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# Private Retirement Scheme in Malaysia: Legal Analysis

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## ABSTRACT

The Government recognizes the significance of savings to guarantee sufficient savings after retirement. In this regard, the Malaysian Government established the private retirement scheme (PRS) in 2012 as a complementary scheme to the existing pension schemes. PRS seeks to provide alternatives for employed or self-employed Malaysian citizens, to enhance a well-structured and regulated scheme. By using a legal research approach, this study seeks to analyze the existing legislations governing PRS in Malaysia. The study found that the PRS is mainly regulated by Capital Markets and Services Act (CMSA) 2007 and other legislations. There are several legal challenges that can be observed in PRS system. Among them are PRS Guidelines 2012 only provide a minimum standard in relation to the governance policy of PRS providers and CMSA is silent in the matters regarding PRS scheme based on Shariah principles to be offered by the providers.

**Keywords:** Private Retirement Scheme, Legal Framework, Investment Law, Islamic Private Retirement Scheme

**JEL Classifications:** G21, G23, K3

## 1. INTRODUCTION

The introduction of the private retirement scheme (PRS) by the Malaysia Government in 2012 was a result of recommendations made by the Securities Commission Malaysia (SC) to hasten the private pension industry in this country. PRS can be defined as a voluntary pension scheme that allows people to contribute into an investment instrument to build up their retirement income (Liew, 2012).

According to Federation of Managers Malaysia (FIMM) (2012), PRS funds are purposely built for long term (10-15 years basis) investing to prepare the investors for a comfortable retirement years. It empowers the contributors to take charge of their retirement investment as they can accommodate from the existing PRS providers and invest according to their risk profile and expected returns. In contrast to employment provident funds (EPF) which is required by EPF Act 1991 to declare dividend of at least 2.5%, PRS does not provide such a guarantee. Nevertheless, to ensure the safety of the contributors' fund, SC Malaysia has come

out with certain requirements for these funds such as the equity exposure, proof of stability pursuant to historical performance of existing funds and experience of fund manager. These will guarantee the consistency and stability of the fund's performance and thus appropriate for retirement saving.

PRS is administered by private pension administrator (PPA). PPA acting as a record keeper and resource center for all data performed by contributors. All assets of each PRS will be separated from the PRS provider and supervised by an independent scheme trustee. The PRS providers, the PPA, the scheme trustee and distributors of PRS are being regulated by SC in order to make sure the right function of the industry and protect members through practical and investor protection requirement (Yeoh, 2012).

Currently, there are 8 providers approved by the SC under section 139B of Capital Markets and Services Act, 2007 (CMSA) to carry out the PRS as can be seen in the following Table 1. Table 1 also represents the PRS scheme and fund offered by the existing providers.

