HANDBOOK FOR HUB LEADERS

LEGAL 101

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INTRODUCTION

As hub leaders, the future of our hub relies on the decisions we make today. The "learn-as-we-go" approach can have a lot of benefits in terms of laying solid foundation, but can prove to be extremely time consuming and costly.

Over the past 4 years, we have discovered that the simplest of legal advice can go a long way in securing ones footing in the world of hub management be it in regards to registration, contracts, or employment of staff.

The biggest consideration that always popped up when discussing legal consultation is cost to value ratio. It always used to feel that it's too much to spend such an amount when we're not even making that much. In hindsight, after every issue that popped up, we know now that it would not have been too much to spend if we had our corners covered.

This handbook aims to provide a simple and basic outline of a number of legal aspects that may arise in your work as a hub leader. It is our hope that having this information can help save you from a lot of struggle down the road as we faced.

REGISTERING YOUR HUB

With a lot grassroots communities, the idea of being registered or legally recognised is considered anathema. But if properly and openly discussed with your community members, while considering the opinions and thoughts about principals to stand by, registration can have a far more beneficial long term effect for your hub and community.

Each type of legal registration, whether with the Companies Commission of Malaysia (CCM) or Registrar of Societies (ROS), has its advantages and disadvantages. It would be good to weigh out all the different options and find one that best suits what your hub stands for, how it wants to be managed, and the cost of maintaining it.

Company Limited by Shares (Sdn. Bhd.)

1. This type of companies is incorporated for the purpose of acquiring profit.

2. A company limited by shares is a company formed on the principle that the members' liability is limited to the amount, if any, unpaid, on shares held by the members (refer to Section 10(2) CA 2016).

3. "Limited by shares" means that the liability of the shareholders to creditors of the company is limited to the capital originally invested, i.e. the nominal value of the shares and any premium paid in return for the issue of the shares by the company. A shareholder's personal assets are thus protected in the event of the company's insolvency, but any money invested in the company may be lost.

4. Advantages: -
   (a) a company as a separate person is liable for its own debts and its members are not as such liable for its debts;
   (b) able to own its own property;
   (c) perpetuity of succession;
   (d) facilitates the transfers of members' interests. Shares are items of property which are freely transferable in the absence of express provisions;
   (e) separation of management and ownership.

5. Drawbacks: setting up and management of companies are subject to the complexity of legislation and regulations and is governed by formalities which have to be attended to, in accordance with rules and regulations laid down in the Companies Act 2016, loss of privacy and expenses far greater than that which would normally apply to sole traders and partnerships.

6. Every company must have auditors for the main purpose of auditing its accounts and reporting to the members of the company. Companies are required to prepare and submit annual financial statements to the Companies Commission of Malaysia ("CCM" or "SSM" short for Suruhanjaya Syarikat Malaysia) under the Companies Act 2016.

7. Companies are required to pay taxes as required by Lembaga Hasil Dalam Negeri (LHDN) and Royal Malaysian Customs Department (RMCD).

8. Corporate tax is governed under the Income Tax Act 1967, which applies to all companies registered in Malaysia for chargeable income derived from Malaysia including business profits, dividends, interests, rents, royalties, premiums and other income. Income obtained from other countries is exempted from corporate tax except for businesses related to banking, insurance and sea and air transport. Similar to personal income tax, there are tax exemptions available such as tax incentives and foreign tax credit.

Company Limited by Guarantee (CLBG)

1. Company limited by guarantee are formed usually for non-profit making purposes such as for promoting a charity, common interest, religion or profession. It is often referred to as a 'not for profit' or 'charitable company'. Any profit made by the company is re-used for the good of the business.

2. A company limited by guarantee is prohibited to have share capital (refer Section 12 CA 2016). It is a public company.

3. A company is limited by guarantee if the liability of its members is limited to such amount as the members undertake or 'guaranteed' to contribute to the assets of the company in the event of it being wound up.

