

# Doing Business in Malaysia



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# Contact Us in Malaysia

## PKF Malaysia

Level 33, Menara 1MK, Kompleks 1 Mont Kiara  
No.1, Jalan Kiara, Mont Kiara,  
50480 Kuala Lumpur  
Malaysia

Tel: +603 6203 1888

Email: [general@pkfmalaysia.com](mailto:general@pkfmalaysia.com)

Website: [www.pkfmalaysia.com](http://www.pkfmalaysia.com)



**Lim Ai Chen**

Partner

Email: [aichen@pkfmalaysia.com](mailto:aichen@pkfmalaysia.com)





# Foreword

The PKF 'Doing Business in Malaysia' publication provides an overview of the most important aspects of doing business in Malaysia and we trust it will be both informative and useful.

The purpose of this booklet is to provide a general understanding of doing business in Malaysia. It is not written as an exhaustive guide, but rather it is designed to provide information on material issues that investors should consider when investing in Malaysia.

By taking advantage of the PKF International network and with our understanding of the Malaysian culture and business environment, we are able to provide comprehensive services to our clients, helping them in setting up their business and exploring opportunities in Malaysia. We look forward to cooperating with you and assisting your business to grow and achieve success in the future.

The Malaysian economy enjoys a clear competitive advantage in producing and processing primary products due to an abundance of natural resources together with a world-class transport and telecommunications infrastructure.

Malaysia also offers a low-cost business environment, high skill levels and relatively low salary costs for qualified professionals and executives. The lifestyle, climate, educational opportunities and the availability of a pool of multilingual professionals competent in English and the major Asian languages (i.e. Chinese, Indian, Malay and Indonesian) are key advantages. The country is also a prime tourist destination offering very unique traditional attractions amidst modern-day development.

PKF Malaysia's areas of expertise include:

- Audit and assurance
- Technology assurance
- Insolvency services
- Data analytics
- Corporate finance advisory
- Enterprise support services
- Business risk solutions
- Forensic investigation and support
- Taxation compliance and consulting services





# Demographic and Environmental Overview

## A profile of Malaysia

Malaysia is a federation of 13 states in South East Asia which was formed in 1963. It is located along the Straits of Malacca and the southern part of the South China Sea. Malaysia is divided into two geographical regions:

- the peninsular region or West Malaysia, which borders Thailand to the north and Singapore to the south; and
- the East Malaysia region bordering Kalimantan, Indonesia and Brunei.

The capital of Malaysia, Kuala Lumpur, is located centrally in West Malaysia and has a total land size of 329,750 km<sup>2</sup>. The terrain of West Malaysia is constituted mainly by coastal plains rising to mountains and hills in the centre. The weather is generally tropical with the east coast area of the Peninsula affected by seasonal monsoons between the months of October to February.

Malaysia is a multi-ethnic society, consisting mostly of Bumiputera (Malays and other indigenous people), followed by Chinese and Indians. As at the end of 2020, the total population was estimated to be approximately 32.7 million.

The country is rich in natural resources and is blessed with petroleum, tin, timber, copper, iron, ore, natural gas and bauxite.

## Economic summary

Malaysia is considered one of the most developed economies in South East Asia. In 2021, the Malaysian economy regained its momentum with a 3.1% growth, as compared to -5.6% in the previous COVID-marred year. The performance was driven by the services and manufacturing sectors, which constituted 81.3% of total GDP. Some sectors such as high-touch services, tourism-related industries and construction, were slower to recover due to continued restrictions on movement and operating capacity.

Its GDP per capita at the national level stood at Malaysian ringgit (MYR) 47,324 in 2021, rising from MYR 43,475 in 2020. Seven states recorded GDP per capita above the national level, namely WP Kuala Lumpur (MYR 124,232), WP Labuan (MYR 78,032), Pulau Pinang (MYR 58,527), Sarawak (MYR 57,635), Selangor (MYR 55,568), Melaka (MYR 47,799) and Negeri Sembilan (MYR 47,452). In general, the GDP per capita value

is influenced by production performance and price factors. The year 2021 saw an improvement of the overall performance in all major economic sectors, especially the services and manufacturing sectors.

Malaysia is an economy that has progressed from one dependent on agriculture and primary commodities to a manufacturing-based economy, and is now transforming into a service and knowledge driven economy.

## Services and exchange controls

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The foreign exchange administration rules in Malaysia serve the purpose of providing an appropriate framework that will influence capital flows and facilitate currency risk management to promote the financial and economic stability of the country.

The foreign exchange control rules are governed under notices issued by Bank Negara Malaysia (BNM) pursuant to the Financial Services Act 2013 (FSA). These notices set out the measures governing the monetary and financial rules applicable to residents and non-residents. Currently, there are seven notices available from the BNM's website in the following categories:

- a) Notice 1: Dealings in Currency, Gold and Other Precious Metals
- b) Notice 2: Borrowing, Lending and Guarantee
- c) Notice 3: Investment in Foreign Currency Asset
- d) Notice 4: Payment and Receipt
- e) Notice 5: Security and Financial Instruments
- f) Notice 6: Import and Export of Currency
- g) Notice 7: Export of Goods

The definitions of residents and non-residents per the FSA are as follows:

### Definition of 'resident':

- a citizen of Malaysia, excluding a citizen who has obtained permanent resident status in a country or a territory outside Malaysia and is residing outside Malaysia;
- a non-citizen of Malaysia who has obtained permanent resident status in Malaysia and is ordinarily residing in Malaysia;
- a body corporate incorporated or established, or registered with or approved by any authority, in Malaysia;
- an unincorporated body registered with or approved by any authority in Malaysia; or
- the government or any state government.

### Definition of 'non-resident':

- any person other than a resident;
- an overseas branch, a subsidiary, regional office, sales office or representative office of a resident company;
- embassies, consulates, high commissions, supranational or international organisations; or
- a Malaysian citizen who has obtained permanent resident status of a country or territory outside Malaysia and is residing outside Malaysia.

## Investing

A resident without domestic ringgit borrowing is free to invest any amount in foreign currency (FC) assets onshore and abroad. As regards domestic ringgit borrowing, a resident is free to invest:

- up to MYR 1 million equivalent in aggregate per calendar year for resident individuals; or
- up to MYR 50 million equivalent per calendar year in aggregate on a corporate group basis for resident entities (including resident entities within a group with a parent-subsidiary relationship), sourced from conversion of ringgit and trade foreign currency account (TFCA).

Non-residents investors are free to:

- undertake any type of investment in ringgit assets or FC assets in Malaysia (direct or portfolio investments) without any restriction.
- open a ringgit account or a foreign currency account with a licensed onshore bank. Funds are free to be remitted in and out of such accounts, subject to the normal due diligence process by the licensed onshore bank;
- repatriate divestment proceeds, profits, dividends or any income arising from investments in Malaysia. Repatriation shall be made in FC; and
- hedge the foreign exchange exposure arising from investments in Malaysia either via a licensed onshore bank or an appointed overseas office (AOO).

