# The Legal Quagmires in the Anti-Money Laundering And Anti-Terrorism Financing Act 2001

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**ABSTRACT:** Money laundering is considered as a significant worldwide phenomenon, with grave economic, political and social ramifications. Widespread international concerns over such crime have led to the establishment of international policies and standards by the Financial Action Task Force (FATF) aimed at preventing it, and ultimately criminalizing it within the national boundary. In accordance with such policies, Malaysia introduced the Anti-Money Laundering Act in 2001(AMLA) as a legal modality in governing such crime. It was amended and renamed to AMLATFA in 2003 to include terrorism financing. However, of late concerns have been voiced relating to some of its instrumental flaws including the exclusion of certain offences from the predicate offence list and the comparatively low sanctions for money laundering. Such deficiencies would inevitably raise the question of the utility of AMLATFA in curbing money laundering and terrorism financing in the country. Within this uncertain legal landscape, this paper will highlight the conundrums surrounding the said legislation. The authors contend that despite the adherence to global governance standards, legal deficiencies in the AML/CFT regime in Malaysia remained, and that such a problem merit urgent attention and action from the relevant authorities. This paper employs a doctrinal legal research and secondary data of which the AMLATFA is the primary source. The secondary sources for this article include decided cases, articles in academic journals, books and online databases.

***KEYWORDS**: money laundering, terrorism financing, financial action task force (FATF), instrumental flaws.*

## INTRODUCTION

In the past decade, money laundering has been one of the major crimes that countries around the world, including Malaysia, are confronting. Historically, such crime was associated with the proceeds of illegal drugs and distribution. However, in recent times, numerous financial and non-financial crimes such as illegal deposit taking, cheating, criminal reach of trust, tax evasion, human trafficking and smuggling of firearms have been connected with money laundering. Since then it has transcended beyond the real world into cyberspace. Despite not being a regional centre for money laundering, the formal and informal financial sectors in Malaysia are considered to be vulnerable to abuse by narcotic traffickers, financiers of terrorism and criminal elements (United States Department of Justice Report 2006; US DOJ International Narcotics Control Strategy Report 2009). In 2001, in accordance with international policy responses to money laundering and in her attempts to curb such criminal activities, Malaysia enacted AMLA, which came into force on 15 January 2002 (Shanmugam and Thanasegaran 2008). In 2003, the said Act was revised and renamed as AMLTFA 2001, to provide for preventive measures against money laundering and to include terrorism financing, forfeiture of terrorist property and property involved in, or derived from, money laundering and terrorism financing offences (Mohd Yasin 2007; Shanmugam and Thanasegaran 2008). In December 2013, the Amendment Bill was tabled in Parliament for the first reading by the Deputy Finance Minister, Datuk Ahmad Maslan. The bill was subsequently passed and assented in July 2014.

This paper seeks to highlight some of the conundrums surrounding the legal and regulatory AML/ATF regime, which was deemed to be deficient in some aspects, prior to the amendment and post-amendment in 2014. The first part of the paper examines the varied meanings attached to money laundering and terrorism financing. The second part, which is the crux of the paper, examines the legal and regulatory issues involved in the AML/ATF regime pre and post amendment Act 2014. The third and last part which concludes the paper suggests that despite the adherence by Malaysia to international policies and regulations, the practical implementation of the regime within various sectors and at the international level remain problematic. Such issues should be addressed immediately in order to prevent the escalation of money laundering and terrorism financing risks in Malaysia.

## WHAT IS MONEY LAUNDERING?

Money Laundering can be characterized as the process by which the proceeds of crime are put through a series of transactions; disguising their illicit origins and making them seem to have come from a legitimate source (Graycar and Grabosky, 1996). Provost (2009) and Akopyn (2010) suggest that money laundering is where one conceals an illegal application of income to make it appear legitimate. However, the literature on money laundering indicates a wide array of differing definitions of what constitute the act of money laundering. On the one hand, the Central Bank of Malaysia (CBM) defines money laundering as to cover all activities and procedures to change the identity of illegally obtained money so that it appears to have originated from a legitimate source. FATF defines money laundering as the processing of a large number of criminal acts to generate profit for individual or group that carries out the act, with the intention to disguise their illegal origin in order to legitimize the ill-gotten gains of crime. Any crime that generates significant profit extortion, drug trafficking, arms smuggling and some white collar crime may create a "need' for money laundering (FATF 2001).

