)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    | Remarks/Justification |
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|  |  | term not exceeding three years or to both for contravention of subsidiary legislation made under this Act, the penalties to be provided for in the subsidiary legislation.                                                                                                                                                                                                                                                                                                                                                                                                                                                       |                       |
|  |  | <b>Court rules</b><br><b>30.</b> The Rules Committee constituted under the Courts of Judicature Act 1964 may, subject to and in accordance with the provisions of that Act relating to the making of rules, make rules—<br>(1) with respect to the proceedings and the practice and procedure of the Court in relation to the provisions of this Division;<br>(2) with respect to any matter or thing in relation to the provisions of this Division required, permitted or expedient to be prescribed by rules;<br>(3) without limiting the generality of the provisions of this section, with respect to Court fees and costs. |                       |

Table 4—Miscellaneous

|                        |  |  | Provision (Draft Agency Bill)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        | Remarks/Justification                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              |
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| Part V - Miscellaneous |  |  |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    |
|                        |  |  | <b>31. Seals</b><br>(1) An agent does not have to be appointed or authorised by a document under seal in order to execute or perform any other act under or requiring a seal as an agent. This subsection applies despite subsection 67(3) of the Companies Act 2016.<br>(2) A document required to be executed by an agent under seal may be executed as such but otherwise without compliance with any additional formalities or matters required at common law and shall be treated as valid as if no distinction exists at common law between execution by an agent under seal and execution under hand.<br>(3) An agent may execute a document required to be under seal under hand.<br>(4) The provisions of subsections (2) and (3) do not affect any requirement imposed by any written law. | <p>The common law on seals in the context of agency is complex as seen in the PCAC. Legislation such as the US Uniform Commercial Code and UK Companies Act 2006 were considered. The proposed provisions are to simplify the approach relating to seals in the context of agency. There is no attempt to address the legal position of seals in the context of agency involving statutory corporations as the consent of States may be required under the Federal Constitution particularly as regards to statutory corporations incorporated under state law, among others.</p> <p>The proposed provision modernises and simplifies the law on seals in agency. It removes the outdated distinction between documents under seal and those not under seal when executed by an agent. It also makes clear that an agent's authority to execute a sealed document does not itself need to be given under seal.</p> <p>This proposed removal is guided by the approach in the United Kingdom, where a similar filing requirement was abolished under Section 2 of the Powers of Attorney Act 1971 and later repealed by Section</p> |

|  |  |  | Provision (Draft Agency Bill)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          | Remarks/Justification                                                                                                                                                                                                                                                                                                                                                   |
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|  |  |  |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        | 152(4), Schedule 7 of the UK Supreme Court Act 1981.                                                                                                                                                                                                                                                                                                                    |
|  |  |  | <b>32. Disability and other limitations</b><br>(1) An individual physically incapable of signing or marking a document of any nature, may direct another to execute the document on his behalf. The direction and execution must be in the presence of a witness. The document must state that it was executed at the direction of the physically incapable person on his behalf, in both instances, in the presence of the witness.<br>(2) An individual unable to execute a document of any nature as a result of illness or disability but is able to make a mark by hand, foot or mouth, must execute the document in the presence of a witness who provides a sworn statutory declaration giving the reason why the document has been executed in that manner or otherwise by an advocate who provides a certificate to the same effect.<br>(3) The documents in subsections (1) and (2) apply to all documents including, any relating to the appointment of an agent, the creation of an agency | In the context of disability, Part X of the CA 1950 does not address disability in the context of agency. This provision is intended to address situations involving the disabled who have legal capacity. We have taken into considerations the approaches in the UK HM Land Registry's Practice Guide 2.1 and Part B of the Isle of Man Land Registry Practice Guide. |

|  |  |  | Provision (Draft Agency Bill)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     | Remarks/Justification                                                                                                                                                                                                                                                                                                                               |
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|  |  |  | <p>and any directions, consents and other matters relating to the agency.</p> <p>(4) Any document executed in accordance with subsections (1) and (2) shall be presumed to be validly executed by the individual unless the contrary is proved.</p> <p>(5) The provisions of subsections (1), (2) and (3) do not affect any requirement in any written law or any other valid way of executing a document or giving directions or instructions or expressing consent at common law.</p> <p>(6) To avoid doubt, the provisions of Division 1 of Part IV apply to the execution and witnessing of any document to be executed under this section and any direction or other matter required in this connection.</p> |                                                                                                                                                                                                                                                                                                                                                     |
|  |  |  | <p><b>33. Private international law</b></p> <p>The provisions of this Act, unless otherwise provided, do not affect the operation and application of the rules of private international law. Accordingly, the legal effect, validity, enforceability and admissibility of an agency or matters related will continue to be determined by the law applicable under those rules.</p>                                                                                                                                                                                                                                                                                                                                | <p>This provision preserves the applicability of private international law where the contrary is not provided in the Bill. This provision is inserted by taking into consideration Section 19 of the New Zealand Contract and Commercial Law Act 2017 and Section 4 of the Electronic Transactions (Electronic Agents) Guernsey Ordinance 2019.</p> |

|                                                        |  |  | Provision (Draft Agency Bill)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    | Remarks/Justification                                                                                                                                    |
|--------------------------------------------------------|--|--|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------|
| Part VI - Transitional, Savings and Related Provisions |  |  |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                  |                                                                                                                                                          |
|                                                        |  |  | <b>34. Repeal</b><br>Part X of the Contracts Act 1950 and the Powers of Attorney Act 1949 are repealed.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          | To repeal the existing Part X of the Contracts Act 1950 and the Powers of Attorney Act 1949 and replace it with a wholly new legislation as drafted.     |
|                                                        |  |  | <b>35. Savings Despite section 34—</b><br>(1) a person who, was, immediately before the commencement of this Act, a duly appointed agent continues as an agent on and after the date of the commencement of this Act, subject to the terms of the appointment and the terms of the agency and subsection (7);<br>(2) a person who, was, immediately before the commencement of this Act, a duly appointed attorney under a power of attorney continues as an attorney on and after the date of commencement of this Act, subject to the terms of the appointment and the terms of the power of attorney and subsection (7);<br>(3) a power of attorney executed and attested in accordance with the Powers of Attorney Act 1949 before the commencement of this Act but which has not as yet been deposited under the Powers of Attorney Act 1949 at the date of | This provision is to provide for the effect of the new legislation on agencies and powers of attorney created before the new legislation, in particular. |

|  |  |  | Provision (Draft Agency Bill)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              | Remarks/Justification |
|--|--|--|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------|
|  |  |  | <p>such commencement may continue to be deposited under the Powers of Attorney Act 1949 as if the Powers of Attorney Act 1949 had not been repealed and such power of attorney had been created and duly deposited under the Powers of Attorney Act 1949 immediately before the commencement of this Act;</p> <p>(4) a power of attorney and any revocation, variation or other document related to the power of attorney deposited under the Powers of Attorney Act 1949 will continue to be available to search of such documents;</p> <p>(5) this Act applies to all agencies and powers of attorney, whether created before, on or after commencement of this Act;</p> <p>(6) the commencement of this Act does not affect the validity, invalidity, effect, or consequences of anything done or suffered by an agent or attorney or otherwise in relation to the law of agency or powers of attorney before such commencement;</p> <p>(7) any right, interest, title, immunity, duty, privilege, obligation or liability acquired, accrued or incurred before the</p> |                       |

|  |  |  | Provision (Draft Agency Bill)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 | Remarks/Justification |
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|  |  |  | <p>commencement of this Act or any legal proceedings or remedy in respect of any such right, interest, title, immunity, duty, privilege, obligation or liability shall not be affected by this Act and remains in force as if this Act had not been enacted;</p> <p>(8) the provisions of this Act shall apply to any act, omission or matter arising in relation to an agency or power of attorney on or after the date of commencement of this Act even if that agency or power of attorney was created before such date. To avoid doubt, in relation to an agency or power of attorney created before such date—</p> <p>(a) the terms of appointment of an agent or attorney and the terms of the agency or power of attorney shall, in respect of any act, omission or matter arising on or after the date of commencement of this Act, be read and interpreted as if such terms contained a provision that the scope and application</p> |                       |

|  |  |  | Provision (Draft Agency Bill)                                                                                                                                                                                                                                                                                                                                                       | Remarks/Justification |
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|  |  |  | <p>of such terms were to be subject to any mandatory requirement, prohibition or limitation imposed by the provisions of this Act;</p> <p>(b) a power of attorney, if irrevocable before such date shall remain irrevocable in accordance with the terms of the power of attorney and shall be treated as if it were a power of attorney which is irrevocable under section 18.</p> |                       |

## 2.12 Draf Rang Undang-Undang Agensi

Kami nyatakan di bawah, cadangan kami untuk satu Rang Undang-undang mengenai undang-undang agensi. Draf Rang Undang-Undang itu bersifat sementara dan peruntukannya boleh dimasukkan ke dalam perundangan yang lebih luas yang menggabungkan aspek undang-undang lain. Kami telah membentangkan draf Rang Undang-undang berdasarkan perundangan sendiri mengenai undang-undang agensi untuk memberikan perspektif yang lebih jelas tentang pandangan dan cadangan kami tentang pendekatan yang perlu diambil dalam pembaharuan undang-undang agensi.

### RANG UNDANG-UNDANG

#### *b e r n a m a*

Suatu Akta untuk menggubal semula, menyemak dan mengemas kini undang-undang yang berkaitan dengan agensi dan untuk mengadakan peruntukan bagi perkara yang berkaitan.

[ ]

**DIPERBUAT** oleh Parlimen Malaysia seperti berikut:

### BAHAGIAN I

#### PERUNTUKAN AWAL

#### **Tajuk ringkas dan permulaan kuat kuasa**

1. (1) Akta ini boleh dinamakan Akta Agensi 2026.

(2) Akta ini mula berkuat kuasa pada tarikh yang ditetapkan oleh Menteri melalui pemberitahuan dalam Warta dan Menteri boleh menetapkan tarikh yang berlainan bagi permulaan kuat kuasa peruntukan yang berlainan Akta ini.

## Tafsiran

2. (1) Dalam Akta ini, melainkan jika konteksnya menghendaki makna yang lain—

“peguam bela” ertinya seseorang yang berhak untuk menjalankan amalan sebagai peguam bela atau sebagai peguam bela dan peguam cara di bawah undang-undang yang berkuat kuasa di mana-mana bahagian Malaysia;

“agensi” ertinya agensi sebagaimana yang disebut dalam seksyen 3;

“ejen” ertinya ejen sebagaimana yang disebut dalam seksyen 3;

“peraturan” bermaksud perkiraan yang membawa akibat undang-undang.

"kecerdasan buatan"

(a) bermaksud teknologi yang membolehkan pengaturcaraan atau latihan peranti atau perisian untuk—

- (i) melihat persekitaran melalui penggunaan data;
- (ii) mentafsir data menggunakan pemprosesan automatik yang direka bentuk untuk menganggarkan kebolehan kognitif; dan
- (iii) membuat syor, ramalan atau keputusan,

dengan tujuan untuk mencapai objektif tertentu;

(b) termasuk, kecerdasan buatan generatif, yang bermaksud model bahasa yang mendalam atau besar yang boleh menjana teks, imej, audio dan kandungan lain berdasarkan data yang dilatih;

"sistem kecerdasan buatan" ertinya sistem berasaskan mesin yang direka bentuk untuk beroperasi dengan tahap autonomi yang berbeza-beza dan yang mungkin mempamerkan kesesuaian selepas penggunaan, dan bahawa, untuk objektif eksplisit atau tersirat, membuat kesimpulan, daripada input yang diterimanya, cara menjana output seperti ramalan, kandungan, cadangan, atau keputusan yang boleh mempengaruhi persekitaran fizikal atau maya;

“common law” ertinya common law dan termasuklah, common law sebagaimana yang digunakan di Malaysia;

“komputer” bermaksud mana-mana peranti digital, elektronik, magnetik, optik, elektrokimia, atau peranti lain untuk rakaman, penyimpanan, pengambilan semula, atau pemprosesan data atau maklumat, atau sekumpulan peranti yang saling bersambung atau berkaitan, melaksanakan fungsi logik, aritmetik, storan, atau paparan, dan termasuk, apa-apa kemudahan penyimpanan data atau komunikasi yang beroperasi bersama peranti itu, atau kumpulan peranti yang saling berkaitan atau berkaitan itu; dan ia termasuk, input dan output yang diperlukan dan pangkalan data komputer; tetapi ia tidak termasuk, sebarang peranti yang tidak boleh diprogramkan atau yang tidak mengandungi sebarang kemudahan penyimpanan data;

“program komputer” ertinya atur cara dalam apa-apa bentuk, termasuk yang dimasukkan ke dalam komputer atau ke dalam mana-mana perkakasan dan termasuk kerja reka bentuk persediaan yang membawa kepada pembangunan program komputer dengan syarat bahawa sifat kerja persediaan itu sedemikian rupa sehingga atur cara komputer boleh terhasil daripadanya pada peringkat kemudian;

“kontrak” termasuklah, apa-apa kontrak, transaksi atau perbuatan, dokumen, rekod, notis atau instrumen lain yang menghasilkan akibat undang-undang, lisan, bertulis atau sebaliknya;

“elektronik” termasuklah, dicipta, direkodkan, dihantar atau disimpan dalam bentuk digital atau dalam bentuk tidak ketara lain melalui cara elektronik, magnetik atau optik atau melalui apa-apa cara lain yang mempunyai keupayaan untuk penciptaan, rakaman, penghantaran atau penyimpanan yang serupa dengan cara tersebut, termasuk, melalui komputer, melalui program komputer, melalui kecerdasan buatan atau oleh sistem kecerdasan buatan; dan "secara elektronik" mempunyai makna yang sepadan;

“ejen elektronik” termasuklah, program komputer atau sistem kecerdasan buatan atau cara elektronik atau automatik lain yang digunakan secara bebas untuk memulakan tindakan atau bertindak balas terhadap rekod atau persembahan elektronik secara keseluruhan atau sebahagian, tanpa semakan atau tindakan oleh orang sebenar;

“rekod elektronik” bermaksud kontrak atau rekod lain yang dicipta, dijana, dihantar, disampaikan, diterima, atau disimpan melalui cara elektronik;

“ekuiti” ertinya undang-undang ekuiti sebagaimana yang digunakan di Malaysia;

“keupayaan undang-undang” termasuklah, mana-mana kriteria untuk kapasiti undang-undang yang dinyatakan dalam Akta ini atau keupayaan untuk membuat dan melaksanakan apa-apa kontrak atau sebaliknya untuk menjejaskan hubungan undang-undang dengan pihak ketiga;

“ketidakupayaan mental” ertinya seseorang yang tidak mempunyai keupayaan untuk memasuki dan melaksanakan apa-apa kontrak atau sebaliknya untuk menjejaskan hubungan undang-undang dengan pihak ketiga kerana dia tidak dapat membuat keputusan untuk dirinya sendiri berhubung dengan perkara itu kerana kemerosotan, atau gangguan dalam fungsi minda atau otak, sama ada kekal atau sementara dan “keupayaan mental” dan “kekurangan keupayaan mental” membawa maksud yang sepadan;

“prinsipal” ertinya prinsipal sebagaimana yang disebut dalam seksyen 3;

“sub-ejen” ertinya sub-ejen sebagaimana yang disebut dalam seksyen 10;

“terma” berhubung dengan suatu agensi, ertinya mana-mana atau semua yang berikut, sebagaimana yang diubah dari semasa ke semasa, mengikut konteks menghendaki—

- (a) menyatakan terma bertulis agensi itu;
- (b) menyatakan terma lisan agensi itu;
- (c) menyatakan terma agensi dalam apa-apa bentuk lain.

(2) Akta ini—

- (a) bukanlah undang-undang yang lengkap berkaitan dengan agensi atau ejen; dan
- (b) bertujuan untuk dilengkapi dengan kaedah-kaedah undang-undang biasa dan ekuiti kecuali jika dinyatakan sebaliknya atau jika kaedah-kaedah itu tidak konsisten dengan peruntukan Akta ini.

(3) Jika terdapat apa-apa percanggahan antara peruntukan Akta ini dan peruntukan mana-mana undang-undang bertulis lain, peruntukan undang-undang bertulis lain itu diguna pakai, melainkan jika Akta ini memperuntukkan atau berniat sebaliknya.

(4) Istilah “lantik”, “pelantikan” dan perkataan yang mempunyai kesan yang serupa apabila digunakan berkaitan dengan ejen dan penciptaan agensi termasuklah, seseorang yang menjadi ejen dan agensi yang diwujudkan melalui apa-apa cara yang ditimbangkan oleh Akta ini dan undang-undang biasa dan ekuiti, jika ini terpakai.

(5) Peruntukan Akta ini tidak terpakai bagi sesuatu agensi yang dikawal oleh undang-undang selain daripada undang-undang Malaysia melainkan jika Akta ini memperuntukkan sebaliknya. Undang-undang yang mengawal sesuatu agensi dianggap (melainkan sebaliknya dinyatakan atau bertujuan) sebagai undang-undang Malaysia jika—

- (a) ejen itu dilantik untuk melaksanakan perkara secara substantif di Malaysia; atau
- (b) ejen itu semata-mata <sup>171</sup>atau pada dasarnya, seorang pemastautin Malaysia; atau
- (c) kontrak atau tindakan yang akan dibuat atau dilaksanakan oleh ejen itu sebahagian besarnya dikawal oleh undang-undang Malaysia; atau
- (d) prinsipal adalah semata-mata atau pada dasarnya, seorang pemastautin Malaysia; atau
- (e) ejen atau prinsipal mempunyai tempat perniagaan di Malaysia dan agensi itu terlibat perniagaan atau operasi tempat perniagaan itu; atau
- (f) ejen atau prinsipal itu ditubuhkan di bawah undang-undang Malaysia; atau
- (g) kontrak atau tindakan yang akan dimeterai atau dilaksanakan oleh ejen yang sebahagian besarnya melibatkan sebagai pihak kepada kontrak atau perbuatan, pemastautin Malaysia, kediaman prinsipal dan ejen yang perlu diambil kira.

## BAHAGIAN II

### AGENSI

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<sup>171</sup> Atau secara sendiri= solely

## Divisyen 1

### Peruntukan Am

#### **Agensi ditakrifkan**

3. Agensi ialah perhubungan (sama ada atau tidak, fidusiari) yang wujud antara dua orang—

- (a) salah seorang daripadanya secara nyata atau tersirat menyatakan persetujuan bahawa pihak yang lain harus bertindak bagi pihaknya dengan atau tanpa kuasa untuk menjejaskan hubungan undang-undangnya dengan pihak ketiga; dan
- (b) seorang lagi yang sama menyatakan persetujuan untuk bertindak atau lebih bertindak menurut manifestasi itu.

Orang yang bagi pihaknya perbuatan itu hendak dilakukan ialah prinsipal. Pihak yang akan bertindak ialah ejen. Pihak ketiga ialah orang selain prinsipal atau ejen.

#### **Elemen agensi lain**

4. (1) Ejen dan prinsipal boleh menjadi orang sebenar atau mana-mana orang lain yang mempunyai kapasiti undang-undang untuk bertindak sebagai ejen atau prinsipal, sebagaimana yang berkenaan.

(2) Suatu agensi boleh diwujudkan tanpa pertimbangan.

(3)(a) Sebuah agensi tidak boleh diwujudkan jika dilarang oleh mana-mana undang-undang bertulis atau oleh undang-undang biasa atau oleh ekuiti.

(b) Jika mana-mana undang-undang bertulis memperuntukkan bahawa mana-mana agensi hanya boleh diwujudkan tertakluk kepada syarat atau formaliti tertentu, tiada agensi boleh diwujudkan sehingga syarat atau formaliti tersebut dipenuhi.

(4) Keupayaan undang-undang—

(a) hendaklah tertakluk kepada subseksyen (3)(b), tertakluk kepada pengendalian dan pemakaian kaedah-kaedah undang-undang antarabangsa persendirian (dan sewajarnya, kapasiti undang-undang akan ditentukan oleh sistem undang-undang yang terpakai untuk kapasiti undang-undang, mengikut peraturan undang-undang antarabangsa persendirian);

(b) individu di Malaysia, sama ada sebagai ejen atau prinsipal, yang memeterai atau mewujudkan hubungan agensi yang dikawal oleh undang-undang Malaysia akan ditentukan oleh undang-undang Malaysia.

(5) Keupayaan undang-undang seseorang ejen atau prinsipal di mana undang-undang Malaysia terpakai akan—

(a) jika seorang individu, berhenti apabila meninggal dunia, hilang upaya mental atau muflis;

(b) jika orang yang sah, berhenti daripada penggulungan atau pembubaran atau jika ia tidak lagi mempunyai kuasa dan keupayaan untuk melaksanakan perkara itu.

Keupayaan undang-undang ejen atau prinsipal pada satu-satu masa ditafsirkan sewajarnya. Tiada apa-apa dalam subseksyen (5) ini menghendaki seseorang ejen mesti mempunyai kapasiti undang-undang.

(6) Prinsipal mesti mempunyai keupayaan undang-undang untuk melantik ejen.

