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LEGAL OPINION & ANALYSIS – SOME CHALLENGING LEGAL ISSUES ASSOCIATED WITH E-CONTRACTS PURSUANT TO THE LAWS OF MALAYSIA

A) Foreword

The primary issues raised in this article are with regards to the legal viability of e-Contracts. The author looks into the legal risks associated with Company XXXX's suggested e-Contract model, a departure from the conventional physical contract wherein the latter entails many signatures to be tendered upon a sequence of documents that many Merchants regard to be cumbersome and time-consuming. The following legal advice is rendered upon research undertaken into assessment of the matter and analysis of the same. The purpose of this legal opinion and analysis is to alert the Board of Directors of Company XXXX about the legal risks faced in proceeding with its proposed e-Contract model with regards to its business with Merchants.

B) Gkash's Proposed e-Contract Model – Merchant Agreements

- i) **Company XXXX has envisaged a proposed e-Contract Model with reference to Merchant Agreements where Merchants would only be required to tender signature and affix Company Stamp for a single time upon the 'Merchant Application Form' in the section entitled 'Declaration & Acceptance'.** The Merchant Agreement is supposed to be accessed from this portion and there may be further links therefrom containing specific information applicable and pertaining to each Merchant which the Merchant may individually and confidentially further access via the Merchant Access Portal. Some of the terms are supposed to be generic where all Merchants would have access to these terms & conditions;
- ii) **This proposed e-contractual model entails signing by ordinary e-Signature and not via digital signature;**
- iii) **There would be no signing required upon any other e-Contracts** such as the 'Welcome Address', 'Merchant Agreement, terms and conditions stated at the Merchant Access Portal – the signature tendered & company stamp affixed upon the Merchant Application Form is slated to be all-encompassing;

Comment: This format is desired as it is envisaged to reduce the number of steps to be followed in entering into and executing contracts and would also save cost as it is essentially wholly paperless. In proposing this model of e-contract, Company XXXX would be emulating to some extent, the e-contractual model of its competitors in the fintech industry.

C) Potential Legal Repercussions Ensuing from Company XXXX's Proposed e-Contract Model

Each of the issues pertaining to the points as stated in B above shall be considered in turn herein:

- i) **Company XXXX has envisaged a proposed e-Contract Model with reference to Merchant Agreements where Merchants would only be required to tender signature and affix Company Stamp for a single time upon the 'Merchant Application Form' in the section entitled 'Declaration & Acceptance'. The Merchant Agreement is supposed to be accessed from this portion and there may be further links therefrom containing specific information applicable and pertaining to each Merchant which the Merchant may individually and confidentially further access via the Merchant Access Portal. Some of the terms are supposed to be generic where all Merchants would have access to these terms & conditions;**

Comments: The idea of a mere '*Application Form*' completed at the outset which contains links stated to be legally binding upon the Merchant seems problematic at the point of inception itself. A contract (whether in physical form or electronic form) is treated as being concluded between the parties entering into it when each party has had the chance to read and comprehend all its terms in an easily accessible manner with no potential ambiguity operating to potentially vitiate the legal validity of the contract. **The format as proposed by Company XXXX appears to be quite complicated with the Merchant having to access many links to fully comprehend the nature and terms and conditions of the contract being entered into.**

An **Application Form** as its name suggests, can only truly be acknowledged as an acceptance of the application of the Merchant to participate as a Merchant in the programmes launched and operated by Company XXXX. This is the stage of inception or the first stage of establishing potential contractual relations with Company XXXX. **It should not be functioning as the conclusion of a valid and binding contractual agreement between the parties. It is merely a pre-cursor to the establishment of a legally binding contractual relationship between the parties.** After showing the desire to participate in Company XXXX's retail programmes for Merchants by filling out the Application Form, the screening of the Merchant by the performance of '*Simplified CDD*' as required by the legislation pertaining to AML/CFT needs to take place prior to acceptance by the Merchant. The process of Simplified CDD entails obtaining the following information from the customer & beneficial owner:

- (a) Full name;
- (b) NRIC number / passport number / reference number of any other official documents of the customer / beneficial owner;
- (c) Residential & / or mailing address;
- (d) Date of birth; &
- (e) Nationality

Company XXXX is required to verify the identity of the customer & beneficial owner.

