

## EXTRA TERRITORIAL EFFECT OF MALAYSIAN LAW ON CORPORATE LIABILITY

The principle of extraterritoriality is the application of national laws on persons, properties or conduct outside of the jurisdiction.[1] In Malaysia, there is the Extra-Territorial Offences Act 1976 ("**ETOA**") which governs certain offences under written laws which were committed in any place without and beyond the limits of Malaysia and on the high seas onboard any ships or on any aircraft registered in Malaysia or otherwise as if the offences were committed in Malaysia.[2]

In general, extra-territorial effect is the effect of Malaysian law on offences committed outside of the Malaysian jurisdiction. Extra-territorial effect extends to laws governing corporates liabilities. There are many legal precautions that Malaysian corporation carrying out business in foreign jurisdiction and foreign corporation carrying out business in Malaysia should be aware of and prevent committing such offences, especially offences with extra-territorial effect. This article will discuss further the impact of Malaysian laws with extra-territorial effect on local and foreign corporates.

### **Corporate Liability Offences with Extra-Territorial Effect**

A corporation is a legal entity and like any individuals, corporations too, possess rights and responsibilities under the law.[3] The responsibilities are known as corporate liabilities which are liabilities imposed on corporations to take responsibility for any civil or criminal wrongdoing.

In Malaysia, there are many relevant laws that govern corporate liabilities, for example, Companies Act 2016, Penal Code, Financial Services Act 2013, Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 and so on.[4] However, as mentioned above, the ETOA does not cover all written laws in Malaysia but rather certain offences. Lord Diplock in *India v Wiggins*[5] explained that there is a statutory presumption against extra-territorial effect:[6]

*“My Lords, in construing Acts of Parliament there is a well-established presumption that, in the absence of clear and specific words to the contrary, an ‘offence-creating section’ of an Act of Parliament (to borrow an expression used by this House in Cox v Army Council [1962] 1 All ER 880; [1963] AC 48) was not intended to make conduct taking place outside the territorial jurisdiction of the Crown an offence triable in an English criminal court. As Viscount Simonds put it ([1962] 1 All ER 880 at 882[1963] AC 48 at 67):*

*‘... apart from those exceptional cases in which specific provision is made in regard to acts committed abroad, the whole body of the criminal law of England deals only with acts committed in England.’...*”

One example of corporate criminal liability with extra-territorial effect is corruption as governed and provided under Section 17A of the Malaysian Anti-Corruption Commission Act 2009 (“**MACC Act**”). The corporate criminal liability under the said provision has an extra-territorial effect as it extends to Malaysian Commercial Organisations, carrying on business in Malaysia or foreign jurisdictions as well as foreign Commercial Organisations carrying on a business or part of a business in Malaysia.[7]

The purpose of imposing such criminal liability on all companies in Malaysia and Malaysian companies transacting abroad is to encourage companies to take appropriate and parallel steps to ensure businesses are carried out with integrity and without corruption.[8] The penalty imposed against corporate offenders under Section 17A is a fine as much as ten times the value of the bribe or Ringgit Malaysia 1 million whichever that is higher.[9]

An example of a corporate civil liability with extra-territorial effect is in relation to the compliance of personal data protection. Corporations play an important role in data protection, especially when they hold a database of clients’ details and other corporate information that has to be highly safeguarded. The principal law governing data protection in Malaysia is the Personal Data Protection Act 2010 (“**PDPA**”). The PDPA applies to any person who processes and has control over or authorizes the processing of any personal data in relation to commercial transactions.[10] These persons include: -

(i) Corporations[11] established in Malaysia and the personal data is processed regardless in the context of that establishment, by that person or other person employed by that establishment; and

(ii) corporations not established in Malaysia but uses equipment in Malaysia for the processing of the personal data otherwise than for the purposes of transit through Malaysia. [12]

In general, in bringing an action against one entity, one must be satisfied that the provision governing the offence has extra-territorial effect and that it involves Malaysian entities within or outside of the Malaysian jurisdiction or any foreign entities in Malaysia.

There must be some element of Malaysian entity or jurisdiction for the relevant Malaysian

law to have extra-territorial effect. A non-Malaysian corporate cannot be liable for an offence committed in another country other than Malaysia.