(7) Yang berikut terpakai bagi ejen dalam konteks kapasiti undang-undang—

(a) Mana-mana orang boleh menjadi ejen tanpa mengira kapasiti undang-undang;

(b) Kekurangan kapasiti undang-undang ejen tidak menghalang ejen daripada melakukan tindakan sebagai ejen termasuk, mana-mana yang mempunyai akibat undang-undang ke atas prinsipal. Prinsipal terikat kepada pihak ketiga dengan tindakan ejen sedemikian seolah-olah ejen itu mempunyai kapasiti undang-undang. Untuk mengelakkan keraguan, tiada hubungan agensi boleh diwujudkan jika ejen yang dikatakan tidak mempunyai personaliti undang-undang kecuali di bawah peruntukan Bahagian 2 Bahagian IV;

(c) Walaupun terdapat peruntukan subseksyen (b), ejen yang masih di bawah umur atau yang tidak mempunyai keupayaan mental tidak—

- (i) bertanggungjawab kepada prinsipalnya; atau
- (ii) terikat secara peribadi kepada pihak ketiga berkenaan dengan sebarang tindakan bagi pihak prinsipalnya termasuk, kontrak atau apa-apa tindakan lain yang mungkin mempunyai akibat undang-undang.

Dalam subseksyen (c) ini, seorang di bawah umur dan seseorang yang tidak mempunyai keupayaan mental tidak termasuk seorang di bawah umur atau seseorang yang mempunyai tahap ketidakupayaan mental yang pada masa material mempunyai pemahaman yang mencukupi untuk memberi persetujuan kepada agensi dan melakukan perbuatan yang dikehendaki oleh agensi.

(8) Perkara berikut terpakai bagi kehilangan keupayaan undang-undang berikutan penubuhan suatu agensi—

- (a) Kuasa sebenar ejen ditamatkan apabila prinsipalnya kehilangan kapasiti undang-undang tetapi hanya apabila ejen mendapat notis kehilangan kapasiti undang-undang;
- (b) Penamatan agensi berkuat kuasa terhadap pihak ketiga yang berurusan dengan ejen apabila pihak ketiga mendapat notis tentang kehilangan kapasiti undang-undang prinsipal;
- (c) Kuasa sebenar ejen akan kekal berkesan walaupun prinsipalnya kehilangan keupayaan undang-undangnya apabila—
  - (i) surat kuasa wakil yang memberikan kuasa kepada ejen (peguam) tidak boleh ditarik balik atau tidak tertakluk kepada pembatalan di bawah peruntukan Bahagian III;
  - (ii) instrumen menjadikan kuasa sebenar ejen berkuat kuasa apabila prinsipal kehilangan kapasiti atau instrumen itu tidak boleh ditarik balik walaupun kehilangan sedemikian, undang-undang bertulis membenarkan.

subperenggan (i) dan (ii) adalah berasingan dan bebas antara satu sama lain dan setiap subperenggan tidak menghadkan skop dan kesan yang lain.

(9) Peruntukan Akta ini, apabila merujuk kepada ejen termasuklah, sebutan kepada seorang peguam di bawah surat kuasa wakil dan sebutan kepada suatu agensi termasuklah, suatu agensi yang ditubuhkan melalui surat kuasa wakil, melainkan jika konteks atau sifat seorang peguam atau surat kuasa wakil memerlukan selainnya.

## Divisyen 2

### Had dan kuasa

#### **Pengaturan dan had agensi**

5. (1) Peruntukan Bahagian ini mengandungi peruntukan yang dinyatakan tentang perkara yang boleh dan tidak boleh dilakukan oleh ejen. Seseorang ejen boleh bertindak dengan cara yang berbeza daripada apa yang boleh dilakukannya dalam peruntukan yang dinyatakan itu jika ia berada dalam, dalam apa jua keadaan, kuasa sebenar ejen seperti yang dinyatakan dalam subseksyen 7(1). Perbuatan ejen juga boleh disahkan atau dibenarkan oleh peruntukan lain Akta ini. Untuk mengelakkan keraguan tetapi tanpa mengehendkan pemakaian subseksyen 2(2) dan 2(3), undang-undang biasa dan undang-undang bertulis lain boleh diambil kira semasa menentukan kuasa dan kewajipan ejen dan perkara lain yang berkaitan dengan sifat atau hubungan agensi. Tiada apa-apa pun dalam subseksyen (1) ini menghalang pemakaian subseksyen (2) hingga (3).

(2) Peruntukan berikut terpakai kepada ejen apabila ejen mengehendkan atau mengecualikan liabilitinya atau memperoleh ganti rugi bagi apa-apa pelanggaran kewajipan dan kewajipannya yang timbul daripada ketidakjujurannya, salah laku yang disengajakan, atau kecuaiian yang teruk. Apabila peruntukan ini merujuk kepada had atau pengecualian atau indemniti, ia berhasrat untuk memasukkan sebarang kontrak atau perjanjian dalam apa jua bentuk. Peruntukan ini tidak menghalang sebarang larangan atau sekatan tambahan ke atas pengecualian atau pengehadan sedemikian di bawah mana-mana undang-undang bertulis lain—

(a) tiada pengehadan atau pengecualian atau tanggung rugi sedemikian boleh mempunyai kesan mengecualikan atau mengehendkan liabiliti atau tuntutan atau memberikan indemniti melainkan pengehadan atau pengecualian atau indemniti itu adalah suatu

yang adil dan munasabah dengan mengambil kira keadaan yang, atau sepatutnya secara munasabah, diketahui atau difikirkan oleh pihak-pihak kepada kontrak atau perkiraan apabila dibuat;

- (b) tiada pengehadan atau pengecualian atau tanggung rugi sedemikian boleh mempunyai kesan membenarkan mana-mana pihak ketiga yang bukan merupakan pihak kepada mana-mana kontrak atau perkiraan untuk penciptaan agensi itu mendapat manfaat atau memperoleh hak daripada mana-mana peruntukan dalam mana-mana kontrak atau perkiraan sedemikian yang mengecualikan atau mengehadkan liabiliti atau tuntutan atau yang boleh memberikan indemniti;
- (c) tiada pengehadan atau pengecualian atau tanggung rugi sedemikian boleh mempunyai kesan menjadikan hak atau remedi atau penguatkuasaannya tertakluk kepada syarat yang ketat atau membebaskan;
- (d) tiada pengehadan atau pengecualian atau tanggung rugi sedemikian boleh mempunyai kesan membenarkan prinsipal diletakkan pada kerugian akibat daripada mengejar hak atau remedi sedemikian;
- (e) tiada had atau pengecualian atau tanggung rugi sedemikian boleh mempunyai kesan mengecualikan atau menyekat peraturan keterangan atau prosedur;
- (f) had atau pengecualian atau tanggung rugi yang berasingan daripada atau sekunder kepada atau selainnya berkaitan dengan had atau pengecualian atau tanggung rugi yang disebut dalam perenggan (a) hingga (e) yang dikatakan mempunyai kesan mengecualikan atau mengehadkan atau memberikan indemniti berhubung dengan mana-mana perkara yang sepatutnya dilarang oleh subseksyen sedemikian adalah dilarang.

(3) Subseksyen (1) dan (2) terpakai bagi sesuatu agensi yang diwujudkan sebelum tarikh permulaan kuat kuasa Akta ini setakat yang ia berkaitan dengan liabiliti ejen yang terakru pada atau selepas tarikh tersebut.

(4) Menteri boleh membuat peraturan-peraturan untuk—

- (a) mengecualikan mana-mana perniagaan atau profesion yang dikawal selia oleh undang-undang bertulis daripada pemakaian subseksyen (2);

- (b) menghadkan atau mengubah suai pemakaian subseksyen (2) berkenaan dengan mana-mana perniagaan atau profesion yang dikawal oleh undang-undang bertulis.

## **Umum**

6. Seseorang ejen mesti mematuhi peruntukan ini jika dia tidak mempunyai kuasa sebenar untuk sebaliknya atau selainnya dibenarkan bertindak secara berbeza di bawah peruntukan lain Akta ini—

(1) seseorang ejen mesti menjalankan penjagaan dan kemahiran yang munasabah dalam hal keadaan, dengan mengambil kira, khususnya—

(a) kepada apa-apa pengetahuan atau pengalaman khas yang dimiliki oleh ejen atau yang dipercayai oleh ejen itu; dan

(b) jika orang itu bertindak sebagai ejen dalam perjalanan perniagaan atau profesion, kepada apa-apa pengetahuan atau pengalaman khas yang munasabah untuk dijangkakan daripada seseorang yang bertindak dalam perjalanan jenis perniagaan atau profesion itu;

(2) seseorang ejen tidak boleh menggunakan kuasanya secara langsung atau tidak langsung untuk faedah ejen itu sendiri;

(3) seorang ejen mesti menerima arahan daripada prinsipalnya, jika boleh, jika keadaan sedemikian rupa sehingga seorang ejen secara munasabah dijangka akan meminta arahan kepada prinsipal;

(4) seorang ejen juga mesti mengambil apa-apa arahan lain daripada prinsipalnya;

(5) seseorang ejen, jika tiada arahan daripada prinsipal atau syaratnya, mesti mengendalikan agensi itu mengikut adat sesuatu agensi yang bersifat sedemikian di tempat di mana ejen itu mengendalikan agensi itu;

(6) seseorang ejen tidak boleh mengikat atau menyerahkan prinsipal atau dirinya untuk melaksanakan atau tidak melaksanakan budi bicara pada masa hadapan;

- (7) ejen mesti mengelakkan konflik antara kepentingan ejen dan kepentingan prinsipal;
- (8) seseorang ejen tidak boleh mewakilkan tugas dan obligasinya kepada orang lain;
- (9) jika seseorang ejen bertindak untuk lebih daripada satu prinsipal, dia mesti mempertimbangkan sama ada dia dapat melaksanakan kewajipannya dengan betul sebagai ejen untuk lebih daripada satu prinsipal;
- (10) jika seseorang ejen bertindak untuk lebih daripada satu prinsipal, dia tidak boleh memihak secara tidak adil kepada satu prinsipal atau kumpulan prinsipal sehingga merugikan yang lain;
- (11) seseorang ejen tidak boleh membuat keuntungan daripada agensi itu atau berurusan atas akaunnya sendiri dalam perniagaan agensi itu;
- (12) ejen tidak boleh mengambil apa-apa ganjaran untuk bertindak sebagai ejen, tetapi ini tidak menjejaskan hak ejen untuk dibayar balik untuk perbelanjaan dan pengeluaran sah ejen;
- (13) ejen mesti memberikan akaun yang sepatutnya kepada prinsipal apabila diminta;
- (14) Seseorang ejen mesti membayar kepada prinsipalnya semua jumlah wang yang diterima atas akaun prinsipal itu, tetapi dia boleh mengekalkan daripada jumlah wang yang diterima kerana prinsipal itu, semua wang yang kena dibayar kepadanya berkenaan dengan pendahuluan yang dibuat atau perbelanjaan yang dilakukan dengan sewajarnya olehnya dalam menjalankan perniagaan agensi itu dan apa-apa saraan yang perlu dibayar kepadanya kerana bertindak sebagai ejen;
- (15) Jika terdapat lebih daripada seorang ejen, ejen-ejen mesti bertindak sebulat suara.
- (16) seseorang ejen tidak boleh secara peribadi menguatkuasakan kontrak yang dibuat olehnya bagi pihak prinsipalnya, dan dia juga tidak terikat secara peribadi dengannya. Seseorang ejen hendaklah dianggap boleh bertindak sebaliknya dan terikat secara peribadi—
- (a) jika kontrak dibuat olehnya untuk penjualan atau pembelian barang bagi seorang saudagar yang bermastautin di luar negara;
- (b) jika dia tidak mendedahkan nama prinsipalnya; dan

(c) jika prinsipal, walaupun didedahkan, tidak boleh didakwa.

### **Pihak berkuasa sebenar**

7. (1) Seseorang ejen mempunyai kuasa sebenar—

- (a) apabila pihak berkuasa akan bertindak sehingga menjejaskan hubungan perundangan prinsipal dengan pihak ketiga; dan
- (b) ia terhasil daripada manifestasi persetujuan bahawa ejen harus mewakili atau bertindak untuk prinsipal, secara nyata atau tersirat dibuat oleh prinsipal kepada ejen.

(2) Kuasa sebenar boleh dinyatakan atau tersirat.

(3) Ejen mestilah secara munasabah memahami dan percaya daripada manifestasi prinsipal bahawa ejen itu akan mewakili atau bertindak bagi pihak prinsipal selaras dengan manifestasi tersebut.

(4) Seseorang ejen mempunyai kuasa sebenar dalam perkara berikut. Perkara ini tidak mengehadkan keadaan di mana seseorang ejen mungkin mempunyai kuasa sebenar di bawah subseksyen (1) dan (2)—

- (a) semua pihak berkuasa untuk menjalankan agensi itu mengikut termannya;
- (b) semua pihak berkuasa untuk menjalankan apa-apa perbuatan atau perkara yang bersampingan dengan perenggan (a);
- (c) semua pihak berkuasa untuk menjalankan apa-apa perbuatan atau perkara yang perlu untuk melakukan perbuatan yang dibenarkan;
- (d) jika pihak berkuasa hendak menjalankan perniagaan, semua pihak berkuasa untuk menjalankan apa-apa perbuatan atau perkara yang perlu bagi perniagaan itu atau biasanya dilakukan semasa menjalankan perniagaan itu;
- (e) semua pihak yang berkuasa, dalam keadaan kecemasan, untuk menjalankan apa-apa tindakan atau perkara bagi maksud melindungi prinsipalnya daripada kerugian atau

sebarang liabiliti<sup>172</sup> sebagaimana yang akan dilakukan oleh ejen itu, jika seseorang yang berhemat biasa, dalam hal keadaan yang serupa;

- (f) pihak berkuasa untuk mengaktifkan sifat agensi atau adat biasa perniagaan membenarkan ejen bertindak dengan cara itu. Ini mungkin termasuk, dalam keadaan sedemikian, kuasa untuk melantik orang lain untuk menjalankan tindakan yang perlu dilakukan oleh ejen dalam agensi.

(5) Seseorang ejen hanya diberi kuasa untuk menjalankan perbuatan yang sah dan prinsipal tidak bertanggungjawab kepada ejen untuk menanggung rugi ejen terhadap perbuatan yang menyalahi undang-undang. Perbuatan ini termasuk, perbuatan yang akan dilakukan oleh pihak ketiga dan sebarang janji nyata atau tersirat untuk menanggung rugi terhadap perbuatan tersebut.

(6) Seseorang prinsipal hanya terikat dengan perbuatan ejennya setakat yang perbuatan itu berada dalam kuasa ejen itu. Jika perbuatan tersebut termasuk, perbuatan yang bukan dalam kuasa ejen, prinsipal hanya terikat dengan perbuatan dalam kuasa ejen jika perbuatan dalam kuasa ejen boleh diasingkan daripada perbuatan yang bukan dalam kuasa ejen. Peruntukan subseksyen ini adalah tertakluk kepada peruntukan seksyen 9.

(7) Seseorang prinsipal hendaklah dianggap mempunyai notis tentang apa-apa maklumat yang diperolehi, diterima atau dipegang oleh ejennya dalam perjalanan perniagaan agensi itu, seperti antara prinsipal dan pihak ketiga. Ini melainkan—

- (a) kebiasaan biasa perniagaan itu atau undang-undang yang terpakai kepada agensi seumpama itu menyimpulkan atau memperuntukkan sebaliknya;
- (b) maklumat itu diperolehi, diterima atau dipegang oleh ejen sepenuhnya atau terutamanya dalam kapasiti yang berbeza;
- (c) maklumat itu ditahan oleh ejen daripada prinsipal berkaitan dengan penipuan ke atas prinsipal.

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<sup>172</sup> Atau Kehilangan/Ganti Rugi = Loss or damage

## **Kuasa Zahir<sup>173</sup>**

8. (1) Seseorang ejen atau mana-mana pihak lain mempunyai kuasa nyata apabila dia mempunyai kuasa untuk menjejaskan hubungan undang-undang prinsipal dengan pihak ketiga di mana pihak ketiga secara munasabah percaya bahawa ejen atau pelaku lain mempunyai kuasa untuk bertindak bagi pihak prinsipal dan kepercayaan itu terhasil daripada manifestasi prinsipal—

- (a) seseorang tidak perlu menjadi ejen sebenar prinsipal untuk mempunyai kuasa yang jelas;
- (b) seseorang yang tidak mempunyai kuasa sebenar boleh mempunyai kuasa ketara;
- (c) suatu ungkapan dalam Akta ini kepada kuasa seseorang, sama ada sebagai mempunyai atau tidak pihak berkuasa atau perkataan yang mempunyai kesan yang sama merujuk kepada pihak berkuasa sebenar dan bukan kepada pihak berkuasa yang ketara, jika tiada rujukan khusus kepada pihak berkuasa ketara atau melainkan konteksnya menghendaki sebaliknya.

Pihak lain merujuk kepada seseorang yang bukan ejen sebenar. Ejen apabila digunakan di tempat lain dalam seksyen ini atau untuk tujuan kuasa jelas termasuk pihak yang tersebut.

(2) Seorang ejen yang mempunyai kuasa nyata yang bertindak kononnya bagi pihak prinsipal dengan akibat undang-undang bagi prinsipal mengikat prinsipal itu, mengenai perbuatan itu dalam kuasa nyatanya, kepada pihak ketiga. Prinsipal mesti mengesahkan tindakan ejen, agar prinsipal menguatkuasakan sebarang kontrak yang timbul daripada perbuatan tersebut.

(3) Peruntukan seksyen ini tidak menghadkan operasi doktrin estoppel.

## **Hak ejen**

9. (1) Tertakluk kepada terma agensi, seseorang ejen hanya berhak mendapat bayaran untuk melaksanakan apa-apa perbuatan apabila perbuatan itu telah selesai tetapi seseorang ejen boleh

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<sup>173</sup> Kuasa nyata = apparent authority

menahan wang yang diterima olehnya atas sebab barang yang dijual walaupun semua barang yang diserahkan kepada ejen untuk jualan itu belum dijual atau jualan itu belum selesai.

(2) Seseorang ejen, yang bersalah atas salah laku dalam perniagaan agensi itu, tidak berhak mendapat apa-apa imbuhan berkenaan dengan bahagian perniagaan itu, subjek salah laku itu. Walaupun terdapat peruntukan ini, mahkamah mengikut budi bicaranya boleh membenarkan ejen sebahagian daripada imbuhan jika ia adalah adil dan munasabah untuk berbuat demikian dalam keadaan tersebut.

(3) Tertakluk kepada terma agensi, seseorang ejen berhak untuk mengekalkan harta (sama ada boleh alih atau tak alih) prinsipal yang dipegang oleh ejen, sehingga jumlah yang perlu dibayar untuk komisen, pembayaran dan perkhidmatan berkenaan dengan agensi itu telah dibayar atau diakaunkan kepada ejen. Jumlah yang perlu dibayar adalah munasabah jika tidak disediakan secara khusus dalam syarat agensi.

(4) Seorang prinsipal—

- (a) hendaklah menanggung rugi ejennya terhadap akibat perbuatan ejen yang dilakukan secara sah dan suci hati, dalam kuasanya, walaupun memudaratkan hak pihak ketiga;
- (b) bertanggungjawab untuk membayar pampasan kepada ejennya di mana prinsipal telah berjanji kepada ejen untuk melaksanakan tindakan untuk memudahkan pelaksanaan tugas dan kewajipan ejen dan ejen mengalami kecederaan kerana kekurangan penjagaan dan kemahiran prinsipal.

Divisyen 3

Sub-ejen

## **Peraturan am**

**10.** Perkara berikut terpakai—

(1) sub-ejen yang dilantik dengan sewajarnya oleh ejen, mengikat prinsipal untuk perbuatannya dengan pihak ketiga seolah-olah dilantik secara langsung oleh prinsipal. Ini tidak bermakna sub-ejen sebenarnya dilantik oleh prinsipal.

(2) seorang ejen bertanggungjawab kepada prinsipal untuk perbuatan sub-ejen itu.

(3) sub-ejen itu tidak boleh bertindak di luar kuasa ejen itu.

(4) kuasa sub-ejen mungkin terhad, secara nyata atau tersirat oleh ejen. Tanggungjawab ejen terhadap prinsipalnya tidak terjejas oleh sebarang had tersebut.

(5) terma pelantikan sub-ejen oleh ejen tidak mengikat prinsipal.

(6) sub-ejen bertanggungjawab kepada ejen atas perbuatannya tetapi juga akan bertanggungjawab kepada prinsipal untuk ketidakjujuran sub-ejen, salah laku yang disengajakan atau kecuaiian teruk, sebagai tambahan kepada apa-apa tanggungjawab ejen terhadap prinsipalnya.

(7) Ejen yang melantik sub-ejen tanpa kuasa adalah bertanggungjawab bagi semua tindakan sub-ejen seolah-olah ejen itu adalah prinsipal dan sub-ejen, ejen. Prinsipal tidak bertanggungjawab ke atas tindakan sub-ejen dalam kes sedemikian dan sub-ejen bukan ejennya.

(8) kuasa sub-ejen ditamatkan apabila kuasa ejen itu ditamatkan. Peruntukan seksyen 13 terpakai sebagai antara ejen dan sub-ejen.

(9) Seseorang ejen tidak boleh melantik sub-ejen jika undang-undang tidak membenarkan ejen itu membuat pelantikan sedemikian.