Immediately after this process, follows the process of verification of the criteria furnished with reference to Simplified CDD.

These processes must necessarily follow a chronological order after the Application Form has been filled out by the Merchant as one naturally cannot *'put the cart before the horse.'*

- ii) **This proposed e-contractual model entails signing by ordinary e-Signature and not via digital signature;**

Comments: Presently, the position of the law is such that only digital signatures would render an e-Contract as legally binding and enforceable. One of the reasons for this could also be the fact that all parties to the contract would need to sign upon it with security as to their identity being ensured and there is little risk of fraud being perpetrated under these circumstances. **One of the risks associated with regards to e-Signatures is the fact that it could be unilateral where only the party accepting signs upon it and not the party offering the services. Analyzed from a logical standpoint, this would not be legally tenable as the Company which is a contracting party, must be represented by a person authorized to act on its behalf. There can never be a situation where these sort of unilateral contracts have equal legal standing / acceptability as contracts where all the contracting parties tender their respective signatures upon it.**

- iii) **There would be no signing required upon any other e-Contracts such as the 'Welcome Address', 'Merchant Agreement, terms and conditions stated at the Merchant Access Portal – the signature tendered & company stamp affixed upon the Merchant Application Form is slated to be all-encompassing;**

Comments: From the perspective of legal security of the contract, there are several chronological stages during which the express agreement / consent of the Merchant must be obtained, signified or evidenced by the tendering of the Merchant's signature and other forms of accompanying execution formalities. This is because **the onboarding of the Merchant has been envisaged by legislation governing the same to entail several tiers of formalities & executions.**

There is no legal security in one stage being deemed to be all-encompassing and completely and wholly legally binding. What would be deemed to be final, conclusive and legally binding acceptance would be acceptance of each agreement at each respective stage by the tendering of the signature by the parties at each of these stages. This would have the effect of signifying very clearly and unequivocally that the Merchant has knowledge of terms and conditions pertaining to each individual contract which collectively forms the sequence of contracts (wherein each contains specific information) and the Merchant would be estopped from asserting otherwise. **If this order is followed, there would not be conspicuous loopholes which the Merchants would be able to exploit to their advantage to refute the validity of the contracts.**

Furthermore, following the conventional model, a main contract would be attached with schedules, appendices etc. and the signature of all the parties would be upon it. This is a scenario where all information is linked in one contract and sighted simultaneously with no ambiguity whatsoever arising or at least the risk of this is very much mitigated.

From a legal standpoint, there can never be a situation where generic and non-generic terms can form part of a legally binding contract. Clarity of terms being agreed to is a salient and established tenet of Malaysian contract law. It is imperative that at all times, the final, clear and conclusive version of the contract is being entered into otherwise, an ambiguous contract may be challenged in its entirety especially where the party relying upon the enforcement of its terms is in a disadvantaged position.

D) Additional Risks Faced

Company XXXX's proposed e-Contract model with regards to Merchant Agreements is non-compliant in many respects in relation to its legality based on the matters highlighted above. **There can never be a conscious choice accorded to Merchants to choose between an established and legally valid legal framework (with reference to the signing of physical agreements) and a form of e-Contract that would be questionable in almost all its aspects in relation to its legal validity.** This is a fact notwithstanding similar models used by Company XXXX's competitors.