## Borrowing

Resident entities are free to borrow any amount in ringgit and foreign currency. They may borrow in foreign currency up to a limit of MYR 100 million equivalent in aggregate from non-resident financial institutions and other unrelated non-residents, including through the issuance of securities or Islamic securities denominated in foreign currency.

A resident entity that wishes to finance its activities in the real sector is free to borrow any amount of ringgit in Malaysia from a non-resident entity within its group of entities or a non-resident direct shareholder. Up to MYR 1 million may be borrowed in aggregate from any non-resident, excluding a non-resident financial institution, for use in Malaysia. Further, there is no limit to raising finance through the issuance of tradable securities or redeemable preference shares (RPS) denominated in ringgit in Malaysia to any non-resident.

A non-resident entity is free to obtain FC borrowing from any licensed onshore bank to use in or outside Malaysia, and also free to issue foreign currency-denominated sukuk (sharia-compliant Islamic bonds) or conventional bonds in Malaysia for use in or outside Malaysia. Non-resident entities other than financial institutions are free to borrow in ringgit in any amount from any resident (including a licensed onshore bank) to finance or refinance real sector activities in Malaysia.

A non-resident custodian bank or non-resident stockbroking corporation is free to obtain overdraft facilities from a licensed onshore bank to facilitate the settlement of shares or ringgit instruments due to an inadvertent delay of payment by the non-resident to avoid settlement failure.

## Buying and selling foreign exchange

Residents are free to buy or sell the ringgit currency against foreign currency with a licensed onshore bank (excluding international Islamic banks) on a spot or forward basis whether on a firm commitment or anticipatory basis. They are free to sell ringgit against a foreign currency with a licensed onshore bank on a spot basis up to the aggregate of their six-month FC obligations or on a forward basis up to the underlying tenure of their FC obligations, in terms of foreign exchange hedging of foreign currency obligations.



Under the Dynamic Hedging Framework, a resident institutional investor registered with BNM is free to enter into forward contracts to buy ringgit up to 100% of its invested underlying foreign currency-denominated assets or unwind the forward contracts entered into, without documentary evidence with a licensed onshore bank, for the purpose of managing its foreign currency exposure. The unwinding of its initial forward contract can be undertaken with the same or a different counterparty licensed onshore bank with which it has entered the initial forward contract.

Residents are also free to hedge foreign currency-denominated derivative contracts, other than exchange rate derivatives, offered by a resident provider up to the net open position of the foreign exchange exposure with any licensed onshore bank. The resident is required to unwind the forward position if it exceeds the net open position.

Resident entities are also free to undertake the foreign exchange transactions involving ringgit above on behalf of the resident and non-resident entities within their group of entities (excluding financial institutions) with a licensed onshore bank.

## Non-residents

Non-residents can undertake foreign exchange transactions involving ringgit with onshore banks or directly overseas via the AOO of licensed onshore banks. A non-resident may undertake the following foreign exchange transactions:

### Foreign exchange transactions for own account

- Buy or sell foreign currency against ringgit on a spot basis for any purpose.
- Buy or sell foreign currency against ringgit on a forward basis based on underlying obligation. There is also no restriction to unwind or cancel the forward transaction for any underlying commitment (except portfolio investment).

### Foreign exchange transactions on behalf of another individual/entity

- A non-resident entity can enter into foreign exchange transactions involving ringgit (spot or forward basis) on behalf of a resident or non-resident entity within its group of entities.
- A non-resident institutional investor, including a custodian/trust bank, can enter into foreign exchange transactions involving ringgit on behalf of its non-resident clients. The non-resident institutional investor may also participate in the Dynamic Hedging Framework to actively manage its ringgit foreign exchange exposure.
- A non-resident financial institution can enter into foreign exchange transactions involving ringgit on behalf of its non-resident clients for the settlement of international trade in goods or services with a resident.

Apart from foreign exchange transactions, a non-resident entity (with or without underlying ringgit interest rate exposure) and a non-resident financial institution (with underlying ringgit interest rate exposure) may also trade ringgit-denominated interest rate derivatives with a licensed onshore bank or an AOO.



# Consumer Protection and Special Industries

## Intellectual and industrial property rights

The Intellectual Property Corporation of Malaysia ('MyIPO') is the body that administers the intellectual property system in Malaysia. Intellectual property protection in Malaysia comprises trademarks, patents, copyrights, industrial designs, geographical indications and layout designs of integrated circuits.

Malaysia is a signatory to or member of the following international conventions and treaties:

- Paris Convention;
- Berne Convention;
- Agreement on Trade Related Aspects on Intellectual Property Rights (TRIPS);
- World Intellectual Property Organisation (WIPO);
- World Trade Organisation (WTO); and
- Patent Cooperation Treaty (PCT).

## Trademarks

The Trademarks Act 2019 marks Malaysia's accession to the Madrid Protocol, whereby it allows multiple-class applications and brand owners to file one application across 122 member states under the Madrid System. The Trademarks Act 2019 provides protection for registered trademarks. Once registered, no person or enterprise other than its proprietor or authorised users may use them. The period of protection is ten years and is renewable at the end of every ten-year period.

Proprietors of trademarks may assert their rights to the trademarks either through legal recourse by registering under the Trademarks Act 2019 or, for non-registered trademarks, through the tort of passing off. A trademark includes 'any letter, word, name, signature, numeral, device, label, brand, ticket, heading, shape of goods or their packaging, colour, sound, scent, hologram, positioning, sequence of motion or any combination thereof'.

## Patents

A patent is defined as an exclusive right granted for an invention, which is a product or a process that provides a new way of doing something or offers a new technical solution to a problem. The invention has to be technical in nature and must contribute to any field of technology. In Malaysia, patents are governed and protected under the Patents Act 1983.

To qualify for patent protection, the invention must satisfy all of the following requirements:

- a) It must be new and must not have been made known to the public anywhere in any form in the world;
- b) It must involve an inventive step, that is the invention must not be obvious to someone with knowledge and experience in the technological field of the invention; and
- c) It must be capable of industrial application in any kind of industry.

An invention would not be considered as new if there had been prior disclosure of essential elements of the invention anywhere in the world, including prior patent applications.

However, prior patent disclosures may be disregarded in the following circumstances:

- a) where prior disclosure of the invention was made in confidence; or
- b) where prior disclosure of the invention was made by the applicant of the patent themselves or their predecessor in title and such disclosure occurred within one year preceding the date of the patent application.

Inventions that consist of any of the following are not patentable:

- a) discoveries, scientific theories and mathematical methods;
- b) plant or animal varieties or essentially biological processes for the production of plants or animals, other than man-made living micro-organisms, micro-biological processes and the products of such micro-organism processes;
- c) schemes, rules or methods for doing business, performing purely mental acts or playing games; and
- d) methods for the treatment of the human or animal body by surgery or therapy, and diagnostic methods practised on the human or animal body.

