

TURNING YOUR DOMESTIC HAVEN INTO A
THRIVING BUSINESS:

SHOULD SHORT-TERM ACCOMMODATION BE REGULATED?

The short-term accommodation business has disrupted and transformed the hospitality industry on a global scale. Its staggering growth especially across emerging markets in the Asia-Pacific region calls into question whether the short-term accommodation business needs to be monitored through regulation. In this article, Mohamad Izahar Mohamad Izham and Liya Saffura Ab Rashid of the Corporate & Government Advisory Practice of Zaid Ibrahim & Co. (a member of ZICO Law) share their insights and provide an overview of the existing legal frameworks and regulatory trends in relation to short-term accommodation in Malaysia and the Asia-Pacific region.

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Airbnb, Inc. or “Airbnb” for short, is the pioneer of “short-term accommodation” (“STA”) which has arguably become the most disruptive business model to the traditional hotel industry. Airbnb has grown exponentially since its inception in 2008 where within the first three years since the idea was implemented, it has expanded worldwide with offices in major cities such as Paris, Milan, Barcelona, Copenhagen, Moscow, and São Paulo.

contributed over RM200 million in revenue to the Malaysian tourism industry. The hospitality “e-hub” service has become the go-to platform for STA due to its economical fare, home-like ambience, and advent of micro-entrepreneurs in contrast to the ubiquitous confines of traditional hotel operations, primarily the inability to accommodate larger groups of guests in one room. Just as e-hailing services like Grab have transformed the public transport landscape in Malaysia, Airbnb is making similar waves in the tourist accommodation industry.

i Airbnb’s valuation as at 2017 of USD31 billion trumps the valuation of the two largest hotel chains, Hilton and IHG combined, both valued at USD21 billion and USD9.3 billion respectively.

However, as with any other emerging industry, the existence of a legislative framework is one of the main concerns that remain unresolved. Therefore, the Government needs to delicately balance the interest of all affected stakeholders in order to among others harmonise the disruptive nature of STA against the readiness of the traditional tourist accommodation industry in embracing STA. This article aims to explore this notion by briefly considering the existing legislative framework in relation to STA, the regulatory trends in selected Asia-Pacific countries as well as an observation of best practices and features to be considered should the Government intend to introduce a STA legal framework in Malaysia.

The formerly branded “Airbedandbreakfast.com” is now known as a leading global organisation that operates as an agency or brokerage by providing an internet contract base linking “those with rooms to let” and “those with rooms to rent” temporarily.

With 44,000 listings, Malaysia is the fastest Airbnb home provider in South East Asia with a recorded 99% increase in guest arrivals totaling two million as at July 2018. In the same year, Airbnb

REGULATED ACTIVITIES RELEVANT TO STA OPERATIONS

In January 2018, the Ministry of Tourism, Arts and Culture (“MOTAC”) announced that STA home providers renting out their property are required to register with MOTAC. Prior to that, the STA industry, particularly hosts and guests alike had difficulty ascertaining the applicable regulatory framework to follow suit in the absence of a specific legislation regulating the STA industry.

In Malaysia, the existence of piecemeal provisions under various legislations which regulate activities relating to STA may potentially raise issues for STA operations. Below are some noteworthy legislations together with its applicability to STA operations:

Legislations	Applicability to STA operations
Town and Country Planning Act 1976	<ul style="list-style-type: none"> This Act allows local planning authorities to regulate, control, and plan the development and use of all lands and buildings within its purview. Once the building plans have been approved, the local planning authority will issue planning permissions, stating the nature of the development allowed. The permission granted may be for among others “commercial purposes” (such as hotels or lodging houses) or “residential purposes” (such as apartments or condominiums). The Former Assistant Minister of the then Ministry of Tourism, Culture and Environment, Pang Yuk Ming echoed the sentiment, “Airbnb is a business, but if an apartment is built as a residential property, it cannot be used for commercial purposes”. As such, operations of STA in residential properties may contravene this Act should it be considered as conducting commercial activities.
Hotels (Federal Territory of Kuala Lumpur) Act 2003	<ul style="list-style-type: none"> This Act prohibits any person from operating a “hotel” without a licence. “Hotel” is broadly defined to include premises where: <ul style="list-style-type: none"> -persons are harboured or lodged for hire or reward of any kind; and -the rooms are furnished by the owner, lessee, principal tenant, occupier or manager of such premises for the domestic use of the persons so harboured or lodged. This broad definition of “hotel” may potentially affect the legality of STA operations, as the concept of STA is to provide lodging for guests in return for monetary compensation. STAs are also typically furnished with beddings and basic appliances, for the convenience of guests. There are certain exemptions from obtaining the requisite license if the premise is: <ul style="list-style-type: none"> -carried on by or on behalf of the Federal Government, the Government of any State, or any statutory body established by any written law; -controlled/regulated operation such as private healthcare facility and child care centre; -controlled/regulated hotel for private educational institution or private higher educational institution; or -a premise let out on landlord and tenant basis.

