

*Papers Compilation*

**INTERNATIONAL SEMINAR  
& INDONESIA FORUM  
ON OCEAN LAW AND RESOURCES:**

***BUILDING COMPREHENSIVE PERSPECTIVE ON  
NATIONAL SECURITY AND SUSTAINABLE  
DEVELOPMENT***

**Faculty of Law Brawijaya University  
Malang, May 17<sup>th</sup> to 19<sup>th</sup>, 2010**

**Held in Cooperation:**



**Faculty of Law  
University of Brawijaya  
Malang**



**Faculty of Law  
University of Trisakti  
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**Faculty of Law  
University of Wollongong  
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## EMERGING ISSUES ON RECLAIMED LAND IN MALAYSIA: ALIENATION FOR FREEHOLD OR LEASEHOLD?

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### Abstract

*Due to rapid development and land scarcity in the urban areas in Malaysia the state government has to reclaim the land at the coastal areas in order to meet the need for physical space for commercial activities, housing, public facilities and etc. There are many issues derived from land reclamation; among others environmental degradation, instability of reclaimed land, long term excessive settlement and land reclamation disputes between the states. However in this paper the focus is on the meaning of reclaimed land, powers of the state authority in matters pertaining to alienation of reclaimed land and issuance of title to the reclaimed land. The objective of this paper is to present the extend of powers of the state authority in relation to reclaimed land i.e. whether the state authority can alienate the reclaimed and if the answer is affirmative, the reclaimed may be alienated in perpetuity or only for a lease of not exceeding 99 year.*

**Keywords:** *Reclaimed land, Malaysian land law, alienation, state authority, title.*

### 1. Introduction

Malaysian land law, in particular Peninsula Malaysia is governed by the National Land Code 1965 (other than Penang and Malacca).<sup>1</sup> ("NLC") As for Sabah and Sarawak there is Sabah Land Ordinance<sup>2</sup> and Sarawak Land Code<sup>3</sup> applicable in these two states respectively. Basically the principles on land law in Peninsula Malaysia (also known as West Malaysia) and Sabah and Sarawak (also known as East Malaysia) are similar except that the Sabah Land Ordinance and Sarawak Land Code contain provisions on native land.<sup>4</sup> In Malaysian context, land is a state matter as stated in the 9<sup>th</sup> schedule

<sup>1</sup> There are separate National Land Code for Penang and Malacca.

<sup>2</sup> Sabah Cap 68.

<sup>3</sup> Cap 81.

<sup>4</sup> As for Sabah and Sarawak, their land ordinance contains provisions on native land.

List II of Federal Constitution 1957.<sup>5</sup> As such the state authority has full jurisdiction over all matters pertaining to land; for instance on disposal of land, registration of titles, approval of sub-division, amalgamation, conversion of land and issuance of permit and license. As far as reclaimed land is concerned, there is no specific law in Malaysia to regulate this matter. As such provisions of the NLC will be the sole statute that shall be referred to when discussing issues on reclaimed land. On the other hand, there are sets of statutes that indirectly related to land reclamation: in particular under the Coastal Management Plan that relates to environmental protection. This would include the Environmental Quality Act 1987, Land Conservation Act 1960, National Park Act 1980 and Fisheries Act 1985. Nevertheless the scope of this paper is only confined to powers of the state authorities in Malaysia in relation to reclaimed land of the coastal area and thus it would focus mainly on the provisions of the NLC.

## 2. What is Reclaimed Land?

Reclaimed land is an artificial creation of land at the coastal area. It is a modification of the coastal area by land filling, leveling, draining and etc so as to create a new area for human to utilise that land. Under section 5 of the NLC, "land" is defined as "*.....land covered by water*" and the same section defines "state land" as "*all land in the state (including so much of the bed of any river, and of the foreshore and bed of the sea, as is within the territories of the state or the limits of territorial waters) other than-(a) alienated land; (b) reserved land; (c) mining land; (d) any land which, under the provisions of any law relating to forests (whether passed before or after the commencement of this Act), is for the time being reserved forest.*" Further, the same section defines "foreshore" as "*all land lying between the shoreline and the low water mark of ordinary spring tides and the shoreline is defined as the high water mark of ordinary spring tide.*"

From the above definitions, technically it is clear that the reclaimed land may be taken place within the area that defines as foreshore. Land reclamation may take place within the area inside the baseline that is considered as internal waters, whereby waters within 12 nautical miles from the baseline are territorial waters and those within 200 nautical