Applications for registration of a patent may be filed at MyIPO. A successful patent registration in accordance with the above would grant the applicant patent protection within Malaysia. In addition, the applicant may also opt to file an international application under the Patent Cooperation Treaty (PCT) system, which makes it possible to seek patent protection for an invention simultaneously in each of a large number of countries by filing an 'international' patent application.

As the PCT is in force in Malaysia, patent protection may also be obtained by entering the national phase of a PCT application 30 months from the earliest priority date.

A patent is valid for 20 years from the date of filing the application. As there are no provisions to extend the patent term, the patent can be utilised by any person upon expiry of the term.

## Copyright

Copyright is the exclusive right to control creative works created by an author, copyright owner and performer for a specific period governed under the Copyright Act 1987. Copyright protection in Malaysia is automatic without any requirement for registration or other action. Copyright gives the creator of an original work, for a limited period, exclusive rights to do certain acts with the work.

Copyright is granted to the following works:

- musical works;
- literary works;
- artistic works;



- dramatic works;
- films;
- sound recordings;
- broadcasts; and
- derivative works.

Under the Copyrights Act 1987, the manner in which a work may qualify for copyright protection in Malaysia is as follows:

- i. The author is a citizen or permanent resident of Malaysia or member country of the Berne Convention at the time the work was made;
- ii. The work is first published in Malaysia or in any member country of the Berne Convention or, if the work is first made available to the public elsewhere, it must be subsequently made available within 30 days to the public in Malaysia or in any Berne Convention member country; or
- iii. The work was created in Malaysia or in any member country of the Berne Convention.

The duration of copyright protection granted is as follows:

- a) for literary, musical or artistic works, a copyright subsists during the life of the author plus 50 years after his/her death;
- b) for published editions, copyright subsists for 50 years from the beginning of the calendar year in which the work was first published;
- c) for sound recordings, copyright subsists for 50 years from the beginning of the next calendar year following the year in which the recording was first published;
- d) for broadcasts, copyright subsists for 50 years from the beginning of the next calendar year following the year in which the broadcast was first made; and
- e) for films, copyright subsists for 50 years from the beginning of the next calendar year following the year in which the film was first released.

Copyright owners have the exclusive right to control the undertaking of the following acts in Malaysia in relation to the work:

- a) reproduction of the work in any material form;
- b) communication to the public;
- c) performance, playing or showing to the public;
- d) distribution of copies of the work to the public by sale or other transfer of ownership; and
- e) commercial rental and lending to the public.

A copyright infringement occurs when any of the activities under the exclusive control of the copyright owner are conducted without his or her authorisation. Acts of infringement are actionable by way of civil suit, and reliefs that may be granted include damages, an account of profits and an injunction order.

## Industrial design

An industrial design is defined as features of shape, configuration, pattern or ornament applied to an article which can be reproduced by industrial means, being features which in the finished article appeal to and are

judged by the eye, though may be constituted by elements which are three-dimensional (the shape of the article) or two-dimensional (pattern, ornament). Industrial designs are protected by the Industrial Designs Act 1996.

Some things that are considered not registrable under the Malaysian industrial design law include:

- a) method or principle of construction;
- b) features of shape or configuration of an article which are dictated solely by function;
- c) features of shape or configuration of an article which are dependent on the appearance of another article of which the article is intended by the author of the design to form an integral part;
- d) an integrated circuit or part of an integrated circuit (protected under the Layout-Design of Integrated Circuits Act 2000); and
- e) designs that are contrary to public order and morality.

Registered industrial designs are protected in that they may not be lawfully copied or imitated without the registered owner's authorisation.

For an industrial design to be registrable, it has to be new and not disclosed anywhere in the world prior to an application for registration. Effective from 1 July 2013, Malaysian industrial design law has a worldwide novelty standard, in that the design must not have been disclosed to the public in Malaysia or elsewhere before the priority date or the date of application for registration in Malaysia, in respect of the same article or any other article. Disclosure of a design that is identical or similar to the applied for design in a domestic application with an earlier priority date or date of application for registration is also considered as failing the novelty standard.

The initial duration of registration for a Malaysian industrial design is five years from the filing date of the application for registration. The application can be renewed for four further five-year periods, giving a maximum period of protection of 25 years.

An application to register an industrial design may be filed with MyIPO. Upon successful completion of a formal examination, the design will be registered and a registration certificate will be issued.

## Geographical indication

A geographical indication is a sign used on products that have a specific geographical origin and possess qualities or a reputation that are due to that origin. A geographical indication is commonly used not only for natural or agricultural products, but also applies to products of industry and handicrafts.

Protection of a geographical indication is governed by the Geographical Indication Act 2000 and Geographical Indications Regulations 2001.

The Geographical Indication Act 2000 provides that certain geographical indications may not qualify for protection in Malaysia, including geographical indications that are contrary to public order or morality, geographical indications that have ceased to be protected in the country or territory of origin and those that are no longer in use in the country or territory of origin.

The geographical indication must identify a product as originating in a given place. In addition, the qualities, characteristics or reputation of the product should be essentially due to the place of origin. Since the qualities depend on the geographical place of production, there is a clear link between the product and its original place of production.

A geographical indication is valid for ten years from the application date, and it is renewable upon expiry of the ten-year period.

## Integrated circuit layout-designs

The protection of layout-designs of integrated circuits is governed by the Layout-Designs of Integrated Circuits Act 2000. The Act defines an 'integrated circuit' as 'a product, whether in its final form or in an intermediate form, in which the elements, at least one of which is an active element, and some or all of the interconnections are integrally formed in and on, or in or on, a piece of material and which is intended to perform an electronic function'. 'Layout-design' is defined as 'the three-dimensional disposition, however expressed, of the elements of an integrated circuit and some or all of the interconnections of the integrated circuit or such a three-dimensional disposition prepared for an integrated circuit intended for manufacture'.

A layout-design is automatically eligible for protection, provided the following conditions are met:

- a) the layout-design is original, i.e. the result of its creator's own intellectual effort and not commonplace at the time of creation;
- b) it has been fixed in a material form or incorporated into an integrated circuit at the time of its creation;
- c) the right holder was a qualifying person at the time the layout-design was created.

A qualifying person is defined as a natural or legal person who is (i) a national of, domiciled or ordinarily resident in Malaysia or any member country of the World Trade Organisation (WTO); (ii) incorporated in Malaysia or any member country of the WTO; or (iii) has a real and effective industrial or commercial establishment for the creation of layout-designs, or the production of integrated circuits in Malaysia or any member country of the WTO.

The governments of such countries also qualify to be the right holders of layout-designs.

A layout-design shall be protected for a period of ten years from the date the layout-design is first commercially exploited in Malaysia or elsewhere, although the term of protection shall not exceed a period of 15 years from the date the layout-design was created.