**Table 1: List of PRS providers and their scheme and fund offered**

| Providers                                  | Scheme and fund offered  |  |
|--|--|--|
|  | Conventional   | Shariah  |
| AIA pension and asset management Sdn. Bhd. | AIA PAM - Conservative fund<br>AIA PAM - Moderate fund<br>AIA PAM - Growth fund  | AIA PAM - Islamic moderate fund  |
| AmInvestment management Sdn. Bhd.          | AmPRS - Conservative fund<br>AmPRS - Moderate fund<br>AmPRS - Growth fund  | AmPRS - Islamic equity fund<br>AmPRS - Islamic balanced fund<br>AmPRS - Islamic fixed income fund<br>AmPRS - Tactical bond<br>AmPRS - Dynamic sukuk  |
| CIMB-principal asset management Berhad     | CIMB - Principal PRS plus conservative<br>CIMB - Principal PRS plus moderate<br>CIMB - Principal PRS plus growth<br>CIMB - Principal PRS plus equity<br>CIMB - Principal PRS plus asia pacific ex Japan equity | CIMB Islamic PRS plus conservative<br>CIMB Islamic PRS plus moderate<br>CIMB Islamic PRS plus growth<br>CIMB Islamic PRS plus equity<br>CIMB Islamic PRS plus Asia Pacific ex Japan equity |
| Hwang Investment management Berhad         | Hwang PRS conservative fund<br>Hwang PRS moderate fund<br>Hwang PRS growth fund  | Hwang AIIAMAN PRS Shariah Growth fund  |
| Kenanga investors Berhad                   | KenangaOnePRS conservative fund<br>KenangaOnePRS moderate fund<br>KenangaOnePRS growth fund  |  |
| Manulife Asset Management Services Berhad  | Manulife PRS - Conservative fund<br>Manulife PRS - Moderate fund<br>Manulife PRS - Growth fund   | Manulife Shariah PRS - Conservative Fund<br>Manulife Shariah PRS - Moderate fund<br>Manulife Shariah PRS - Growth fund   |
| Public Mutual Berhad                       | Public mutual PRS conservative fund<br>Public mutual PRS moderate fund<br>Public mutual PRS growth fund  | Public mutual PRS Islamic conservative fund<br>Public mutual PRS Islamic moderate fund<br>Public mutual PRS Islamic growth fund  |
| RHB Asset Management Sdn. Bhd.             | RHB retirement series - Conservative fund<br>RHB retirement series - Moderate fund<br>RHB retirement series - Growth fund  |  |

PRS: Private retirement scheme

As presented in the Table 1, it can be seen that 6 providers have offered PRS scheme and fund on Shariah based. Only Kenanga Investors Berhad and RHB Asset Management Sdn. Bhd. do not offer any scheme on fund based on Shariah principles. Table 1 also shown that AmInvestment Management Sdn. Bhd. and CIMB-Principle Asset Management Berhad have the biggest number of Shariah products respectively compared to the other providers.

## 2. LITERATURE REVIEW

Hamadah (2010) in his survey found that benefits provided by EPF were not sufficient to sustain the life of retirees in Malaysia. Average EPF balance for men retiring in 2010 is RM160,000 while for women is RM100, 000 but 50% of EPF members retiring in 2010 have a balance of <RM50,000. To overcome the problem, EPF has allowed its members to allocate part of their savings with external fund managers who are approved by them. 30% of labour force whom is mostly self-employed has no EPF/SOCSO coverage. These are the reason why government introduces PRS as a complement to EPF and GPS (Nur, 2012).

Najib (2013) highlighted the advantages of the PRS when announcing the Malaysian Budget through the incentives given to participants in PRS that are;

- i. Personal tax relief of RM3,000;
- ii. Tax deductions of 19% of employees' remuneration to the employers;
- iii. Tax exemption on income received;
- iv. Proposed tax deduction on employers' contributions to the scheme for their employees.

The establishment of a PPA in July 2012 is to protect investors' interests and is seen as a positive development for the retirement fund industry. Further, PPA supports investors in switching PRS providers. The PRS regulations allow investors to switch provider once a year if consumers are not happy with the existing provider.

However Ching (2012) has compared the PRS and the EPF scheme. In this regard, the author mention that PRS is difference from EPF as the contributors' money is protected under EPF scheme but the savings in PRS is not guaranteed because it depends on how the fund performs. In addition, the PRS is an investment scheme. Investors need to be conscious of the quality of the funds assets, the management experience and quality of service offered by fund providers. They need to have knowledge about investments.

In addition, according to Ching, the approach of choosing PRS depends on the stage of a person's life. If a person is near

retirement, then he tends to invest in less aggressive PRS plan because he cannot risk his retirement money. Alternatively, if a young person have a predicted financial goal and know that he is still far from target due to factors such as inflation, the cost of living, and savings or fixed deposit rates; he may opt for a higher-risk PRS plan. The expected returns from his PRS will be much higher over the longer period.

Although the introduction of PRS is a stimulating breakthrough for Malaysia's pension industry and a long-anticipated savings opportunity for middle-income earners, Hui (2012) stressed that the investor should be educate regarding the positive and negative effects of the PRS products. This is to provide options to investors to match their retirement goals and risk options. In this regard, there are five key points which should be adressed before investors sign up for the PRS. Such points include the quality of a fund's assets; evaluate sales charges, management experience, switching facilities and quality of servicing.