Legislations	Applicability to STA operations
	<ul style="list-style-type: none"> Should STA hosts wish to rely on the exceptions, particularly the exception for landlord and tenant arrangements, they would need to be wary of the legal requirements in establishing a landlord and tenant relationship. Kuala Lumpur City Hall (“DBKL”) has been progressive by requiring any individual, agent, or company that is engaged in STA operations in Kuala Lumpur to register with DBKL. The free-of-charge registration is to allow DBKL to supervise the increasing pattern of Airbnb operations in the city and assist the Companies Commission of Malaysia with its data collection and studies. Failure to register is an offence in which DBKL can take action under its various powers.
<p>Tourism Industry Act 1992</p>	<ul style="list-style-type: none"> This Act provides for the licensing and regulation of the tourism industry. Under the Act, “<i>tourist accommodation premises</i>” is defined as “<i>accommodation premises</i>” that are registered under section 31C of the Act. In this respect, “<i>accommodation premises</i>” include “<i>any building, including hostels, hotels, inns, boarding-houses, rest houses and lodging houses, held out by the proprietor, owner or manager, either wholly or partly, as offering lodging or sleeping accommodation to tourists in return of some compensation of any kind</i>”. This requirement may be applicable to STA hosts as MOTAC has urged STA hosts to register under the Act to enable MOTAC to collect statistics regarding the STA hosts. However, despite the requirement to register all homes should they provide accommodation for tourists, STA hosts are finding it difficult to complete the registration process. This could potentially stem from the ambiguity of whether or not STAs are to be included as an accommodation premise, which, if the same provide accommodation for tourist, is required to register with MOTAC under the Act.
<p>Strata Management Act 2013 and Strata Management (Maintenance and Management) Regulations 2015</p>	<ul style="list-style-type: none"> This Act and its regulations regulate strata properties i.e. properties that have been subdivided as parcels according to their respective types. In particular, the regulations prohibits use of parcels in such a manner that causes nuisance or danger, which is one of the main concerns raised by occupants in STA operating buildings. The operation of STAs in stratified buildings may potentially infringe the prohibition of causing “<i>nuisance or danger</i>” due to high traffic of guests coming in and out of the stratified parcel. DBKL has highlighted that the condominium management in itself may impose rules to bar STA operations. The Act allows for joint management bodies and management corporations (“JMB/MC”) to make additional by-laws to regulate STA operations by passing a special resolution. The JMB/MC are also empowered to impose a fine against any “<i>parcel owner, occupant or invitee</i>” who infringes such provisions which could curtail STA operators.
<p>Registration of Guests Act 1965</p>	<ul style="list-style-type: none"> This Act provides for the obligation of keepers of residential accommodation in respect of the registration of their guests. If a premise, whether furnished or unfurnished, is used to provide services for “<i>lodging or sleeping accommodation</i>”, the owner and/or operator of the premise is required to maintain a specified register of guests. Failure to do so is an offence and may be penalised. The broad definition of “<i>lodging or sleeping accommodation</i>” may potentially include STA operations where STA hosts must keep a registry of guests, which will be readily available for inspection by the relevant authority.
<p>Innkeepers Act 1952</p>	<ul style="list-style-type: none"> The Innkeepers Act provides relief and limits the liability of the “<i>innkeeper</i>” with regard to the goods which are brought in by guests. The Act defines an “<i>inn</i>” to include “<i>any hotel, boarding-house, or other place where any person is harboured or lodged for hire or reward and where any domestic service is rendered by the owner, lessee, principal tenant, occupier or manager to the person so harboured or lodged, licensed under any written law for the time being in force in Peninsular Malaysia</i>”. As such, STA hosts (provided they fall within the definition of an “<i>innkeeper</i>” under the Act) may potentially rely on such provisions limiting their liability in relation to the belongings of guests brought in to the STA property (provided that it falls within the definition of an “<i>inn</i>” under the Act).