## Consumer and user protection

### Consumer Protection Act 1999 (CPA)

In Malaysia, consumers are protected under the Consumer Protection Act 1999 (CPA). The CPA lays down consumer protection principles that apply to all business offerings and services provided to consumers in trade, including transactions that are conducted through electronic means. The CPA, through the Consumer Protection (Electronic Trade Transactions) Regulations 2012, additionally requires websites conducting business to disclose certain information, including but not limited to business name and a description of the main characteristics of the services.

Another notable order issued by the Ministry of Domestic Trade, Cooperatives and Consumerism is the Consumer Protection (Future Services Contract) (Amendment) Order 2014 which specifically addresses the categories of services that would fall under the definition of 'future services'. This order offers protection to consumers for payments made in advance in the event of cancellation or termination of services. Simply put, consumers are entitled to a refund for the unutilised portion of services paid in advance.

In the insurance sector, the Bank Negara Malaysia (BNM) may specify standards on business conduct to a licensed insurer for the purposes of ensuring that the licensed insurer is fair, responsible and professional when dealing with financial consumers. A financial consumer means any person who uses the insurance product for personal, domestic or household purposes or in connection with a small business, as specified by BNM. These standards may include standards relating to:



- a) transparency and disclosure requirements, including the provision of information to financial consumers that is accurate, clear, timely and not misleading;
- b) fairness of terms in a financial consumer contract for financial services or products;
- c) promotion of financial services or products;
- d) provision of recommendations or advice including assessments of suitability and affordability of financial services or products offered to financial consumers; and
- e) complaints and dispute resolution mechanisms.

The Financial Services Act 2013 (FSA) and Islamic Financial Services Act (IFSA) provide a list of prohibited business conduct. This list includes among other things:

- a) engaging in conduct that is misleading or deceptive in relation to the nature, features, terms or prices of any financial service or product;
- b) inducing a financial consumer to do an act or omit to do an act in relation to any financial service or product by:
  - i. making or recklessly making a statement, illustration, promise, forecast or comparison that is false, misleading or deceptive; or
  - ii. dishonestly concealing, omitting or providing material facts in a manner which is ambiguous;
- c) exerting due pressure or influence in relation to the provision of any financial service or product to a financial consumer;
- d) demanding payments from a financial consumer in any manner for unsolicited financial services or products;
- e) colluding with any other person to fix or control the features or terms of any financial service or product to the detriment of any financial consumer.

Both the FSA and IFSA contain several provisions on consumer protection, which lay down the requirements in relation to pre-contractual duty of disclosure, representations and remedies for misrepresentations for insurance and takaful contracts.

The FSA and IFSA also set out provisions relating to insurance policies and takaful certificates. BNM also prohibits a person from entering into a general insurance contract with an insurer other than a licensed general insurer licensed by the BNM, unless with prior approval from the BNM.

Further, an insurer is required to have an express provision in its policies informing its customers of a cooling-off period. A cooling-off period allows the customer to terminate a life policy within a specified period and obtain a full refund of money paid.

The Guidelines on Product Transparency and Disclosure issued by the BNM provide that general insurance products can be cancelled by the customer at any time by giving a written notice to the insurer. Upon cancellation, the customer is entitled to a refund of the premium, based on short period rates. Any expense incurred by the insurance company could be deducted from the premium paid.

In addition, paragraph 2 of schedule 8 of the FSA gives a policy owner the right to return a life policy to the insurer within 15 days from the date of delivery of the life policy. Upon return of the life policy, the insurer must immediately refund the premium, subject only to the deduction of expenses incurred for the medical expenses of the policy owner.



# Legal Framework for Business

The Companies Act 2016 requires that every company keeps accounting and other records to sufficiently explain the transactions and financial position of the company and enable preparation of financial statements which show a true and fair view of the company to be conveniently and properly audited.

All transactions must be recorded within 60 days of completion and the accounting and other records must be kept at the company's registered office or such other place that is deemed fit. Such accounting and other records are to be retained for seven years after the completion of the transaction, and must be made available for inspection at all times.

## Accounting regulations in Malaysia

Companies are required to present a set of financial statements in accordance with the approved accounting standards issued or adopted by the Malaysian Accounting Standards Board (MASB) and the requirement of the Companies Act 2016.

Two financial reporting frameworks are available for the preparation of financial statements in Malaysia, namely the Malaysian Financial Reporting Standards (MFRS) and Malaysian Private Entities Reporting Standards (MPERS). Entities other than private entities are required to apply the MFRS; this framework is identical to the International Financial Reporting Standards (IFRS). Private entities, on the other hand, may apply MPERS in their entirety. The MPERS is based on the International Financial Reporting Standards for Small and Medium-sized Entities (IFRS for SMEs) issued by the International Accounting Standards Board (IASB) except for property development activities. Alternatively, private entities may comply with MFRS in their entirety.

The Companies Act 2016 defines a private entity as a private company that is not itself required to prepare or lodge any financial statements under any law administered by the Securities Commission Malaysia or Bank Negara Malaysia. Further, a private entity is not a subsidiary or associate of, or jointly controlled by, an entity which is required to prepare or lodge any financial statements under any law administered by the Securities Commission Malaysia or Bank Negara Malaysia. An entity would not be considered a private entity if it is a management company (as defined in the Interest Schemes Act 2016), a subsidiary or associate of a management company or if it is jointly controlled by a management company.

## Accounts controls in Malaysia: Statutory audits

The Companies Act 2016 requires the directors of a public company to appoint an auditor at any time before the first annual general meeting of the company or to fill a casual vacancy at the auditor's office. Should

the directors fail to appoint an auditor, the shareholders are required to appoint an auditor through ordinary resolution. The appointment and setting the remuneration of auditors must be tabled at each annual general meeting for shareholders' approval. If a public company fails to appoint an auditor, the Registrar has the power to appoint one or more auditors upon application in writing from any shareholder of the company.

For newly incorporated private companies, the directors are required to appoint an auditor at least 30 days before the end of the period for the submission of the first financial statements to the Registrar or to fill a casual vacancy in the office of auditor. Should the directors fail to appoint an auditor, the shareholders of the company are required to appoint an auditor by way of ordinary resolution. Auditors are required to be appointed 30 days before the expiry of the period allowed for lodgement of the previous year's financial statements with the Registrar. If a private company fails to appoint an auditor, the Registrar has the power to appoint one or more auditors upon application from shareholders of the company.

A private company may be exempted from the appointment of an auditor if it falls within one of the three categories set out below:

- a) Dormant company – A company that has been dormant since incorporation or is dormant in the current financial year and the immediately preceding financial year;
- b) Zero-revenue company – A company that did not derive any revenue during the current financial year and in the immediately preceding two financial years, and the total assets in the current and immediately preceding two financial years is less than MYR 300,000;
- c) Threshold-qualified company – A company that:
  - i. has revenue not more than MYR 100,000 during the current financial year and in the previous two financial years;
  - ii. the total assets held in the current and previous two years does not exceed MYR 300,000; and
  - iii. has fewer than five employees at the end of its current financial year and in each of its previous two financial years.

