



# **THE BEDB AND LAW SOCIETY'S**

***'LAW CLINIC FOR START-UPS AND ENTREPRENEURS'***

***iCentre, Bandar Seri Begawan, Brunei Darussalam***


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# **BUSINESS SET-UP ROAD MAP**





Once the preferred business entity has been selected by the entrepreneur, the owner must take care to comply with all laws regulating (a) the type of business entity; and (b) the type of business that he is carrying on. Depending on the types of businesses, there may be other regulations to comply with. Failure to comply with the law and the requirements of the law attracts consequences. For example, failure to comply (a) is an offence under the law; (b) you can be charged for the offence; (c) you can be fined if found guilty, and a second or subsequent offence may incur additional penalties, including default fines, imprisonment. Your license may be revoked.

Regulatory compliance can further be divided into 2 types (a) those affecting all business; and (b) those affecting only certain types of businesses. Regulatory requirements and compliance are found in statute law and some times required by administrative policies.



It is not possible to cover every type of business so a general outline will be discussed. This briefing is a general introduction legal issues that can affect your business. It is not intended to discuss details. Remember that laws and regulations can change from time to time, and you must keep updating yourself with such new laws and regulations.

Since business prudence is a must in all business operations, I will also explain some of the more common legal risk factors in business you should consider to reduce or avoid.

It is preferable, before starting the business to find out what regulations apply to your business.

# A. Those affecting all businesses

- **The business entity**
  - **Business names:** for a firm or enterprise, there is little compliance required except when –
    - There is a change in the registered particulars when a Form 3 must be completed and filed with the Registrar of Business Names;
    - when you carry on the business as a nominee of another person, you must register the person on whose behalf you are carrying on the business;
    - if you are no longer partner or owner of the business, you must remove your name from the registration. Failure to do so will make you liable for all debts of the business.



- **Corporations**

- Once the company has been set-up or incorporated, you must comply with all the requirements of the Companies Act. These include, filing of Annual Returns, lodgment of certain types of resolutions and within the time prescribed by the Companies Act. Failure to comply with these requirements is an offence and incurs a penalty and in some instances, a default fine of say, B\$50-00 for each day the offence continues. This can be heavy in the long term.
- It is prudent to appoint a Company Secretary to handle these requirements for you.
- For example, a company must pay tax and must submit a yearly tax return to the Collector of Income Tax and failure to do so is an offence.



- **Employment**

- **Labour**

- Labour quota must be applied for and obtained before you are permitted to employ a foreign worker;
- The Labour quota being approved does not mean you can already employ the foreign worker, the Immigration permit or work pass must first be issued. The Labour Quota only means you are entitled to employ the number of foreign workers listed in your Labour Quota and the Immigration permit means you are entitled to employ a particular immigrant employee in your business;
- You cannot lend or 'hire-out' your foreign employee to another company (unless licensed for that purpose).



- **Immigration**

- This is the requirement to apply for and obtain a work permit for a foreign worker after you have the Labour Quota.
- Note that the Immigration work permit always states the name of the company for which the foreign worker may be employed in.
- If you have 2 companies, say a firm and a sendirian berhad, and the foreign worker is issued with a work permit for the firm, he may not work for the sendirian berhad and vice versa because they are different entities. The same applies where between two sendirian berhad companies.
- Where it is two firms (enterprise) belonging to the same person, it is not clear whether the Immigration Department would permit the foreign worker to work for either of these two firms because in law, the two firms represent only one owner.
- The important thing is, if in doubt, always ask the relevant authorities and preferably, in writing and obtain an answer in writing for your business records.

- **Miscellaneous Licence (Lisen Rampaian)**

The ML/LR is regulated by two different authorities, the Municipal Department (Bandaran) and the District Office (Pejabat Daerah). Under the MLA, section 3 states, *“No person shall open or keep open any place, or conduct any trade, business and occupation specified in the Schedule except under and in accordance with a licence issued under this Act.”*

- Types of businesses which requires ML/LR are:-

- a) **Municipal Board areas only**

- Retail shop
  - ❖ ‘retail shop’ includes a place (not petrol station) where retail trade or business is carried on (not including repair work or motor vehicle dealer)
- Timber store and furniture factories




**b) District Office – all areas in Brunei Darussalam**

- Workshop
- Motor Vehicle Dealer
- Petrol Station

**c) District Office – all areas outside Municipal Board Area**

- Coffee Shops, eating houses, boarding houses, public resorts and entertainment;
  - ❖ ‘boarding houses’ includes hotel, guest house and any premises with not less than four (4) rooms in which persons may hire a room and where domestic service is provided);
  - ❖ ‘coffee shop’ includes ice cream shop, cold drink shop;
  - ❖ ‘eating house’ includes restaurant, clubs where meals are served.