REGULATORY TRENDS FOR STA OPERATIONS IN ASIA-PACIFIC COUNTRIES

The lack of a clear regulatory framework leaves the Government at a crossroad in determining whether to develop a regulatory framework and if so, whether it is imminently pertinent in correlation to the

growth of the local STA industry. Numerous countries are already in the process of reviewing their existing laws in order to determine whether to explicitly regulate STA, in particular from the perspective

of the benefit to the economy as well as the social welfare of the public. Below are some of examples of countries, who have undergone

the process or is in the midst of reviewing their existing legal framework relevant to STA operations.

Country	Status	Updates
 Vietnam	<ul style="list-style-type: none"> • Unregulated • No prohibition on STA operations 	No recent updates.
 Japan	<ul style="list-style-type: none"> • Regulated • Implemented the New Minpaku Law in June 2018 	The New Minpaku Law made it mandatory for STA hosts to register their listing and display a license number on their listing page. According to the Japan Tourism Agency, from 15 June 2018 (the day where 80% listings were removed due to the New Minpaku law) to 31 January 2019, there were, 1,986,417 visitors who stayed in Airbnbs. Although this number is less than the guests in Japanese hotels, there is a steady growth both in visitors and registered Minpaku since the inception of the New Minpaku Law.
 Myanmar	<ul style="list-style-type: none"> • Unregulated • The Immigration Act 1947 of Myanmar provides that foreign visitors on tourist visas are only allowed to stay in a hotel 	No recent updates.
 Thailand	<ul style="list-style-type: none"> • Unregulated • In the midst of conducting a review on their laws in relation to STA operations 	In 2018, Airbnb has announced its partnership with the Thai Government in order to legalise Airbnb operations.
 Singapore	<ul style="list-style-type: none"> • Unregulated • The Urban Redevelopment Authority (“URA”) is developing a framework for short-term accommodation 	As at July 2018, Lawrence Wong, the Minister for National Development, said that laws allowing for STA operations are not likely to be proposed anytime soon as there are mixed views from the public. However, the URA has said that it will work with relevant agencies to develop a framework to regulate the use of private residential properties for STA.
 Philippines	<ul style="list-style-type: none"> • Unregulated • No prohibition on STA operations 	No recent updates.
 Indonesia	<ul style="list-style-type: none"> • Regulated • Established the Five Regulation Points to regulate STA operations 	No recent updates.
 Australia	<ul style="list-style-type: none"> • Regulated in certain states • New South Wales, Tasmania and the South Australian Government has passed reforms on STA 	<p>In New South Wales, a reform through the Fair Trading Amendment (Short Term Rental Accommodation) Act 2018 was passed in August 2018.</p> <p>The reform introduced three important items:</p> <ul style="list-style-type: none"> • a code of conduct for the STA industry, • a registration system of premises used for STA rental, and • reforms to strata management powers to allow for prohibition of certain lots to be used for STAs.
 New Zealand	<ul style="list-style-type: none"> • Regulated • New Zealand City Councils have passed new laws to regulate STA operations 	Starting from July 2018, residential Auckland properties leased for more than 28 days of the year is required to pay a percentage of the Accommodation Provider Targeted Rates, which was previously charged to commercial accommodation providers on top of the residential rate. Such payment will go towards Auckland Tourism, Events and Economic Development operations. Furthermore, STA hosts who have guests for more than 180 days per year will be obliged to pay the full targeted rate as they will be categorised as a commercial provider.

IS THERE ROOM FOR THE STA INDUSTRY TO THRIVE IN MALAYSIA?

The STA industry is expected to continuously grow in Malaysia, even without a specific legislative framework to regulate it. Recognising the escalating need to develop clear policies and oversight of the STA industry, the Government has undertaken steps to assess the impact of the STA model on the general public as well as on the traditional players in the accommodation industry.

Should the Government ultimately decide to regulate the STA industry, the Government may find it useful to explore the lessons learned from

best practices in other jurisdictions worldwide. Such an approach would complement the meticulous task of scrutinising existing legislations while having to determine a wholesome policy which will be able to fulfil the need of all stakeholders.

Below is a summary of observation of best practices and features obtained from STA regulatory trends worldwide, which may potentially be considered in determining the appropriate policy in relation to the Malaysian STA framework:

1. LIMITING THE ANNUAL STA DAYS

A common feature seen in STA regulations has been the introduction of a maximum limit on days when STA hosts can offer accommodation to guests. Countries such as Japan, England, and Switzerland have imposed an annual STA limit ranging from 180, 90, and 60 days respectively. In England, there is an exception to the general rule which allows STA hosts to exceed the annual limit provided that they have obtained a planning permit. To ensure compliance, enforcement of the annual limit will be conducted by the STA platforms such as Airbnb, which already has in place a system to automatically block bookings if a STA host has exceeded their annual limit.