Money laundering is a process involving three stages (Bank Negara Malaysia/GP9). First stage is the placement that involves moving the money from the scene of the crime to a legitimate temporary place. At this stage, the illegal proceeds are placed into the financial system through such activities such as physical disposal of illegal proceeds; smuggling of currency in bulk; mixing illicit proceeds with legitimate funds and depositing cash in small amounts. The second stage is layering, which involve disguising the trail of the illegal money. This would involve the separation of illicit proceeds that disguise audit trails and the anonymous transaction. Examples of this type of layering are the multiple transfers of money, the multiple transactions, the payment of fake invoices and buying or selling of the same goods. The third stage is integration, which involve making the cash available to the criminals. This is the stage when the laundered proceeds are successfully integrated into the economy as legitimate funds such as trading that involve invoice manipulation to remit money abroad, buying properties and engaging in legal business (Mohd Yasin (2002, 2007).

Prior to the 2014 Act, the AMLATFA 2001 created a single form of money laundering offence applicable throughout Malaysia to the proceeds of unlawful activity. Such violation was defined in section 3 read together with section 4, which provided for the penalty for money laundering (Hamin, 2013). Sections 3 and 4 put into legislative effect the FATF Recommendation 4 on the criminalization of money laundering (Mohd Yasin). Under the new Amendment Act, the offence has been taken out of section 3(a) – (c) and consolidated into a new section 4, which provides that money laundering is an act of a person who: Firstly, engages directly or indirectly in a transaction that involves proceeds of unlawful activity or instrumentalities of an offence (Section 4(1)(a). Secondly, when a person acquires, receives, processes, disguises, transfers, converts, exchanges, carries, disposes of or uses proceeds of an unlawful activity or instrumentalities of an offence (section 4 (1)(b)). Thirdly, removes from or brings into Malaysia proceeds of any unlawful activity and instrumentalities of an offence (section 4 (1)(c)). Fourthly, when a person conceals, disguises or impedes the establishment of the true nature, origin, location, movement, disposition, title of or rights with respect to, or ownership of, proceeds of any unlawful activity or instrumentalities of an offence (section 4(1)(d)). The new penalty in Section 4 (1) of AMLATFA is an imprisonment for a term not exceeding fifteen years and a fine not less than five times the sum or value of the unlawful activity or instrumentalities of an offence or five million ringgit, whichever is higher.

## Cyber laundering

New technology such as the ICT has generated new ways for financial institutions and banks to offer financial products and services online, which inevitably lead to enhanced speed of transmission of digitized information, as well as facilitating cross-border movement of funds and services. This development involving electronic banking and e-money technologies have made money laundering activities even more prevalent than before. (Masciandaro 1998 ; Vitilingam 2007). Indeed, the FATF Report as early as in 2001 on Money Laundering Typologies identifies online banking and the Internet as principal money laundering vehicles. Cyber laundering is challenging not only to the traditional AML/ATF laws and regulations but more importantly the law enforcement efforts in tracing the money laundering transactions involved, detecting the crime and prosecuting the offenders. Philippsohn (2001), Vagras and Backhouse (2003) and Filiplowski 2008 contend that the laws and regulations created to counter money laundering need to include new provisions dealing with the use of new technology. However, despite the increasing volume of literature on cyber laundering (Filiplowski 2008; Philippsohn 2001) there is a dearth of such literature within the local scene i.e. Malaysia and Singapore (Siong Thye Tan 2002).

## WHAT IS TERRORISM FINANCING?

Terrorism financing is the act of providing financial support, either through legitimate or illegitimate source to terrorists or terrorist organizations in order to enable them to carry out terrorist acts. Section 3(1) of the AMLATFA 2001 defines a terrorist financing offence as any offence under section 130N, 130O, 130P or 130Q of Penal Code. Essentially, financing of terrorism includes providing or collecting property for carrying out an act of terrorism; providing services for terrorism purposes; arranging for retention or control of terrorist property, or dealing with terrorist property. It is evident that in Malaysia, money laundering and terrorism financing are two separate offences being encompassed within the same statute. Whilst money laundering is solely based on the proceeds derived from unlawful activities or ill-gotten gains, the focus of financing of terrorism is on the determination or use of funds, which may have been derived from legitimate sources (Kaur 2007). Money laundering could contribute to an increase in terrorism since firstly laundered money can be used to fund terrorist activities in particular, the proceeds from the production and marketing of narcotics/drugs (Masciandaro 2001). The United States of America and the United Nations have identified several groups operating in the South East Asian region as terrorists, including the Al Qaeda, Jemaah Islamiah, Communist Party of the Philippines/ New People's Army; Cambodian Freedom Fighters, Moro Islamic Liberation Front (MILF). They were alleged to be involved in narcotics smuggling, smuggling of goods, commodity and firearm, trafficking in persons, extortion, kidnapping, intellectual property theft, counterfeiting, fraud, credit theft and armed robbery (US DOJ International Narcotics Control Strategy Report 2009).