Syed (2012) has discussed several key points regarding the PRS. According to him, the associated advantages of PRS including; (a) possibility of growth in the fund because of the large scale; (b) allows planning and management of funds for the future needs; (c) good for employers to retain talents; and (d) supports better quality of life. He stressed also the caution on some risks involved in this scheme such as the fund is subject to volatility of the capital market. PRS does not pay to be greedy and it is better to have small returns than chasing for higher but very risky returns.

## 2.1. Analysis of Legal Framework of PRS and Recommendation

In Malaysia, the main legal framework of PRS is based on three sources i.e., the (CMSA, 2007), capital markets and services (PRS industry) regulations 2012 (PRS Regulations, 2012) and the Securities Commission Guidelines on PRS 2012 (PRS Guidelines, 2012).

### 2.1.1. CMSA 2007

In 2011, CMSA 2007 has been amended by Capital Markets and Services (Amendment) Act 2011 (Act, A1406) where new provisions pertaining the PRS Industry has been inserted under Part IIIA of the principal Act. The amendment came in force effectively on 3<sup>rd</sup> October 2011. Due to such amendment, there are 44 sections deal with the PRS (section 139A-139ZR). The provision begin with Division 1-Preliminary (Section 139A), Division 2-PRS (section 139B-139ZE), Division 3-Trustee for employer-sponsored retirement scheme (Section 139ZF-a39ZH) and Division 4-General (139ZI-139ZR).

According to the CMSA 2007, PRS means a retirement scheme governed by a trust, offered or provided to the public for the sole purpose, or having the effect, of building up long term savings for retirement for members where the amount of the benefits is to be determined solely by reference to the contributions made to the scheme and any declared income, gains and losses in respect of such contributions but does not include (a) any pension fund approved under section 150 of the Income Tax Act 1967; or (b) any retirement scheme or retirement fund established or provided by

the Federal Government, State Government or any statutory body established by an Act of Parliament or a State law (Section 139A).

The contributor under this scheme is referred to any person who makes contribution into a PRS and includes a member or an employer who makes contribution into a PRS on behalf of his employees (Section 139A). Therefore, it can be an individual person or a corporation to be regarded as contributor to the scheme. For employer-sponsored retirement scheme means a retirement scheme established by a company for the purpose or providing retirement benefits to employees of that company or for its related company. This scheme is open to the unemployed person, private sector employee, civil servant, self-employed person and etc. As compared to others social security i.e., GPS and EPF, the coverage of contributors and participant of this PRS is more widen.

In order to maintain and protect the interest of investors and PRS industry, the CMSA, 2007 provides the statutory requirements on quality and reliability of providers, for example all application must be approved by the SC. The criteria of selection through approval or removal of applicant are stated in section 139R and 139S and other requirements concerning their financial position. The writers is of opinion that the specification of this requirement is a preliminary positive action by the SC to ensure only good quality providers will be allowed to participate in this industry.

### 2.1.2. Capital markets and services (PRS industry) regulations 2012

Based on the PRS Regulations 2012, the writers divide duties and responsibilities of providers into several types i.e., fiduciaries duties, management of records, management of deeds, preserving of integrity and management of annual reports and returns.

## 2.2. Fiduciaries Duties

A fiduciary relationship is the relationship between a person in a position of trust, the fiduciary, and the person for whose benefit the fiduciary acts. A fiduciary's powers are exercised on behalf of others who are in a position of dependence. There are numerous relationships which can be categorized as fiduciary. In *R v Comber* [1911] 1 Ch 723, Fletcher Moulton LJ stated:

“Fiduciary relations are of many different types; they extend from the relation of myself to an errand boy who is bound to bring me back my change up to the most intimate and confidential relations which can possibly exist between one party and another where the one is wholly in the hands of the other because of his infinite trust in him. All these are cases of fiduciary relations, and the courts have again and again, in cases where there has been a fiduciary relation, interfered and set aside acts which, between persons in a wholly independent positions, would have been perfectly valid.”

