

Doing Business in Malaysia

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Malaysia consists of thirteen states and three federal cities. Malaysia's landmass of 329,847 square kilometres is naturally separated into two main regions by the South China Sea and is referred to as Peninsula Malaysia and Malaysian Borneo. Malaysia has a population of approximately 25 million, consisting of a majority of Malays and smaller Chinese and Indian populations. Islam is the official religion and Malay is the official language. Malaysia is one of the top exporters of natural rubber and palm oil. Other exports include timber, cocoa, pineapple and tobacco.

Malaysia is a federal constitutional elective monarchy. The federal head of the state is the „Yang di-Pertuan Agong“, who is commonly referred to as the king of Malaysia. The king is elected to a five-year term among the nine hereditary sultans of the Malay states. As a former British colony, Malaysia has inherited the Westminster parliamentary system. Parliament is headed by a prime minister.

Legal Background

Malaysia maintains a common law system. Many of its laws are modelled after their British counterparts. The supreme law of the land is the Malaysia constitution, which in turn provides for a unique dual justice system. This dual justice divides the laws into a criminal and civil part (secular laws) and to a sharia part (islamic laws). The relationship between these two justice systems can be complicated and has caused numerous problems. It is important to note

that a civil court is not entitled to overrule any decision made by the Sharia court. A classic example of the problems caused by the dual justice system is the problem relating to religion. The Malaysian constitution guarantees freedom of religion within Malaysia. However, the constitution categorically defines all ethnic Malays as Muslims. A change in religion for an ethnic Malay is therefore technically not allowed and the federal court has refused to accept jurisdiction in such matters. Another unique feature in Malaysian law is that there are special laws applicable to the states of Sabah and Sarawak *inter alia* in the areas of land law and immigration.

The laws in Malaysia can be divided into two parts, namely, the written statutes as well as the unwritten common law or case law. While statutes have a priority in application, Malaysian case law would be applied in the event that there are no governing statutes. English, Australian, Indian and Singaporean case law are also used as persuasive case authorities. The application of common law in Malaysia has been statutorily provided for in the Criminal Procedure Code as well as in the Civil Law Act. Another source of unwritten law are customary laws. These play a particularly large role in East Malaysia.

The court procedure in Malaysia is very similar to that in England. The 1958 Reciprocal Enforcement of Judgements Act allows for judgements from superior courts in reciprocating countries (including Singapore, the United Kingdom, New Zealand and certain parts of India) to be directly enforceable.

Judgements from non-reciprocating countries (including Germany) can only be enforced by bringing a fresh action on the judgements in the Malaysian courts. Malaysia maintains a regional centre for Arbitration in Kuala Lumpur and is a signatory to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

Foreign Investment and Local Equity Participation

Malaysia's foreign investment policies have liberalised greatly in the past few years. In its efforts to promote foreign business in Malaysia, the government has established various investment incentives for foreign investors. Malaysia has entered into an Investment Guarantee Agreement with Germany, which secures the following :

- Protection against nationalisation and expropriation,
- Prompt and adequate compensation in the event of nationalisation or expropriation,
- Provision of free transfer of profits, capital and other fees, and
- Settlement of investment disputes under the Convention on the Settlement of Investment Disputes.

Portfolio Investment

A non-resident is free to make any portfolio investments, including purchasing of any ringgit debt securities issued by non-residents in Malaysia.

Manufacturing

Investment regulations in the area of manufacturing are specified in the 1986 Promotion of Investments Act and the 1975 Industrial Coordination Act. Although the government has indicated an intention to introduce more concise laws relating to investment in the manufacturing and services industries, this has yet to be done.

The Malaysia Industrial Co-ordination Act requires both foreign and local manufacturing companies with shareholders' funds of RM2.5 million and above or engaging 75 or more full-time paid employees to apply for a manufacturing licence for approval by the Ministry of International Trade and Industry. The Malaysian Industrial Development Authority (MIDA) screens all projects to ensure that these are in line with the Third Industrial Master Plan (2006-2020) as well as with other important economic policies. Each application is decided upon on a case-by-case basis. Projects with a C/E Ratio of less than RM55,000 are categorised as labour-intensive and will in general not qualify for a manufacturing licence or for tax incentives.

Companies engaging in the manufacturing industry may receive investment-related tax benefits by means of application for the Pioneer Status or for Investment Tax Allowance.

Oil and Gas

The national oil corporation Petroliaam Nasional Bhd (PETRONAS) maintains full ownership and exclusive rights relating to exploring, winning and obtaining oil and gas on-shore and off-shore Malaysia. All foreign energy investment is conducted through production sharing contracts between foreign operators and PETRONAS. Non-Malaysian firms are permitted to participate in oil services either in partnership with local firms or as contractors. They are restricted to a 30% equity stake if they are incorporated locally.

Investments in Immovable Property

The Foreign Investments Committee in Malaysia has issued guidelines for the acquisition of immovable property within Malaysia. In general, only foreign companies having at least 30% Bumiputra (meaning ethnic Malay) interest is entitled to purchase immovable property within Malaysia.

Foreigners are only allowed to acquire property other than residential units, which are valued at more than

- Any acquisition of property by foreign interest from local interest and other foreign interest;

- Any acquisition of property which will be developed as a development project other than residential unit; and

Foreigners are not entitled to acquire the following properties :

- residential unit under the category of low and medium low cost as determined by the State Authority;
- properties built on Malay reserve land;
- properties allocated to Bumiputera (Bumiputera quota) in any property development project as determined by the State Authority;
- stall and service workshops;
- agricultural land developed on the basis of the homestead concept; and
- properties gazetted under National Heritage Act 2005.