## THE LEGAL AND REGULATORY QUAGMIRES IN MALAYSIA

The Malaysian Government had introduced the Anti-Money Laundering Act 2001 (AMLA) in line with the general principles laid out in the Basle Statement as well as the recommendations provided by the Paris-based FATF (Financial Action Task Force). The Central Bank of Malaysia or Bank Negara Malaysia (BNM) is currently the Financial Intelligence Unit or the "competent authority" for the purpose of combating money laundering activities under the said Act.

For the past several years, the Attorney-General Chambers have prosecuted a total of 21 money laundering cases, of which, the defendants of the two cases were convicted in 2005 and 2007 respectively. The other 19 cases are at various stages of prosecution. These cases involved a total of 738 charges of money laundering offences with an accumulated amount of RM262.1 million (Bernama 2007). Since 2010, there are 54 cases pending before the courts and from 2004 till 2010, and 11 convictions were recorded (Bernama 2010). In contrast, recent enforcement activity in the UK has shown that considerable number of cases (756) are being prosecuted and charged, 298 cases reaching the courts and 276 convictions (SOCA 2008b). From 2008 to 2009, 67 people were charged with money laundering under Serious Organised Crime and Police Act 2005 Act (SOCA 2009).

Despite the enforcement of AMLA since 2002 several thorny issues relating to the provisions itself and the enforcement of money laundering activities remain. Also, despite the reasonably effective implementation of the legislative scheme of AMLA, there is incomplete coverage of serious offences such as environmental crime, counterfeiting and piracy of non-artistic products (APG Mutual Report 2007). The said report also indicates that whilst the legislative scheme is rather comprehensive, the criminal sanctions for AMLA prosecutions are rather inadequate.

On the issue of Customer Due Diligence (CDD), the APG Report notes that there are uncertainties about the current level of implementation due to varied interpretations of the obligation to identify beneficial ownership. There is also no obligation on securities firms to close the accounts, particularly when they have doubts about the identity of existing customers. Also, there is much uncertainty about the extent to which insurers can verify CDD undertaken by agents (APG Mutual Report 2007).

Furthermore, several problems arise in Suspicious Transaction Reporting (STR) as it has a limited scope since not all the required predicate offences for STR reporting is included within the schedule to AMLATFA. This has led to some uncertainties about the effectiveness of the system in certain sectors of the financial industry (APG Mutual Report 2007). On the issue of protection and no tipping-off in AMLA, there is a lack of clarity on the tipping off offence in section 35. Such deficiency must be addressed by the relevant authorities in order for the law enforcers to be able to do their work effectively and with some degree of certainty.

In relation to international cooperation, the APG Mutual Report 2007 observes that the full implementation of the Palermo Convention has not been achieved by Malaysia and AMLA due to several reasons: Firstly, the incomplete coverage of serious offences in the predicate offence list. Secondly, inadequate penalties for the money laundering offence and thirdly the requirement for dual criminality for all forms of mutual legal assistance are the impediments to such implementation.

On the issue of Mutual Legal Assistance (MLA), mandatory requirements as to dual criminality and its sufficient importance, present potential impediments. There are also no provisions for effective sharing of confiscated assets of MLA on confiscation and freezing of assets. Malaysia's extradition laws and procedures broadly meet all the essential criteria, although efficiency of their implementation is hampered by various complex procedures.

Apart from these substantive legal inadequacies, the 2007 APG report also found that Malaysia was non-compliant with Special Recommendation on Terrorist Financing IX on cash couriers, which has been viewed as a serious deficiency given Malaysia's long and porous borders. Since then, Malaysia has addressed most of the recommendations set out in the Mutual Evaluation Report (or MER). Such effort includes rectifying the only Non-Compliant rating in terms of SR IX. This is done by implementing the cash transportation declaration system whenever money is transferred across national boundaries since January 2010 (Zamani Abdul Ghani 2010).

Additionally, deficiencies specific to Malaysia's offshore banking centre in Labuan was discovered, including insufficient resources committed to AML/CTF compliance and constraints on the powers of Labuan's financial authority to both access and share bank customer information (US DOJ International Narcotics Control Strategy Report 2009). However, the FATF report in 2009/2010 observes that much improvement has been made, and compliance to a certain extent in these aspects has been achieved incrementally.