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<sup>5</sup>There are 14 states in Malaysia and under schedule 9 List II, apart from land, matters that will fall within the purview of the state is Malay custom, Muslim religion, agriculture, forestry, local government, library and museum.

miles seawards from the baseline are the Exclusive Economic Zone.<sup>6</sup> Meanwhile the first 3 nautical miles of the territorial waters from the low water mark is under the state jurisdiction, and the rest is fallen within the federal jurisdiction.<sup>7</sup>

### 3. Powers of the State Authority and Alienation of Reclaimed Land

As mentioned earlier, land matters fall within the jurisdiction of the state authority.<sup>8</sup> As such the state authority has a power to dispose the land.<sup>9</sup> Disposal may be further divided into two i.e. disposal by way of alienation<sup>10</sup> and other than by alienation.<sup>11</sup> The powers of disposal of the state authority are provided for in the NLC and also in other relevant statutes for instance the Mining Enactment and the Forest Enactment.<sup>12</sup>

The question here, does the state authority has a power to dispose i.e. alienate the foreshore? There are three provisions of the NLC that may be used as an argument that the state authority has this power.

First, under the NLC once the land is alienated, the state authority will issue the issue document of title to the proprietor as evidence of proprietorship to the land.<sup>13</sup> The types of title is divided into two i.e. registry title and land office of title.<sup>14</sup> In this regard the NLC states that “.....registry title shall be appropriate in the case of (i) town or village land, (ii) any lot of country land exceeding four hectares in area, and (iii) any part of the foreshore or sea-bed: ....”<sup>15</sup>

The above provision shows that it is possible for foreshore or sea-bed to be alienated, otherwise why provision as regards to it's title is provided for in the NLC.<sup>16</sup> This section clearly provides that for foreshore or sea-bed, the title shall be a registry title

<sup>6</sup> Refer to Emergency (Essential Powers) Ordinance No. 7/1969.

<sup>7</sup> Section 4 of the Emergency (Essential Powers) Ordinance No. 7/1969.

<sup>8</sup> State authority is defined in section 5 of the NLC as Ruler or Governor of the State, as the case may be. However in practice the duty and function of the Ruler or Governor are performed by the Exco members of state executive council.

<sup>9</sup> Section 42 of the NLC.

<sup>10</sup> Alienation is mentioned in section 76 of the NLC

<sup>11</sup> Other than alienation here refers to disposal of land by way of reservation of land, permits for temporary occupation license, permits for extraction and removal of rock materials and permit to use of air space above state land or reserved land.

<sup>12</sup> Section 41 of the NLC.

<sup>13</sup> Section 76 of the NLC provides that the alienation will take effect upon registration.

<sup>14</sup> Section 77(1)(a) of the NLC.

<sup>15</sup> Section 77(3)(iii) of the NLC.

<sup>16</sup> In contrast under Foreshore Act of Singapore, the act gives authority to the state government to reclaim foreshore or sea-bed and the said reclaimed area shall become a state land.

Second, when the state authority alienates the land, it can be for a lease or perpetuity. The NLC clearly provides that "the alienation of State land under this Act shall consist of its disposal by the State Authority .....(a) for a term not exceeding ninety-nine years:

*(aa) in perpetuity. Provided that nothing in paragraph (aa) shall enable the State Authority to dispose of any part of the foreshore or sea-bed for a period exceeding ninety-nine years.....*<sup>17</sup>

The proviso above shows that the state authority may dispose the foreshore but the disposal of foreshore shall not exceed 99 years in which it shall be a leasehold and not perpetuity.

Third, another provision of the NLC that may be related to powers of the state authority as regards to alienation of foreshore is that; *the State Authority may by notification in the Gazette delegate to the State Director, or to the Registrar, or to any Land Administrator or other officer ..... the exercise or performance (subject to such conditions and restrictions as may be prescribed in the notification) of any powers or duties conferred or imposed on the State Authority by or under this Act: Provided that.... (ii) this section shall not apply to any power of the State Authority under this Act to dispose of any land..... within fifty metres of any shoreline.*<sup>18</sup>

This provision implies that it is possible to alienate the land after fifty metres of any shoreline but certainly it is only up to the maximum of 12 nautical miles from the baseline as mentioned earlier.