### **Impact of Extra-Territorial Malaysian Laws on Local and Foreign Corporates**

With the growth in frequencies of transactions and foreign investments in Malaysia, having certain laws with extra-territorial effect would, not only prevent offences being committed by foreign corporations in Malaysian jurisdiction, but it also protects people from falling victim to offences committed by Malaysian entity in another jurisdiction.

Foreign investors could carry out businesses in Malaysia in many ways, from setting up a subsidiary company in Malaysia, to selling of products and/or services to the Malaysian market.

There are many factors that foreign investors would take into account when considering doing business in Malaysia, one factor being the laws and regulations. With extra-territorial effect on certain written laws governing corporations in Malaysia, it means that these foreign companies are likely to be subjected to the same law even though they are not incorporated in Malaysia.

A foreign company can be liable for its agents or employees or even its subsidiaries who committed the offence in Malaysia.[13] This is known as imputing liability on the controllers of the corporation.[14]

This approach was also adopted in Section 17A(3) of the MACC Act mentioned above. The available defence is that the offence committed by the corporation was committed without the consent of the relevant person (controller) and that person (controller) has exercised reasonable due diligence to prevent such offence being committed.[15]

However, such extra-territorial effect is justifiable. First, if the corporation is carrying out certain business dealings in Malaysia, it is expected that the corporation will adhere to the laws of Malaysia. Secondly, if a Malaysian corporation is to carry out business dealings outside of this jurisdiction, it is expected that the wrongdoings will be dealt with by the Malaysian laws.

### **Conclusion**

In essence, extra-territorial effect of Malaysian law has its pros and cons. On the regulatory aspect, it encourages corporations to carry out business in an ethical manner and with integrity within and outside of the Malaysian jurisdiction; and on the economic aspect, such effect would hold back some foreign investors from entering into the Malaysian market to avoid completely any possibility of non-compliance and committing any offences that would have an extra-territorial effect against them.

Regardless, having national laws with extra-territorial effect shows a certain exertion of authority over the governance of offences committed outside of the jurisdiction. Considering the rise in cross-border transactions and the use of internet, it opens up more possibilities of offences. Hence, there is a need for implementing more laws with extra-territorial effect.

1. TLB, "Extraterritoriality", (Transnational Litigation, n.d.), <<https://tlblog.org/extraterritoriality/#:~:text=Extraterritoriality%20refers%20to%20the%20application,%2C%20nationality%2C%20and%20universal%20jurisdiction.>>
2. Section 2 of the Extra-Territorial Offences Act 1976.
3. Janet Barry-Johnson, "Corporation: What It Is and How to Form One", (Investopedia, 14 June 2023), <<https://www.investopedia.com/terms/c/corporation.asp#:~:text=A%20corporation%20is%20a%20legal,own%20assets%2C%20and%20pay%20taxes.>>
4. Usharani Balasingam, 'Corporate Criminal Liability: Some Reflections for Malaysia', (2022) Vol 14, No. 4, Institutions and Economics, <<https://doi.org/10.22452/IJE.vol14no4.5>>
5. [1980] 2 All ER 593.
6. Ibid at 596.
7. Kherk Ying Chew and Eddie Chuah, "Malaysia: Extra Territorial Effect of New Corporate Liability for Corruption Offences", (Global Compliance News, n.d.), <<https://www.globalcompliancenews.com/2020/09/17/malaysia-extra-territorial-effect-of-new-corporate-liability-for-corruption-offences03092020/>>
8. Malaysian Anti-Corruption Commission, "Section 17A Malaysian Anti-Corruption Commission (MACC) Act Enforced On 1st June 2020", (MACC, n.d.), <[https://www.sprm.gov.my/index.php?page\\_id=103&contentid=669&cat=CN&language=en#:~:text=The%20provision%20under%20Section%2017A,the%20benefit%20of%20the%20organisation.](https://www.sprm.gov.my/index.php?page_id=103&contentid=669&cat=CN&language=en#:~:text=The%20provision%20under%20Section%2017A,the%20benefit%20of%20the%20organisation.)>
9. Section 17A of the Malaysian Anti-Corruption Commission Act 2009.
10. Section 2(1) of the Personal Data Protection Act 2010 (PDPA).
11. Section 2(4) of the PDPA.
12. Section 2(2) of the PDPA.
13. See example of extraterritorial effect of Section 17A of MACC Act at Kherk Ying Chew and Eddie Chuah (n 4).
14. Usharani Balasingam (n 4).
15. Ibid.

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