Companies that elect for audit exemption are required to lodge their unaudited financial statements with the Registrar together with the required certificate in accordance with the requirements of the Companies Act 2016. The unaudited financial statements are required to comply with applicable accounting standards and must be lodged together with the directors' report, directors' statement and statutory declaration.

### **Content of financial data to be published: Annual accounts**

Directors of a company are required to present a set of financial statements in accordance with the approved accounting standards issued or adopted by the Malaysian Accounting Standards Board (MASB) including the requirements set by the Companies Act 2016.

### **Statement by directors and statutory declaration**

The financial statements must be accompanied by a statement signed by at least two directors or, in the case of a sole director, by that director, in accordance with the resolution of the Board of directors, stating whether the financial statements have been drawn up in accordance with the applicable accounting standards so as to give a true and fair view of the financial position and performance of the company. A statutory declaration must also be filed by a director or by the person responsible in setting forth their opinion as to the correctness of the financial statements and attested by the Commissioner for Oaths.





## Directors' report

A directors' report is to be attached to the financial statements. The contents to be covered in the directors' report are set out in section 253 and the fifth schedule of the Companies Act 2016.

## Duty of circulation and lodgement of financial statements and directors' reports

Company directors are required to prepare the financial statements within 18 months from the date of incorporation and, subsequently, within 6 months from the company's financial year end.

A private company is required to circulate its financial statements and directors' report to its shareholders, auditors and every person who is entitled to receive notice of general meetings within six months from the company's financial year end and lodge them with the Registrar of the Companies Commission of Malaysia within 30 days from the date of the circulation. A public listed company must circulate its financial statements and directors' report to its members 21 days before its annual general meeting and lodge them with the Registrar of the Companies Commission of Malaysia within 30 days from its annual general meeting. Lodgements can be filed electronically via the Malaysian Business Reporting System.

Amounts shown in the financial statements and directors' report must be presented in Malaysian currency (i.e. MYR) and the report must be presented in the national language or English language.

## Auditors' report

The financial statements must be duly audited by an approved auditor except for private companies that elected for audit exemption.

The auditors' report is required to state whether the financial statements have been properly drawn up in accordance with the applicable accounting standards and the Companies Act 2016 so as to give a true and fair view of the financial position, financial performance and cash flows of the company.

## Additional disclosure for public listed companies

Public listed companies are required to comply with the disclosures required by Bursa Malaysia Securities Berhad's Listing Requirements in their annual reports. Public listed companies must file their annual report with the stock exchange within four months of the financial year end. They are also required to provide interim financial reports on a quarterly basis to their shareholders within two months of the end of each quarter.



# Forms of Business Organisations

## Setting up a Malaysian company

Effective from 31 January 2017, companies are governed by the new Companies Act 2016 (CA 2016), which provides for three types of companies to be incorporated:

1. company limited by shares;
2. company limited by guarantee; or
3. unlimited company.

In practical terms, almost all companies will be companies limited by shares, i.e. companies with limited liability, the maximum liability of a member being limited to the value of share capital. Companies may be formed as either private companies or public companies. Unlimited companies have no limit to the liability on their members.

The Companies (Amendments) Act 2019 (CAA 2019) came into effect on 15 January 2020. The CAA 2019 represents the first time that amendments had been made to the CA 2016 since it came into operation on 31 January 2017 and is generally aimed at removing ambiguities surrounding certain provisions in the CA 2016.

There are seven different forms of business organisation available in Malaysia. These are:

- a) limited liability partnership;
- b) partnership;
- c) sole proprietorship;
- d) companies limited by shares;
- e) companies limited by guarantee;
- f) unlimited company;
- g) branch of a foreign company.



## Limited liability partnership

A limited liability partnership (LLP) is an alternative business vehicle to carry on business in Malaysia. An LLP combines the characteristics of a private company and a conventional partnership and is regulated under the Limited Liability Partnerships Act 2012.

An LLP is a body corporate and has a legal personality separate from its partners (i.e. separate legal entity). Two or more individuals or bodies corporate may form an LLP for any lawful business in accordance with the terms of the LLP agreement executed amongst them. The Limited Liability Partnerships Act 2012 does not impose a maximum number of partners of an LLP. The liabilities of the partners of an LLP are limited. An LLP is also capable of suing and being sued and has unlimited capacity to conduct business and hold property.

LLPs may be formed by professionals i.e. lawyers, chartered accountants and company secretaries for the purpose of carrying on their professional practice. Given that the liability of the partners of an LLP is limited, the LLP business vehicle helps start-ups and small and medium enterprises (SMEs) grow their businesses without having to worry about their personal liabilities and personal assets. The registration fee for a new LLP or for the conversion of a conventional partnership or private company into an LLP is MYR 500.

An LLP has perpetual succession and any change in the partners of the LLP will not affect the existence, rights or liabilities of an LLP.

## Partnership

Partnerships are formed when two or more persons combine some or all of their resources, skills, abilities or industry, with the objective of making a profit which will be shared by all partners. Partnerships are regulated under the Partnership Act 1961.

In a partnership, all partners are personally jointly liable, without limit, for the debts and obligations of the partnership. Any number of persons up to a maximum of 20 may form a partnership. If more than 20 persons intend to carry on business, the business must be registered as a company under the CA 2016 or must be formed under some other written law in Malaysia (for example, under the Legal Profession Act 1976).







### **Sole proprietorship**

A sole proprietorship is the simplest form of business ownership. It is formed essentially for businesses comprised of one person (being the sole proprietor). The sole proprietor is entitled to all profits of the business and is personally liable, without limit, for all debts and obligations of the business.

### **Company limited by shares**

A company limited by shares may be a private limited company or a public limited company. A private company is identified as a Sendirian Berhad or Sdn Bhd while a public company is identified as a Berhad or Bhd. In a company limited by shares, the personal liability of its members is limited to the amount (if any) unpaid on their shares.

The CA 2016 restricts the right of members of private companies to transfer their shares, restricts the number of members to a maximum of 50 and prohibits members from soliciting the public to subscribe for their shares. A private company is also prohibited from accepting deposits of money from the public whether with interest or not. A public company is not subject to the abovementioned restrictions. A private company may convert to a public company and vice versa.

### **Company limited by guarantee**

A company limited by guarantee limits its members' liability to the amount the members undertake to contribute to the company in the event the company is wound up. A company limited by guarantee is typically used for non-profit purposes. A company limited by guarantee is required to have a constitution. It may not hold land unless a licence has been obtained from the relevant minister and it is not permitted to distribute dividends to its members.

### **Unlimited company**

An unlimited company is a company where the members' liability for its debts is unlimited. A creditor of the company can sue a member personally for debts of the company but the liability of the members only arises if the company is unable to meet its debt and is wound up.

On the winding up of an unlimited company, every past and present member shall be liable to contribute



to the assets of the company for payment of its debts and liabilities and costs incurred in the winding up. However, a past member shall not be liable to contribute to the debts of the company if they ceased to be a member of the company for one year or more before the commencement of the winding up and they are not liable to contribute in respect of any debt or liability of the company incurred or contracted after they ceased to be a member.

