



RENEWABLE ENERGY M&A IN MALAYSIA: KEY LEGAL AND COMMERCIAL CONSIDERATIONS

MONTH :
September 2025

BY :
Constance Low &
Cristabel Low

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Driven by the global energy transition and its commitment to decarbonise, Malaysia has set a target of achieving net-zero and to increase renewable energy capacity in its electricity mix to 70% by 2050. To accelerate this shift, Malaysia has introduced various programmes and incentives to encourage participation in the renewable energy industry, such as the Large Scale Solar (**LSS**) programme, Corporate Green Power Programme (**CGPP**), Corporate Renewable Energy Supply Scheme (**CRESS**), self-consumption (**SeIco**) and Net Energy Metering (**NEM**), building upon earlier initiatives such as the Feed-in Tariff (**FIT**) programme. In addition, targeted tax incentives, such as the Green Investment Tax Allowance and Green Investment Tax Exemption, have been made available to encourage investments in renewable energy assets.

These schemes and benefits have attracted industry players to participate and contribute to Malaysia's renewable aspirations, leading to a notable increase in the supply of renewable energy assets in

the market. Consequently, the renewable energy sector has witnessed a significant rise in mergers and acquisition (**M&A**) activity.

Given the renewable energy is a highly regulated industry, prospective M&A participants must carefully navigate the regulatory landscape. Each programme comes with its own sets of conditions and requirements imposed by the regulators, which can materially impact a prospective investor or buyer evaluating opportunities in the sector.

In this article, we examine some key legal and commercial considerations in renewable energy M&A transactions, with a particular focus on projects in Peninsular Malaysia.

1) Relevant Stakeholders

- In Malaysia, the relevant regulators are the Ministry of Energy Transition and Water Transformation (**PETRA**), Energy Commission (**EC**), and Sustainable Energy Development Authority (**SEDA**).

(a) PETRA is the government ministry tasked to manage and regulate the

electricity supply industry strategically by optimizing renewable energy and energy efficiency to ensure dependable, affordable, and sustainable services, and ensure water sustainability and security through policy development and strengthened governance.

(b) EC is responsible for regulating energy supply activities in Peninsular Malaysia, and to advise PETRA on all matters relating to the generation, production, transmission, distribution, supply and use of electricity. In addition, EC is the body which issues the licences under the Electricity Supply Act 1990.

(c) The key role of SEDA is to administer and manage the implementation of the feed-in tariff mechanism

under the Renewable Energy Act 2011.

- In addition, the main offtaker in Peninsular Malaysia is the national utility company, Tenaga Nasional Berhad (TNB), who purchases electricity from power producers and supplies the same to electricity consumers. TNB also owns the electricity transmission and distribution network in Peninsular Malaysia.

2) Foreign equity restrictions

- Generally, energy projects in Malaysia under the FiT, LSS, CGPP and CRESS programmes are required to have at least 51% Malaysian equity interest. This effectively limits the foreign investor or buyer to 49% equity interest. While this shapes the structure of transactions, it has not deterred international participation. Foreign investors and buyers have adopted structuring approaches that allow them to secure a greater degree of economic

exposure while remaining compliant with regulatory requirements, achieving both compliance and commercial viability. These measures include utilising joint venture arrangements with a Malaysian party, reserved matters and veto rights in shareholders agreements, and allocating economic benefits via contractual provisions and equity instruments.

3) Moratorium periods and regulatory approvals required

- A critical issue which should be addressed at the outset of any renewable energy M&As is the regulatory approvals applicable to the proposed transaction. The approvals required from the regulatory authorities and relevant energy stakeholders can significantly impact the transaction structure and overall feasibility of the transaction.
- Accordingly, comprehensive due diligence on the target company with the assistance of experienced legal counsel is

essential. Parties should carefully assess any restrictions on changes in shareholding, moratorium periods and the specific approvals required, paying particular attention to the terms and conditions under the generation licences and power purchase agreement of the power producer. In addition, restrictions on change of shareholders and/or change in control may also be imposed via the request for proposal, letter of award, letter of notification or guidelines issued by EC.

- From a structuring perspective, transaction parties should carefully consider the optimal deal structure that complies with moratoriums, change of shareholding restrictions and regulatory approval requirements, while meeting their commercial objectives. The required approvals should be expressly addressed in the transaction documents and factored into the transaction timeline.

- Generally, there are restrictions in the power purchase agreement which may be triggered by a proposed transaction:
 - (a) The LSS power purchase agreement (**LSS PPA**) imposes a moratorium period during which the following actions are prohibited without the prior written approval of PETRA and/or EC (as applicable, subject to review of the relevant LSS PPA):
 - (i) transfers or disposals of the project by the solar power producer;
 - (ii) transfers or disposals of shares or interest in shares by a shareholder of the solar power producer or any entity which is referenced in the LSS PPA;
 - (iii) a change in control of the solar power producer (whether directly or indirect).
 - (b) The LSS PPA also prohibits the solar power producer from disposing any interest in the power project without the prior written consent of the EC and TNB.
- The generation licence issued under the Electricity Supply Act 1990 restricts changes in the shareholders and shareholding structure from those attached to the generation licence without the prior written approval of PETRA.
- For feed-in-tariff projects, approval from SEDA will be required under the feed-in approval for any change in the information submitted to SEDA, which typically includes information of the licence holder's shareholders and shareholding structure.
- Applications to PETRA are typically submitted to EC as the coordinating agency.