### **Ejen dan bukan sub-ejen**

**11.** Jika ejen diberi kuasa untuk melantik orang lain untuk bertindak bagi prinsipal dalam perniagaan agensi, orang yang dilantik itu adalah ejen prinsipal dan bukan sub-ejen. Orang itu akan mempunyai kuasa yang sama untuk bertindak bagi prinsipal sebagaimana ejen yang diberi kuasa untuk menamakan orang itu melainkan sebaliknya dalam agensi yang diwujudkan antara

prinsipal dan ejen yang diberi kuasa untuk menamakan. Sebarang larangan atau had dalam Akta ini yang terpakai kepada ejen yang diberi kuasa untuk menamakan juga terpakai kepada orang itu.

#### Divisyen 4

#### Ratifikasi dan penamatan

##### **Peraturan mengenai ratifikasi**

12. (1) Seseorang prinsipal boleh mengesahkan tindakan ejen jika ejen bertindak di luar kuasanya termasuk, jika ejen bertindak tanpa kuasa tetapi dengan kuasa yang nyata. Pengesahan bermakna bahawa ejen akan dianggap telah bertindak dalam kuasanya. Jika ejen telah bertindak tanpa kuasa tetapi dengan kuasa yang jelas, ejen itu akan, selepas ratifikasi, dianggap telah bertindak dengan kuasa sebenar. Seseorang prinsipal tidak bertanggungjawab untuk mengesahkan, tertakluk kepada peruntukan subseksyen 8(2). Seseorang prinsipal boleh melalui kelakuannya, mengesahkan tindakan seorang ejen.

(2) Ratifikasi tidak mungkin jika hak pihak ketiga akan terjejas.

(3) Pengesahan yang sah oleh prinsipal mestilah dengan pengetahuan penuhnya tentang semua fakta dan keadaan material melainkan prinsipal mempunyai pengetahuan yang mencukupi bahawa dia berbuat demikian tanpa pengetahuan penuh tentang fakta dan keadaan material.

(4) Ratifikasi ialah pengesahan keseluruhan transaksi yang berkaitan dengan akta yang disahkan itu. Tiada pengesahan sebahagian daripada transaksi dibenarkan.

##### **Peraturan mengenai penamatan**

13. (1) Tertakluk kepada subseksyen 4(8), sesuatu agensi menamatkan—

- (a) apabila prinsipal menamatkan agensi itu, yang mungkin dilakukan oleh prinsipal;
- (b) apabila ejen itu menamatkan agensi itu, yang mungkin melalui kelakuan ejen itu;
- (c) apabila—
  - (i) prinsipal meninggal dunia;

- (ii) prinsipal bankrap atau jika orang sah, tertakluk kepada penggulungan atau pembubaran; atau
- (iii) prinsipal kehilangan keupayaan undang-undangnya;
- (d) apabila—
  - (i) ejen itu mati; atau
  - (ii) ejen itu bankrap atau jika orang yang sah, tertakluk kepada penggulungan atau pembubaran;
- (e) apabila perkara agensi itu tamat.

(2) Perkara berikut terpakai bagi penamatan sesuatu agensi, tertakluk kepada apa-apa terma atau perkiraan lain yang bertentangan—

- (a) seorang prinsipal—
  - (i) tidak boleh menamatkan kuasa ejen apabila ejen itu mempunyai kepentingan dalam mana-mana harta (sama ada alih atau tak alih) yang menjadi perkara agensi;
  - (ii) tidak boleh menamatkan kuasa ejen untuk perbuatan dan kewajipan yang telah dilaksanakan atau ditanggung di bawah agensi itu; atau
  - (iii) tertakluk kepada subseksyen (2)(a)(i), boleh menamatkan kuasa ejen sebelum ejen itu menggunakan kuasanya untuk mengikat prinsipal.

(3) Pampasan perlu dibayar oleh prinsipal atau ejen yang menamatkan agensi kepada pihak yang lain jika terma memperuntukkan bahawa agensi itu adalah untuk suatu tempoh masa dan agensi itu ditamatkan sebelum tempoh itu tamat, melainkan mengikut terma atau perkiraan lain agensi itu atau jika terdapat sebab yang mencukupi.

(4) Seseorang prinsipal atau ejen yang menamatkan agensi itu mesti memberi notis yang munasabah, dengan mengambil kira fakta dan keadaan, tertakluk kepada terma atau perkiraan lain agensi itu. Ganti rugi akan dibayar oleh prinsipal atau ejen yang menamatkan agensi kepada pihak lain.

(5) Ejen mesti, bagi pihak wakil prinsipal, mengambil semua langkah yang munasabah untuk melindungi dan memelihara kepentingan prinsipal yang diamanahkan dalam ejen itu, di mana

sesuatu agensi ditamatkan kerana kematian, ketidakupayaan atau kebangkrapan prinsipal atau jika orang undang-undang, kerana penggulungan atau pembubarannya.

(6) Tertakluk kepada subseksyen 4(8), seseorang ejen, berkenaan dengan dirinya, akan terus mempunyai kuasa untuk bertindak sehingga dia menerima notis penamatan kuasanya atau penamatan itu diketahui olehnya. Pihak ketiga berhak untuk menganggap bahawa kuasa ejen belum ditamatkan sehingga penamatan tersebut diketahui olehnya.

## Divisyen 5

### Pihak ketiga

#### **Kesan agensi**

**14.** (1) Sesuatu kontrak yang dibuat melalui ejen, dan obligasi yang timbul daripada perbuatan ejen, boleh dikuatkuasakan dengan cara yang sama dan membawa akibat undang-undang yang sama seolah-olah kontrak yang dibuat dan perbuatan yang dijalankan adalah oleh prinsipal secara peribadi.

(2) (a) Jika seorang ejen berkontrak dengan seseorang yang tidak mengetahui dan tidak mempunyai sebab untuk mengesyaki bahawa dia adalah seorang ejen, prinsipal ejen itu boleh menghendaki pelaksanaan kontrak itu, tetapi dalam keadaan sedemikian, pihak berkontrak yang satu lagi itu akan mempunyai hak yang sama seperti terhadap prinsipal, sebagaimana yang dia akan miliki terhadap ejen itu.

(b) Pihak berkontrak yang lain, boleh menolak untuk melaksanakan kontrak jika dia mengetahui identiti prinsipal sebelum kontrak itu selesai dan dia boleh membuktikan bahawa dia tidak akan memasuki kontrak jika dia mengetahui identiti prinsipal.

(3) Jika suatu pihak berkontrak dengan pihak lain, tidak mengetahui atau tidak mempunyai alasan yang munasabah untuk mengesyaki bahawa pihak yang satu lagi adalah ejen, prinsipal, jika dia menghendaki pelaksanaan kontrak, hanya boleh berbuat demikian tertakluk kepada hak dan kewajiban ejen dan pihak yang satu lagi kepada kontrak itu.

(4) Seseorang yang berurusan dengan ejen yang bertanggungjawab secara peribadi boleh mempertanggungjawabkan ejen atau prinsipalnya atau kedua-duanya.

(5) Seseorang yang membuat kontrak dengan ejen tidak boleh—

(a) memegang ejen bertanggungjawab jika dia mendorong ejen bertindak atas kepercayaan bahawa hanya prinsipalnya akan bertanggungjawab;

(b) memegang prinsipal bertanggungjawab jika dia mendorong prinsipal bertindak atas kepercayaan bahawa hanya ejennya akan bertanggungjawab.

(6) Seseorang yang mewakili dirinya sebagai ejen yang diberi kuasa kepada orang lain, apabila tidak dibenarkan, dan mendorong pihak ketiga untuk berurusan dengannya sebagai ejen, bertanggungjawab untuk membayar pampasan kepada pihak lain bagi apa-apa kerugian atau ganti rugi yang ditanggung dalam urusan itu, melainkan jika orang yang dikatakan sebagai prinsipal itu mengesahkan tindakannya sebagai ejen.

(7) Seseorang, sebenarnya bertindak atas akaunnya sendiri, tetapi yang bertujuan untuk membuat kontrak sebagai ejen tidak berhak untuk menghendaki pelaksanaan kontrak itu.

(8) Seseorang prinsipal terikat kepada pihak ketiga melalui perbuatan atau kewajipan ejennya yang bertindak tanpa kebenaran prinsipal, jika prinsipal telah melalui tindakannya mendorong pihak ketiga untuk mempercayai bahawa ejennya bertindak dalam kuasanya.

(9) Salah nyataan yang dibuat, atau penipuan yang dilakukan oleh ejen yang bertindak dalam perjalanan (tetapi tidak sebaliknya) perniagaan agensi untuk prinsipalnya, mempunyai kesan yang sama ke atas perjanjian yang dibuat oleh ejen sedemikian seolah-olah prinsipal telah membuat atau melakukan salah nyataan atau penipuan tersebut.

### BAHAGIAN III

#### SURAT KUASA PERWAKILAN

##### **Pelaksanaan dan Penyaksian**

15. (1) Suatu surat kuasa wakil hendaklah dilaksanakan oleh pemberi kuasa tersebut.

(2) Suatu surat kuasa wakil tidak perlu dimeterai atau dibuat sebagai satu surat cara dan boleh dilaksanakan secara bertandatangan sahaja.

(3) Pelaksanaan surat kuasa wakil oleh pemberi kuasa di Malaysia hendaklah disaksikan oleh—

- (a) seorang peguam bela dan peguam cara;
- (b) seorang notaris awam di Malaysia;
- (c) seorang pesuruhjaya sumpah;
- (d) seorang pegawai daerah; atau
- (e) seorang majistret.

(4) Pelaksanaan surat kuasa wakil oleh pemberi kuasa di luar Malaysia untuk digunakan di Malaysia atau berhubung apa-apa perkara yang ditadbir oleh undang-undang Malaysia hendaklah disaksikan oleh—

- (a) seseorang yang dilesenkan untuk mengamal undang-undang di tempat surat kuasa itu ditandatangani;
- (b) notaris awam yang dilantik untuk menjalankan fungsi notaris awam di tempat surat kuasa itu ditandatangani;
- (c) pegawai konsular Malaysia; atau
- (d) jika ditandatangani di Kerajaan Arab Saudi, oleh Pesuruhjaya Haji Malaysia.

(5) Orang yang menyaksikan pelaksanaan surat kuasa wakil hendaklah—

- (a) menyatakan kapasiti dirinya ketika menyaksikan;
- (b) mengesahkan bahawa orang yang menandatangani surat kuasa wakil ialah pemberi kuasa;
- (c) mengesahkan bahawa surat kuasa wakil itu ditandatangani secara sukarela oleh pemberi kuasa; dan
- (d) mengesahkan bahawa kandungan surat kuasa wakil itu telah diterangkan kepada pemberi kuasa oleh orang yang menyaksikan.

(6) Penerima kuasa boleh, jika difikirkan sesuai, melaksanakan apa-apa instrumen atau melakukan apa-apa perbuatan lain atas namanya sendiri melalui kuasa yang diberikan oleh pemberi kuasa.

(7) Setiap instrumen atau perbuatan yang dilakukan oleh penerima kuasa atas namanya sendiri menurut subseksyen (6) hendaklah mempunyai kesan yang sama seolah-olah ia dilakukan oleh penerima kuasa atas nama pemberi kuasa.

(8) Untuk mengelakkan keraguan, surat kuasa wakil boleh dilaksanakan dan disaksikan menurut peruntukan Divisyen 1 Bahagian IV.

### **Keperluan undang-undang lain dipelihara**

**16.** Peruntukan Bahagian ini—

(1) adalah tanpa menjejaskan apa-apa keperluan dalam mana-mana undang-undang bertulis lain mengenai penyaksian atau pendaftaran instrumen yang mewujudkan surat kuasa wakil; dan

(2) setakat tidak bercanggah dengan peruntukan ini, tidak menjejaskan kaedah berhubung pelaksanaan instrumen oleh pertubuhan perbadanan.

### **Pembuktian kuasa wakil**

**17.** (1) Sesuatu surat kuasa wakil dan kandungannya boleh dibuktikan melalui suatu salinan yang—

(a) merupakan perturunan semula (reproduction) dokumen asal melalui alat fotografik atau apa-apa alat lain secara faksimili atau elektronik; dan

(b) mengandungi sijil yang ditandatangani oleh pemberi kuasa atau orang yang menyaksikan surat kuasa itu menurut seksyen 15—

(i) jika asal hanya satu muka surat, sijil pada akhir muka surat yang menyatakan bahawa salinan itu adalah salinan benar dan lengkap; dan

- (ii) jika asal terdiri daripada dua muka surat atau lebih, suatu sijil pada akhir setiap muka surat salinan tersebut menyatakan bahawa ia adalah salinan benar dan lengkap bagi muka surat asal yang sepadan.

(2) Jika salinan yang mematuhi subseksyen (1) telah dibuat, kandungan surat kuasa wakil juga boleh dibuktikan melalui salinan kepada salinan tersebut, jika salinan kedua itu sendiri mematuhi subseksyen (1).

### **Ketakbolehbalkan kuasa wakil**

**18.** Suatu surat kuasa wakil adalah tidak boleh dibatalkan jika—

- (a) ia secara nyata menyatakan bahawa ia tidak boleh dibatalkan; dan
- (b) ia diberikan untuk menjamin—
  - (i) suatu kepentingan undang-undang atau kepentingan proprietari penerima kuasa; atau
  - (ii) suatu obligasi yang terhutang kepada penerima kuasa.

(2) Surat kuasa wakil boleh memperuntukkan bahawa ia tidak boleh dibatalkan bagi suatu tempoh masa tertentu sahaja.

(3) Selagi surat kuasa wakil kekal tidak boleh dibatalkan mengikut terma-terma tersebut atau selagi kepentingan atau obligasi itu wujud, surat kuasa wakil tidak boleh dibatalkan—

- (a) oleh pemberi kuasa tanpa persetujuan penerima kuasa;
- (b) jika pemberi kuasa seorang individu, melalui kematian, ketidakupayaan atau kebangkrapannya; atau
- (c) jika pemberi kuasa suatu badan korporat, melalui penggulungan atau pembubarannya.

(4) Jika surat kuasa wakil berkaitan dengan kepentingan proprietari, ia boleh dilaksanakan oleh orang yang memegang kepentingan itu dan penggantinya dalam hak milik, kecuali diperuntukkan sebaliknya.

## **Perlindungan penerima kuasa dan pihak ketiga apabila kuasa wakil dibatalkan**

**19.** (1) Penerima kuasa yang bertindak menurut surat kuasa wakil selepas ia dibatalkan tidak bertanggung jika penerima kuasa tidak mengetahui pembatalan itu pada masa tindakan tersebut dilakukan.

(2) Suatu transaksi adalah sah seolah-olah surat kuasa itu masih berkuat kuasa jika pihak yang berurusan dengan penerima kuasa tidak menyedari bahawa surat kuasa itu telah dibatalkan.

(3) Jika surat kuasa itu dinyatakan tidak boleh dibatalkan dan diberikan sebagai jaminan, mana-mana orang yang berurusan dengan penerima kuasa berhak menganggap bahawa surat kuasa itu tidak boleh dibatalkan oleh pemberi kuasa kecuali jika diketahui bahawa pembatalan itu dibuat dengan persetujuan penerima kuasa.

(4) Tanpa menjejaskan subseksyen (3), seseorang dianggap mengetahui pembatalan jika dia tahu mengenai sesuatu peristiwa yang mempunyai kesan membatalkan surat kuasa (cth: kematian atau ketidakupayaan pemberi kuasa).

(5) Surat kuasa wakil dibatalkan dalam apa-apa keadaan yang menyebabkan agensi terhenti menurut seksyen 13.

(6) Seksyen ini terpakai tanpa mengira bila surat kuasa itu dicipta, tetapi hanya bagi tindakan selepas permulaan Akta ini.

## **Ketidakpakaian<sup>174</sup> seksyen 5 Akta Undang-Undang Sipil 1956**

**20.** Peruntukan seksyen 5 Akta Undang-Undang Sipil 1956 tidak terpakai kepada kuasa-kuasa wakil, jika peruntukan tersebut pernah terpakai kepada mana-mana bahagian Malaysia sebelum permulaan Akta ini.

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<sup>174</sup> *ketidakpakaian*

## **Deposit kuasa wakil**

**21.** (1) Menteri boleh membuat peraturan—

- (a) bagi mendeposit kuasa-kuasa wakil dengan mana-mana orang yang ditetapkan oleh Menteri;
- (b) berhubung cara kuasa-kuasa wakil itu didepositkan, disimpan, dicari dan diakses;
- (c) bagi melaksanakan apa-apa perkara lain yang perlu atau suai manfaat berkaitan dengannya.

(2) Deposit kuasa wakil—

- (a) tidaklah mandatori;
- (b) boleh dibuat berkenaan kuasa-kuasa wakil yang diwujudkan sebelum atau selepas permulaan Akta ini, kecuali kuasa-kuasa wakil yang telah didepositkan di bawah Akta Kuasa Wakil 1949;
- (c) bukanlah bukti tentang kesahihan, kebenaran atau kuatkuasa sesuatu kuasa wakil.

(3) Untuk maksud seksyen ini, kuasa-kuasa wakil termasuk apa-apa pembatalan, perubahan atau dokumen lain yang berkaitan dengan kuasa wakil.

## **Bahagian IV**

### **ELEKTRONIK DAN AGEN ELEKTRONIK**

#### **Divisyen 1**

#### **Pengiktirafan Kaedah Elektronik dalam Agensi**

## **Dokumen-dokumen Agensi**

**22.** (1) Perkara-perkara berikut tidak dianggap tidak sah, tidak boleh dikuatkuasakan, tidak boleh diterima sebagai bukti secara sah, atau tidak mempunyai efek undang-undang semata-mata kerana ia atau mana-mana daripadanya berada dalam bentuk elektronik atau dilaksanakan atau dipengaruhi secara elektrik—

- (a) apa-apa kuasa wakil, kenyataan, sijil, persetujuan, arahan, arahan, dan apa-apa dokumen atau perkara berkaitan agensi atau mana-mana perkara yang dipertimbangkan oleh atau mungkin timbul di bawah Akta ini;
- (b) apa-apa tandatangan, meterai, pemerakuan atau pengesahan oleh notari yang berkaitan dengan sub-sekyen (1)(a);
- (c) apa-apa akuan berkanun atau kenyataan lain dibuat di bawah sumpah berkaitan dengan sub-sekyen(1)(a);
- (d) apa-apa maklumat yang dirujuk berkaitan dengan sub-sekyen (1), tetapi tidak terkandung dalam maklumat lain dalam bentuk elektronik.

(2) Jika undang-undang bertulis atau undang-undang umum mensyaratkan berkenaan dengan apa-apa perkara berkaitan dengan Akta ini—

- (a) bahawa apa-apa maklumat atau rekod, notis, instrumen atau dokumen apa-apa jenis termasuk mana-mana yang terkandung dalam sub-sekyen (1), hendaklah dalam bentuk bertulis, maka dokumen dalam bentuk elektronik memenuhi keperluan undang-undang itu;
- (b) tandatangan, meterai, pemerakuan atau pengesahan oleh notari atau pengesahan oleh notari secara elektronik memenuhi keperluan undang-undang itu;
- (c) seseorang menyimpan dokumen yang berbentuk kertas, (barang)<sup>175</sup> atau bahan lain, penyimpanan salinan dokumen dalam bentuk elektronik memenuhi keperluan undang-undang itu;
- (d) seseorang menyimpan dokumen yang berada dalam bentuk elektronik, penyimpanan salinan dokumen memenuhi keperluan undang-undang itu;
- (e) kenyataan atau pengisytiharan untuk dibuat di bawah sumpah atau akuan berkanun, dokumen yang disumpah atau akuan berkanun dalam bentuk elektronik memenuhi keperluan undang-undang itu.

(3) Peruntukan seksyen 17 juga mesti dipatuhi walaupun peruntukan subseksyen (2).

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<sup>175</sup> Closest word to the term 'article', otherwise can delete and just refer to “..atau bahan...”.

(4) Jika sesuatu undang-undang bertulis atau undang-undang umum mewajibkan atau membenarkan berkenaan apa-apa perkara berkaitan dengan Akta ini, apa-apa maklumat atau dokumen yang hendak diberi, dipaparkan, diserahkan, dihantar atau disampaikan (apa sahaja ungkapan yang digunakan untuk menggambarkan tindakan itu), penyampaian maklumat, dokumen atau salinan kepada bentuk elektronik atau melalui cara elektronik memenuhi kehendak undang-undang itu. Keperluan itu boleh berupa kewajipan atau akibat yang dikenakan oleh undang-undang jika keperluan tidak dipenuhi.

(5) Untuk mengelakkan keraguan, seseorang boleh menyaksikan atau memperaku penandatanganan dokumen secara nyatama melalui cara elektronik dan pengisytiharan bersumpah atau pengisytiharan untuk dibuat di bawah sumpah boleh dibuat di hadapan seseorang yang hadir secara elektronik.

### **Tiada kewajipan menggunakan bentuk atau cara elektronik**

23. Seksyen 22 tidak memaksa seseorang untuk melakukan atau menerima apa-apa dalam bentuk elektronik atau melalui cara elektronik.