## Opening a branch

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Pursuant to the Companies Act 2016, foreign companies are not allowed to carry on business in Malaysia unless they are registered with the Registrar of Companies (“ROC”) as a foreign company. The CA 2016 does not have an exhaustive definition of ‘carrying on business’ as the term is defined to include ‘establishing or using a share transfer or share registration office or administering, managing or otherwise dealing with property situated in Malaysia as an agent, legal personal representative, or trustee, whether by servants or agents or otherwise’.

The CA 2016 does however provide some negative guidance on the meaning of carrying on business. It provides that a foreign company will not be regarded as carrying on business in Malaysia by virtue only of carrying on any of the following activities in Malaysia (‘permitted activities’):

- a) is or becomes a party to any action or suit or any administrative or arbitration proceeding or effects settlement of an action, suit or proceeding or of any claim or dispute;
- b) holds meetings of its directors or shareholders or carries on other activities concerning its internal affairs;
- c) maintains any bank account;
- d) effects any sale through an independent contractor;
- e) solicits or procures any order which becomes a binding contract only if the order is accepted outside Malaysia;
- f) creates evidence of any debt, or creates a charge on movable or immovable property;
- g) secures or collects any of its debts or enforces its rights in regard to any securities relating to those debts;
- h) conducts an isolated transaction that is completed within a period of 31 days, but not being one of a number of similar transactions repeated from time to time;
- i) invests any of its funds or holds any property; or
- j) imports goods temporarily under the Customs Act 1967 for the purpose of display, exhibition, demonstration or as trade samples with a view to subsequent re-exportation within a period of three months or within such further period as the Director General of Customs and Excise may in his discretion allow.

Foreign companies intending to carry on business in Malaysia may either incorporate a subsidiary or register a branch under the CA 2016. The branch of a foreign company does not have separate legal personality and is considered an extension of the foreign company. The foreign company will be liable for all debts and liabilities of the branch.

Pursuant to the Guidelines on Foreign Participation in the Distributive Trade Services Malaysia (‘DTS Guidelines’), effective from 1 November 1995, the establishment of a branch in Malaysia to carry on business in wholesale or retail trade is not permitted for a foreign company. Any foreign involvement in wholesale and retail trade would require the incorporation of the business locally by the foreign company. As the DTS Guidelines are merely regulatory guidance and do not have the force of law, failure to comply is not an offence. Non-compliance could, however, result in administrative consequences for the company.



# Taxation

## The Malaysian tax system

Malaysia's taxation system is assessed on a current year basis and is territorial in scope whereby income tax is imposed on income accruing in or derived from Malaysia with a general exception of resident companies carrying on a business of shipping or air transport, banking or insurance, which are subject to income tax on a worldwide basis.

The Inland Revenue Board (IRB), an agency of the Ministry of Finance (MOF), is the responsible regulatory body for the administration of direct taxes, whilst the Royal Malaysian Customs Department (RMCD) administers customs and excise duties and sales and services tax.

## Corporate tax

A company is considered to be a Malaysian tax resident company if the control and management of its business or affairs are exercised in Malaysia. Factors such as the location of directors' meetings or where superiors' direction and control are exercised are indicative of the place of management and control of a company.

Income is taxed in Malaysia if income is sourced from Malaysia (i.e. accrued in or derived from Malaysia). Income that is sourced from outside Malaysia but received in Malaysia is generally exempted from tax, except for companies carrying on a business of shipping or air transport, banking or insurance.

Currently, the income tax rate for resident and non-resident companies for the year of assessment 2020 is 24% (i.e. the maximum rate for residents and flat rate for non-residents). The tax rate for a small and medium-sized enterprise (SME) is 17% on the first MYR 600,000 of chargeable income while the remaining chargeable income is taxed at 24%. SMEs are defined as companies with paid-up capital or limited liability partnerships (LLP) with capital contributions not exceeding or equal to MYR 2.5 million and having a gross income of not more than MYR 50 million in the basis year.

## Personal income tax

Income tax is imposed on income accruing in or derived from Malaysia by any person. Gains or profits from an employment, profession or vocation are taxable if derived from Malaysia. Employment income is regarded as derived from Malaysia if the employment is exercised in Malaysia and subject to Malaysian tax, even if the income is paid outside of Malaysia.

The following types of income pursuant to section 4 of the Income Tax Act 1967 (ITA) are chargeable:

- a) gains or profits from a business;
- b) gains or profits from an employment;
- c) dividends, interest or discounts;
- d) rents, royalties or premiums;
- e) pensions, annuities or other periodical payments not falling under any of the foregoing paragraph; and
- f) gains or profits not falling under any of the foregoing paragraphs.

Employment income under the ITA is inclusive of salary and wages, remuneration, leave pay, fees and commissions, bonuses and gratuities, perquisites and allowances (whether in money or otherwise) in respect of having exercised the employment.

Income for individuals is assessed to tax on a current year basis and on a calendar year basis. For example, the basis period for year of assessment (YA) 2020 is from 1 January 2020 to 31 December 2020.

Tax residency of an individual is determined based on the number of days he or she is present in Malaysia. The individual would be regarded as a tax resident in Malaysia for a particular year if he or she is:

- in Malaysia for an aggregate period of 182 days or more during the year;
- in Malaysia for a period of fewer than 182 days during the year, and that period is linked by or to another period of 182 or more consecutive days (including temporary absences) in Malaysia either in the immediately preceding or following year. Any absence from Malaysia is temporary if the individual is in Malaysia immediately prior to and after the absence, and the absence is:
  - connected with service in Malaysia and owing to service matters or attending conferences or seminars or study abroad;
  - owing to ill health of the individual or a member of his or her immediate family; or
  - in respect of social visits not exceeding 14 days in total;
- in Malaysia for a total period of 90 days or more during the year, and with respect to three out of the four immediately preceding years, either has been:
  - resident in Malaysia; or
  - in Malaysia for an aggregate period of 90 days or more; or
- resident in Malaysia in the following year, and was a resident for each of the three immediately preceding years.

Tax residents are subject to a progressive tax ranging from 0% to 30%, and are entitled to tax reliefs and rebates. The chargeable income of non-residents is subject to tax at a flat rate of 30%, and they are not entitled to reliefs and rebates, as enjoyed by tax residents.

## Non-resident income tax

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Non tax-resident individuals will generally be subject to tax at a flat rate of 30% for employment income accruing in or derived from Malaysia, and they are not entitled to tax reliefs and rebates on their chargeable income and tax payable.