This is premised on the concern that the STA industry would have a devastating effect on normal long term-housing markets, potentially transforming urban centres into tourist destinations. It is imperative to prevent the “*displacement effect*” i.e. mass migration into urban areas in which studies have indicated STA as contributing to soaring rent prices in neighbourhoods. As a result of the advent of the STA model, consumer perspective in the housing market has shifted as housing

has been commoditised and new investors encouraged to purchase houses for investment purposes, in turn increasing the scarcity of housing for residential purposes. Consequently, locals are not able to afford the high rents imposed by landlords, who are able to gain more income from operating STA properties than traditional tenancies and leases.

Importantly, the objective of the policy aims to reconcile interests of residents and tourists alike by preventing operations of STA in residential premises all year round. In the Malaysian context, it may be worthwhile to consider extending the policy to restrict operations on festive occasions or public holidays so as to manage the influx of human traffic during such periods. The limitation of annual STA days should also take into consideration the location of the properties i.e. in urban or rural areas. For one, a higher limit may be prescribed to STA hosts with properties in urban areas in order to, among others, encourage rural development.

2. COLLECTION OF TOURISM TAX

It has been reported that Airbnb has been in discussion with the Ministry of Finance, MOTAC, and the Royal Malaysian Customs Department to impose a Voluntary Collection Agreement (“**VCA**”) in order to collect tourism tax. From a regulatory perspective, the collection of such tax is already prevalent in various jurisdictions regulating STA including Switzerland, France, and Canada to name a few. The reaction from STA platforms, has been positive where such platforms have continually expressed interest to participate and assist Governments with tax collection.

Recent developments have even seen countries such as Aruba signing a Memorandum of Understanding with Airbnb to cooperate in order to drive sustainable tourism by agreeing to focus on establishing a framework for discussions regarding tax. Below are some examples in relation to VCAs executed in various cities in the United States:

City	VCA	Tax Collection
Los Angeles	Signed in 2016	USD100 million as at December 2018
Pennsylvania	Signed in 2015	USD21.2 million as at December 2019
Maine	Signed in 2017	USD5.3 million as at April 2017
Connecticut and Vermont	Signed in 2016	USD13 million as at December 2018

The VCA ensures that STA operations are taxed in the same manner, not leaving it behind in the democratic exercise but streamlining tax payments and collections for hosts and guests. Importantly, adopting this policy would placate criticisms from the hotel

industry of an “*uneven playing field*” approach with the unrelenting claims that the STA industry is not operating within the same tax regime.

3. REQUIREMENT FOR GUESTS

In a recent study commissioned by the Government, one of the main issues faced by various stakeholders due to the growth of the STA industry in Malaysia is public nuisance. In order to address this issue, the STA policy developed should consider making it mandatory for each hosts to provide "house policy agreement" to be adhered by the guests upon booking the STA home. The consequence of not complying with the agreement is a fine to be borne by the guests in which it can be suggested that for recurring breaches, guests could potentially even be blocked from the STA platform.

Such a requirement is currently imposed in Maui, Hawaii in the United States whereby STA hosts are required to display house policies which are signed by guests. Policies include terms and conditions such as agreeing to quiet hours from 9:00pm to 8:00am, vehicles to be parked in designated parking areas as well as prohibition on parties or group gatherings unless the guests are registered in advance. In the event that such house policies are not complied with, the

Government can impose fines on the STA hosts or guests, subject to the terms of the signed agreement.

Moreover, in Victoria, Australia, the Government has passed the Owners Corporation Amendment (Short-Stay Accommodation) Act 2016 imposing fines to guests that have caused unreasonable noise, or behaved badly including causing any health, safety or security hazard, damaging common property and obstructing a residence. In addition to the fines, the Act has also made hosts liable for any damage, noise or loss of amenity caused by their guests in which STA hosts may be ordered to pay compensation to their neighbours for any damage caused by their guests to the common property. Through the Victorian Civil and Administrative Tribunal, neighbours could be compensated and repeated misconducts by guests can even result in a ban on the operation of STA homes.

4. REQUIREMENT FOR HOSTS

It is commonplace for STA platforms to typically disclaim responsibility for any security and safety issues, instead urging hosts to comply with the security and safety laws imposed by the Government of the respective jurisdictions in which it operates. In the absence of specific protection under local laws applicable to the STA industry, it would be useful for the Government to draw parallels from existing requirements imposed on the hotel industry onto STA operations.