4) Capital structure and shareholders' rights

- Many energy projects, particularly those involving foreign investors, often adopt capital structures involving various class of shares, such as ordinary shares and preference shares. A prospective investor or buyer should undertake a thorough review of the terms of these equity instruments, as well as the shareholders' agreement, to fully understand the rights and extent of control being acquired and the company's governance framework, such as board representation rights, reserved matters, veto powers and dividend entitlement.
- In addition, the accounting and tax implications arising from these share structures and terms should also be carefully assessed, as they may significantly influence overall investment returns.
- Prospective buyers should also note that under Malaysian law, dividends (including those on

preference shares) may only be distributed if the target company has sufficient profits and satisfies the solvency requirements prescribed under the Malaysia Companies Act 2016. Furthermore, where the preference shares are redeemable, redemption may be carried out from (a) the company's profits, (b) the proceeds from a fresh issuance of shares, or (c) the company's capital, provided the requisite solvency requirements are met. These factors may impact deal valuation and anticipated returns.

5) Generation licence expiring before power purchase agreement tenure

- A potential issue which may arise in energy M&A transactions is a mismatch between the tenures of the generation licence and power purchase agreement (**PPA**).
- Typically, a PPA has a term of 21 years from the project's actual commercial operation date (COD), save for LSS4

projects, where the term extends to 25 years from COD.

- The generation licence is typically issued for a period of 21 years. As the power producer has to apply for the generation licence before the actual COD, the generation licence may be issued with a commencement date prior to the actual COD. This may result in the generation licence expiring before the PPA term, potentially preventing the project from being operated for the full PPA term.
- Accordingly, the prospective buyer or investor should ensure that any shortfall in the term of the generation licence is appropriately addressed in the transaction documents to mitigate this risk, which may involve obtaining an extension of the generation licence.

6) Land

- The power producer's rights to use the project land are crucial to the bankability, security and long-term viability of the project. A prospective buyer or

investor should conduct comprehensive land due diligence to confirm the power producer holds valid and enforceable rights to occupy and utilise the land for the entire duration of the PPA and the decommissioning period at the end of the project's lifecycle. Failure to secure sufficient land rights may expose the project to operational disruption, and in some cases, an event of default under the PPA.

- The right to use the land for the power plant can be secured either through direct ownership of the land or leasing the land from the landowner. Where a lease arrangement is used, it is important for the lease to be registered on the issue document of title in favour of the power producer, ensuring the lease is binding on third parties, including subsequent purchasers of the land. If the lease has not been registered, registration should be addressed in the transaction documents as conditions

precedent or completion deliverables, requiring the seller to secure registration before closing.

- In addition, the prospective buyer should verify the power producer has secured rights over the land used for the transmission lines, through a registered lease or wayleave arrangement.
- In power projects where TNB is the offtaker, the PPA typically requires the power producer to transfer the ownership of the land where the substation is located to TNB. The prospective buyer should request documentary evidence confirming the transfer of such land to TNB.
- Further, prospective buyers should also ensure that the project land is suitable for the development of a power plant. Common land issues encountered on power projects include:

(a) **Leasehold land or subleased land:** Where the power plant is

installed on state leasehold land or subleased land under a master lease, buyers should assess the remaining tenure of the lease to ensure it extends until the expiry of the PPA and covers the decommissioning period.

- (b) **Category of land use:** Under the National Land Code, the appropriate category of land use for power projects is classified as 'industry'. If the project site does not have the appropriate category of land use (e.g. agricultural land), conversion of the category of land use will be required, which entails application to the relevant state authority and payment of conversion premium based on assessed land value, which may be substantial. Alternatively, in certain states, developers may

apply for a special permit that allows non-industrial land to be used for industrial purposes without a full conversion. The conversion premium or the fee to obtain the special permit should be factored into the financial modelling.

- (c) **Malay reserved land:** Additional caution is required if a project is located on Malay reserved land governed by the relevant State Malay Reservation

Enactments. As a general rule, Malay reserved land can only be owned, leased or transferred to a Malay, unless the power producer is expressly recognised under the relevant state enactment. If the power producer does not qualify as Malay,¹ it may face significant challenges in securing a long-term lease over the Malay reserved land.

This article was written by our Projects, Energy & Infrastructure partners, Constance Low and Crystabel Low. It contains general information only. It does not constitute legal advice or an expression of legal opinion and should not be relied upon as such.

*For further information, please contact
Constance (email: constance.low@asl.com.my) or
Crystabel Low (email: crystabel.low@asl.com.my)*

¹ Note: The definition of “Malay” differs based on the relevant state enactment.