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- Hawkers
    - ❖ ‘hawker’ means person who is itinerant hawker or sets up stall in any place to sell food or goods of any kind;
  - Retail shop;
  - Timber store and furniture factories;
  - Workshop

‘workshop’ means a place in which any manual labour is performed or any plant/machinery is operated for trade or business for the purposes of

- i. Manufacturing;
- ii. Altering, repairing, cleaning or laundering an article;
- iii. Modification of an article for sale;
- iv. Preparing or manufacturing food for human consumption, fodder or animal feed.



- **Public Entertainment**

- Note that if you wish to organize talks, seminar or any kind of gathering in which the public or any class of the public are permitted you must obtain a permit from the Ministry of Home Affairs.

- **Tabung Amanah Pekerja**

Under the Tabung Amanah Pekerja (TAP) and the Supplemental Contributory Pensions Order, 2009, as an employer, you have duty to –

- Contribute and pay to TAP the relevant percentage of total salary of your employee; and
- Deduct the relevant amount from your employee's salary.
- If you do not, you are liable to pay to TAP.



- **Stamp Act**

- Keep in mind that certain documents, contracts, tenancy agreements are subject to stamp duty. Some times the duty is a nominal fixed amount and some times it may be ad valorem (depends on the value of the transaction). For example, tenancy agreements, sale and purchase of land. If in doubt, can seek the opinion of the Collector of Stamps by paying B\$25.00.
- If you do not pay stamp duty when it is required, you are penalized by paying double (if not more than 1month) or five times the amount (after 3 months). Also, the court may, if the court thinks you are trying to cheat the Government of Brunei, not allow you to use the contract as evidence to prove your case.


- **Town & Country Planning (Development & Control)**

- Under this Act, if your business wants to put up advertisement, billboard, signs, etc, you need to obtain approval in writing from the Town and Country Planning Department.



- **Partnership Contracts**

- If you enter into a partnership, you should draw up a partnership agreement to regulate the terms under which the partnership is operated between you and your partner in the business.
- If you have a sendirian berhad and you have other shareholders who put in their money, then you should have a Shareholders' Agreement to regulated the way the business of the company will be operated.
- Examples of areas you would wish to consider putting down on record include, functions and duties of each party, who has final say in decision making, who can 'hire-fire' staff, who decides how much to pay, if company needs more funding, who pays (bank loans & guarantees), who decides on which supplier to use, who is authorised to make contracts, etc.
- Usually, if you go to a lawyer, the fees for these will vary substantially between lawyers. However, you should choose a lawyer who is familiar with such kinds of work with experience. You can ask the lawyer what his/her experiences are in this particular area of the law. Not all lawyers know all the law or have sufficient experience in relevant areas of business law.

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- A recent example of one of the many risks and dangers in a partnership is the case of bank's claim against a firm (of 2 partners) in which the firm took out a bank facility from the bank. Partner 1 was sued by the Bank and tried to disclaim liability for the bank facility (loan) by saying that another Partner 2 took out the bank facility without Partner 1's authorization. The High Court judge decided that under the Contracts Act of Brunei Darussalam both the partners were jointly liable for the debt. To make the problem worse Partner 1 had a difficulty finding Partner 2. To avoid this happening, you can, when setting up banking transaction with the Bank give to the bank a mandate which requires both or all partners to sign for any bank facility and provide for limits of authorization, if necessary.
  - In a partnership, it is important to know that partners are jointly and severally liable for all the debts and liabilities of the firm in the conduct of the business of the firm. To reduce this risk, you must choose your partners well although it may at times be difficult if not impossible, but you can still try your best. Having a written partnership agreement will certainly help to reduce the risks but will not totally eliminate such risks and reduce disputes in the future.



- **Employment Contracts**

- It is always useful to have a proper employment contract drawn up between the company and the worker so as to avoid dispute later on.
- The foreign worker contract signed by employer and worker and witnessed by the Commissioner of Labour (Labour Contract) contains minimum basic terms and conditions. So, if there is/are additional terms you wish to introduce into the contract, you should make a separate contract, but the terms of your contract cannot be less favourable than the terms in the Labour Contract.
- Minimum rules apply under the Employment Order, 2009 especially to manual workers.
- If your company is sendirian berhad, and you are a director, you may wish to consider having a contract between yourself and the company. One of the benefits is that you may claim for tax deduction under the Income Tax Act.
- If the director or you are a nominee, or it is a joint venture, it is important to have a director's contract of employment with the company.