Certain types of non-recurring income will be subject to withholding tax, which represents the portion of a payment to a non-resident payee that is withheld by the payer in Malaysia as tax to be paid directly to the IRB. It is not applicable for payments made to a resident payee. Payments that are subject to withholding tax are as follows:

No	Type of income	Tax rate (%)
1	Public entertainer's professional income	15
2	Interest	15
3	Royalties	10
4	Special classes of income: <ul style="list-style-type: none"> <li>• rental of movable property</li> <li>• advice, assistance or services rendered in Malaysia</li> <li>• payment for services rendered in connection with use of property or installation or operation of any plant, machinery or other apparatus purchased from a non-resident person</li> </ul>	10
5	Dividends (single tier)	Exempt
6	Income other than above	10

The aforementioned withholding tax rates are subject to the application of a double tax treaty between Malaysia and the country in which the recipient is a resident. If the treaty provides for a lower withholding tax rate then the treaty rate will prevail over the domestic rate.

Other exemptions or concessions are granted in certain situations, such as:

- Income tax exemption for non-resident employees who are short-term visitors (other than public entertainers), if the aggregate period(s) of employment in Malaysia does not exceed 60 days. If a short-term visiting employee is resident in a country that has a double tax treaty with Malaysia, the qualifying period is generally extended to 183 days provided certain prescribed conditions are met.
- 50% exemption of gross employment income at the level of expatriates in a managerial capacity with a Labuan entity in Labuan, co-located office or marketing office (until YA 2020).
- Exemption for an expatriate receiving fees as a director of a Labuan entity (until YA 2020).
- Expatriates working in approved operational headquarters, regional offices, international procurement centres, regional distribution centres or treasury management centres based in Malaysia are taxed on a time apportionment basis in accordance with the employment income attributed to the number of days the employment is exercised in Malaysia.

## Sales tax and service tax

The Goods and Services Tax Act 2014 (which was effective from 1 April 2015) was repealed and replaced by the Sales Tax Act 2018 and the Service Tax Act 2018 (SST regime) as from 1 September 2018.

### Sales tax

Sales tax is a single stage consumption tax imposed on goods manufactured in or imported into Malaysia for local consumption. Sales tax is only imposed on a single level. All goods manufactured in Malaysia or imported into Malaysia are taxable unless they are specifically exempted by order of the Minister of Finance.



Sales tax on the importation of taxable goods into Malaysia is levied and payable as if it were a customs duty or an excise duty. Sales tax is levied on the sales value of imported taxable goods and is computed based on the value of such taxable goods plus any customs duty or excise duty paid or to be paid on such taxable goods. Goods that are exported will not be subject to sales tax. Sales tax is also not applicable to taxable goods that are imported into or transported between designated areas (i.e. Labuan, Langkawi and Tioman) and/or special areas (i.e. free zones such as the Port Klang Free Zone, licensed warehouses or licensed manufacturing warehouses and the joint development areas).

The sales tax rate is currently set at 5% or 10% generally, depending on the category of goods specified under the Sales Tax (Rates of Tax) Order 2018. However, petroleum products are subject to different rates under the aforementioned order.

Goods that are exempted from sales tax include vegetables, live animals, daily necessities such as rice, cooking oil, newspapers and certain chemicals and medicines.

## Service tax

Service tax is another form of consumption tax levied and charged on any taxable service. A service that is taxable may be prescribed by the Minister of Finance to be a taxable service under the Service Tax Act 2018.

Taxable services, as prescribed under the Service Tax Regulations 2018, include the provision of accommodation services, insurance and takaful, services of food and beverage preparation, provision of electricity, clubs and gaming facilities, information technology as well as telecommunication services. Any person who provides any taxable service which is of the prescribed value must be registered.

The rate of service tax is currently set at 6% of the price, value, premium or takaful contribution of the taxable service. Credit card or charge card services are imposed at a fixed amount of MYR 25 for each card. Service tax is applicable to (among others) professional and consultancy services provided by accountants, advocates and solicitors, engineers, architects, surveyors (including valuers, assessors and real estate agents), advertising agencies, consultancy firms, management service providers, insurance companies, motor vehicle service and repair centres, telecommunication services companies, security and guard services agencies, recreational clubs, estate agents, parking space services operators and courier service firms.

Professional services provided by a company to companies within the same group or the provision of services from business to business (B2B) of similar services will be exempted from the 6% service tax. Courier services provided from a point within Malaysia to a destination outside Malaysia are also exempted from the 6% service tax. Similar to sales tax, taxable services provided within or between designated areas and special areas are not subject to service tax, except for certain taxable services (within or between designated areas or special areas or both) such as the provision of passenger air transport, telecommunication services, accommodation premises, food and beverages and services for the clearing of goods from customs control. In order to widen the scope of taxable services to include services rendered by foreign service providers, services imported by businesses are – effective from 1 January 2019 – subject to service tax and in this regard, the Malaysian recipient would need to account for 6% tax via the reverse charge mechanism.

## Digital service tax

Effective from 1 January 2020, foreign online service providers are required to register and service tax is imposed on any digital service provided by a foreign registered person (i.e. foreign service provider (FSP) who is required to register under the Service Tax Act 2018) to any consumer in Malaysia.

### a) Scope of 'digital service'

'Digital service' is defined as any service that is delivered or subscribed to over the internet or other electronic networks and which cannot be obtained without the use of information technology and where the delivery of the service is essentially automated. This encompasses services such as subscription to online

newspapers, advertisement and online platforms, online licensing of software, website hosting, internet-based telecommunication, provision of music and livestreaming services, search engines and social networks.

**b) Definition of 'FSP'**

Under the Service Tax Act, an FSP is defined as any person who is outside Malaysia providing any digital service to a consumer and includes:

- i. a person who sells digital products directly to consumers;
- ii. a person who sells digital products indirectly through intermediaries such as online platforms and issues the invoice for such a sale; and
- iii. an online platform that makes transactions on behalf of an overseas service provider and issues an invoice or any other document under their name.

**c) Definition of 'consumer'**

'Consumer' is defined as any person who fulfils any two of the following conditions:

- i. makes payment for digital services using a credit or debit facility provided by any financial institution or company in Malaysia;
- ii. acquires digital services using an internet protocol address registered in Malaysia or an international mobile phone country code assigned to Malaysia;
- iii. resides in Malaysia.

In determining whether a consumer resides in Malaysia, the FSP may consider information or a declaration from the consumer as follows:

- i. the billing address of the consumer in Malaysia;
- ii. the home address of the consumer in Malaysia; or
- iii. the recipient's country selection.

**d) Exemption from applying reverse charge on imported taxable digital services**

To ensure that there is no double taxation, the Service Tax (Persons Exempted from Payment of Tax) (Amendment) Order 2019 provides, among other things, that any person who, in carrying on their business, acquires digital services from a foreign registered person, is exempted from payment of service tax.

**e) Extension of inter-group relief facility to digital services provided by Foreign Registered Persons ("FRP s")**

Effective from 14 May 2020, FRPs who provide any digital service to any company in Malaysia within the same group of companies with the FRP are exempted from charging service tax on such digital services.