## **Divisyen 2**

### **Peruntukan mengenai ejen elektronik**

#### **Tafsiran Divisyen**

24. (1) Peruntukan seksyen ini terpakai walaupun—

- (a) mana-mana peruntukan Bahagian II yang sebaliknya;
- (b) ejen elektronik yang tidak mempunyai personaliti undang-undang.

(2) Peruntukan Divisyen ini hendaklah terpakai, tetapi tanpa menjejaskan peruntukan seksyen 25 dan 26(1) atau melainkan konteks memerlukan sebaliknya—

- (a) kepada mana-mana perkara yang melibatkan ejen elektronik yang cacat atau didakwa cacat atau produk ejen elektronik yang telah digunakan, dioperasikan, dihasil atau diimport dalam atau ke dalam Malaysia;

- (b) di mana ejen elektronik telah bertindak atau didakwa bertindak bagi pihak mana-mana orang di Malaysia atau yang biasanya menetap di Malaysia atau mempunyai tempat kediaman di Malaysia atau didakwa demikian; atau
- (c) di mana seseorang yang berurusan dengan ejen elektronik itu berada di Malaysia atau biasanya menetap di Malaysia atau mempunyai tempat kediaman di Malaysia;
- (d) di mana terma-terma mana-mana kontrak yang mengawal guna atau operasi ejen elektronik itu di bawah undang-undang Malaysia;
- (e) di mana terma-terma mana-mana kontrak yang mengawal guna atau operasi ejen elektronik itu berada di bawah undang-undang selain undang-undang Malaysia tetapi penggunaan atau operasi ejen elektronik itu melibatkan penggunaan atau operasi di Malaysia atau ada hubung kait rapat dengan Malaysia; atau
- (f) penggunaan atau operasi ejen elektronik itu memberi kesan kepada orang-orang di Malaysia.

Pelaksanaan peruntukan ini tidak menghalang seseorang daripada menuntut ganti rugi dan pampasan serta remedi lain di bawah mana-mana undang-undang bertulis lain atau hukum umum di bawah undang-undang negara lain termasuk bagi perkara atau tuntutan yang tidak ditangani oleh peruntukan Divisyen ini. Kontrak dalam subseksyen ini (2) termasuk mana-mana kontrak sekunder atau berkaitan serta apa sahaja instrumen atau susunan (bertulis, lisan atau sebaliknya) berkaitan kontrak.

(3) Dalam Divisyen ini, melainkan konteks memerlukan sebaliknya—

“wakil bertauliah<sup>176</sup>” bermaksud mana-mana orang sebenar atau badan berkanun<sup>177</sup> yang ditubuhkan di dalam Malaysia yang telah menerima mandat bertulis daripada pengeluar untuk bertindak bagi pihak pengeluar dalam perkara-perkara tertentu;

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<sup>176</sup> Authorised Representative: Atau “wakil diberikuasa”.

<sup>177</sup> Legal Person: Atau “orang di sisi undang-undang”

“komponen” bermaksud apa-apa barang, sama ada berwujud atau tidak berwujud, bahan mentah atau perkhidmatan berkaitan, yang digabungkan ke dalam, atau berhubung antara satu sama lain dengan, ejen elektronik;

“data” bermaksud sebarang representasi digital bagi tindakan, fakta atau maklumat dan sebarang penyusunan tindakan, fakta atau maklumat tersebut, termasuk dalam bentuk rakaman suara, visual atau audiovisual;

“fail pembuatan digital” bermaksud versi digital bagi, atau templat digital untuk, barangan mudah alih yang memuatkan maklumat berfungsi yang diperlukan untuk menghasilkan item berwujud dengan membolehkan kawalan automatik mesin atau alat;

“pengedar” bermaksud mana-mana orang sebenar atau badan berkanun dalam rantaian bekalan yang menyediakan produk ejen elektronik di pasaran, selain pengeluar atau pengimport produk ejen elektronik itu.

“pelaku ekonomi” bermaksud pengeluar produk ejen elektronik atau komponen, penyedia perkhidmatan berkaitan, wakil berkuasa, pengimport, penyedia perkhidmatan atau pengedar;

“produk ejen elektronik” bermaksud bagi ejen elektronik, semua barangan alih (*movables*), walaupun digabungkan ke dalam alatan alih lain atau tetap; termasuk juga elektrik, fail pembuatan digital, bahan mentah dan perisian;

“pengimport” bermaksud mana-mana orang sebenar atau badan berkanun yang meletakkan produk ejen elektronik daripada negara ketiga di pasaran Malaysia;

“pengeluar” bermaksud mana-mana orang sebenar atau badan berkanun yang—

- (a) membangunkan, menghasilkan atau memproduksi produk ejen elektronik;
- (b) memiliki reka bentuk atau produk yang direka bentuk atau dihasilkan, atau yang menampilkan nama, tanda dagangan atau ciri pembezaan lain pada produk itu, menampilkan diri sebagai pengeluar;
- (c) membangunkan, menghasilkan atau memproduksi produk ejen elektronik untuk kegunaan sendiri;

“kawalan pengeluaran” bermaksud bahawa—

- (a) pengeluaran produk ejen elektronik melaksanakan atau, berkenaan tindakan pihak ketiga, meluluskan atau memberi persetujuan kepada—
  - (i) penyepaduan, berhubung antara satu sama lain atau bekalan komponen, termasuk kemas kini atau naik taraf perisian; atau
  - (ii) pengubahsuaian ejen elektronik, termasuk pengubahsuaian ketara;
- (b) pengeluaran produk ejen elektronik mempunyai keupayaan untuk membekalkan kemas kini atau naik taraf perisian, sama ada sendiri atau melalui pihak ketiga;

“disediakan di pasaran” bermaksud apa-apa bekalan produk ejen elektronik untuk pengedaran, penggunaan atau penggunaan di pasaran Malaysia dalam aktiviti komersial, sama ada sebagai bayaran atau percuma;

“penawaran di pasaran” bermaksud penyediaan pertama produk ejen elektronik di pasaran Malaysia;

“digunakan dalam perkhidmatan” bermaksud penggunaan pertama produk ejen elektronik di Malaysia dalam aktiviti komersial, sama ada sebagai bayaran atau percuma, dalam keadaan produk tersebut belum ditempatkan di pasaran sebelum penggunaan pertamanya.

“perkhidmatan berkaitan” ertinya perkhidmatan digital yang disepadukan ke dalam, atau saling berkaitan dengan, sesuatu produk dengan cara yang ketiadaannya akan menghalang produk daripada melaksanakan satu atau lebih fungsinya;

“penyedia perkhidmatan” ertinya mana-mana orang sebenar atau seseorang di sisi undang-undang yang menawarkan, semasa menjalankan aktiviti komersial, sekurang-kurangnya dua daripada perkhidmatan berikut: pergudangan, pembungkusan, pengalamatan dan penghantaran produk ejen elektronik, tanpa memiliki pemilikan produk ejen elektronik itu, tidak termasuk perkhidmatan pos, perkhidmatan penghantaran bungkusan dan apa-apa perkhidmatan pos atau perkhidmatan pengangkutan barang;

“pengubahsuaian besar<sup>178</sup>” ertinya pengubahsuaian produk ejen elektronik selepas ia diletakkan di pasaran atau dimasukkan ke dalam perkhidmatan—

- (a) yang dianggap penting di bawah mana-mana undang-undang bertulis yang berkaitan tentang keselamatan produk; atau
- (b) jika mana-mana undang-undang bertulis yang berkaitan tentang keselamatan produk tidak menetapkan had ambang pada perkara yang akan dianggap sebagai pengubahsuaian yang besar, bahawa—
  - (i) menukar prestasi asal, tujuan atau jenis produk ejen elektronik, tanpa perubahan itu telah diramalkan dalam penilaian risiko awal pengilang; dan
  - (ii) mengubah sifat bahaya, mewujudkan bahaya baharu atau meningkatkan tahap risiko.

“rahsia perdagangan” ertinya maklumat yang memenuhi semua keperluan berikut—

- (a) ia adalah rahsia dalam erti kata bahawa ia bukan, sebagai sebuah badan atau dalam konfigurasi dan pemasangan tepat komponennya, secara amnya diketahui di kalangan atau mudah diakses oleh orang dalam kalangan yang biasanya berurusan dengan jenis maklumat yang dipersoalkan;
- (b) ia mempunyai nilai komersial kerana ia adalah rahsia;
- (c) ia telah tertakluk kepada langkah yang munasabah di dalam keadaan yang tersebut, oleh orang yang mengawal maklumat itu secara sah, untuk merahsiakannya.

### **Pengiktirafan ejen elektronik**

25. (1) Sesuatu kontrak atau mana-mana peruntukannya tidak tak sah,<sup>179</sup> tidak boleh dikuatkuasakan, tidak boleh diterima, atau tanpa kesan undang-undang semata-mata kerana pembuatan, pembentukan, penciptaan, penghantaran atau pelaksanaannya melibatkan tindakan atau penggunaan satu atau lebih ejen elektronik.

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<sup>178</sup> Substantial modification: or pengubahsuaian teguh (CLJ)

<sup>179</sup> Tidak tidak sah/tidak tak sah = Is not invalid.

(2) Tindakan melaksanakan, menyempurnakan atau menamatkan sesuatu kontrak tidak sah, tidak dapat dikuatkuasakan, tidak boleh diterima, atau tidak mempunyai kesan undang-undang semata-mata kerana ia melibatkan tindakan satu atau lebih ejen;

(3) Kontrak boleh dibuat, dibentuk atau diwujudkan melalui interaksi ejen-ejen elektronik, yang bertindak bagi pihak para pihak, walaupun tiada manusia warganegara yang sedar atau telah meneliti tindakan ejen-elemen tersebut atau syarat-syarat yang terhasil.

(4) Kontrak boleh dibuat, dibentuk atau diwujudkan melalui interaksi ejen elektronik, bertindak bagi pihak satu pihak, dan seorang manusia (bertindak untuk dirinya sendiri atau orang lain) tanpa mengira sama ada setiap pihak telah meneliti atau sedar tentang maklumat relevan, tindakan ejen elektronik, atau syarat-syarat yang terhasil.

(5) Satu atau lebih ejen elektronik boleh bertindak bagi pihak satu atau lebih pihak dalam urusan yang sama.

(6) Di mana ejen elektronik bertindak bagi pihak seseorang dalam apa-apa perkara yang boleh dilakukan oleh seseorang sebagai ejen, termasuk untuk tujuan membuat, membentuk atau mewujudkan kontrak, ejen elektronik diandaikan, kecuali dibuktikan sebaliknya, bertindak sebagai ejen bagi orang berkenaan dan dalam hal membuat, membentuk atau mewujudkan kontrak, orang berkenaan dimaksudkan berhasrat untuk mewujudkan kontrak yang mengikat secara sah. Di mana ejen elektronik bertindak akibat atau atas arahan atau tindakan ejen-elemen lain, ejen-elemen tersebut diandaikan, kecuali dibuktikan sebaliknya, bertindak sebagai ejen bagi orang untuk mana mana ejen lain bertindak bagi pihaknya.

### **Tanggungjawab dan liabiliti untuk ejen elektronik**

**26.** (1) Tertakluk kepada peruntukan subseksyen-subseksyen dalam bahagian ini selepas dan subseksyen 25(6), ejen elektronik yang bertindak bagi pihak seseorang dalam perkara seperti yang telah dinyatakan dalam subseksyen 25(6) hendaklah diperlakukan sebagai ejen bagi orang itu dan orang itu hendaklah diperlakukan sebagai prinsipal dengan prinsipal bertanggungjawab terhadap tindakan ejen-nya mengikut peruntukan Bahagian II walaupun ejen elektronik tidak semestinya dalam undang-undang boleh bertindak sebagai ejen.

(2) Peruntukan subseksyen (1) dipinda atau diganti apabila ejen elektronik cacat berkaitan dengan tindakan-tindakannya termasuk dalam membuat, membentuk atau mewujudkan kontrak atau perkara lain yang telah ditugaskan kepada ejen elektronik. Ejen elektronik adalah cacat jika produk ejen elektronik itu cacat dalam erti bahawa ejen elektronik tidak beroperasi atau tidak berfungsi atau tidak menyediakan keselamatan seperti mana seseorang berhak secara munasabah menjangkakan produk ejen elektronik jenis itu. Semua keadaan hendaklah dipertimbangkan dalam menilai sama ada ejen elektronik itu cacat atau tidak, termasuk—

- (a) penyampaian dan ciri-ciri produk ejen elektronik, termasuk pelabelannya, reka bentuk, ciri teknikal, komposisi dan pembungkusan serta arahan untuk pemasangan, pemasangan susun atur, penggunaan dan penyelenggaraan;
- (b) penggunaan yang boleh dijangkakan secara munasabah bagi produk ejen elektronik;
- (c) kesan produk ejen elektronik ke atas sebarang keupayaan untuk terus mempelajari atau memperoleh ciri baharu selepas ia diletakkan di pasaran atau dimasukkan ke dalam perkhidmatan;
- (d) kesan yang munasabah boleh diramalkan pada produk ejen elektronik pada produk lain yang boleh dijangka digunakan bersama-sama dengan produk ejen elektronik, termasuk, melalui antara sambungan;
- (e) masa apabila produk ejen elektronik diletakkan di pasaran atau dimasukkan ke dalam perkhidmatan atau, di mana pengilang mengekalkan kawalan ke atas produk ejen elektronik selepas detik itu, saat produk ejen elektronik meninggalkan kawalan pengilang;
- (f) keperluan dan piawaian keselamatan dan keselamatan produk yang berkaitan, termasuk, keselamatan dan keselamatan serta keperluan dan piawaian keselamatan siber yang berkaitan;
- (g) apa-apa penarikan balik produk ejen elektronik atau kelas termasuk, produk ejen elektronik atau apa-apa campur tangan lain yang berkaitan dengan keselamatan produk oleh Kerajaan atau seseorang atau pihak berkuasa yang menjalankan kuasa di bawah mana-mana undang-undang bertulis atau menjalankan fungsi pengawalseliaan atau oleh pengendali ekonomi seperti yang dinyatakan dalam subseksyen (3);
- (h) keperluan khusus kumpulan pengguna yang bertujuan untuk kegunaan produk ejen elektronik;

- (i) jika tujuan produk ejen elektronik adalah untuk mengelakkan ganti rugi atau kesilapan, sebarang kegagalan produk ejen elektronik untuk memenuhi tujuan tersebut;
- (j) keperluan dan panduan dalam undang-undang bertulis lain atau oleh seseorang atau pihak berkuasa yang menjalankan kuasa di bawah mana-mana undang-undang bertulis atau menjalankan fungsi pengawalseliaan.

(3) berhubung dengan ejen elektronik yang cacat, berikut ialah pengendali ekonomi, mereka yang boleh dipertanggungjawabkan untuk ejen elektronik yang cacat—

- (a) pengilang produk ejen elektronik yang cacat, yang juga akan bertanggungjawab ke atas apa-apa kerugian yang disebabkan oleh komponen yang cacat apabila ia disepadukan ke dalam, atau saling berkaitan dengan, produk ejen elektronik dalam kawalan pengilang itu;
- (b) pengilang komponen yang cacat, di mana komponen itu disepadukan ke dalam, atau saling berkaitan dengan, produk ejen elektronik dalam kawalan pengilang dan menyebabkan produk ejen elektronik itu cacat;
- (c) jika pengilang produk atau komponen ejen elektronik itu ditubuhkan di luar Malaysia—
  - (i) pengimport produk atau komponen ejen elektronik yang cacat;
  - (ii) wakil sah pengilang; dan
  - (iii) jika tiada pengimport atau wakil diberi kuasa sedemikian dalam Malaysia, mana-mana pembekal perkhidmatan;
- (d) mana-mana orang sebenar atau seseorang di sisi undang-undang yang mengubah suai produk ejen elektronik dengan ketara di luar kawalan pengilang dan kemudian menjadikannya tersedia di pasaran atau meletakkan produk ejen elektronik itu ke dalam perkhidmatan, orang sebenar atau seseorang di sisi undang-undang itu hendaklah dianggap sebagai pengilang bagi maksud subseksyen (3)(a).

(4) Setiap pengendali ekonomi yang dinyatakan dalam setiap perenggan (a) hingga (c) (termasuk, mana-mana orang yang dianggap sebagai pengilang di bawah perenggan (d) subseksyen (3)) hendaklah dianggap sebagai bertanggung bagi maksud subseksyen (5) dalam kapasiti yang berasingan dan bebas walaupun orang yang sama boleh menjadi pengendali ekonomi dalam lebih daripada satu kapasiti.

(5) Liabiliti bagi perbuatan ejen elektronik yang cacat tidaklah terletak pada prinsipal sebagaimana yang dinyatakan dalam subseksyen (1) tetapi hendaklah terletak pada pengendali ekonomi (yang mungkin termasuk, prinsipal dalam kapasiti pengendali ekonomi) yang dinyatakan dalam subseksyen (3). Liabiliti pengendali ekonomi adalah untuk membayar pampasan kepada mana-mana orang sebenar atau seseorang di sisi undang-undang (termasuk, penggantinya dalam hakmilik) yang mengalami kerugian atau ganti rugi yang disebabkan oleh ejen elektronik yang cacat. Untuk mengelakkan keraguan, tiada apa-apa pun dalam Bahagian ini bertujuan untuk menghalang tuntutan terhadap prinsipal untuk remedi atau liabiliti yang bukan dalam skop liabiliti di bawah subseksyen (5) ini yang timbul daripada mana-mana kontrak atau tindakan lain ejen elektronik untuk dan bagi pihak prinsipal. Jenis ganti rugi yang perlu diberi pampasan ialah—

- (a) kematian atau kecederaan diri, termasuk, ganti rugi yang diiktiraf secara perubatan kepada kesihatan psikologi;
- (b) liabiliti, kerugian atau ganti rugi yang dialami oleh pengguna ejen elektronik yang cacat atau pihak ketiga, yang bersifat kewangan atau ekonomi;
- (c) pemusnahan atau kerosakan data;
- (d) kerosakan kepada, atau kemusnahan, apa-apa harta (alih atau tak alih), kecuali—
  - (i) produk ejen elektronik yang cacat itu sendiri;
  - (ii) produk ejen elektronik yang cacat oleh komponen yang cacat yang disepadukan ke dalam, atau saling berkaitan dengan, produk ejen elektronik itu oleh pengeluar produk ejen elektronik itu atau dalam kawalan pengilang itu.

(6) Jika pengendali ekonomi tidak dapat dikenal pasti, setiap pengedar produk ejen elektronik yang cacat itu bertanggungjawab seolah-olah ia adalah pengendali ekonomi.

(7) Liabiliti kepada pampasan dan ganti rugi hendaklah ditentukan mengikut prinsip undang-undang tort melainkan jika tuntutan itu berdasarkan undang-undang kontrak. Peruntukan seksyen 28A Akta Undang-Undang Sivil 1956 tidak terpakai berkenaan dengan tuntutan yang dibuat di bawah Divisyen ini. Liabiliti dan ganti rugi hendaklah mengambil kira undang-undang biasa.

(8) Tiada apa-apa jua dalam Bahagian ini boleh menghalang seseorang prinsipal daripada menuntut pampasan dan ganti rugi daripada pengendali ekonomi yang timbul daripada apa-apa kerugian, ganti rugi atau kecederaan yang mungkin dialami oleh prinsipal berkaitan dengan perbuatan ejen elektronik yang cacat

(9) Peruntukan berikut terpakai berkenaan dengan mana-mana kontrak atau perkiraan yang mengecualikan atau menghadkan liabiliti atau tuntutan yang timbul daripada atau berkaitan dengan ejen elektronik yang cacat. Peruntukan ini tidak menghalang sebarang larangan atau sekatan tambahan ke atas pengecualian atau penghadan tersebut di bawah mana-mana undang-undang bertulis lain. Peruntukan ini terpakai kepada mana-mana kontrak atau perkiraan, sama ada dikawal oleh undang-undang Malaysia atau undang-undang mana-mana bidang kuasa lain dan dalam apa jua keadaan, kepada mana-mana keadaan dalam subseksyen 24(2)—

- (a) tiada kontrak atau perkiraan boleh mempunyai kesan mengecualikan atau menghadkan liabiliti atau tuntutan melainkan pengecualian atau penghadan itu adalah satu yang adil dan munasabah dengan mengambil kira keadaan yang, atau sepatutnya secara munasabah, diketahui atau difikirkan oleh pihak-pihak kepada kontrak atau perkiraan itu apabila dibuat;
- (b) tiada kontrak atau perkiraan boleh mempunyai kesan membenarkan mana-mana pihak ketiga yang bukan merupakan pihak kepada kontrak atau perkiraan itu untuk mendapat manfaat atau memperoleh hak daripada mana-mana peruntukan dalam kontrak atau perkiraan yang mengecualikan atau menghadkan liabiliti atau tuntutan;
- (c) tiada kontrak atau perkiraan boleh mempunyai kesan untuk membuat hak atau remedi atau penguatkuasaannya tertakluk kepada syarat yang ketat atau membebankan;
- (d) tiada kontrak atau perkiraan boleh mempunyai kesan membenarkan seseorang yang berurusan dengan ejen elektronik itu dirugikan akibat daripada mengejar hak atau remedi itu;
- (e) tiada kontrak atau perkiraan boleh mempunyai kesan mengecualikan atau menyekat peraturan keterangan atau prosedur;
- (f) kontrak atau perkiraan yang berasingan daripada atau sekunder kepada atau selainnya berkaitan dengan kontrak atau perkiraan yang disebut dalam perenggan (a) hingga (e)

yang berupa sebagai mempunyai kesan mengecualikan atau mengehadkan perkara-perkara yang sebaliknya akan dilarang oleh subseksyen sedemikian adalah dilarang;

(g) walaupun perenggan (a) hingga (f), suatu kontrak atau perkiraan mungkin mengandungi pengecualian atau had ke atas liabiliti atau tuntutan setakat yang dibenarkan oleh mana-mana undang-undang bertulis atau oleh seseorang atau pihak berkuasa yang menjalankan apa-apa kuasa di bawah mana-mana undang-undang bertulis.