- **General Contracts**

- Generally, it is a good practice to have contracts signed between yourself and the counterparty in any business dealing, not only to avoid disputes as to terms, but also to make a record of the terms (as a reminder). The days of the simple 'hand-shake' may be over.
- For most contracts, even a piece of paper may be sufficient. However, for most contract, oral contracts are valid but you must be able to prove it. Contracts relating to land need to be in writing. If not, it is not enforceable in court.
- Always remember that when entering into tenancy agreements, ask for a grace period for renovations and allowance for Lisen Rampaian to be issued as this may take some time. If you do not, you may end up paying more monthly rentals than you wish.




- **Due diligence**

- This means that before you enter into contract, buy some thing from another person, or make any payment or delivery of an asset to the person, make sure he is not already a bankrupt or has come within the bankruptcy regime/process.
- If you make payment to him and he is in fact a bankrupt or subsequently becomes a bankrupt, you may have paid the person for nothing and you lose your money and the asset you bought.
- So, where the sum involve is quite substantial, it is always useful to make a bankruptcy search on the person at the High Court by paying a small fee. You can do this yourself or ask a law firm to do this for you.
- This applies equally when you are ordering some thing from an overseas supplier. Often, you do not know the person or what he is. You need to check that the supplier does not have a problem with bankruptcy and that he does exist. This can be done by instructing a solicitor in the country concerned to assist you to make relevant searches.



- **Insurance**

- Insurance or takaful are most important in business. This protects you against 3<sup>rd</sup> party liability for a reasonable fee if you are faced with damages claim by a 3<sup>rd</sup> party. Types of insurances can include, for example-
  - Buildings;
  - 3<sup>rd</sup> party liability / public liability;
  - Vehicles (motor vehicles 3<sup>rd</sup> party insurance);
  - Workmen compensation;
  - Ask the insurer what types of business losses can be covered.

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- You must make sure you understand the insurance you bought and what it covers.
    - The terms under which you must give notification to the insurance company is important;
    - You must make full disclosure of material facts to the insurance company in the application form to avoid the insurer disclaiming liability for failure to disclose a material information;
    - For example, in a motor vehicle insurance, you must ask the insurance company whether passengers in your car is covered by the insurance. Some times, even in Comprehensive Insurance, passengers in your car may not be covered. You can ensure this by paying a small sum to cover passenger liability (extra coverage). Failure to do this may be very costly to you.



- **Sendirian Berhad**

- If you are a sendirian berhad, engaging a reliable corporate secretary is necessary. The Registrar of Companies is becoming more strict these days and failure to make a filing or return on time will incur penalties against the company. Corporate secretaries usually charge a reasonable fee and you can shop around. They give to you a list of the services that is/are included in the scope of work.
- The Collector of Income Tax has also become strict and failure to make an income tax return within time and after a notice has been served incurs a penalty and they want you to be charged in court. The name of your company is advertised in the daily newspaper.
- If you are a director of a sendirian berhad company (even as nominee), you may become personally liable for the debts of the company if the company is trading while in an insolvent state.
- If the company takes a loan from the bank, you may be asked to provide a bank guarantee for the loan. You must consider the risks that the company does not pay.



- **Road - Map**

Before you starting signing contracts and making payments on a business, it is always useful to have a 'road-map' to list down all the things that -

- You must comply with on Government Regulations;
- You must have or can obtain in order to start your business;
- The types of insurance your require;
- That you have sufficient funds to last you for a certain period of time (assuming the business will not make profit within that time);
- That you know how to keep proper records of your income and expenditure and keep this fund separate from your personal funds (or employ another person to do this).
- Remember, in a sendirian berhad, the money of the company is **NOT YOUR PERSONAL MONEY** but the money of the company until you declare a proper dividend and pay out on the dividend to you. If you take money from the company without declaring a proper dividend, you are legally committing theft of company's funds and can be charge and if convicted, sent to jail. Also, creditors can sue you personally for the money you took illegally.

## B. Specific businesses (examples only)

Here, there are specific business items that you may need to consider depending on the type of business you are engaged in. It is not the intention to discuss the details of these items here but just to highlight a few examples so that you can consider them so you know they exist.

- Government will lease certain industrial land to you to carry on business at reasonable yearly rentals if you fulfill their pre-conditions.
- If you wish to enter into manufacturing, you must apply for a manufacturing licence from BINA (Industrial Co-ordination Order, 2001).
- Certain types of business will require special approvals and licences such as, businesses relating to tobacco, health care products, products which comes under the Poisons List Act.
- Investment Incentives Order, 2001 – to encourage industrial businesses and development in Brunei. If you business apply for and obtain certification that your business

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- is a 'pioneer industry';
  - is a pioneer enterprise'
  - manufactures a product certified as 'pioneer product' or carries on a certain type of business,

your business will be entitled to certain benefits, eg., tax benefits (can be extended on application), and where, for example only, you export any product which is issued with a export enterprise certificate, your business will also be entitled to certain tax reliefs of a certain percentage and for certain number of years.

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