Pursuant to **BNM's Circular on Risk Management in Technology (RMiT) [Ref. No.: BNM/RH/PD 028-98]** issued on 18 July 2019 and has taken effect on 1 January 2020, Company XXXX is compelled to ensure that its Technology Risk Management Framework is an integral part of its enterprise risk management framework (ERM). The TRMF must include the following:

(c) the identification of technology risks to which Gcash is exposed, including risks from the adoption of new or emerging technology;

(f) risk controls & mitigations

Pursuant to the 'Operational Requirements' as stated in Part B, Principle 1 [Establish Adequate Governance & Operational Arrangements] of BNM's Guideline 2009, an issuer of e-money is compelled to establish adequate operational arrangements for its e-money scheme, which includes:

- i. Rules & procedures setting out the rights & liabilities of the issuer and the user, and the risks the user may incur.

Operational risk has been explained in the Guideline as arising from the potential for loss due to inadequate or failed internal processes, people and systems, external factors and fraud.

Pursuant to Part B, Principle 3 [Ensure That The Risks Of Using E-Money And Rights And Responsibilities Of All Stakeholders Are Clearly Defined And Disclosed], an issuer of e-money must ensure that the rights and responsibilities of all its stakeholders (e.g. users & merchants) are clearly set out in the relevant contractual documents. The terms and conditions for the use of e-money should be easily accessible and understood.

Principle 3 also relays that there must be measures to address consumer protection, education and privacy. Among others, an issuer is compelled to ensure that : its client charter, at the minimum, includes its commitment towards ensuring safe operations, privacy of customer information, reliable and quality service, transparency of product and services, and prompt response to enquiries, complaints, refund and disputes.

There must also be in place, a system to address complaints or queries raised by users, and a dispute resolution mechanism.

E) List of Identified Legal Risks Associated with e-Commerce

- i) It may be difficult to establish the precise point in time at which an electronic contract has been formed;

❖ *The only way to avoid the legal uncertainties surrounding the time of electronic contract formation is to incorporate clear provisions in the contract that state how acceptance is to be communicated and when acceptance of the offer will be deemed to be effective.¹*

- ii) It may be difficult to establish the place where an electronic contract has been formed;

❖ *An electronic contract should include clear provisions where the parties submit to the jurisdiction of the courts of a particular place and agree to the applicable law to govern the contract. The place of contract formation will then have minimal legal relevance.²*

- iii) The authority of an individual to enter into an electronic contract on behalf of another person or entity may be uncertain;

❖ *Regardless of whether an electronic contract is formed by paper or electronic communications, the parties must still carry out their usual due diligence investigations to ensure that individuals who are entering into the contract on behalf of another person or organization possess the actual or apparent authority to enter into the contract.³*

- iv) Depending on the terms of a specific contract, it may be uncertain whether electronic communications are effective to amend the contract and the validity of electronic notices may be unclear;

❖ *Contracting parties must expressly address electronic communications in their contract documents. The provisions must be clear as to which communications under the contract may and may not take place in electronic form;⁴*

¹ eContracting – Security and Legal Issues: Cooperative Research Centre for Construction Innovation: © Icon.Net Pty Ltd 2008

² Ibid

³ Ibid

⁴ Ibid

- ❖ *If the contracting parties do not wish to be bound by electronic communications, then the contract should clearly exclude electronic communications as a valid form of notice delivery;*⁵
- ❖ *If the contracting parties do wish to use electronic communications, they should consider whether they wish to contractually avail themselves of effective electronic communications for some, but not all, contractual notices. The communications that are to remain paper-based should be clearly excluded by appropriate provisions;*⁶
- ❖ *The electronic communication method to be used should be identified & the relevant electronic addresses & details of authorized recipients should be stated;*⁷
- ❖ *If electronic communications are to be used, the parties should expressly consent to the use of electronic communications, but only to the extent specified in the contract;*⁸
- ❖ *The contract should include a timing provision to govern when electronic communications will be deemed to have been received by the parties. The nature of the provision will depend on the electronic communication method being used & the commercial acceptability of the proposed provision to both contract parties;*⁹
- ❖ *The contract should deem those notices & communications that the contract allows to be delivered by electronic means, to be in writing & signed. In relation to electronic signatures, the contract should identify the precise signature method to be used, and the parties should consent to the use of that method & acknowledge that they consider the method to be both reliable & appropriate; and*¹⁰
- ❖ *If an online collaboration system is used for electronic communications, the parties should include a contractual provision setting out alternative communication protocols to be followed in the event that the system becomes unavailable.*¹¹