In relation to fiduciaries duties, the PRS Regulations 2012 requires providers of PRS, (a) at all times exercise its powers for a proper purpose and in good faith in the best interest of the members as a whole; (b) exercise the degree of care and diligence that a reasonable man would exercise if he was in the PRS provider's position; (c) in the performance of its function and the management and operation of the PRS, act in accordance with the provisions

and covenants of the deed, the provisions of the CMSA 2007, these Regulations and any guidelines issued by the Commission; (d) give priority to the interest of members as a whole over its own interest in the event of a conflict between the interest of members as a whole and its own interest.

The duty of good faith in corporate law has been illustrated by Eisenberg (2005) is consists of a general baseline conception and specific obligations that instantiate that conception. The baseline conception consists of four elements: Subjective honesty, or sincerity; non violation of generally accepted standards of decency applicable to the conduct of business; non violation of generally accepted basic corporate norms; and fidelity to office. Among the specific obligations that instantiate the baseline conception are the obligation not to knowingly cause the corporation to disobey the law and the obligation of candor even in non-self-interested contexts.

### 2.3. Management of Records

The PRS providers are required to keep records of all transactions relating to the PRS and ensure that all accounts and records kept are complete and accurate. They also are responsible to make all financial records or other books of the PRS available for inspection by (i) a scheme trustee; (ii) an officer or employee of the scheme trustee authorized by the scheme trustee to carry out the inspection; or (iii) an auditor appointed by the scheme trustee to carry out the inspection, and give such persons carrying out the inspection any information, explanation or other assistance that they may require in relation to those records.

### 2.4. Management of Deeds

Another aspect which is given priority is the agreement between the PRS provider and contributor. This is a written contract between the PRS provider and contributor; therefore it is the requirement of the PRS provider to provide a copy of the deed to a member upon request for a copy of the deed and on payment of such reasonable sum as may be imposed by the PRS provider. Further, the PRS provider must make available for inspection a copy of the deed without charge to any member of the public.

In regards to this matter, there is no standard agreement/deed of PRS (written contract between the providers and investors). Therefore, each PRS provider will implement their own contract with different terms and clauses. The autonomy and discretionary power is given to PRS providers in this aspect as long as they do not trespass the boundary of the Act (CMSA, 2007), regulations and guidelines. The best offer and promotion will win the heart of contributors. This is the game of normal business and possibly, it will open to manipulation and other unethical activities which will create unhealthy situation and contributors will be the victim at the end of the game.

### 2.5. Preserving Integrity

The PRS providers should maintain their integrity in carrying their duties. This duties includes (i) not to act as principal in the sale and purchase of securities, derivatives, property or assets to and from the PRS unless specified otherwise by the Commission; (j) not to make improper use of its position in managing the PRS to gain directly or indirectly, an advantage for itself or for any other

person or to cause detriment to the interests of members of such PRS; (k) not to invest any monies available under the deed in any securities, derivatives, property or assets in which or from which the PRS provider or any of its officer derives a benefit without the prior approval of the scheme trustee; and (l) carry out any other duties or responsibilities as may be specified by the Commission.

### 2.6. Management Annual Reports and Returns

Further, the PRS provider also has a duty in relation to annual reports, returns as stated in section 11 of the regulations. A PRS provider must ensure that all financial statements relating to the PRS comply with approved accounting standards.

#### 2.6.1. Guidelines on PRS 2012 (PRS guidelines 2012)

In addition to the CMSA 2007, SC Malaysia has issued a Guidelines on PRS to be observed by the PRS provides effectively on 5 April 2012. In short, the Guidelines are divided into 14 Chapters as follow: Chapter 1 (Introduction); Chapter 2 (Definitions); Chapter 3 (The PRS Provider); Chapter 4 (Scheme Trustee); Chapter 5 (Delegation and Outsourcing by PRS Providers); Chapter 6 (Oversight arrangement by PRS Providers); Chapter 7 (Constitutions of the Scheme); Chapter 8 (Investments of the Scheme); Chapter 9 (Charges, Fees and Expenses); Chapter 10 (Dealing, Valuation and Pricing); Chapter 11 (Operational Matters); Chapter 12 (Reporting and Audit); Chapter 13 (Disclosure Document and Product Highlights Sheet; and Chapter 14 (Applications, Notifications and Reporting).