4. Advantages: -
   (a) it's a private limited company that has guarantors rather than shareholders, hence is suitable for voluntary organisations;
   (b) separate legal entity between company and its members and is responsible for its own debts;
   (c) personal finances of the company's guarantors are protected. They will only be responsible for paying company debts up to the amount of their guarantees;
   (d) able to have its own property, enter into tenancies and contracts, employ people in its own name.

5. Drawbacks: setting up and management of companies are subject to the complexity of legislation and regulations and is governed by formalities which have to be attended to , in accordance with rules and regulations laid down in the Companies Act 2016, loss of privacy and higher set up costs.

6. Every company must have auditors for the main purpose of auditing its accounts and reporting to the members of the company. Companies are required to prepare and submit annual financial statements to the Companies Commission of Malaysia (CCM) under the CA 2016.

7. Malaysia offers tax exemptions to a certain number of entities which are not for profit in character such as companies limited by guarantee, foundations and non-profit organisations.

Limited Liability Partnership (LLP)

1. Governed under Limited Liability Partnerships Act 2012 ("LLPA").

2. Limited liability partnerships is an alternative method to carry out business which combines the characteristics of private companies and conventional partnerships.

3. The provisions of the Partnership Act 1961 and the rules of equity and common law applicable to partnerships are not applicable to a LLP registered under the LLPA.

4. Advantages: -
   (a) is a body corporate and has legal personality separate from that of its partners;
   (b) perpetuity of succession;
   (c) any change in the partners of a LLP shall not affect the existence, rights or liabilities of the LLP;
   (d) LLP has unlimited capacity and shall be capable of: -
      (i) suing and being sued;
      (ii) acquiring, owning, holding and developing or disposing of property; an
      (iii) doing and suffering such other acts and things as bodies corporate may lawfully do and suffer.

5. Drawbacks: loss of privacy as financial accounts have to be submitted to CCM yearly for public record. Setting up and management of a LLP is subject to the complexity of legislation and regulations under the LLPA.

6. LLP is required to lodge an annual declaration with the CCM that it is able to pay its debts as they become due in the normal course of business OR does not appear to be able to pay its debts as they become due in the normal course of business.

7. Every LLP shall keep such accounting and other records as will sufficiently explain the transactions and financial position of the LLP and enable profit and loss accounts and balance sheets to be prepared from time to time which gives a true and fair view of the state of affairs of the LLP.

8. LLP is not required to prepare audited financial statement by an auditor but needs to keep proper and sufficient accounting and to indicate the true financial position.

9. LLP has a similar tax treatment like Sdn Bhd where chargeable income from LLP will be taxed at the LLP level at the tax rate of 24% generally. Profits paid, credited or distributed to partners in the LLP are exempt from tax. Specific incentives provided to a company do not apply to an LLP.

Societies / Association (Persatuan) / Club

1. Association is a group of people who come together around a common cause or purpose. They are not formed for carrying on business activities.

2. Has to be registered with the Registrar of Society and governed under the Societies Act 1966.

3. Advantages: provide members with opportunities to network and share information and resources. It brings together its members for a specific area ranging from nationwide to those in individual states, neighborhood or internationally. It may be easier to get things done as part of an association.

4. Drawbacks: you don't always get a say in what the association decides. There are membership fees involved and involvement in association requires an investment in time. Setting up and management of an association is subject to the complexity of legislation and regulations under the Societies Act 1966.

5. Every registered societies, association and clubs shall at least once a year submit its account for audit by an auditor and to keep proper and sufficient accounting records. If required to do so, the societies, association and clubs have to submit any information and documents to the ROS for inspection.

6. The activities of some clubs, associations or similar institutions are trade dealings which are conducted for a profit that is subject to tax as business profits such as a fitness centre or a professional football club.