- v) If parties to an e-contract use incompatible technology, there may be difficulty ensuring consistency between the electronic records available to each party;

⁵ Ibid

⁶ Ibid

⁷ Ibid

⁸ Ibid

⁹ Ibid

¹⁰ Ibid

¹¹ Ibid

❖ ***Users of collaboration systems should use the same version of the system and, if necessary, the same operating system to run the system.¹²***

vi) A digitized copy of a paper record may be inadmissible if the party relying on it cannot satisfy the court that it is an accurate copy of the paper record.

❖ ***Parties must implement procedures to ensure that they can demonstrate the authenticity, integrity & reliability of a digitized copy of a paper record. These procedures include ensuring the accuracy of the scanner, recording details of the person responsible for scanning the record & time stamping of the digitized record.¹³***

vii) An electronic record may be considered by a court to be unreliable as evidence if the parties cannot prove the integrity of the record (i.e. that it has not be altered by human intervention or corrupted by computer malfunction).

❖ ***If an electronic record is likely to be of evidential importance, then the electronic record should be signed using digital signature technology.¹⁴***

❖ ***Where the electronic record is of very high evidential importance, the record should also be time stamped so that the integrity of the record can be assured even if the digital signature becomes invalid.¹⁵***

viii) The parties may be unable to prove the time an electronic record was created or communicated. Establishing time may be of importance in relation to the time a contract was formed or the time a notice was sent under a contract. Time may also be of assistance in establishing or challenging the integrity or authenticity of an electronic record.

❖ ***Where the time of creation or communication of an electronic record is highly important, the record should be signed with a digital time stamp and, if necessary, a trusted third-party time stamping authority should be used to issue & verify the time stamp.¹⁶***

ix) An electronic record may be considered by a court to be unreliable as evidence if the parties cannot prove the record was created or communicated by the person who is alleged to have created or communicated it.

- A party who receives an electronic communication must be able to verify that the communication has come from the source from which it is purported to have been sent.¹⁷

¹² Ibid

¹³ Ibid

¹⁴ Ibid

¹⁵ Ibid

¹⁶ Ibid

¹⁷ Ibid

- Password-based authentication mechanisms may not be reliable because they may be subject to dictionary-based attacks, or they may be disclosed by human carelessness.¹⁸
- ❖ *Where electronic communications which take place using email are of high evidential importance, they should incorporate email authentication mechanisms (such as the sender policy framework, trusted email open standard & Yahoo domain keys) to assure the origin of the email;*¹⁹
- ❖ *Where an electronic record is communicated over the internet, secure internet protocols such as SSL or TLS should be used to ensure data origin authentication;*²⁰
- ❖ *An authentication mechanism appropriate for the degree of certainty in authentication required for the particular communication should be used. Where a high level of authentication is required, a combination of authentication mechanisms (such as a password together with a security token) should be used.*²¹
- ❖ *Where an online collaboration system relying on password-based authentication is used, password expiry mechanisms should be incorporated into the system. Where a high degree of authentication is required, internet protocol-based authentication systems should also be used.*²²

x) The disclosure process in the event of a dispute may be costly & time consuming if there is a multitude of electronic copies of records held on a range of electronic devices. There may be no way of clearly identifying & locating all copies of electronic records in order to satisfy the party's disclosure obligations in a timely & cost-effective manner.