The PRS Guidelines 2012 are issued by the SC pursuant to section 377 of the CMSA 2007. These guidelines are to be complied with by any person intending to act as a PRS provider in establishing, offering or providing a PRS or to hold himself as establishing, offering or providing a PRS scheme as well as the requirements to be complied with by a Scheme Trustee. These guidelines are aimed at providing the regulatory and operational requirements that would safeguard the interests of contributors to the PRS. The CMSA, 2007, PRS Regulations 2012 and securities laws form the regulatory framework for PRS in Malaysia, and must be read together. All parties to a PRS are expected to be guided by the letter and the spirit of the regulatory requirements.

The PRS providers are guided by basic principles as mentioned in the PRS Guidelines 2012. The principles set out are in tandem with the SC's regulatory objectives of ensuring robust regulation and supervision of the PRS industry, promoting trust and confidence in the PRS and protecting members' interests. The principles states that providers must act in the interest of members as a whole with the aim of providing cost effective voluntary retirement funds and ensure that the schemes are operated in a proper and efficient manner. Further, the PRS providers must ensure that the schemes are accessible by a wide cross-section of the population and unreasonable exclusions from participation to a scheme should be avoided, for example imposition of high minimum contribution amount or not accepting contributions from employers who make contributions on behalf of their employees. It is also a duty of PRS providers to ensure that the investment policies for the funds under the schemes must be consistent with the objective of building savings for retirement and ensure that there is a prudent spread of risk.



The writers are of opinion that the guidelines only provide a minimum standard in relation to the governance policy of PRS providers. The detail provisions for implementation purposes of the scheme must be drafted in accordance to the spirit of CMSA 2007, PRS Regulations 2012 and PRS Guidelines 2012. Discretion is given to the PRS providers in terms of implementation of the scheme and this is based on the vision, mission and objective of each one of the PRS providers. Therefore, it is expected that there will be no standardization of deed instrument/agreement between the PRS providers and contributors between the existing eight PRS providers in Malaysia. Whether this good or bad is yet to be determined? However, the important issues here is the protection of contributors and integrity of the industry must be the main aim of the PRS providers. As what Ambachtsheer et al. (2006) identifies the main weakness of governance is poor selection processes for members of the governing board, a lack of self-evaluation of board effectiveness and weak oversight by the board. Other specific problems include ambiguity in delegation of power between board and management responsibilities, board micro-management and non-competitive compensation policies in pensions fund. Even though under CMSA 2007 has prescribed the general principles of law in relation to PRS and the SC also published the PRS Guidelines 2012 but in terms of the process and procedures, specification of terms of contract between PRS providers and contributors is different amongst PRS providers and determination of the investment objective and its achievement is the discretion of the PRS providers.

### *2.6.2. Application of Islamic principles in PRS legal framework*

Generally, the CMSA 2007 is silent in the matters regarding PRS scheme or fund based on Shariah principles. However, it must be noted that, section 316 of CMSA 2007 relating to Islamic securities is a significant platform for the PRS providers in offering the scheme based on Shariah. Section 316 grants permission to the SC to issue guidelines made under section 377 to regulate the Islamic securities industries. Pursuant to this, SC may issue relevant guidelines in giving full effects to the principles of Shariah in relation to Islamic securities transactions including the PRS Shariah based.