7. Section 53A of the Income Tax Act 1967 was introduced to enhance the transparency in the tax treatment of a club, association or similar institution. This provision applies to a club, association or similar institution which is established, controlled and conducted by its members not for the purpose of seeking profits.

MANAGEMENT OF COMPANY/ORGANISATION

Whether you are a director, manager, leader, or committee member in some form of a registered or informal organisation that manages a hub, there are a number of points that requires consideration in regards to decision making. Seeing as your primary role would be to serve the community under your care, the main perspective to always consider is, "What would benefit my community the most?".

Although compliance in accordance with the amended Companies Act 2016 requires only one signatory (i.e., a director or a company secretary for execution of all documents), it would be wise to have at least 2 signatories to sign off for any financial transaction and to keep proper accounting records for all monetary transactions. Best to have a check and balance system in place to ensure all monies are utilized prudently and responsibly. Ensure annual returns are filed in a timely manner (i.e., within 30 days on anniversary date of incorporation with the Companies Commission of Malaysia)

It is also important to practice good governance. Good governance is the way in which directors and managers control a company/organisation and make decisions, especially decisions that have an important effect on the future of your entity. Employing good governance helps your entity to regulate risks as well as to reduce the opportunity for corruption and mismanagement.

Some points to consider in your management:

- Have your committee members or board of directors to agree on a particular set of standards, principals, procedures, and ethics to stand by from day 1 onwards.
- Keeping minutes of meetings and resolutions should be properly recorded and kept for reference.
- Do everything legally from the start, changing unorthodox practices later on would be much harder to do so.
- If you follow local practices, you can only be local. But if you follow best practices, you can go anywhere.

PROPERTY RENTAL

For most hubs, renting a space to call home for your community would be the most straight forward option.

Apart from negotiating the usual terms of a tenancy (rental, scope of use, hours, etc), here are a few other things to consider when renting a space:

1. Duration of tenancy: - Does the value of your investment to the space equal to the duration of your tenancy? It would not be wise to invest as much in a space if your tenancy is not 5 years or more.
2. Sublease clause: - Most tenancies have a clause that does not allow you to sub-lease your space to tenants. If you are hoping for rental to be part of your revenue, it’s best to have this explicitly mentioned in the tenancy, or to have an accompanying signed letter from your landlord allowing you to do so.
3. Amenities and fixtures: - Some tenancies can have a clause that does not allow you to legally remove any amenities and fixtures that you have installed in the space even if it was purchased with your own money.
4. Legal fees: - Agree beforehand with your landlord if costs for legal fees an stamp duties are to be shared by both parties.

Stamp duty is chargeable on instruments and not on transactions. If a transaction can be affected without creating an instrument of transfer, no duty is payable. An unstamped or insufficiently stamped instrument is not admissible as evidence in a court of law, nor will it be acted upon by a public officer. It is always best to get the documents stamped.

HIRING EMPLOYEES

Hub leaders can sometimes choose to not have employment contracts when starting out. This can prove to be a pickle in the long run if employees feel that they are short-changed for the work that they have invested in your hub.

Consider the following points when drafting out a simple employment contract:

- Have your employee’s tasks and job scope clearly stipulated in the contract. This will come in handy to resolve any dispute of work not completed etc.
- Practice the policy of paying fair wages to your employees, this can go a long way for the public image of your hub as employees tend to talk about their employers if they feel they have been wronged.
- If you are a legally registered entity, you are required by law to contribute to the EPF, SOCSO, and EIS of your staff. If you are not a legally registered entity, you are not required to do so.
- Ensure that the duration of the contract is clearly stipulated so that your employees know how long they are officially attached to your hub.
- For best practice, it would be advisable to have a termination clause and resignation clause included in your contract so that your employee does not feel trapped or bound by the contract.`

Employees Provident Fund (EPF)

1. The Malaysian EPF is a compulsory pension scheme for all Malaysian citizens and Malaysian permanent residents who are working in Malaysia. It is not compulsory for non-Malaysian citizens and non-Malaysian permanent residents to contribute to the EPF, but they may elect to do so.