In Japan, as part of the mandatory requirement for hosts to register rental properties for short term stays with the local government, the new Minpaku Law requires the property to undergo fire safety checks to prevent fire hazard and disaster to ensure the safety of not only the guests but also the safety of other occupants of the building. In addition, the STA host is required to submit proof that he is not

currently suffering from any mental illness to ensure that the host is able to conduct the STA operation without compromising the safety and comfort of guests.

The UK has also moved towards regulating STA hosts strictly in terms of safety and security through a report published by the UK House of Commons All Party Parliamentary Group for Leisure, Tourism and the Hospitality Industry. In the report, a recommendation was made to compel STA platforms to ensure that the hosts are aware of their responsibilities in undertaking a fire safety assessment, a health and safety assessment and if relevant, obtain Gas Safe certification. It was also recommended that hosts be prohibited from registering properties without proof of having undertaken the relevant assessments.

5. SHORT-TERM ACCOMODATION LICENSE

Another feature to consider in introducing STA legislation is in relation to a licensing regime. The importance of introducing such a scheme is to give certainty and raise public confidence in that there is an oversight body monitoring and regulating the STA industry. The license requirement can also ensure that properties adhere to minimum standards such as prescribed health and safety requirements i.e. installed smoke detectors and fire extinguishers. Aside from that, it is

also to prove that the unit rented is the STA host's primary residence in order to prevent investors who do not live on the property from renting out a unit or entire property as an STA.

An example of this can be seen in Denver, Colorado in the United States where certain requirements are imposed on STA hosts before applying for short-term accomodation license as follows:

Subject Matter	Requirements on Host
General Liability Insurance	Host must have general liability insurance to receive a Short-Term Rental business license.
Zoning Restrictions	Host must adhere to zoning restrictions where only one rental contract is permitted at any time in a short-term rental.
Rental Packet	All short-term rentals must provide a rental packet containing contact information for the host and a local responsible party, safety information, as well as relevant rules and restrictions. In addition, every listing must have an operable smoke detector, carbon monoxide detector, and fire extinguisher.
Taxes	Payment of taxes to the relevant authority.

To this end, the requirements imposed are not only to ensure that the security and safety of the premise are in check but also allows the Government to regulate the information regarding STA hosts.

In the UK, a report published by the House of Commons All Party Parliamentary Group for Leisure, Tourism and the Hospitality Industry recommended that STA accreditation schemes such as those developed between Airbnb and Quality in Tourism, are rolled-out across all STA platforms as a step to drive up standards in the emerging industry. Nonetheless, although such initiatives have increased oversight over the quality and standard of hosts and properties, it remains to be seen whether such requirements would be extended to STA platforms.

This relates to the longstanding debate of STA platforms being viewed as "intermediaries" connecting STA hosts and visitors, rather than as an STA service provider. Consequently, adherence to local laws are

then left to the responsibility of STA hosts. Even so, STA platforms such as Airbnb do assist hosts to apply for the requisite license or permit in certain jurisdictions such as San Francisco, California in the USA through a "pass through registration" scheme on its website. In fact, the collection of tax for STA operations, albeit being imposed on the STA hosts, is actually contractually enforced by the STA platform itself, in accordance to the terms under the VCA or any memorandum of understanding signed between the STA platform and the Government.

In light of this, the Government needs to realise the importance of the roles of all stakeholders in the STA industry in particular STA platforms in promulgating a model law, in order to ensure compliance with the framework. A symbiotic relationship through active participation by STA platforms in the discourse towards regulating the industry would eventually facilitate effective implementation of new STA laws, should the Government decide to regulate the industry.

CONCLUSION

Inevitably, the STA industry will continue to grow with the ever increasing demand in the accommodation industry for cheaper prices and larger rooms. The Malaysian Government must then consider the appropriate policy and the appropriate time for regulatory intervention, citing lack of information on the size of the industry at the present day. In doing so, the Malaysian Government needs to reconcile the notion that STA hosts are not subjected to the same rules as traditional hoteliers or any other lodging based service providers. In respect of the traditional players in the tourist accommodation industry, they must consider embracing the wave of change and incorporate innovations in their business model in order to compete with the STA industry.

However, in doing so, there is a need to determine the right policy, which can only be achieved through a wholesome public consultation with affected stakeholders in Malaysia. STA platforms such as Airbnb has consistently underlined its commitment to cooperate towards this common goal by declaring that it would, "collaborate closely with key stakeholders to facilitate understanding of the growing short-term accommodation market". Through the development of an all-inclusive policy and the creation of an enabling environment for all stakeholders to compete, this will subsequently boost the Malaysian tourism accommodation industry to greater heights.

If you have any questions or require any additional information, you may contact the following person or the ZICO Law Partner you usually deal with.



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