Malaysia
Kadir Andri & Partners

Loans to associate companies

Section 133A of the Companies Act 1965 (Companies Act) explicitly prohibits the provision of financial assistance to persons connected with the directors of a company, including an associated company. Paragraph 8.23 of the Bursa Malaysia Main Market Listing Requirements (MMLR) on the other hand provides that, except as otherwise provided under law and subject to certain pre-conditions, a public listed company or its non-listed subsidiaries may provide financial assistance in the form of advance, guarantee, indemnity or to provide collateral for a debt in favour of its associated company.

Julian M Hashim

Jeannie Goon

This article attempts to highlight the legality of a public listed company or its non-listed subsidiaries providing financial assistance to an associate company. Given express authorisation under the MMLR, would it be right to conclude that the prohibition under section 133A should not apply to public listed companies or their non-listed subsidiaries? This does not seem to be the legislative intent given the extensive application of the Companies Act to all companies that are incorporated under it.

Further jurisdictional studies illustrate that foreign jurisdictions have adopted a distinctive approach within this area of law. For instance, the UK Companies Act 2006 liberalised the law by abolishing the general prohibition on providing loans to an associate company and imposing an additional requirement for obtaining shareholders' prior consent for public companies and companies associated with a public company. Conversely, in Hong Kong, the New Companies Ordinance expanded the prohibition to cover a wider category of persons connected to include an associated body corporate.

There are legal certainties in these foreign jurisdictions despite the distinctive approach adopted. It is however noted that the Malaysian Companies Bill 2015, which aims to modernise the Malaysian corporate legal framework, did not introduce greater clarity apart from substantially escalating sanctions imposed on directors upon conviction. The risk of these escalated sanctions, coupled with the fact that it is not exceptional within corporate practice for companies to advance working capital to their associate companies, pressingly calls for certainty within this area of law.

With liberalisation calling for a flexible spectrum to meet developing corporate market expectations, it is ultimately a quest to achieve an adequate balance between converging standards of liberalisation, the fundamental rule of law of legal certainty and the need to protect the interests of minority shareholders and creditors.

Julian M Hashim and Jeannie Goon

Contacts
Level 10 Menara BRDB
285 Jalan Maarof
Bukit Bandaraya
59000 Kuala Lumpur, Malaysia
T: +603 2780 2888
F: +603 2780 2832
E: partner@kaaplaw.com
W: www.kaaplaw.com