Currently, there are no specific guidelines issued by SC to regulate the Shariah based PRS. The only legislation to regulate the Shariah based PRS is the Guidelines 2012. The Guidelines 2012 provide several provisions to be observed by PRS providers in offering Shariah based PRS. According to the Guidelines 2012, where a PRS provider manages or offers a fund under the PRS expressed to be managed and administered in accordance with Shariah principles, the compliance officer must have a basic knowledge of Shariah laws and principles. In this regard, the officer has a function to recommend necessary training to any Shariah adviser or panel of advisers. He also has duties to monitor and resolve conflict of interest situations between all funds managed and administered by the PRS provider in its capacity as a PRS provider.

Where appropriate, the compliance officer must advise the audit committee, or compliance committee (if any) of the PRS provider, as well as the investment committee, and any Shariah adviser or panel of advisers of the fund(s) concerned accordingly. The

compliance officer is responsible to report to the audit committee or the compliance committee (if any) and Shariah adviser on whether dealings in the fund's property are appropriate to the fund, and in accordance with Shariah principles. Other than Shariah compliance officer, the Guidelines also require that the investment committee for Shariah based PRS must comprise at least two Muslim members and one of them is required to attend the investment committee meeting.

Apart from that, in term of oversight arrangement by PRS providers, the relevant providers have to appoint the Shariah adviser for a Shariah-compliant fund. In this regard, the PRS provider must notify the SC on the appointment and resignation of the Shariah adviser. The criteria for appointment as a Shariah adviser are; must be independent and has no relationship with the PRS provider; be registered with the SC; for individuals appointment must be comprised at least three individuals who meet the stipulated fit and proper criteria; and for a corporation appointment, it must engage at least one Shariah expert who meets the stipulated fit and proper criteria. The Shariah adviser must not hold office as member of the investment committee of funds managed and administered by the same PRS provider. The Guidelines 2012 also spell out the roles and responsibilities of the Shariah adviser including; (a) to advise on all aspects of the scheme and fund management business in accordance with Shariah principles; (b) to provide Shariah expertise and guidance in all matters, particularly on the fund's deed and disclosure document, fund structure, investments and other operational matters; (c) to ensure that the fund is managed and operated in accordance with Shariah principles, relevant SC regulations and standards, including resolutions issued by the SC's Shariah Advisory Council; (d) to review the fund's compliance report and investment transaction report to ensure that the fund's investments are in line with Shariah principles; and (e) to prepare a report to be included in the fund's annual and interim reports stating its opinion whether the Shariah-compliant fund has been operated and managed in accordance with the Shariah principles for the financial period concerned. In the event where there is ambiguity or uncertainty as to an investment, instrument, system, procedure or process, the Shariah adviser must consult the SC.

The writers is of the opinion that eventhough the Guidelines 2012 provide a guidance to PRS providers, but it only highlight the basic administrative provisions. The existing Guidelines 2012 is not comprehensive to regulate the Shariah based PRS. For examples, the Guidelines is silent on the standard operations procedures to be observed by the PRS provider and the Shariah advisor in particular. Another problem has been highlighted by Syed (2012) on several Shariah issue and challenges regarding the scheme. Among them are the Shariah compliants investments, distribution upon death subject to Faraid (Islamic inheritance system) and the zakat payment element. It seems that such issues have no answer in the Guidelines 2012.

## **3. CONCLUSION**

It is a good effort by Malaysian government to introduce PRS which is available to all employed or self-employed

Malaysians citizens, and to enhance their retirement savings under a comprehensive framework and regulated environment. However, there are several issues that need to be addressed in order to strengthen the existing legal framework and make it more comprehensive. The findings of this research shows that there is no standard agreement/deed of PRS (written contract between the PRS providers and contributors). The writers would recommend a standard agreement/deed must be inserted in the Guidelines 2012.

Apart from that, the existing guidelines is lacked of uniformity in the implementation of governance policy because the discretion is given to the providers in terms of implementation of PRS as it is based on the vision, mission and objective of each one of the PRS providers. The writers are of the view that there should be guidelines on a standard best practice in governance of PRS. As for PRS based Shariah, the standard operation procedures should be introduced and implemented. This is to enhance the quality of PRS management and to promote confidence amongst contributors and future investors.

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