2. The EPF Act 1991 requires employees and their employers to contribute towards their retirement savings, and allows workers to withdraw these savings at retirement or for special purposes before then.

3. Any employer who violates the EPF Act 1991 will be subject to either imprisonment or fine.

<u>Social Security Organization (SOCSO</u>)

1. It is compulsory for all Malaysians and permanent resident employees to register with SOCSO except for Federal and State Government permanent employees, domestic servants, and those who are self-employed. Foreign workers are protected under SOCSO as well since January 2019.

2. SOCSO is implemented and governed under the Employees' Social Security Act 1969.

3. All employees aged 18 to 60 are required to contribute. However, employees aged 57 and above who have no prior contributions before the age of 57 are exempt.

Employment Insurance System (EIS)

1. Introduced in 2018, the Employment Insurance System (EIS) is designed as a safety net for workers who have lost their jobs due to retrenchment or other similar circumstances.

2. The EIS is managed by the Social Security Organisation (SOCSO) and is meant to enable retrenched workers to make ends meet for up to six (6) months. It functions similarly to the Employees Provident Fund (EPF), where contributions will go into a pooled fund and then the fund will be invested.

3. The EIS is not only offered to those who have been retrenched but also those who resigned due to threats to themselves or their families. This even includes sexual harassment at work.

4. EIS covers these situations of loss of employment: -

   (a) normal retrenchment and redundancy
   (b) VSS/MSS (voluntary/mutual separation scheme)
   (c) closure of company due to natural disasters
   (d) bankruptcy or closure of company
   (e) constructive dismissal
   (f) resignation due to sexual harassment or threats made in the workplace
   (g) resignation after being ordered to perform dangerous duties that are not within the job scope

5. Every employee in the private sector is automatically enrolled into the EIS, and it is the employer's responsibility to ensure that contributions are made through salary deductions (monthly deductions). However, EIS does not cover domestic workers, self-employed, civil servants, and workers in local authorities and statutory bodies.

6. Failing to comply with the EIS contribution scheme will result in the employer being fined a maximum of RM10,000.00, or up to two (2) years imprisonment, or both.

GUIDELINES TO CONTRACT DISCUSSION

1. Get the basic terms and conditions agreed via direct correspondence.
2. Spell out all the details (e.g., consideration, duration, remedy for breach and termination.) Remember- it's all hunky-dory when parties are amicable but the real test lies whether your contract drawn up can be relied upon when a party breaches contract, and things turn ugly.
3. Deal with the right person. Do they represent the supposed other party? Can they negotiate terms on behalf?
4. Participate in the negotiation of the essential terms of each contract.
5. Agree on instances that terminate a contract and ways to resolve disputes.
6. Keep it confidential.
7. Last, but not least, when terms have been agreed upon, best to get the contract drafted out by lawyers who understand your needs, signed by all parties and stamped to get maximum protection for your work and business.

HIRING A LEGAL FIRM

There are several methods for retaining a lawyer, but typically it will require an up-front payment or fee. That fee is commonly referred to as a “retainer,” and is given to the lawyer in return for legal representation but does not usually represent all the fees for the entire process.

Retainers are most useful for business that need constant legal work, but do not have enough money to hire a lawyer full time.

Whether to keep a lawyer on retainer is a business decision and it will depend on the needs of your organization.

APPRECIATION

We would like to extend our appreciation to the **British Council** and **Yayasan Sime Darby** for providing us the opportunity to grow our hub in many different ways over the years, especially so with the grant for legal support that we received in 2020. We hope this knowledge that we have come by can continue to make ripples for every future hub leader looking to set up space for community to gather.

Disclaimer:

This handbook does not amount to legal advice. It serves only to assist hub leaders with basic information when starting up a community hub. Any and all legal advice should still be procured through proper legal counsel.