### **Pelbagai pengendali ekonomi**

27. (1) Jika dua atau lebih pengendali ekonomi bertanggungjawab untuk kerugian yang sama, mereka bertanggungjawab secara bersama dan berasingan.

(2) Liabiliti pengendali ekonomi boleh dikurangkan atau tidak dibenarkan jika kerugian itu disebabkan kedua-duanya oleh kecacatan produk ejen elektronik dan oleh kesalahan pihak yang menuntut untuk pampasan dan ganti rugi.

(3) Jika lebih daripada seorang pengendali ekonomi bertanggungjawab bagi kerugian yang sama, pengendali ekonomi yang telah membayar pampasan kepada penuntut bagi pampasan dan ganti rugi berhak untuk meneruskan remedi terhadap pengendali ekonomi lain yang bertanggungjawab bagi produk ejen elektronik yang cacat.

(4) Seseorang pengendali ekonomi tidak boleh, berhubung dengan penuntut bagi pampasan dan ganti rugi, mengehadkan atau mengecualikan liabilitinya.

(5) Mahkamah boleh membahagikan liabiliti setiap pengendali ekonomi sekiranya mereka adalah defendan dalam tindakan yang sama yang dimulakan oleh penuntut.

### **Keterangan**

28. (1) Seseorang yang menuntut pampasan dan ganti rugi mesti membuktikan kecacatan produk ejen elektronik dan hubungan sebab akibat antara kecacatan itu dan kerugian itu.

(2) Jika pihak yang menuntut telah membentangkan dalam prosiding di hadapan Mahkamah fakta dan keterangan yang mencukupi untuk menyokong kewajaran tuntutan itu, defendan dikehendaki mendedahkan keterangan yang berkaitan pada pelupusan defendan. Pihak yang menuntut juga mesti mendedahkan kepada defendan bukti relevan yang boleh dilupuskan oleh pihak yang menuntut.

(3) Sebarang pendedahan bukti mestilah perlu dan berkadar dan boleh mengambil kira kepentingan sah termasuk, perlindungan maklumat sulit dan rahsia perdagangan.

(4) Mahkamah boleh menghendaki supaya langkah yang sewajarnya diambil untuk melindungi maklumat yang didedahkan sebagai rahsia dagangan atau sebagai rahsia dagangan yang dikatakan.

(5) Mahkamah boleh menghendaki keterangan dikemukakan dengan cara yang mudah dicapai dan difahami.

(6) Kecacatan sesuatu produk ejen elektronik hendaklah dianggap—

- (a) jika defendan gagal mematuhi subseksyen (2) atau dengan apa-apa pendedahan keterangan yang dikehendaki di bawah kaedah-kaedah Mahkamah;
- (b) jika pihak menuntut menunjukkan bahawa produk ejen elektronik itu tidak mematuhi undang-undang bertulis atau keperluan orang atau pihak berkuasa yang menjalankan fungsi pengawalseliaan;
- (c) jika pihak yang menuntut menunjukkan bahawa kerugian itu disebabkan oleh kecacatan<sup>180</sup> yang jelas bagi produk ejen elektronik semasa penggunaan yang boleh dijangka secara munasabah atau dalam keadaan biasa.

(7) Pautan sebab akibat antara kecacatan produk ejen elektronik dan kecacatan itu hendaklah dianggap jika telah ditetapkan bahawa sesuatu produk itu cacat dan kerugian yang adalah jenis yang lazimnya konsisten dengan kecacatan berkenaan.

(8) Mahkamah hendaklah menganggap kecacatan produk ejen elektronik itu atau kaitan sebab antara kecacatannya dan kerosakan itu, atau kedua-duanya jika walaupun penzahiran

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<sup>180</sup> Atau kerosakan=malfuction

keterangan mengikut subseksyen (2) dan mengambil kira semua hal keadaan berkaitan kes itu—

- (a) pihak yang menuntut menghadapi kesukaran yang berlebihan, khususnya disebabkan oleh kerumitan teknikal atau saintifik, dalam membuktikan kecacatan produk ejen elektronik atau hubungan sebab akibat antara kecacatannya dan kerosakan, atau kedua-duanya; dan
- (b) pihak yang menuntut menunjukkan bahawa berkemungkinan produk ejen elektronik itu cacat atau terdapat hubungan sebab akibat antara kecacatan produk ejen elektronik dan kerosakan, atau kedua-duanya.

(9) Sebarang anggapan boleh disangkal.

(10) Seseorang pengendali ekonomi tidak akan bertanggungjawab kepada pampasan atau ganti rugi bagi produk ejen elektronik yang cacat dalam mana-mana keadaan berikut, tertakluk kepada apa-apa pengubahsuaian dibuat atau kepada hal keadaan tambahan yang ditetapkan oleh Menteri dalam peraturan-peraturan yang dibuat di bawah seksyen 29—

- (a) dalam hal pengilang atau pengimport, bahawa ia tidak meletakkan produk ejen elektronik itu di pasaran atau memasukkannya ke dalam perkhidmatan;
- (b) dalam kes pengedar, bahawa ia tidak menjadikan produk itu tersedia di pasaran;
- (c) bahawa ada kemungkinan bahawa kecacatan yang menyebabkan kerosakan itu tidak wujud pada masa produk ejen elektronik itu diletakkan di pasaran, dimasukkan ke dalam perkhidmatan atau, dalam hal pengedar, disediakan di pasaran, atau kecacatan itu wujud selepas saat itu;
- (d) bahawa kecacatan yang menyebabkan kerosakan adalah disebabkan oleh pematuhan produk ejen elektronik dengan keperluan undang-undang;
- (e) bahawa keadaan objektif pengetahuan saintifik atau teknikal pada masa produk ejen elektronik itu diletakkan di pasaran atau dimasukkan ke dalam perkhidmatan atau semasa tempoh produk itu berada dalam kawalan pengilang tidak sedemikian rupa sehingga kecacatan itu boleh ditemui;

- (f) dalam kes pembuatan dan komponen yang cacat, bahawa kecacatan produk ejen elektronik di mana komponen itu telah disepadukan adalah disebabkan oleh reka bentuk produk ejen elektronik itu atau kepada arahan yang diberikan oleh pengilang produk ejen elektronik itu kepada pengilang komponen itu;
- (g) dalam hal seseorang mengubah suai produk ejen elektronik, bahawa kecacatan yang menyebabkan kerosakan itu berkaitan dengan bahagian produk ejen elektronik yang tidak terjejas oleh pengubahsuaian.

(11) Pengendali ekonomi tidak boleh dikecualikan daripada liabiliti di bawah subseksyen (10) jika kecacatan produk ejen elektronik adalah disebabkan oleh mana-mana yang berikut, yang diperuntukkan dalam kawalan pengilang—

- (a) perkhidmatan berkaitan;
- (b) perisian, termasuk, kemas kini atau naik taraf perisian;
- (c) kekurangan kemas kini perisian atau peningkatan yang diperlukan untuk mengekalkan keselamatan atau untuk mengurangkan kesilapan;
- (d) pengubahsuaian besar produk ejen elektronik.

### **Kuasa untuk membuat peraturan**

**29.** Menteri boleh membuat peraturan (yang, untuk mengelakkan keraguan, boleh digunakan atau dihadkan kepada kelas, sektor, industri, keadaan atau kriteria tertentu sahaja)—

- (1) bagi atau berkenaan dengan cara pampasan atau ganti rugi yang akan dianugerahkan di bawah Divisyen ini boleh ditentukan dengan mengambil kira peruntukan subseksyen 26(7);
- (2) untuk atau berkenaan dengan cara bagaimana pampasan atau ganti rugi boleh dibahagikan antara pengendali ekonomi dengan mengambil kira peruntukan subseksyen 27(5);
- (3) untuk atau berkenaan dengan cara apa-apa tuntutan boleh dibuat di bawah peruntukan Bahagian ini sekiranya berlaku tuntutan serentak di bawah mana-mana undang-undang bertulis lain atau undang-undang bidang kuasa lain;
- (4) untuk atau berkenaan dengan perkara yang berkaitan dengan keterangan yang dikehendaki untuk ditender atau dikemukakan di bawah peruntukan Bahagian ini;

(5) untuk menetapkan apa-apa hal keadaan di mana pengendali ekonomi mungkin tidak bertanggung kepada pampasan atau ganti rugi bagi produk ejen elektronik yang cacat tambahan kepada yang dinyatakan dalam subseksyen 28(10);

(6) untuk mengubah suai apa-apa hal keadaan sebagaimana yang ditetapkan dalam peraturan yang dibuat di bawah subseksyen (5) atau kepada mana-mana hal keadaan yang dinyatakan dalam subseksyen 28(10);

(7) bagi atau berkenaan dengan semua perkara dan perkara yang dikehendaki atau dibenarkan oleh peruntukan Bahagian ini untuk diperuntukkan, bagi melaksanakan, atau memberi kesan sepenuhnya kepada, peruntukan Bahagian ini;

(8) bagi atau berkenaan dengan apa-apa penalti denda tidak melebihi lima puluh ribu ringgit atau penjara selama tempoh tidak melebihi tiga tahun atau kedua-duanya kerana melanggar perundangan subsidiari yang dibuat di bawah Akta ini, penalti yang akan diperuntukkan dalam perundangan subsidiari.

### **Peraturan mahkamah**

**30.** Jawatankuasa Kaedah-Kaedah yang ditubuhkan di bawah Akta Mahkamah Kehakiman 1964 boleh, tertakluk kepada dan mengikut peruntukan Akta itu yang berhubungan dengan pembuatan peraturan, mermbuat kaedah-

(1) berkenaan dengan prosiding dan amalan dan tatacara Mahkamah berhubung dengan peruntukan Bahagian ini;

(2) berkenaan dengan apa-apa perkara atau perkara berhubung dengan peruntukan Bahagian ini yang dikehendaki, dibenarkan atau suai manfaat untuk ditetapkan oleh kaedah-kaedah;

(3) tanpa menghadkan keluasan peruntukan seksyen ini, berkenaan dengan fi dan kos Mahkamah.

## **Bahagian V**

### **Pelbagai**

## **Meterai**

**31.** (1) Seseorang ejen tidak perlu dilantik atau diberi kuasa melalui dokumen di bawah meterai untuk melaksanakan atau melakukan apa-apa perbuatan lain di bawah atau memerlukan meterai sebagai ejen. Subseksyen ini terpakai walaupun subseksyen 67(3) Akta Syarikat 2016.

(2) Sesuatu dokumen yang dikehendaki untuk disempurnakan oleh ejen di bawah meterai boleh disempurnakan sedemikian tetapi sebaliknya tanpa mematuhi apa-apa formaliti tambahan atau perkara yang dikehendaki di common law dan hendaklah dianggap sebagai sah seolah-olah tiada perbezaan wujud di common law antara pelaksanaan oleh ejen di bawah meterai dan pelaksanaan di bawah tangan.

(3) Seseorang ejen boleh menyempurnakan dokumen yang dikehendaki dimeterai di bawah tangan.

(4) Peruntukan subseksyen (2) dan (3) tidak menjejaskan apa-apa kehendak yang dikenakan oleh mana-mana undang-undang bertulis.

## **Ketidakupayaan dan Had Lain**

**32.** (1) Seseorang individu yang secara fizikal tidak mampu menandatangani atau membuat tanda pada apa-apa dokumen, boleh mengarahkan orang lain untuk menandatangani dokumen tersebut bagi pihaknya. Arahan tersebut dan penandatanganan itu hendaklah dibuat di hadapan seorang saksi. Dokumen itu hendaklah menyatakan bahawa ia telah ditandatangani atas arahan individu yang tidak berkeupayaan secara fizikal tersebut bagi pihaknya, dan dalam kedua-dua hal, di hadapan saksi.

(2) Seseorang individu yang tidak mampu menandatangani apa-apa dokumen akibat sakit atau ketidakupayaan tetapi masih boleh membuat tanda menggunakan tangan, kaki atau mulut, hendaklah menandatangani dokumen tersebut di hadapan seorang saksi yang mengemukakan satu akuan berkanun bersumpah yang memberikan alasan mengapa dokumen itu telah ditandatangani sedemikian, atau sebagai alternatif oleh seorang peguam yang mengeluarkan satu sijil yang menyatakan perkara yang sama.

(3) Dokumen-dokumen dalam subseksyen (1) dan (2) terpakai kepada semua dokumen termasuk apa-apa dokumen yang berhubungan dengan pelantikan ejen, pembentukan agensi serta apa-apa arahan, keizinan dan perkara-perkara lain yang berkaitan dengan agensi.

(4) Apa-apa dokumen yang disempurnakan mengikut subseksyen (1) dan (2) hendaklah dianggap sebagai disempurnakan dengan sah oleh individu itu melainkan jika dibuktikan sebaliknya.

(5) Peruntukan subseksyen (1), (2) dan (3) tidak menjejaskan apa-apa kehendak dalam mana-mana undang-undang bertulis atau apa-apa cara lain yang sah untuk melaksanakan sesuatu dokumen atau memberi arahan atau arahan atau menyatakan persetujuan mengikut undang-undang biasa.

(6) Untuk mengelakkan keraguan, peruntukan Divisyen 1 Bahagian IV terpakai bagi pelaksanaan dan penyaksian apa-apa dokumen yang akan disempurnakan di bawah seksyen ini dan apa-apa arahan atau perkara lain yang dikehendaki berhubung ini.

### **Undang-undang antarabangsa persendirian**

33. Peruntukan Akta ini, melainkan diperuntukkan sebaliknya, tidak menjejaskan pengendalian dan pemakaian kaedah-kaedah undang-undang antarabangsa persendirian. Sehubungan itu, kesan undang-undang, kesahan, kebolehuatkuasaan dan kebolehterimaan sesuatu agensi atau perkara yang berkaitan akan terus ditentukan oleh undang-undang yang terpakai di bawah peraturan tersebut.

## **BAHAGIAN VI**

### **PERUNTUKAN PERALIHAN, PENGECUALIAN DAN PERUNTUKAN BERKAITAN**

#### **Pemansuhan**

34. (1) Bahagian X Akta Kontrak 1950 dan Akta Kuasa Wakil 1949 [Akta 424] adalah dimansuhkan.

#### **Peruntukan peralihan**

35. Tanpa menghiraukan<sup>181</sup> seksyen 34—

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<sup>181</sup> walaupun

(1) seseorang yang, sebelum Akta ini mula berkuat kuasa, ejen yang dilantik dengan sewajarnya terus menjadi ejen pada dan selepas tarikh permulaan kuat kuasa Akta ini, tertakluk kepada terma pelantikan dan terma agensi dan subseksyen (7);

(2) seseorang yang, sebelum Akta ini berkuatkuasa, seorang peguam yang dilantik dengan sewajarnya di bawah surat kuasa wakil terus menjadi peguam pada dan selepas tarikh permulaan kuat kuasa Akta ini, tertakluk kepada terma pelantikan dan terma surat kuasa wakil dan subseksyen (7);

(3) Suatu kuasa wakil yang telah dilaksanakan dan disaksikan mengikut Akta Kuasa Wakil 1949 sebelum permulaan Akta ini tetapi yang belum didepositkan di bawah Akta Kuasa Wakil 1949 pada tarikh permulaan tersebut, boleh terus didepositkan di bawah Akta Kuasa Wakil 1949 seolah-olah Akta Kuasa Wakil 1949 itu tidak dimansuhkan dan seolah-olah kuasa wakil itu telah diwujudkan dan didepositkan dengan sewajarnya di bawah Akta Kuasa Wakil 1949 serta-merta sebelum permulaan Akta ini.

(4) Suatu kuasa wakil dan apa-apa pembatalan, pindaan atau dokumen lain yang berkaitan dengan kuasa wakil yang telah didepositkan di bawah Akta Kuasa Wakil 1949 akan terus boleh dicari dan diakses sebagaimana dokumen-dokumen tersebut.

(5) Akta ini terpakai kepada semua agensi dan kuasa-kuasa wakil, sama ada diwujudkan sebelum, pada, atau selepas permulaan Akta ini.

(6) Permulaan Akta ini tidak menjejaskan kesahan, ketidaksahan, kesan atau akibat apa-apa yang telah dilakukan atau dialami oleh seorang ejen atau penerima kuasa atau selainnya berhubung undang-undang agensi atau kuasa wakil sebelum permulaan tersebut.

(7) Apa-apa hak, kepentingan, hakmilik, kekebalan, tugas, keistimewaan, obligasi atau liabiliti yang telah diperoleh, terakru atau ditanggung sebelum permulaan Akta ini atau apa-apa prosiding undang-undang atau remedi berkenaan apa-apa hak, kepentingan, hakmilik, kekebalan, tugas, keistimewaan, obligasi atau liabiliti tersebut tidaklah terjejas oleh Akta ini dan terus berkuatkuasa seolah-olah Akta ini tidak pernah digubal.

(8) Peruntukan-peruntukan Akta ini hendaklah terpakai kepada apa-apa perbuatan, peninggalan atau perkara yang timbul berhubung sesuatu agensi atau kuasa wakil pada atau selepas tarikh permulaan Akta ini walaupun agensi atau kuasa wakil itu diwujudkan sebelum tarikh tersebut. Bagi mengelakkan keraguan, berhubung suatu agensi atau kuasa wakil yang diwujudkan sebelum tarikh tersebut—

- (a) syarat-syarat pelantikan ejen atau penerima kuasa dan syarat-syarat agensi atau kuasa wakil itu, bagi apa-apa perbuatan, peninggalan atau perkara yang timbul pada atau selepas tarikh permulaan Akta ini, hendaklah dibaca dan ditafsirkan seolah-olah syarat-syarat tersebut mengandungi suatu peruntukan bahawa skop dan pemakaian syarat-syarat itu adalah tertakluk kepada apa-apa kehendak mandatori, larangan atau had yang dikenakan oleh peruntukan Akta ini; dan
- (b) suatu kuasa wakil yang tidak boleh dibatalkan sebelum tarikh tersebut hendaklah kekal tidak boleh dibatalkan mengikut syarat-syarat kuasa wakil itu dan hendaklah diperlakukan seolah-olah ia merupakan kuasa wakil yang tidak boleh dibatalkan di bawah seksyen 18.

**PART III: CONTRACTS**  
**(RIGHTS OF THIRD PARTIES)**  
**BILL**

**Report of Contracts  
(Rights of Third Parties) Bill**

### **3.0 CONTRACTS (RIGHTS OF THIRD PARTIES) BILL**

#### **3.1 Executive Summary**

##### **3.1.1 Background**

- (i) Malaysian contract law, derived from the Indian Contracts Act 1872 and English common law, has long precluded a third party from enforcing a contract made for his or her benefit. While the Contracts Act 1950 is silent on the rule, the Privy Council in *Kepong Prospecting Ltd v Schmidt* (1968) established that the English doctrine of privity applies in Malaysia, a position recently reaffirmed by the Federal Court in *RHB Islamic Bank Bhd v AmGeneral Insurance Bhd* (2019). Whilst common law exceptions exist — principally through judicial circumventions like agency and trust — these solutions are often artificial, limited, and inadequate for modern commercial practice.
- (ii) This Bill introduces a principled statutory exception to the privity rule. It is the product of an urgent reform initiative launched in January 2025 by Dato’ Seri Azalina Othman Said (Minister of Law and Institutional Reform) and executed by the CRRCL, chaired by Federal Court Judge Datuk Seri Vazeer Alam bin Mydin Meera, alongside the Legal Affairs Division (BHEUU) of the Prime Minister’s Department, Monash University Malaysia, and University Kebangsaan Malaysia. Drawing on and improving upon the UK Contracts (Rights of Third Parties) Act 1999 and the Singapore Contracts (Rights of Third Parties) Act 2001, this legislation modernizes Malaysian law to align with regional standards.

##### **3.1.2 Purpose of the Bill**

- (i) The Bill enables a third party to enforce a contractual term where:
  - (a) the contract expressly provides that the third party may enforce it; or

- (b) the term purports to confer a benefit on the third party, unless the parties' common intention — construed from the contract — was that the term should not be so enforceable.
- (ii) The Bill does not abolish privity. It creates a limited, rebuttable exception that honours the reasonable expectations and intentions of the contracting parties, ensuring that third-party beneficiaries who suffer direct losses have an immediate legal remedy rather than letting defaulting parties escape liability.