## RECENT CHANGES TO THE AMLATFA 2001

In the past few years, the government has increased its effort in curbing money laundering by pushing for further amendment to the AMLATFA 2001 to make it more comprehensive and to remedy the loopholes indicated by the APG report. On May 15, 2014, the Parliament passed an amendment in revising a large portion of the Act. Firstly, the second schedule of the AMLATFA was amended to include several offences under the Excise Act 1976, the Malaysian Palm Oil Board Act 1998 and its 2005 Regulations, the Money Services Business Act 2011, the Sales Tax Act 1972 and the Service Tax Act 1975. However, unfortunately serious offences identified by the APG Report 2007 including environmental crime, counterfeiting and piracy of non-artistic products are yet to be brought within the ambit of the amendment Act.

Secondly, enhanced punishment for money laundering under the new 2014 Act from an imprisoned term for a maximum of five years or fined up to five million ringgit or both to 15 years and an increase of the maximum fine up to five times the size and value of the proceeds of unlawful activity or instrumentalities of an offence at the time of an offence or RM5million, whichever is higher is a great legal leap. Such an enhanced imprisonment penalty is now almost at par with that in other jurisdictions such as the UK (14 years), Hong Kong (14 years), Indonesia (5-15 years), Philippines (7-14 years), Brunei (14 years), Australia (5-25 years) and also the US (20 years) (Hamin, 2013; Hamin 2014).

Thirdly, as to the uncertainties on the level of implementation and varied interpretation of beneficial ownership, the new 2014 Act had given a rather comprehensive coverage on the duty of reporting institutions to conduct Customer Due Diligence (CDD). Under the new section 16, there must be ascertaining, verification, taking reasonable steps to obtain and verify the identity and all the necessary information of the customer.

Fourthly, is the issue of no obligation to close accounts when there are doubts on the identity of the customers by securities firms. Section 18 of the new Act aims to remedy this problem, whereby if there is information or doubts on the identity of the customers or the accounts are operated by a fictitious, false or incorrect name in conducting any business relationship, transaction or activity with a reporting institution, the account shall not be opened.

Fifthly, the issue of lack of clarity on the tipping-off offence, the Act created two new offences of tipping off in the new clause 14A, which is to be inserted after section 14 of the existing AMLATFA. This clause seeks to prohibit the disclosure of reports and related information that is about to be provide or has been provided to the competent authority. Under clause 14A(1) it is an offence to disclose to a third party that a reporting institution is proposing to report or is reporting or has reported or proposing to provide or is providing or has provided information to the competent authority. The penalty upon conviction is a maximum fine of RM3 million or an imprisonment term of five years, or both. Section 14A (2) criminalizes anyone to whom disclosure of knowledge or information contravening section14A (1) has been made, records or further discloses such knowledge or information. The penalty for such offence is a maximum fine of RM3 million or a jail sentence of five years, or both.

Sixthly, with regards to the non-compliance with Special Recommendation IX on Terrorist Financing on cash couriers, the new Act 2014l introduced a new Part IVA, which contains sections 28A to 28L that provides for the monitoring of cross-border movements of cash and bearer negotiable instruments to detect and curb money laundering and terrorism financing.

Despite addressing the above-mentioned issues, the new Act 2014 has failed to address certain issues highlighted by the APG report. Firstly, the problems of the Suspicious Transaction Reporting (STR) as not all predicate offences are required for STR reporting. There is also the issue of the implementation of the Palermo Convention as Malaysia has yet to conform to it. The requirement of dual criminality for all forms of mutual legal assistance as there is no effective provision on sharing of confiscated assets of MLA remained and so is the problem of the implementation of the extradition laws that is hampered by various complex procedures.

## CONCLUSION

The recent amendments to the AMLATFA indicate the seriousness of the Malaysian Government in curbing money laundering and terrorist financing. However, there are still instrumental and normative deficiencies which have to be addressed immediately by the Malaysian authorities in order to ensure that the changes in the law is sufficiently broad to cover other aspects not previously alluded to by the existing AMLATFA in the prevention and regulation of money laundering and terrorism financing within Malaysia (Hamin, 2014). The global AML/ATF trend is also inclined towards measuring the effectiveness of such regimes, in which the ultimate yardstick is the overall result of the implementation of such regimes (FATF 2010, Zamani Abdul Ghani 2001). This is the pertinent aspect of the regimes in which Malaysia has some way to go because despite efforts by Malaysia to adhere to the FATF Recommendations, such as the recent amendments made by the Parliament, legal and regulatory deficiencies in the AML/CFT regimes remain, which should be addressed immediately in order to prevent and regulate money laundering and terrorism financing from occurring within its geographical and terrestrial jurisdiction.

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