- ❖ *Parties contracting with each other using e-contracts should have a document retention & destruction policy to ensure that electronic records can be easily identified & located. The use of an online collaboration system will meet this requirement because it automatically logs all iterations of electronic records created using the system.*²³
- ❖ *Where a collaboration system is used, the parties should not use other electronic systems for the creation or communication or electronic records, as doing so will complicate the disclosure process.*²⁴
- ❖ *The document retention & destruction policy should include established procedures to delete electronically stored records from backup media.*²⁵

¹⁸ Ibid

¹⁹ Ibid

²⁰ Ibid

²¹ Ibid

²² Ibid

²³ Ibid

²⁴ Ibid

- xi) If a party to an e-contract destroys contractual records after it becomes aware of potential litigation in relation to the contract, it may be in breach of its duty to preserve evidence.

❖ ***An organization should only destroy electronic records in accordance with a formal document retention & disposal policy, which should include procedures to be followed in the event of a dispute arising.***²⁶

- xii) If project records are not archived in a manner that ensures that they remain accessible and that maintains the integrity of the records, the parties may be in breach of their statutory obligations to maintain records.

❖ ***Organizations should review any legislation relevant to the organization & to the project to ensure that they comply with their statutory record-keeping obligations. In particular, to ensure the accessibility & reliability requirements of electronic record-keeping are satisfied, organizations should comply with the specific archiving recommendations referred to below.***²⁷

- xiii) Where e-contractual records are archived electronically, there is a risk that they may not remain accessible or their integrity may not be assured if the storage media on which they are kept breaks down over time, or if technology changes mean that it is no longer possible to access the records.

❖ ***The agreement with any party responsible for the archiving of e-contractual records should specify the technical standards to be met by the service provider in archiving the data. Contractual provisions should also specify who is to bear the cost of archiving the data and, if the data is required to be accessed, the access procedure & the party who is to bear the access costs; and***²⁸

❖ ***Ideally, archived records should not be stored in encrypted format unless they are time stamped by a trusted third-party time stamping authority.***²⁹

F) Proposals for Risk Mitigation for Assumption of Risks

It is duly acknowledged that the state of local laws may not be perceived to be fully abreast with the technological advancements in the fintech industry in Malaysia. There are **many gaps which thus far is not seen to be sufficiently addressed by the adversarial legal system that is the legal framework in Malaysia. If the law in its conventional form is strictly adhered to, the commercial viability of the business may be at stake.**

²⁵ Ibid

²⁶ Ibid

²⁷ Ibid

²⁸ Ibid

²⁹ Ibid

These assertions are not in any way an admission that laws are being contravened but rather an acknowledgement that the uncertainties in the interpretation of the law must be somehow addressed by alternative methods wherein the business is able to operate fully by the assumption of risks in areas where the application and interpretation of the laws may be perceived to be still uncertain.

It is proposed that Company XXXX consider maintaining a pool of funds for potential payout to parties who may be aggrieved by their rights being affected as a result of Company XXXX's voluntary assumption of certain legal risks inherent due to uncertainties in the interpretation and application of the laws where these risks are assumed for the sole reason of the commercial viability and sustainability of Company XXXX's business as an SME. In assessing the quantum of funds to be maintained or reserved at any given time, the factors that may be taken into consideration are: the foreseeability of quantum of losses per case; the size and volume of the business, affordability; risk forecast / estimation based upon maximum risk exposure etc..

G) Concluding Remarks

Based upon recent internal discussions, it is apparent that BNM, as the regulatory authority remains mum on some uncertainties with regards to the application of the local laws to the matter of e-contracts and e-signatures tendered upon such contracts. This is not encouraging state of affairs as these ambiguities continue not to be addressed, leaving the e-money issuer in a constant state of uncertainty where business risks are concerned. However, **in efforts towards some form of self-regulation and risk mitigation assumed in the course thereof, the salient points addressed in this legal opinion may provide some guidance.**