### 3.1.3 Key Provisions

- (i) **Enforcement rights.** A third party may claim any remedy available in an action for breach of contract, without needing to have provided consideration himself or herself. The third party must be expressly identified by name, class, or description, but need not be in existence when the contract is made.
- (ii) **Variation and rescission.** Once a third party has assented to, or relied on, a term, the contracting parties may not vary or terminate the contract so as to extinguish that right without the third party's consent — unless the contract expressly reserves that freedom. Courts may dispense with consent where the third party cannot be located or lacks capacity.
- (iii) **Defences.** The promisor retains all defences and rights of set-off against the third party that would have been available against the promisee. The third party cannot acquire rights in a more advantageous position than the original party.
- (iv) **No double liability.** Where the promisee has already recovered a sum in respect of the third party's loss, any award to the third party is reduced accordingly.
- (v) **Arbitration.** A third party enforcing a contractual term is bound by

any arbitration agreement in the contract, consistent with the Arbitration Act 2005.

#### 3.1.4 **Exceptions**

- (i) The Bill is a statute of general application but does not apply to:
- (ii) negotiable instruments under the Bills of Exchange Act 1949;
- (iii) contracts binding on a company and its members under the Companies Act 2016;
- (iv) limited liability partnership agreements under the Limited Liability Partnerships Act 2012;
- (v) employment contracts, to the extent of imposing obligations on employees; and
- (vi) contracts for the international carriage of goods by sea, rail, road, or air subject to applicable international conventions (though third parties may still avail themselves of exclusion or limitation clauses in such contracts).

#### 3.1.5 **Relationship with Existing Law**

- (i) The Bill operates alongside the amended Contracts Act 1950 and preserves existing rights arising under common law, equity, or the quasi-contractual provisions of sections 69–71 of the Contracts Act 1950.

**Economic Note:** This reform is critical to harmonizing Malaysian law with internationally accepted norms. Failing to recognize third-party rights puts Malaysia at a disadvantage compared to ASEAN neighbours (like Singapore) and major trading partners (such as China, via its 2021 Civil Code). Without this facility, transaction costs increase, and international businesses may avoid selecting Malaysian law or Malaysia as a seat of arbitration.

### **3.1.6 Transitional Arrangement**

- (i) The Bill applies to contracts entered into six months after commencement. Parties may explicitly opt in to the Bill's application for contracts entered into on or after the date of commencement, by express provision in the contract.

### **3.1.7 Legislative Position**

- (i) The Contracts (Rights of Third Parties) Bill is one of three legislative instruments arising from this reform initiative, alongside the amended Contracts Act 1950 and the new Agency Bill. Together, they fulfil the goal of modernising Malaysian contract law to keep pace with global commerce.

## 3.2 Explanatory Paper

### ***EXPLANATORY PAPER***

#### ***Revised Draft of the Contracts (Rights of Third Parties) Bill***

##### 3.2.1 Introduction

- (i) The Contracts (Rights of Third Parties) Bill seeks to introduce a general statutory exception to the doctrine of privity of contract, allowing third parties to enforce contractual terms made for their benefit. The discussions surrounding the Bill involved legal experts, policymakers, members of the judiciary, academics, and practitioners, all of whom provided valuable input regarding its provisions.
- (ii) This paper provides a structured analysis of these deliberations, outlining the rationale behind the adoption or rejection of various proposals considered during the meeting. It aims to present a clear and reasoned account of the decision-making process, ensuring transparency and rigor in the development of the legislation.

### 3.2.2 Analysis of Key Suggestions and Decisions

#### (i) Section 2

**Amending Section 2(2) following the UK Supreme Court’s decision in *Secretary of State for the Department for Environment, Food, and Rural Affairs v Public and Commercial Services Union and two other cases* [2024] UKSC 41 (“PCSU”):**

- **Suggestion:** Dr. Burton proposed amending Section 2(2) to read:

*“Subsection (1)(b) does not apply if the promisor can prove the existence of an express or implied term of the contract that shows that the parties did not intend the term to be enforceable by the third party.”*

- **Decision:** Adopted. Section 2(2) will be amended to read:

*“Subsection (1)(b) does not apply if the promisor can prove the existence of an express or implied term of the contract which shows that the parties did not intend the term to be enforceable by the third party.”<sup>182</sup>*

- **Reasoning:**

- The objective of the proposed amendment is to clarify the operation of the rebuttal mechanism embedded in Section 2(2), particularly in light of recent judicial developments, most notably the *PCSU* decision. That case provided significant clarification regarding Section 1(2) of the UK Act, which is functionally analogous to Section 2(2) of our draft Bill. The decision elucidates the correct interpretative framework to be applied in determining whether a contract term is intended to be enforceable by a third party, and the circumstances under which the statutory presumption may be rebutted.
- The amendment is intended to better reflect this interpretative guidance and provide legal clarity on the test to be applied in rebutting the presumption under Section 2(1)(b).
- Under the second limb, once the conditions under Section 2(1)(b) (i.e., that the term purports to confer a benefit on a third party) and Section 2(3) (express identification of the third party) are met, a statutory presumption arises that the third party is entitled to enforce the term.

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<sup>182</sup> Editorial note: The wordings “...*the contract that shows that...*” in the original suggestion was revised to “...*the contract which shows that...*” to enhance readability, in line with the ethos underlying the law reform project.

- In the following paragraphs of the majority judgment, the Supreme Court articulated a structured approach to the interpretative task of the Court under Section 1 of the UK Act (corresponding to Section 2 of the present Bill):

“89. **The task of the court under the 1999 Act is first to gather together the express terms of the contract.** This may be straightforward in the case of a single, legally drafted document or more may be involved as in the present cases (see para 16 above) or in cases concerning which provisions of a bill of lading are incorporated into a voyage charterparty (see *Herculito Maritime Ltd v Gunvor International BV* [2024] UKSC 2, [2024] Bus LR 580, paras 76-87) or where the contract is formed from a chain of emails supplemented by oral discussions as happened in *Carmichael v National Power plc* [1999] UKHL 47; [1999] 1 WLR 2042. **Once all the express terms have been identified, the court’s task is then to construe those express terms and to consider whether any additional terms should be implied.** The principles set out in *ICS, Wood v Capita and Arnold v Britton* on construing contracts are directed at determining the meaning of ambiguous words in the express terms of the contract. They are not directed at and do not permit or require a wide ranging look at surrounding circumstances beyond the express and implied terms of the contract as a way of determining what rights are created: see *Arnold v Britton*, para 77 (Lord Hodge). They cannot be used to supplement the words of the contract in a way which does not conform to the recognised test for the implication of terms.

...

99. The majority in the Court of Appeal were therefore in error, including in what was said in the passage quoted at para 69 above, when they suggested that section 1(2) merely shifted the burden of proof as to the parties’ common intention so that the burden of proving that there was no intention to confer third party rights fell on the promisor rather than on the third party who is asserting those rights. We disagree therefore with their comment that it would be rare for the existence or otherwise of third party rights to turn on the application of section 1(2) because once the court is apprised of the full factual background it will usually be possible to arrive

*at a positive decision as to the parties' common intention rather than having to fall back on the application of the burden of proof.*

*100. This incorrectly elides the double intention test approach with the different approach adopted in the 1999 Act. Section 1(2) involves a different object of inquiry from that supposed by the majority. They focused on whether there was a common intention of the parties to create a right which would be enforceable by the Union as third party, as an aspect of the double intention test approach. But **section 1(2) only has application where the criteria in section 1(1)(b) and (3) are satisfied so as to give rise to the statutory presumption of third party enforceability, and its true focus is whether there is established a common intention of the parties as a matter of construction of the contract that the third party should not be able to enforce the contract.**”*

*(Emphases added.)*

- Lord Andrew Burrows, concurring, distilled the mechanism even more clearly at paragraph 147:

*“147. Taking account of the collective bargaining context, including, as I have indicated in para 143 above, the objective intentions of the union representatives, and therefore not confining oneself to the contracts of employment in isolation, it is my view that the presumption set up by sections 1(1)(b) and 1(3) has not here been rebutted. **Under section 1(2) of the 1999 Act, the burden of proof to rebut the presumption is on the employer** and I agree with Mr Segal that the employer has not established that, on a proper construction of the employment contract, the employer and employee objectively intended that the union should not have the right to enforce the check-off term. **The employer has not established that, on a true interpretation of the express terms in the contract of employment the parties did not intend the trade union to have the right to enforce the check-off term. So, for example, there is no express term that the third party shall not have the right to enforce the check-off term. Nor is there any other express term (eq a no assignment clause) indicating that the third party should not have that right. The employer has also not established that there is a term implied***

by fact to that effect applying, for example, the standard “officious bystander” obviousness test. As the presumption has not been rebutted, the union has the right to enforce the check-off term.”

(Emphases added.)

- From the above authority, the following propositions may be extracted:
  - (1) Once the criteria under Section 2(1)(b) and 2(3) of the Bill are satisfied, a rebuttable presumption arises that the third party has the right to enforce the contractual term.
  - (2) The evidential burden then shifts to the *promisor* to affirmatively establish that the parties *did not* intend the third party to have enforceable rights.
  - (3) The promisor may discharge this burden by pointing to an *express term* in the contract evidencing that the parties did not intend to confer enforceable rights on the third party. Examples include:
    - An express opt-out clause;
    - A “no assignment” clause or similar restriction;
    - Explicit limitation of benefits to contracting parties only.
  - (4) In the absence of such express language, the promisor must prove the existence of an *implied term* to the same effect. This must satisfy the usual tests for implication of terms under common law, i.e., the business efficacy or officious bystander tests.
- The proposed amendment thus serves multiple objectives:
  - Alignment with jurisprudence: It brings the language of the statute in line with the refined principles articulated by the UK Supreme Court in the *PCSU* decision, ensuring consistency with evolving common law jurisprudence.
  - Legal certainty: It codifies the burden of proof and the applicable standards for rebuttal, providing clarity for courts, parties, and legal practitioners.
  - Policy intent: It reinforces the policy objective of facilitating enforceability by third parties, while preserving party autonomy and freedom of contract.
- The proposed revision to Section 2(2) represents a necessary and well-considered enhancement to the statutory framework governing third party rights. It offers

doctrinal clarity and operational precision in the application of the rebuttal mechanism under Section 2. By expressly referencing the possibility of rebuttal through either an express or implied term, the provision accurately reflects the judicial developments in the *PCSU* decision and aligns our legislative approach with mature common law interpretive standards.

**Inclusion of an express opt-out clause for third-party rights:**

- **Suggestion:** Dato' Mary proposed the inclusion of an express out-out clause to clarify the exclusion of third-party rights.
- **Decision:** Not adopted.
- **Reasoning:**
  - The general consensus was that the existing provisions under Sections 2(2) and 2(4) already provide a sufficiently clear mechanism for excluding third-party rights. These provisions enable contracting parties to expressly indicate their intention, rendering an additional opt-out clause unnecessary.
  - Introducing an explicit opt-out clause would be redundant, as the statutory framework already accommodates the exclusion of third-party rights where intended. The policy and therefore the language of the statute is to enable contracting parties to provide in their contract for a third party to enforce a right intended for it by the tests contained in Section 2. Where the contracting parties do not intend the third party to enforce any right under the legislation, all they need to do is say so in their contract by a term of the contract (i.e., the opt-out clause).

**Clarifying “volunteer” in Section 2(5):**

- **Suggestion:** Justice Azizul suggested explicitly defining “volunteer” as “*a person who has not provided consideration*” to enhance clarity.
- **Decision:** Adopted. Section 2(5) will be amended to read:

*“... and such remedy must not be refused on the ground that, as against the promisor, the third party has not provided consideration.”*
- **Reasoning:**
  - The term “volunteer” carries varying meanings across different legal contexts, including equity, employment, and military law. This Working Group reviewed definitions from multiple sources, including *Black’s Law Dictionary* (7<sup>th</sup>ed., West Group, 1999), *Osborn’s Concise Law Dictionary* (6<sup>th</sup> ed., Sweet &

Maxwell, 1976), *Words and Phrases Legally Defined* (Vol. 5, Butterworth & Co. (Publishers) Ltd., 1970), and *Words, Phrases & Maxims Legally & Judicially Defined* (Vol. 14, LexisNexis, 1983).

- Given the wide-ranging definitions of “*volunteer*”, this Working Group concurs that refining the language in Section 2(5) is necessary to ensure the term is understood within the contractual context.
- The amendment ensures precision in statutory interpretation, preventing potential misapplications of the term.

(ii) Section 3

**Replacing “*rescind*” with “*terminate*” in Section 3(1):**

- **Suggestion:** Mr. Oon recommended replacing the term “*rescind*” with “*terminate*” to avoid potential ambiguity.
- **Decision:** Adopted. Section 3(1) will be amended to read:

“... *the parties to the contract may not, by agreement, terminate the contract...*”
- **Reasoning:**
  - The term “*rescind*” may suggest that a contract is void *ab initio*, whereas, in this context, it refers to the discharge of future obligations rather than rendering the contract void from inception.
  - The term “*terminate*” aligns more closely with modern contract law principles, as established in Lord Wilberforce’s judgment in *Johnson v Agnew* [1979] 1 All ER 883 (at page 889), which has been subsequently affirmed by the Malaysian courts (see, for example, *Morello Sdn. Bhd. v. Jaques (International) Sdn. Bhd.* [1995] 2 CLJ 23, FC).

**Adding “*prejudice*” after “*alter*” in Section 3(1):**

- **Suggestion:** Mr. GK Ganesan suggested adding the word “*prejudice*” after the word “*alter*”, on the basis that not all alterations are necessarily prejudicial.
- **Decision:** Not adopted.
- **Reasoning:**
  - The words of Section 3(1) have already covered this concern. That is, only those variations of the contract by the contracting parties that extinguish or alter the

third party's entitlement under that right are prohibited. Those variations of the contract that extinguish or alter the third party's entitlement would be prejudicial (or harmful or detrimental) to the third party.

(iii) Section 6

**Introducing a procedural requirement for mandatory consolidation of claims:**

- **Suggestion:** Dr. Burton suggested that promisees should be required to join proceedings when a third party seeks to enforce their contractual rights.
- **Decision:** Not adopted.
- **Reasoning:**
  - This is primarily a procedural matter and is more appropriately governed by O. 4, r. 1 or O. 15, rr. 4 and 6 of the Rules of Court 2012.
  - The burden should rest with the parties (in practice usually the promisor), who are best placed to inform the court of any related claims.

**Applicability to nominated sub-contractors in construction contracts:**

- **Issue:** Justice Vazeer inquired whether sub-contractors could avail themselves of the rights conferred by the Bill.
- **Analysis:**
  - The applicability of the Bill *vis-à-vis* construction contracts was considered in the Law Commission Report No. 242 (1996). In particular, paragraph 7.18(iii) states:

*“... But to allay the fears of the construction industry we should clarify that, even if there is no express contracting out of our proposed reform, we do not see our second limb as cutting across the chain of sub-contracts that have traditionally been a feature of that industry. For example, we do not think that in normal circumstances an owner would be able to sue a sub-contractor for breach of the latter's contract with the head-contractor. This is because, even if the sub-contractor has promised to confer a benefit on the expressly designated owner, **the parties have deliberately set up a chain of contracts which are well understood in the construction industry as ensuring that a party's remedies lie against the other contracting party only. In other words, for breach of the promisor's obligation, the owners' remedies lie against the head-contractor who in turn has the right to sue***

the sub-contractor. On the assumption that that deliberately created chain of liability continues to thrive subsequent to our reform, our reform would not cut across it because on a proper construction of the contract - construed in the light of the surrounding circumstances (that is, the existence of the connected head-contract and the background practice and understanding of the construction industry) - the contracting parties (for example, the sub-contractor and the head-contractor) did not intend the third party to have the right of enforceability. Rather the third party's rights of enforcement in relation to the promised benefit were intended to lie against the head-contractor only and not against the promisor... ”

(Emphases added.)

- It follows that the Bill does not automatically confer rights on sub-contractors unless the contractual provisions grant them enforceable rights. This aligns with the well-established industry practice in construction contracts, where the allocation of rights and obligations follows a structured chain of privity. As such, the enforceability of third-party rights remains a matter of contractual interpretation rather than a statutory guarantee.

(iv) Section 7

**Amending “does not confer any right” to “confers no right” in Section 7(1)–(5):**

- **Suggestion:** This Working Group recommends adopting the UK Act’s formulation (“*confers no right*”) instead of the Singapore Act’s formulation (“*does not confer any right*”).
- **Decision:** Adopted. The relevant parts of Section 7(1)–(5) will be amended to read:  
“Section 2 confers no right on a third party...”
- **Reasoning:**
  - The UK Act’s wording is preferred as it is more emphatic and eliminates any potential ambiguity between permissive and restrictive interpretations.
  - The phrase “*confers no right*” conveys a categorical exclusion, reinforcing the intended statutory effect with greater linguistic precision.

(v) Section 8

**Clarifying potential conflict with the Contracts Act 1950 (Sections 69–71):**

- **Issue:** Dato’ Mary raised a query regarding whether the Bill might conflict with Sections 69–71 of the Contracts Act 1950.
- **Analysis:**
  - This Working Group is of the view no such conflict arises, as the relevant provisions of the Contracts Act 1950 are based on different legal bases of recovery.
  - The claims under Sections 69 and 70 are believed to derive from the Roman law doctrine of *negotiorum gestio*: see Ernest G. Lorenzen, *Negotiorum Gestio in Roman and Modern Civil Law*, 13 Cornell L. Rev. 190 (1928); Low Weng Tchung, *The Law of Restitution and Unjust Enrichment in Malaysia* (Kuala Lumpur: LexisNexis, 2015), paragraphs [3.85]–[3.87]. Alternatively, some scholars suggest that they are grounded in the broader principle of unjust enrichment (Cheong May Fong and Lee Yin Harn, *Civil Remedies* (2<sup>nd</sup> ed., (Kuala Lumpur: Sweet & Maxwell, 2016), Chapter 7). Section 71 is now almost certainly as one based on the causative event of unjust enrichment: see *Dream Property Sdn Bhd v Atlas Housing Sdn Bhd* [2015] 2 CLJ 453, FC; Cheong May

Fong, *ibid*; D Fung, *Restitution and s 71 of the Contracts Act 1950* [1994] 2 MLJ lxxix.

- Irrespective of their precise doctrinal basis, it is clear that these restitutionary rights operate independently of contract. In contrast, the Bill is concerned solely with third-party rights within the context of contractual relationships, as reflected in both its title and the substantive provisions of Section 2.
- Accordingly, this Working Group finds no basis for a conflict between these two legal frameworks, as they address separate areas of law—one focused on Roman Law or unjust enrichment as an independent source of rights and the other on contract third-party rights.
- Further, Section 8(1) of the Bill provides that the third party rights recognised under contract through a reform of its privity rule (on the benefit side) does not affect any right or remedy of a third party that exists or is available apart from this Bill.

(vi) Section 9

**Expanding Section 9 beyond arbitration:**

- **Suggestion:** Dato' Mary proposed broadening the scope of Section 9 to include ADR mechanisms beyond arbitration, such as mediation.
- **Decision:** Not adopted.
- **Reasoning:**
  - Mediation and other ADR mechanisms are inherently private and voluntary processes between the parties involved. Unlike arbitration, which results in binding awards with a statutory enforcement regime, ADR mechanisms generally do not carry the same enforceable legal authority. As such, expanding Section 9 to include these mechanisms is considered unnecessary.

(vii) Conclusion

This Working Group acknowledges that legislative development is a dynamic process. Throughout the drafting of the Bill, our approach has been guided by a balance between upholding the established principles of contract law and recognizing that the law must evolve in response to practical realities and judicial interpretation.

To that end, we have adopted several suggestions, particularly those aimed at improving the clarity of language and aligning the Bill with modern legal principles. These revisions demonstrate our willingness to refine the Bill where there is persuasive justification.

Conversely, where proposals have not been incorporated, it is due to the absence of compelling need or the availability of more appropriate avenues. Each decision was made after careful deliberation, with regard to how the legislation fits together and how it would operate in practice before the courts.

Ultimately, this Bill represents considered improvement, advancing the law where change is justified. Our aim has been to ensure that the law remains both principled and practical, meeting the needs of those who rely on it.

### 3.3 Contracts (Rights of Third Parties) Bill

A BILL

*intituled*

An Act to make provision for the enforcement of contractual terms by third parties.

[ ]

**ENACTED** by the Parliament of Malaysia as follows:

#### **Short title and application**

1. (1) This Act may be cited as the Contracts (Rights of Third Parties) Act 2026 and shall apply throughout Malaysia.

(2) Subject to subsection (3), this Act does not apply in relation to a contract entered into before the end of the period of 6 months from [insert effective date].

(3) The restriction in subsection (2) does not apply in relation to a contract which—

(a) is entered into on or after [insert effective date]; and

(b) expressly provides for the application of this Act.

#### **Right of third party to enforce contractual term**

2. (1) Subject to the provisions of this Act, a person who is not a party to a contract (called in this Act a third party) may, in the third party's own right, enforce a term of the contract if—

- (a) the contract expressly provides that the third party may; or
- (b) subject to subsection (2), the term purports to confer a benefit on the third party.

(2) Subsection (1)(b) does not apply if the promisor can prove the existence of an express or implied term of the contract which shows that the parties did not intend the term to be enforceable by the third party.

(3) The third party must be expressly identified in the contract by name, as a member of a class or as answering a particular description, but need not be in existence when the contract is entered into.