Establishing a Legal Presence in Malaysia

A foreign company wishing to establish conduct business in Malaysia can choose one of the following legal forms :

- Partnership
- Locally Incorporated Company
- Locally registered foreign company

Partnership

Partners in a partnership are wholly personally responsible for his business liabilities. This type of business is not separate legal entity and as such, all legal actions against such businesses have to be commenced personally against the business partners. All partnerships are to be registered under the Companies Commission of Malaysia. It is important to note that the Companies Commission of Malaysia does not allow for foreign companies or individuals to be registered as sole-proprietors. As a matter of practice, it is only in exceptional circumstances that partnerships consisting of foreign individuals or persons are allowed to be registered.

Incorporation of a Malaysian Company

In general, 3 types of companies may be incorporated

- A company limited by shares where the personal liability of its members is limited to the par value of their shares and the number of shares taken or agreed to be taken by them
- A company limited by guarantee where the members guarantee to meet liability up to an amount nominated in the Memorandum and Articles of Association in the event of the company being wound up
- An unlimited company, where there is no limit to the members' liability

The most common corporate form is the company limited by shares. Such companies are called Sendirian Berhad companies or Sdn. Bhd. in short.

A company may be either a private or a public company. A private company is one which

- Restricts the right to transfer its shares
- Limits the number of its members to 50, excluding employees in the employment of the company or its subsidiary and some former employees of the company or its subsidiary
- Prohibits any invitation to the public to subscribe for its shares and debentures
- Prohibits any invitation to the public to deposit money with the company.

A public company is one, which is entitled to offer shares to the public. The pre-requisites applicable are as follows :

- The company has registered a prospectus with the Securities Commission
- The company has lodged a copy of the prospectus with the SSM on or before the date of its issue.

Registration of a Foreign Company

A foreign business may conduct business within Malaysia by means of registration with the Companies Commission of Malaysia. The procedure for registration is similar to that necessary for the incorporation of a Malaysian company.

Labour Law

In West Malaysia as well as the federal territory of Labuan, employees, whose wages does not exceed RM1.500 monthly and all labour workers, irrespective of their salary, are protected by the 1955 Employment Act. Such employees are free to enter to any form of private employment agreement, provided that the agreement fulfills the minimum standards set out in the Employment Act. All other employees are only protected by certain basic obligations provided for in common law as well as basic protection offered by the 1969 Employee Social Security Act, 1952 Workmens' Compensation Act and 1994 Occupational Safety and Health Act. Industrial Relations are governed by the 1959 Trade Unions Act as well as the 1967 Industrial Relations Act.

Malaysian Employees do not receive any pension from the state. Instead, the 1991 Employees Provident Fund Act requires both employers and employees to make contributions to a provident fund, to which a retired employee will have access to upon his/her retirement. Employers are obliged to contribute 12% of the relevant employee's salary to the employee's provident account on a monthly basis. The employee is obliged to make a contribution of 11% of his salary. While all foreign workers as well as their employees are exempt from contributing to provident funds. they may voluntarily choose to do so at fixed rates.

Intellectual Property

Malaysia is a member of the World Intellectual Property Organization (WIPO) and a signatory to the Paris Convention and Berne Convention. Malaysia is also a signatory to the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) signed under the auspices of the World Trade Organization (WTO). Intellectual property is

regulaated and protected by the following local statutes

- The 1983 Patents Act and 1986 Patents Regulations
- The 1976 Trademarks Act and 1997 Trademarks Regulations
- The 1996 Industrial Designs Act and 1999 Industrial Designs Regulations
- The 1987 Copyright Act
- The 2000 Layout Designs of Integrated Circuit Act
- The 2000 Geographical Indications Act

Tax

Tax is imposed on a territorial basis in Malaysia and by means of federal legislation. The main tax legislations applicable in Malaysia include

- The 1967 Income Tax Act
- The 1976 Real Property Gains Tax Act
- The 1986 Promotion of Investments Act
- The 1967 Petroleum Income Tax Act
- The 1990 Labuan Offshore Business Tax Act

The key applicable tax rates in Malaysia are as follows

<u>Type</u>	<u>Application</u>	<u>Rate</u>
Corporate Tax	Income accrued within or derived from Malaysia	27%.
Income Tax	Income accrued in, derived from or remitted to Malaysia	<i>Resident</i> 0-28% <i>Non-resident</i> 28%

RM150,000 per unit. There is however, no limit to the number of properties, which can be owned. The approval of the foreign investment committe is required for the following transactions :

Real Property Gains Tax	Disposal of real property situated in Malaysia or of interest, options or other rights in or over such land as well as the disposal of shares in real property companies	<i>Malaysians</i> 30% if property sold within 2 years, with a reducing rate until 5% in the sixth year and thereafter. <i>Foreigners</i> flat rate of 30% if they sell within five years, and thereafter at the rate of 5%.
Withholding Tax	Non-residents individuals	10% on special classes of income
Sales Tax	Imposed at the import or manufacturing level, with some exceptions	Generally 10%
Services Tax	Only for certain prescribed goods and services	5%

The Malaysian Government has established various tax incentive schemes in order to encourage foreign investment into Malaysia.

Germany has entered into a double taxation agreement with Malaysia.

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