#### **4. Reclaimed Land: Can it be Alienated as a Freehold or Leasehold?**

The preceding discussions present that it is possible for the state authority to alienate the foreshore. Subsequently, as far as reclaimed land is concerned there are two arguments as to its status: either it remains as foreshore or becomes part of the land. If the reclaimed land is considered as part of the land, then the state authority has a power to alienate the reclaimed land in perpetuity<sup>19</sup> because it falls within the meaning of "state land" as prescribed under section 5 of the NLC. The section provides that "state

<sup>17</sup> Proviso to section 76 of the NLC.

<sup>18</sup> Section 13(1)(ii)(c) of the NLC.

<sup>19</sup> The term used in the NLC is state grant or mukim grant. This power is provided in section 76(a) and (aa).

land" refers to *all land other than alienated, reserved land, mining and forest reserved land. This includes river bed, foreshore and seabed.* On the other hand, if the reclaimed land is remained as a foreshore, the state authority can alienate it only for a period not exceeding 99 years.<sup>20</sup>

It is very significant to refer to the intention of the parliament when section 76 was amended in 1985, why the proviso to this section limits the foreshore or seabed to be alienated only for a period of not exceeding 99 years i.e. to give the state full control over such coastal areas. It is observed that the proviso to section 76 has two legal implications:

- i. It restricts the state authority from alienating the foreshore or sea-bed for perpetuity.
- ii. It restricts the state authority from re-alienating or converting any part of the foreshore or sea-bed to freehold irrespective the foreshore or sea-bed has been reclaimed or not.

However section 76(aa)(iii) further provides that the state authority has a power to alienate the land as freehold if the state is satisfied that *"there are special circumstances which render it appropriate to do so"*. There is no definition of "special circumstances" can be found in the NLC. This matter may be referred to the National Land Council<sup>21</sup> in which it may give it's views over the matter. However as emphasised earlier, land is a state matter, thus the state has the authority either to follow or not to follow the views of the National Land Council. Ultimately, the state has a power to use this "special circumstances" to justify it's action. The only mechanism to test whether the state authority can convert the status of reclaimed land fall under the special circumstances or not, is by challenging it before the court.

<sup>20</sup> Under the NLC the term use is state lease or mukim lease where the maximum period of lease can be up to 99 years. The term "leasehold" is commonly used in practice. Leasehold is the term that used under the English law. This power is stated in proviso to section 76 of the NLC.

<sup>21</sup> It is established under Article 91 of the Federal Constitution where it's function is to formulate a national policy for the promotion of the utilization of land throughout the Federation for mining, agriculture, forestry or any other purpose and for the administration of any laws relating thereto. This National Land Council acting in consultation with Federal, State governments and National Finance Council (Article 91(5) of the Federal Constitution).

The recent issue in Malaysia pertaining to reclaimed land is on the action taken by the state government of Penang that has converted the status of reclaimed land from leasehold to freehold.<sup>22</sup> Many quarters have criticized this action and contended that the conversion of this status would mean that the public ownership of coastal areas are now been taken away despite it is accepted in many countries that coasts should never be freehold.<sup>23</sup>

From the legal perspective, there is no issue of public ownership over the coastal areas if this area has been reclaimed and then has been alienated, regardless for a leasehold term or in perpetuity. This is because upon alienation of the reclaimed land, it will be a private property to the registered proprietor. The argument of public ownership over the coastal area would sustain if the coastal area remain as a natural foreshore and no land reclamation takes place and thus no alienation. In other words, the contention of public ownership over coastal area will not be available the moment the land is reclaimed and alienated. Thus if public want to maintain the public ownership of the coastal area, they should argue on the necessity of creation of new artificial area i.e land reclamation and not on the status of reclaimed land.

In addition, under whatever circumstances i.e. whether the reclaimed land becomes part of the land or still regarded as a foreshore, the right of public to get access to the area is still protected. This is based on section 44(1)(c) of the NLC which provides that public will have right of access to land that abuts on the foreshore. Similarly in case where the reclaimed land is alienated (irrespective whether for perpetuity or a leasehold), and the reclaimed land is regarded as a foreshore, public also can seek for the creation of Land Administrator's Right of Way as available under the NLC if they want to have access to the foreshore.<sup>24</sup> This is because "foreshore" falls within the meaning of "public

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<sup>22</sup> The examples are: Queensbay project in Sungai Nibong (housing project) and Bayan Bay Marina Yacht Club

<sup>23</sup> Another example where the issue of foreshore and seabed has arisen is the objection of Mouri peoples on the enforcement of Foreshore and Sea-Bed Act 2004 (New Zealand) in which the act recognized foreshore and sea-bed as crown land. This act violated the Paeora Declaration 2003 where the ownership of foreshore and sea-bed is given to Mouri peoples.