(4) This section does not confer a right on a third party to enforce a term of a contract otherwise than subject to and in accordance with any other relevant terms of the contract.

(5) For the purpose of exercising a third party's right to enforce a term of the contract, there is to be available to the third party any remedy that would have been available to the third party in an action for breach of contract if the third party had been a party to the contract (and the rules relating to damages, injunctions, specific performance and other remedy apply accordingly) and such remedy must not be refused on the ground that, as against the promisor, the third party has not provided consideration.

(6) Where a term of a contract excludes or limits liability in relation to any matter, references in this Act to the third party enforcing the term are to be construed as references to the third party availing himself, herself or itself of the exclusion or limitation.

(7) In this Act, in relation to a term of a contract which is enforceable by a third party—

“promisor” means the party to the contract against whom the term is enforceable by the third party;

“promisee” means the party to the contract by whom the term is enforceable against the promisor; and

“third party” means a person who is not a party to a contract.

## **Variation and termination of contract**

3. (1) Subject to this section, where a third party has a right under section 2 to enforce a term of the contract, the parties to the contract may not, by agreement, terminate the contract, or vary the contract in such a way as to extinguish or alter the third party's entitlement under that right, without the third party's consent if—

- (a) the third party has communicated the third party's assent to the term to the promisor;
- (b) the promisor is aware that the third party has relied on the term (whether or not the third party has knowledge of its precise terms); or
- (c) the promisor can reasonably be expected to have foreseen that the third party would rely on the term and the third party has in fact relied on the term (whether or not the third party has knowledge of its precise terms).

(2) The assent mentioned in subsection (1)(a)—

- (a) may be by words or conduct; and
- (b) if sent to the promisor by post or other means, is not to be regarded as communicated to the promisor until the assent is received by the promisor.

(3) Subsection (1) is subject to any express term of the contract under which—

- (a) the parties to the contract may by agreement rescind or vary the contract without the consent of the third party; or
- (b) the consent of the third party is required in circumstances specified in the contract instead of those set out in subsection (1)(a), (b) and (c).

(4) Where the consent of a third party is required under subsection (1) or (3), the court or arbitral tribunal may, on the application of the parties to the contract, dispense with such consent if the court or tribunal is satisfied that—

- (a) the consent cannot be obtained because the third party's whereabouts cannot reasonably be ascertained; or
- (b) the third party is mentally incapable of giving the third party's consent.

(5) The court or arbitral tribunal may, on the application of the parties to a contract, dispense with any consent that may be required under subsection (1)(c) if it is satisfied that it cannot reasonably be ascertained whether or not the third party has in fact relied on the term of the contract.

(6) If the court or arbitral tribunal dispenses with a third party's consent, it may impose such conditions as it thinks fit, including a condition requiring the payment of compensation to the third party.

(7) The jurisdiction conferred on the court by subsections (4), (5) and (6) is exercisable by both the High Court and the Subordinate Courts.

#### **Defences, etc., available to promisor**

4. (1) Subsections (2) to (5) apply where proceedings for the enforcement of a term of a contract are brought by a third party in reliance on section 2.

(2) The promisor has available to the promisor, by way of defence or set-off, any matter that—

(a) arises from or in connection with the contract and is relevant to the term; and

(b) would have been available to the promisor by way of defence or set-off if the proceedings had been brought by the promisee.

(3) The promisor also has available to the promisor, by way of defence or set-off, any matter if —

(a) an express term of the contract provides for it to be available to the promisor in proceedings brought by the third party; and

(b) it would have been available to the promisor by way of defence or set-off if the proceedings had been brought by the promisee.

(4) The promisor also has available to the promisor—

(a) by way of defence or set-off any matter; and

(b) by way of counterclaim any matter not arising from the contract,

that would have been available to the promisor by way of defence or set-off or by way of counterclaim against the third party (as the case may be) if the third party had been a party to the contract.

(5) Subsections (2) and (4) are subject to any express term of the contract as to the matters that are not to be available to the promisor by way of defence, set-off or counterclaim.

(6) Where, in any proceedings brought against a third party, the third party seeks to enforce a term of a contract (including, in particular, a term purporting to exclude or limit liability) in reliance on section 2, the third party may not do so if the third party could not have done so (whether by reason of any particular circumstances relating to the third party or otherwise) had the third party been a party to the contract.

### **Enforcement of contract by promisee**

5. Section 2 does not affect any right of the promisee to enforce any term of the contract.

### **Protection of promisor from double liability**

6. Where under section 2, a term of a contract is enforceable by a third party, and the promisee has recovered from the promisor a sum in respect of—

- (a) the third party's loss in respect of the term; or
- (b) the expense to the promisee of making good to the third party the default of the promisor,

then, in any proceedings brought in reliance on that section by the third party, the court or arbitral tribunal must reduce any award to the third party to such extent as it thinks appropriate to take account of the sum recovered by the promisee.

### **Exceptions**

7. (1) Section 2 confers no right on a third party in the case of a contract on a bill of exchange, promissory note or other negotiable instrument under the Bills of Exchange Act 1949.

(2) Section 2 confers no right on a third party in the case of any contract binding on a

company and its members under section 33 of the Companies Act 2016.

(3) Section 2 confers no right on a third party in the case of any registration document of a limited liability partnership registered under the Limited Liability Partnerships Act 2012 or any limited liability partnership agreement as defined in that Act.

(4) Section 2 confers no right on a third party to enforce any term of a contract of employment against an employee.

(5) Section 2 confers no right on a third party in the case of —

(a) a contract for the carriage of goods by sea; or

(b) a contract for the carriage of goods by rail or road, or for the carriage of cargo by air, which is subject to the rules of the appropriate international transport convention,

except that a third party may in reliance on that section avail the third party of an exclusion or limitation of liability in such a contract.

(6) In subsection (5) —

“appropriate international transport convention” means—

(a) in relation to a contract for the carriage of cargo by air, the Convention which has the force of law in Malaysia under the First Schedule of the Carriage by Air Act 1974;

(b) in relation to a contract for the carriage of goods by rail, such Convention which has the force of law in Malaysia under such written law as the Minister may by order prescribe; and

(c) in relation to a contract for the carriage of goods by road, such Convention which has the force of law in Malaysia under such written law as the Minister may by order prescribe;

“contract for the carriage of goods by sea” means a contract of carriage —

(a) contained in or evidenced by a bill of lading or sea waybill; or

(b) under or for the purposes of which there is given an undertaking which is contained in a ship’s delivery order.

(7) For the purposes of subsection (6), “bill of lading”, “seaway bill” and “ship’s delivery order” have the meanings given by the Carriage of Goods by Sea Act 1950 and the Carriage of Goods by Sea Act 1992 (UK).

### **Supplementary provisions relating to third party**

**8.** (1) Section 2 does not affect any right or remedy of a third party that exists or is available apart from this Act.

(2) In section 6 of the Limitation Act 1953 and the respective schedules of the Limitation Ordinance (Sarawak Cap. 49) and the Limitation Ordinance (Sabah Cap. 72), the references to an action founded on a contract include references to an action brought in reliance on section 2 relating to a contract.

(3) A third party is not, by virtue of section 2(5) or 4(4) or (6), treated as a party to the contract for the purposes of any other written law.

### **Arbitration provisions**

**9.** (1) Where—

- (a) a right under section 2 to enforce a term (called in this section the substantive term) is subject to a term providing for the submission of disputes to arbitration (called in this section the arbitration agreement); and
- (b) the arbitration agreement is an agreement in writing for the purposes of the Arbitration Act 2005,

the third party is treated for the purposes of the Arbitration Act 2005 as a party to the arbitration agreement as regards disputes between the third party and the promisor relating to the enforcement of the substantive term by the third party.

(2) Where—

- (a) a third party has a right under section 2 to enforce a term providing for one or more descriptions of dispute between the third party and the promisor to be submitted to arbitration (called in this section the arbitration agreement);

(b) the arbitration agreement is an agreement in writing for the purposes of the Arbitration Act 2005; and

(c) the third party does not fall to be treated under subsection (1) as a party to the arbitration agreement,

the third party is, if the third party exercises the right, treated for the purposes of the Arbitration Act 2005 as a party to the arbitration agreement in relation to the matter with respect to which the right is exercised, and treated as having been so immediately before the exercise of the right.

### 3.4 Rang Undang-Undang Kontrak (Hak Pihak Ketiga)

#### RANG UNDANG-UNDANG

*bernama*

Suatu Akta bagi mengadakan peruntukan untuk penguatkuasaan terma kontrak oleh pihak ketiga.

[ ]

**DIPERBUAT** oleh Parlimen Malaysia seperti yang berikut:

#### **Tajuk ringkas dan pemakaian**

1. (1) Akta ini boleh dinamakan Akta Kontrak (Hak Pihak Ketiga) 2026 dan hendaklah terpakai bagi seluruh Malaysia.

(2) Tertakluk kepada subseksyen (3), Akta ini tidak terpakai kepada kontrak yang yang dibuat sebelum tamat tempoh 6 bulan dari [tarikh yang diwartakan].

(3) Batasan dalam subseksyen (2) tidak terpakai berhubungan dengan kontrak yang—

(a) dibuat pada atau selepas tarikh [tarikh yang diwartakan]; dan

(b) memperuntukkan secara nyata pemakaian Akta ini.

#### **Hak pihak ketiga untuk menguatkuasakan terma kontrak**

2. (1) Tertakluk kepada peruntukan Akta ini, pihak ketiga boleh, atas hak pihak ketiga sendiri, menguatkuasakan suatu terma kontrak jika—

(a) kontrak memperuntukkan secara nyata bahawa pihak ketiga boleh; atau

(b) tertakluk kepada subseksyen (2), terma tersebut dikatakan memberi suatu manfaat kepada pihak ketiga.

(2) Subseksyen (1)(b) tidak terpakai jika pemberi janji boleh membuktikan kewujudan suatu terma kontrak yang nyata atau tersirat yang menunjukkan bahawa pihak-pihak tidak berniat untuk menguatkuasaan terma itu oleh pihak ketiga.

(3) Pihak ketiga mestilah dikenal pasti secara nyata dalam kontrak dengan nama, sebagai satu ahli suatu kelas atau sebagai memenuhi suatu perihalan tertentu, tetapi tidak perlu wujud pada masa kontrak itu dibuat.

(4) Seksyen ini tidak memberi apa-apa hak kepada pihak ketiga untuk menguatkuasakan suatu terma kontrak melainkan tertakluk kepada dan menurut apa-apa terma lain kontrak yang relevan.

(5) Bagi tujuan menjalankan hak pihak ketiga untuk menguatkuasakan suatu terma kontrak, tersedia ada kepada pihak ketiga apa-apa remedi yang boleh diadakan kepada pihak ketiga dalam suatu tindakan bagi pelanggaran kontrak seolah-olah pihak ketiga merupakan pihak kepada kontrak itu (dan kaedah-kaedah berhubung dengan ganti rugi, injunksi, pelaksanaan spesifik dan remedi lain terpakai dengan sewajarnya) dan

remedi sedemikian tidak boleh ditolak atas alasan, terhadap pemberi janji, bahawa pihak ketiga telah tidak memperuntukkan balasan.

(6) Dalam keadaan di mana suatu terma kontrak mengecualikan atau mengehadkan liabiliti berhubung dengan apa-apa perkara, rujukan dalam Akta ini kepada pihak ketiga yang menguatkuasakan terma itu, akan ditafsir sebagai rujukan kepada pihak ketiga yang bergantung, untuk pihak ketiga sendiri, kepada pengecualian atau pengehadan itu.

(7) Dalam Akta ini, berhubung dengan suatu terma kontrak yang boleh dikuatkuasakan oleh pihak ketiga—

“pemberi janji” ertinya pihak kepada kontrak yang boleh dikuatkuasakan oleh pihak ketiga terhadapnya;

“penerima janji” ertinya pihak kepada kontrak yang boleh menguatkuasakan kontrak terhadap pemberi janji; dan

“pihak ketiga” ertinya seorang yang bukan satu pihak kepada suatu kontrak.

### **Perubahan dan penamatan kontrak**

3. (1) Tertakluk kepada seksyen ini, jika suatu pihak ketiga mempunyai hak di bawah seksyen 3 untuk menguatkuasakan suatu terma kontrak, pihak-pihak kepada kontrak tidak boleh, melalui perjanjian, menamatkan kontrak, atau mengubah kontrak dengan sebegitu cara untuk menghapuskan atau mengubah hak yang dimiliki oleh pihak ketiga, tanpa persetujuan pihak ketiga jika—

- (a) pihak ketiga telah mengkomunikasikan persetujuan pihak ketiga kepada terma itu kepada pemberi janji;
- (b) pemberi janji telah sedar bahawa pihak ketiga telah bergantung kepada terma itu (sama ada pihak ketiga ada pengetahuan mengenai isi kandungan tepat terma itu atau pun tidak); atau
- (c) pemberi janji boleh dijangka dengan munasabahnyanya untuk tahu bahawa pihak ketiga akan bergantung kepada terma itu (sama ada pihak ketiga ada pengetahuan mengenai isi kandungan tepat terma tersebut atau pun tidak).

(2) Persetujuan yang dirujuk dalam subseksyen (1)(a)—

- (a) boleh diberi dengan perkataan atau tingkah laku; dan
- (b) jika dihantar kepada pemberi janji dengan pos atau dengan cara yang lain, tidak boleh dianggap sebagai telah dikomunikasikan kepada pemberi janji sehingga persetujuan itu telah diterima oleh pemberi janji.

(3) Subseksyen (1) adalah tertakluk kepada apa-apa terma nyata kontrak di mana—

- (a) pihak-pihak kepada kontrak boleh dengan persetujuan membatalkan atau mengubah kontrak tanpa persetujuan pihak ketiga; atau
- (b) persetujuan pihak ketiga adalah dikehendaki dalam keadaan yang dinyatakan dalam kontrak dan bukan dalam keadaan yang diperuntukkan dalam subseksyen (1)(a), (b) dan (c).

(4) Dalam keadaan di mana persetujuan pihak ketiga dikehendaki di bawah subseksyen (1) atau (3), mahkamah atau tribunal timbang tara boleh, atas permohonan pihak-pihak kepada kontrak, mengecualikan kehendak persetujuan sedemikian jika mahkamah atau tribunal timbang tara berpuas hati bahawa—

(a) persetujuan itu tidak dapat diperolehi kerana pihak ketiga tidak boleh dikesan dengan usaha yang munasabah; atau

(b) pihak ketiga tidak mampu dari segi mental untuk memberi persetujuan itu.

(5) Mahkamah atau tribunal timbang tara boleh, atas permohonan pihak-pihak kepada kontrak, mengecualikan kehendak persetujuan pihak ketiga di bawah subseksyen (1)(c) jika ia berpuas hati bahawa tidak boleh ditentukan dengan munasabah sama ada pihak ketiga telah secara fakta bergantung kepada terma kontrak itu atau pun tidak.

(6) Jika mahkamah atau tribunal timbang tara mengecualikan kehendak persetujuan pihak ketiga, ia boleh mengenakan syarat-syarat sebagaimana difikir wajar, termasuk suatu syarat yang mengkehendaki bayaran pampasan kepada pihak ketiga.

(7) Bidang kuasa yang diberi kepada mahkamah oleh subseksyen-subseksyen (4), (5) dan (6) boleh dijalankan oleh kedua-dua Mahkamah Tinggi dan Mahkamah Rendah.

#### **Pembelaan, dsb, yang ada kepada pemberi janji**

4. (1) Subseksyen-subseksyen (2) hingga (5) terpakai kepada prosiding penguatkuasaan suatu terma kontrak yang dimulakan oleh suatu pihak ketiga yang bersandarkan seksyen 3.

(2) Pemberi janji ada, dengan cara pembelaan atau tolakan, apa-apa perkara yang—

(a) timbul daripada atau berhubung dengan kontrak dan adalah relevan kepada terma itu; dan

(b) akan tersedia ada kepada pemberi janji dengan cara pembelaan atau tolakan jika prosiding telah dimulakan oleh penerima janji.

(3) Pemberi janji ada, dengan cara pembelaan atau tolakan, apa-apa perkara jika—

- (a) suatu terma nyata kontrak memperuntukkan ketersediaan perkara itu kepada pemberi janji dalam prosiding yang dimulakan oleh pihak ketiga; dan
- (b) perkara itu akan tersedia ada kepada pemberi janji dengan cara pembelaan atau tolakan jika prosiding telah dimulakan oleh penerima janji.

(4) Pemberi janji ada—

- (a) dengan cara pembelaan atau tolakan; dan
- (b) dengan cara tuntutan balas apa-apa perkara yang tidak timbul daripada kontrak,

yang akan tersedia ada kepada pemberi janji dengan cara pembelaan atau tolakan atau dengan cara tuntutan balas terhadap pihak ketiga (mengikut kes yang berkenaan) jika pihak ketiga merupakan satu pihak kepada kontrak.

(5) Subseksyen-subseksyen (2) dan (4) adalah tertakluk kepada apa-apa terma nyata kontrak mengenai perkara-perkara yang tidak tersedia ada kepada pemberi janji dengan cara pembelaan, tolakan atau tuntutan balas.

(6) Dalam keadaan di mana, dalam apa-apa prosiding terhadap suatu pihak ketiga, pihak ketiga berusaha untuk menguatkuasakan suatu terma kontrak (termasuk, khususnya, suatu terma yang kononnnnya mengecualikan atau mengehadkan liabiliti) bersandarkan seksyen 3, pihak ketiga tidak boleh berbuat demikian jika pihak ketiga sememangnya tidak boleh membuat demikian (sama ada atau tidak atas alasan apa- apa keadaan khusus berhubung dengan pihak ketiga atau sebaliknya) andai kata pihak ketiga merupakan satu pihak kepada kontrak.

### **Penguatkuasaan kontrak oleh penerima janji**

5. Seksyen 3 tidak menjejaskan apa-apa hak penerima janji untuk menguatkuasakan apa-apa terma kontrak.

## **Perlindungan pemberi janji daripada liabiliti berganda**

6. Dalam keadaan di bawah seksyen 3, di mana suatu terma kontrak boleh dikuatkuasakan oleh pihak ketiga, dan penerima janji telah mendapat kembali daripada pemberi janji suatu jumlah mengenai -

- (a) kerugian yang dialami oleh pihak ketiga berkenaan dengan terma itu; atau
- (b) perbelanjaan yang ditanggung oleh penerima janji untuk memperbetulkan bagi pihak ketiga kemungkiran janji oleh pemberi janji,

kemudiannya, dalam apa-apa prosiding yang dimulakan oleh pihak ketiga berdasarkan seksyen itu, mahkamah atau tribunal timbang tara mestilah mengurangkan apa-apa award kepada pihak ketiga setakat mana ianya fikir sesuai dengan mengambil kira jumlah yang telah didapati kembali oleh penerima janji.

## **Pengecualian**

7. (1) Seksyen 3 tidak memberi hak kepada pihak ketiga dalam kes suatu kontrak mengenai bil pertukaran, nota janji hutang atau surat cara boleh niaga yang lain di bawah Akta Bil Pertukaran 1949.

(2) Seksyen 3 tidak memberi hak kepada pihak ketiga dalam kes mengenai apa-apa kontrak yang mengikat suatu syarikat dan ahli-ahlinya di bawah seksyen 33 Akta Syarikat 2016.

(3) Seksyen 3 tidak memberi hak kepada pihak ketiga dalam kes mengenai apa-apa dokumen pendaftaran suatu perkongsian liabiliti terhad yang didaftarkan di bawah Akta Perkongsian Liabiliti Terhad 2012 atau apa-apa perjanjian perkongsian liabiliti terhad seperti yang ditakrif dalam Akta itu.

(4) Seksyen 3 tidak memberi hak kepada pihak ketiga untuk menguatkuasakan apa-apa terma kontrak pekerjaan terhadap seorang pekerja.

(5) Seksyen 3 tidak memberi hak kepada pihak ketiga dalam kes mengenai -

- (a) suatu kontrak untuk pengangkutan barang melalui laut; atau

- (b) suatu kontrak untuk pengangkutan barang melalui keretapi atau jalan raya, atau untuk pengangkutan kargo melalui udara, yang mana tertakluk kepada kaedah-kaedah konvensyen pengangkutan antarabangsa yang sesuai,

kecuali pihak ketiga boleh bersandarkan seksyen itu bergantung kepada pengecualian atau pengecualian liabiliti dalam kontrak sedemikian.

(6) Dalam subseksyen (5)—

“konvensyen pengangkutan antarabangsa yang sesuai” ertinya—

- (a) berhubung dengan suatu kontrak pengangkutan kargo melalui udara, Konvensyen yang mempunyai kuasa undang-undang di Malaysia di bawah Jadual Pertama kepada Akta Pengangkutan Melalui Udara 1974;
- (b) berhubung dengan suatu kontrak pengangkutan barang melalui keretapi, Konvensyen sedemikian yang mempunyai kuasa undang-undang di Malaysia di bawah undang-undang bertulis sedemikian mengikut perintah yang boleh ditetapkan oleh Menteri; dan
- (c) berhubung dengan suatu kontrak pengangkutan barang melalui jalan raya, Konvensyen sedemikian yang mempunyai kuasa undang-undang di Malaysia di bawah undang-undang bertulis sedemikian mengikut perintah yang boleh ditetapkan oleh Menteri;

“kontrak untuk pengangkutan barang melalui laut” ertinya suatu kontrak pengangkutan—

- (a) yang terkandung dalam atau yang boleh dibuktikan dengan bil muatan atau bil laut; atau
- (b) di bawah atau untuk tujuan di mana suatu aku janji telah diberikan dan aku janji itu terkandung dalam pesanan penghantaran kapal.

(7) Untuk tujuan subseksyen (6), “bil muatan”, “bil laut” dan “pesanan penghantaran kapal” mempunyai makna yang diberi oleh Akta Pengangkutan Barang Melalui Laut 1950 dan *Carriage of Goods by Sea Act 1924* (UK).

### **Peruntukan tambahan berkaitan dengan pihak ketiga**

8. (1) Seksyen 3 tidak menjejaskan apa-apa hak atau remedi pihak ketiga yang wujud atau sedia ada selain daripada Akta ini.

(2) Dalam seksyen 6 Akta Had Masa 1953 dan jadual dalam Ordinan Had Masa (Bab 49, Sarawak) dan Ordinan Had Masa (Bab 72, Sabah) masing-masing, rujukan-rujukan kepada suatu tindakan berasaskan kontrak termasuk rujukan-rujukan kepada suatu tindakan yang bersandarkan seksyen 3 berkaitan dengan suatu kontrak.

(3) Suatu pihak ketiga tidak boleh, oleh kerana seksyen 3(5) atau 5(4) atau (6), dianggap sebagai satu pihak kepada kontrak untuk tujuan apa-apa undang-undang bertulis yang lain.

### **Peruntukan timbang tara**

9. (1) Dalam keadaan di mana—

(a) suatu hak di bawah seksyen 3 untuk menguatkuasakan (dipanggil dalam seksyen ini terma substantive) adalah tertakluk kepada terma yang memperuntukkan pengemukaan pertikaian kepada timbang tara (dipanggil dalam seksyen ini perjanjian timbang tara); dan

(b) perjanjian timbang tara adalah satu perjanjian bertulis untuk tujuan Akta Timbang Tara 2005,

pihak ketiga hendaklah dianggap untuk tujuan Akta Timbang Tara 2005 sebagai satu pihak kepada perjanjian timbang tara berkenaan dengan pertikaian antara pihak ketiga dan pemberi janji yang berkaitan dengan penguatkuasaan terma substantif oleh pihak ketiga.

(2) Dalam keadaan di mana—

(a) suatu pihak ketiga mempunyai hak di bawah seksyen 3 untuk menguatkuasakan suatu terma yang memperuntukkan pengemukaan satu atau lebih perihalan mengenai pertikaian antara pihak ketiga dan pemberi janji kepada timbang tara (dipanggil dalam seksyen ini perjanjian timbang tara);

- (b) perjanjian timbang tara adalah satu perjanjian bertulis untuk tujuan Akta Timbang Tara 2005; dan
- (c) pihak ketiga itu tidak boleh dianggap di bawah subseksyen (1) sebagai pihak kepada perjanjian timbang tara,

pihak ketiga itu, jika pihak ketiga menjalankan hak sedemikian, dianggap untuk tujuan Akta Timbang Tara 2005 sebagai satu pihak kepada perjanjian timbang tara berkaitan dengan perkara berkenaan dengan perjalanan hak itu, dan dianggap sebegitu sebaik sahaja sebelum perjalanan hak itu.

## **4.0 CONCLUSION**

The reforms set out in this Report mark a significant milestone in the evolution of the Contracts Act 1950. They reflect a careful balance between preserving the enduring principles of contract law and responding to the demands of a rapidly changing economic and technological landscape.

By modernising the language and structure of the Act, clarifying its doctrinal foundations, and introducing targeted and principled reforms, the Committee has sought to establish a framework that is not only legally coherent but also practically effective and commercially responsive. The complementary development of standalone legislation in key areas, together with the introduction of a structured regime for unfair contract terms, further strengthens the integrity and adaptability of Malaysia's contractual framework.

At the same time, this Report recognises that contract law is not static. It must continue to evolve in response to new forms of commerce, emerging technologies, and shifting societal expectations. The reforms proposed here should therefore be understood not as a final endpoint, but as part of an ongoing process of legal development. Periodic review and refinement will be essential to ensure that Malaysia's contract law remains relevant, competitive, and aligned with both domestic needs and global developments.

Taken together, these reforms position Malaysia as a jurisdiction with a modern, balanced, and forward-looking system of contract law. It is the Committee's expectation that they will enhance confidence in contractual dealings, support innovation and economic growth, and provide a strong and enduring foundation for the continued development of the law.

## ***Appendix A: Committee Members***

### **Committee for the Review and Reform of Contract Law (CRRCL)**

#### **Chair**

- The Honourable Justice Dato’ Seri Vazeer Alam bin Mydin Meera  
Judge of the Federal Court of Malaysia; Adjunct Professor, Monash University Malaysia

#### **Members**

- The Honourable Justice Datuk Wong Kian Kheong  
Judge of the Court of Appeal, Malaysia
- The Honourable Justice Dato’ Azizul Azmi bin Adnan  
Judge of the Court of Appeal, Malaysia
- Dato’ Mary Lim Thiam Suan  
President of the AIAC Court of Arbitration; Former Judge of the Federal Court of Malaysia
- Tan Sri Datuk Seri Panglima David Wong Dak Wah  
Former Chief Judge of Sabah and Sarawak
- Dato Sri JC Fong  
Former Attorney General of Sarawak
- Associate Professor Dr. Adnan Trakic  
Director, Centre for Commercial Law and Regulatory Studies (CLARS), Monash University Malaysia
- Dr. Ridoan Karim  
Deputy Director, CLARS, Monash University Malaysia
- Mr. Philip Koh Tong Ngee  
Senior Partner, Mah-Kamariyah & Philip Koh; Adjunct Professor, Monash University Malaysia and Universiti Malaya
- Mr. Sathish Mavath Ramachandran  
Partner, Deol & Gill
- Professor Dr. Zuhairah Ariff binti Abd Ghadas  
Deputy Vice-Chancellor, Universiti Sultan Zainal Abidin (UniSZA)
- Dr. David Fung Yin Kee  
Head of Litigation, Alex Pang & Co.
- Professor Dr. Kamal Halili bin Hassan  
Professor of Law, Universiti Kebangsaan Malaysia (UKM)

- Mr. Wong Tat Chung  
Senior Partner, Wong Beh & Toh
- Mr. Oon Chee Kheng  
Partner, C K Oon & Co.
- Mr. GK Ganesan  
Founder, GK Ganesan Chambers
- Dr. Mohd Shahril Nizam bin Md Radzi  
Senior Lecturer, Faculty of Law, Universiti Kebangsaan Malaysia (UKM)
- Associate Professor Dr. Cheong May Fong  
Associate Professor, UNSW Sydney (Faculty of Law & Justice)
- Dato Dr. Punitha Silivarajoo  
Deputy Director General (Policy & Development), Legal Affairs Division, Prime Minister's Department (BHEUU, JPM)
- Datuk Thiyagu a/l Ganesan  
Deputy Director General (Law Reform), BHEUU, JPM
- Ms. Wan Nazzatu Nur Hazzin binti Wan Azaham  
Principal Assistant Director, BHEUU JPM
- Ms. Seri Suwarni binti Nasir  
Senior Assistant Director, BHEUU, JPM

**Lead Research Assistant**

- Ms. Anisah binti Norman Ismadi Omar

**Secretariat – BHEUU, JPM**

- Dr. Suharmi bin Ismail, Deputy Director (Policy)
- Dr. Nursyamirah binti Abd Razak, Senior Assistant Director
- Ms. Norshakila a/p Yusof, Senior Assistant Director

## ***Appendix B: Working Groups***

### **Working Groups for the Review and Reform of Contract Law in Malaysia**

#### **Group 1: Sections 1–23 (Definitions, Formation, and Voidable Contracts)**

##### **Co-Chairs**

- Mr. Philip Koh Tong Ngee  
Adjunct Professor, Monash University Malaysia
- Mr. Sathish Mavath Ramachandran  
Partner, Deol & Gill

##### **Members**

- Professor Alexander Loke  
City University of Hong Kong
- Dr. Tanjina Sharmin  
Monash University Australia
- Professor Tham Chee Ho  
Singapore Management University
- Dato Sri JC Fong  
Former Attorney General of Sarawak
- Ms. Lim Chew Yan  
Director of Corporate Finance and Group General Counsel, Hong Leong Management Co. Sdn. Bhd.
- Mr. Mohammed Ali bin Imran  
Minister's Office, Law and Institutional Reform

##### **Research Assistant**

- Ms. Wong Jiaqi
- 

#### **Group 2: Sections 24–37 (Void Agreements and Contingent Contracts)**

##### **Chair**

- Associate Professor Dr. Adnan Trakic  
Monash University Malaysia

## **Members**

- The Honourable Justice Dato' Seri Vazeer Alam bin Mydin Meera  
Judge of the Federal Court of Malaysia
- Ms. Karen Abidi  
Monash University Australia
- Professor Dr. Kamal Halili bin Hassan  
Universiti Kebangsaan Malaysia (UKM), Faculty of Law
- Mr. Rabindra S. Nathan  
Partner, Shearn & Delamore
- Dr. Aashish Srivastava  
Monash University Australia
- Professor Dr. Hartini binti Saripan  
Universiti Teknologi MARA (UiTM)
- Mr. Athirathan Velloo Muthalia  
Monash University Malaysia

## **Research Assistant**

- Ms. Tian Kai Ni
- 

## **Group 3: Sections 38–62 (Performance of Contracts)**

### **Chair**

- Professor Dr. Zuhairah Ariff binti Abd Ghadas  
Universiti Sultan Zainal Abidin (UniSZA), Faculty of Law

### **Members**

- Dr. Mohd Shahril Nizam bin Md Radzi  
Universiti Kebangsaan Malaysia (UKM), Faculty of Law
- Dr. Hanifah Haydar Ali Tajuddin  
Universiti Kebangsaan Malaysia (UKM), Faculty of Law
- Professor Dr. Ida Madieha A. Ghani Azmi  
Ahmad Ibrahim Kuliyah of Laws (AIKOL), IIUM
- Ms. Siti Munirah binti Maarof  
Munirah & Associates

- Professor Dr. Jady Zaidi Hassim  
Sarawak State Attorney-General's Chambers
- Ms. Lisa Di Marco  
Faculty of Law, Monash University Australia
- Ms. Seri Suwarni binti Nasir  
Senior Assistant Director, BHEUU JPM
- Ms. Amirah Fatimah Ahamed  
Administrative Officer, BHEUU JPM

#### **Research Assistant**

- Ms. Wong Yuki
- 

### **Group 4: Sections 63–76 (Variation, Breach, and Remedies)**

#### **Chair**

- Mr. Oon Chee Kheng  
Partner, C K Oon & Co.

#### **Members**

- Dato' Mary Lim Thiam Suan  
President of the AIAC Court of Arbitration
- Associate Professor Dr. May Fong Cheong  
UNSW Sydney
- Mr. G. H. Tee  
Retired High Court Judge
- Ms. Ooi Xin Yi  
Senior Associate, Messrs Lai Chee Hoe & Associates
- Ms. Fung Ru Huey  
Formerly of the Securities Commission

#### **Research Assistant**

- Mr. Haarshwaran a/l Kumar
-

## **Group 5: Sections 77–100 (Indemnity and Guarantee)**

### **Chair**

- Mr. GK Ganesan  
Founder, GK Ganesan Chambers

### **Members**

- Mr. Oon Chee Kheng  
Partner, C K Oon & Co.
- Mr. Yap Boon Hau  
Partner, Mah-Kamariyah & Philip Koh
- Ms. KN Geetha  
Senior Associate, GK Ganesan Chambers
- Ms. Shalini Ragunath  
Head of CAL Department, Methodist College Kuala Lumpur

### **Research Assistant**

- Ms. Lydia Jaynthi Ravichanthiran
- 

## **Group 6: Sections 101–134 (Bailment)**

### **Chair**

- Dr. Ridoan Karim  
Monash University Malaysia

### **Members**

- Mr. Yap Yeong Hui  
Partner, Chooi & Co.
- Dr. Muhammad Abdullah Fazi  
Monash University Malaysia
- Professor Dato' Sri Dr. Ashgar Ali Ali Mohamed  
International Islamic University Malaysia
- Dato' Dr. Punitha Silivarajoo  
Deputy Director General (Policy & Development), BHEUU JPM
- Dr. Chithra Latha Ramalingam  
Monash University Malaysia

- Ms. Rushmila Rafique  
Monash University Malaysia
- Associate Professor Evgeny Guglyuvatyy  
Monash University Malaysia
- Dr. Haemala Thanasegaran  
Monash University Australia

#### **Research Assistant**

- Ms. Tian Kai Ni
- 

### **Group 7: Sections 135–191 (Agency)**

#### **Chair**

- Mr. Wong Tat Chung  
Partner, Wong Beh & Toh

#### **Members**

- Dr. Ridoan Karim  
Monash University Malaysia
- The Honourable Justice Dato' Azizul Azmi bin Adnan  
Judge of the Court of Appeal, Malaysia
- Ms. Christina Xiaoxi Kang  
Legal AI, Monash University Malaysia
- Mr. Lakshmi Nadarajah  
Of Counsel, Christopher & Lee Ong
- Mr. Jeremiah Ravindran Gurusamy  
Partner, RDJ Law
- Ms. Wan Nazzatu Nur Hazzin binti Wan Azaham  
Principal Assistant Director, BHEUU JPM
- Ms. Izzati Hanifah binti Azizi  
Administrative Officer, BHEUU JPM
- Ms. Irene Yong  
Partner, Shearn Delamore & Co.

#### **Research Assistant**

- Ms. Wong Jiaqi

## **Group 8: Privity of Contract and Third-Party Rights**

### **Chair**

- Dr. David Fung Yin Kee  
Head of Litigation, Alex Pang & Co.

### **Members**

- Tan Sri Datuk Seri Panglima David Wong Dak Wah  
Former Chief Judge of Sabah and Sarawak
- Dr. Burton Ong  
Associate Professor, National University of Singapore
- The Honourable Justice Datuk Wong Kian Kheong  
Judge of the Court of Appeal, Malaysia
- Dr. Emmanuel Laryea  
Associate Professor, Monash Law Faculty
- Datuk Thiyagu a/l Ganesan  
Deputy Director General (Law Reform), BHEUU JPM
- Ms. Syafiqah Fasiha binti Ahmad Safri  
Administrative Officer, BHEUU JPM

### **Research Assistant**

- Ms. Liew Yung Enn, Grace

### ***Appendix C: Working Group Reports and Supporting Materials***

The detailed reports and research materials prepared by the Working Groups are compiled in a separate repository. These materials include draft provisions, comparative legal analyses, and supporting justifications that informed the Committee's recommendations. The full set of Working Group reports and supporting documents may be accessed at the following link:

[https://drive.google.com/drive/folders/13K-03LxeBG\\_nsU0IkcyjGnFVNHTg3bTvm?usp=sharing](https://drive.google.com/drive/folders/13K-03LxeBG_nsU0IkcyjGnFVNHTg3bTvm?usp=sharing)

## ***Appendix D: Recordings of Committee Meetings***

The recordings of meetings of the Committee for the Review and Reform of Contract Law (CRRCL), during which the Working Groups' proposals were presented, deliberated, and discussed, are compiled in a dedicated repository. These recordings form part of the Committee's deliberative record and provide additional context to the recommendations set out in this Report. The recordings may be accessed at the following link:

### **1. Recording 1**

<https://monash.zoom.us/rec/share/YHrXdRoYU9lQHBMgyQMA3cL3p3U5Q8HBr9iSGNff2Y3kcyReybyArjujT8xzQ7p2.i2NlkKRT0Q9bakjg>

**Passcode:** pS<sup>^</sup>.H9W

### **2. Recording 2**

<https://monash.zoom.us/rec/share/jevIo96rTAprg5c2eQc5s61KWZFz7IYtz9o2PnXBebLbSCqXwAcfvjcVd7XuklLp.KOsIY4mE0qaAhODb>

**Passcode:** &q0k\*5=P

### **3. Recording 3**

[https://monash.zoom.us/rec/share/VuZCmz-hmsUwQzs571L6e10A09h0IOKcI8X\\_10gxFkLzvIlx-gF0JX3QKAXxwvWQ.CKn2MlK4sViTp15S](https://monash.zoom.us/rec/share/VuZCmz-hmsUwQzs571L6e10A09h0IOKcI8X_10gxFkLzvIlx-gF0JX3QKAXxwvWQ.CKn2MlK4sViTp15S)

**Passcode:** s6&G.+Jm

### **4. Recording 4**

<https://monash.zoom.us/rec/share/loHnogPubHt3R6cJ8TPjyfMkkBn-mBDVcrRsN73r85YZwfyzjqIk2I5qybm53DRc.qk50iGC7gehUzKfQ>

**Passcode:** =Uf.8XnB

### **5. Recording 5**

[https://monash.zoom.us/rec/share/BL42fMzNePAocaL\\_HYQuJtMhKNJhm-k2Hcp2XqwuV6nPSjEVxF9caxW11YUjVnHq.dgiRe6SEgagmhXrT](https://monash.zoom.us/rec/share/BL42fMzNePAocaL_HYQuJtMhKNJhm-k2Hcp2XqwuV6nPSjEVxF9caxW11YUjVnHq.dgiRe6SEgagmhXrT)

**Passcode:** @GtaW0zP

6. **Recording 6**

<https://monash.zoom.us/rec/share/ah2CA9Yz82lzI5WqBPzbPFODKz1canUF2mNLmpkOq3b6yuF2fySmZJzWfIHcAl6T.ietiZkWBuDaZYszX>

**Passcode:** &b&%eb&4

7. **Recording 7**

<https://monash.zoom.us/rec/share/IL9WiJIgxexopXx3u54HiZI9YgDI4oMPBTL0MsGiEWhC7guIjcpSexC7SbiqR0g.iwN1jdQ6kujUo3rl>

**Passcode:** 9%x=5=Yt

8. **Recording 8**

<https://monash.zoom.us/rec/share/0k1yV9OrMCL3m6LXNEYbe4gtu4bCpIvRauCUansyXbmXrgKAGdWjLxWEJ278jU6K.urEanADRjHVcgzyO>

**Passcode:** vc4BA\*8\*

## ***Appendix E: Activities***

### **First Roundtable Discussion (6 February 2025)**



### **Meeting with Justice Vazeer & Research Assistants (21 February 2025)**



### **BHEUU Progress Meeting with the Chair: A Courtesy Visit to Justice Vazeer by the Legal Affairs Division of the Prime Minister's Department (24 March 2025)**



### Agency Working Group Presentation of Draft Bill and Policy Paper (7 May 2025)



### Coordination Meeting of Working Groups 1 to 4 (4 June 2025)



### Roundtable Workshop at the National University of Singapore: Contract Law Reform Across the Causeway (28 & 29 June 2025)



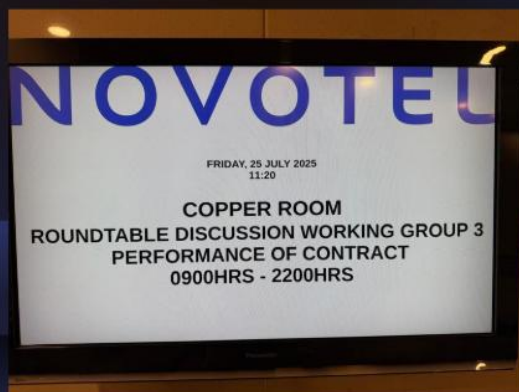
**Roundtable Workshop at the National University of Singapore:  
Contract Law Reform Across the Causeway (28 & 29 June 2025)**



**Engagement Session With Government Agencies (18 July 2025)**



**Workshop on Performance of Contract Working Group (25 July 2025)**



### Presentations by Agency Working Group (18 September 2025)



### Presentations by Working Groups 1 to 6 (29 & 30 September 2025)



### Public Engagement Session for Rights of Third Parties Bill (2 October 2025)



## Public Engagement Session for Rights of Third Parties Bill (2 October 2025)



## Meet with Professor Emeritus John Carter (10 October 2025)



## Budget Discussion with the Director General of the Legal Affairs Division of the Prime Minister's Department, Datuk Zamri bin Misman (24 October 2025)



### Matrices Discussion of Working Groups 1 & 2 (10 November 2025)



### Matrices Discussion of Working Group 4 (10 December 2025)



### Matrices Discussion of Working Groups 3,5, and 6 (9 January 2026)



### Matrices Discussion of Working Groups 3,5, and 6 (23 January 2026)



### Presentation on Unfair Contract Terms (23 February 2026)



### Public Engagement Sessions on Agency Bill (30 March 2026)



### Progress Updates to the Representatives from BHEUU (13 April 2026)



### Progress Updates to the Representatives from the Attorney General's Chambers (14 April 2026)



### Presentation of Amendments to the Final Report via Zoom (21 April 2026)



### In-Person Follow-Up to the 21 April 2026 Meeting (27 April 2026)



### Coordination Meeting with YB Dato' Sri Azalina binti Othman Said (11 June 2026)