<sup>24</sup> Section 388 of the NLC.

terminal<sup>25</sup> where if the land administrator is of the view that it is expedient for the land administrator to create the right of way, he may do so.<sup>26</sup>

### 5. Dealing with Land Which is Yet to be Reclaimed

Another issue on reclaimed land that is unsettled until today is on an agreement of sale and purchase between a vendor-developer and a purchaser over building (either house or commercial unit) that going to be developed on land which is yet to be reclaimed. The main issue is whether such an agreement is valid as this is different from the ordinary concept of sell and purchase of building (either house or commercial unit) where even the building is sold to a purchaser before the construction begins, but the land is already available.<sup>27</sup>

Consequently if the land is reclaimed for housing project<sup>28</sup>, it is questionable what type of contract of sale and purchase that may be executed between developer and purchaser? The current law<sup>29</sup> requires a licensed housing developer<sup>30</sup> to use a standard form of sale and purchase agreement i.e. either schedule G and H or I and J.<sup>31</sup> All these schedules require the certainty of the subject matter, the land title, the size of the land, the size of the building and etc. This is in line with the requirement of law of contract where element of certainty is one of the important elements that must exist in a contract.<sup>32</sup> Therefore there are two main questions here; first, if the houses to be sold are situated on reclaimed land to be, what types of agreement to be used? Second, does construction of building (either house or commercial unit) on a land which is yet to be reclaimed is lacked of certainty? As such, it can be rendered as invalid.

<sup>25</sup> Section 387 of the NLC

<sup>26</sup> Section 390(3) of the NLC.

<sup>27</sup> In Malaysian housing industry, this concept is known as "Sell Then Build".

<sup>28</sup> To date the selling of commercial units in Malaysia is not governed by any specific statutes.

<sup>29</sup> Housing Development (Control and Licensing) Act 1966. (Peninsula Malaysia)

<sup>30</sup> Developers that undertake the construction of more than 4 units of houses or selling for lots of land for purpose of construction of houses are required to be licensed under the Housing Development (Control and Licensing) Act 1966.

<sup>31</sup> Schedules G and I shall be used for selling of conventional unit of houses (landed) while schedules H and J for selling of sub-divided unit of houses (strata). Schedules G and H are for project that adopt the concept "sell then build" and schedules I and J for project that adopt the concept "10-90".

<sup>32</sup> See for instance the case of *Honest Deal Sdn. Bhd v Convenience Shopping Sdn. Bhd.* (<http://www.mahkamah.gov.my/judgment/cg/katevthc/ORIGINATING%20SUMMONS%20S6-24-551-2007.pdf>.) [Retrieved on 7<sup>th</sup> May 2010]



In lieu of the above discussions, it is observed that the position of an agreement of sale and purchase over a building to be built on a reclaimed land is indefinite. As such there is a need for a clear provision in the NLC and other related laws for instance: Town and County Planning Act 1974, Housing Development (Control and Licensing) Act 1966 and directives or guidelines from the Department of Town and Country Planning on this matter.<sup>33</sup>

## 6. Conclusion and Suggestion

Due to absence of a particular act to regulate the foreshore and sea-bed or reclaimed land, there can be many uncertainties on matters that relate to the powers of the state authority, powers of the federal government, rights of the public, right of access and etc. The Federal government may form an act regulating matters on reclaimed lands. This can be done by virtue of Article 76(1) of the Federal Constitution where for purpose of uniformity the federal government can enact the act even though the matters fall within the state jurisdiction. For instance the point that must be settled in this new act is whether foreshore lost its status or not upon land reclamation. Apart from adopting the definition of foreshore as appears in section 5 of the NLC, the definition of foreshore from geology perspective should be taken into account as well.

The Hong Kong Foreshore and Sea-bed (Reclamations), 1997 may be taken as a reference where among others the act requires the publication of notice of plan to the public prior to the reclamation. This procedure is to give opportunity to any person who has an interest, right or easement in or over the foreshore and sea-bed to object the proposal in which if he can prove his claim, then compensation may be paid accordingly. It is therefore very important to have clear provisions on foreshore or sea-bed/land reclamation since creation of artificial space is no longer a new development and have been implemented by almost all states in Malaysia.

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<sup>33</sup> At the moment it is observed that there are a few projects in Lumut, Perak and Malacca that are offering sales of accommodation units on "a small island to be."

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