## **Registration for SST**

In respect of sales tax, a manufacturer of taxable goods is required to be registered under the Sales Tax Act 2018 where the total sales value of taxable goods for a 12-month period exceeds or is expected to exceed MYR 500,000. Manufacturers of certain taxable goods are exempted by order of the MOF from the registration requirement under the Sales Tax Act 2018. These manufacturing activities include developing and printing photographs and production of film slides, manufacture of ready-mixed concrete, preparation of meals, repair of second hand or used goods and the installation of air conditioners in motor vehicles.

As for service tax, a person is liable to be registered under the Service Tax Act 2018 if they are a taxable person providing taxable services and the total value of their taxable services for a 12-month period exceeds or is expected to exceed the prescribed threshold under the Service Tax Regulations 2018. The prescribed total value of taxable services which is liable for registration is MYR 500,000, except for operators of restaurants, bars, snack bars and canteens for whom the threshold is MYR 1,500,000.

Any person who is not liable to be registered for sales or service tax may apply to the Director General (DG) of Customs for registration as a registered person. The DG of Customs may approve the registration to be effective from a date he determines and subject to conditions he deems fit.

## Stamp duty

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Stamp duties are imposed on a wide range of documents at rates varying in accordance with the type of document and the amount involved. Documents subject to stamp duty include affidavits, bills of exchange, bills of lading, bills of sale, contracts, conveyances, receipts and securities. Instruments subject to stamp duty must be stamped within 30 days from the date of execution in Malaysia. If the instrument was executed outside Malaysia, it must be stamped within 30 days after it has been first received in Malaysia.

Section 52(1) of the Stamp Act 1949 prohibits the registration, acceptance or authentication of any instruments that have not been duly stamped.

## Import duties

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Import duties are mostly imposed ad valorem in Malaysia, but they may also be imposed on a specific basis. However, as Malaysia is moving towards trade liberalisation, import duties on a wide range of raw materials, components and machinery have been abolished, reduced or exempted. The value of goods for the purpose of computing import duties is determined largely in accordance with the World Trade Organisation principles of customs valuation. Notwithstanding that, Malaysia being a member state of ASEAN is committed to the ASEAN Common Effective Preferential Tariffs scheme. As such, all industrial goods traded within ASEAN are subject to import duties ranging from 0% to 5%. Malaysia is also a party to a number of free trade arrangements (FTAs) with respect to trade in goods, rules of origin and investments. To date, Malaysia has concluded seven bilateral FTAs with Turkey, Japan, Pakistan, New Zealand, India, Chile and Australia and six regional FTAs under ASEAN with China, Japan, Korea, Australia, New Zealand and India. Import duties between FTA partners are subject to specific reduction and elimination schedules under these agreements.



# Labour Law

## An outline of employment law

The Employment Act 1955 ('Employment Act') applies throughout West Malaysia and the Federal Territory of Labuan. It applies only to employees whose wages are less than MYR 2,000 a month and certain categories of employees irrespective of their wages such as manual labourers, supervisors of manual labourers, drivers and domestic servants. For those who do not fall under these categories, their rights are dependent on their contract of employment. The Employment Act also requires certain minimum benefits and rights to be granted to employees. Failure to do so may amount to a breach on the part of the employer, although such a breach would not nullify the employment contract itself but rather the Employment Act benefits would apply instead of the lower benefits conferred by the employment contract.

An employment contract may be in the form of a contract of service which is a pre-condition for an employer–employee relationship or a contract for service. The former is a contract where an employee is engaged to perform for an employer who exercises control and discretion over the said employee. It is here that an employer–employee relationship is established. The latter is quite simply a contract with an independent contractor.

The employment law in East Malaysia is regulated by the Sarawak Labour Ordinance for Sarawak and the Sabah Labour Ordinance for Sabah. The protection and benefits granted mirrors those of the Employment Act with a few differing provisions. The Ordinances provide the conditions under which a 'child' (below 15 years) and 'young person' (15 years and above but under 18 years) may be employed. Further, there is a requirement for any employer wishing to employ any 'non-resident employee' (a person not from Sabah or Sarawak) to obtain a licence to employ from the Director of Labour Sabah/Sarawak. Both the Ordinances cover employees on a contract of service with an employer and whose wages do not exceed MYR 2,500 a month.

## Standard regulations for employment contracts

Any form of employment that lasts for more than one month must be formalised by a written contract. This contract should specify the key terms of the employment relationship, including work location, scope, wage rates, wage period, holidays, benefits and health and safety issues. In Malaysia, all labour contracts are governed by the Employment Act, which stipulates that the right of employees to participate in or join trade unions cannot be restricted. Employers are also obliged to retain these contracts for six years after they expire.



## Visas and work and residence permits

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For employers who are hiring expatriates, an employment pass would have to be applied for from the Immigration Department. Depending on their basic monthly salary and duration of their employment contracts, an expatriate would be eligible for the following categories of employment pass:

- a) Category I (Expatriate) – A basic monthly salary of MYR 10,000 together with an employment contract for a period of up to five years;
- b) Category II (Expatriate) – Applicant must have a salary range of MYR 5,000 to MYR 9,999 together with an employment contract for a period of up to two years; or
- c) Category III (Knowledge/Skilled) – Applicant must have a salary range of MYR 3,000 to MYR 4,999 together with an employment contract for a period not exceeding 12 months. The number of expatriate posts granted is based on the merits of each case and the employer will need to justify the reason for employing the expatriates.

Companies will also be required to comply with the following minimum paid-up share capital if they wish to employ an expatriate:

- i. 100% Malaysian owned – MYR 250,000
- ii. Jointly-owned by Malaysian and foreigner – MYR 350,000
- iii. 100% foreign owner – MYR 500,000
- iv. Foreign-owned companies (foreign equity of 51% and above) operating in the wholesale, retail and trade sectors – MYR 1,000,000

Companies regulated by any of the following approving agencies must first obtain an approval letter for the relevant employment pass:

- MOHA;
- MIDA for manufacturing and its related services sectors;
- MDeC for the information technology sector, specifically companies awarded with the Multimedia Super Corridor (MSC) status;
- BNM for the financial, insurance and banking sectors;
- SC for the securities and futures market;
- PSD for government contractual positions;
- Iskandar Regional Development Authority for specific companies operating within Iskandar Malaysia;
- ECERDC for specific companies operating within the East Coast Economic Region;
- Talent Corporation Malaysia Berhad for specific key employers under ICAEQ/ACCA/NKEA sectors;
- MaGIC for approved programmes under its purview; or
- Expatriate Committee (EC) for expatriate posts in sectors other than those mentioned above.

In addition to that, companies in sectors which are under the purview of the following regulatory bodies must obtain a supporting letter from the relevant regulatory body:

- Ministry of Education;
- Ministry of Health;
- Ministry of Tourism and Culture;
- Ministry of Youth and Sports;
- Ministry of Agriculture and Agro-based Industries;
- Malaysian Bioeconomy Development Corporation Sdn Bhd;
- Department of Civil Aviation;
- Ministry of Transport;
- Department of Mineral and Geoscience;
- Ministry of Natural Resources and Environment;
- Unit PUSPAL (Central Agency for Application for Filming and Performance by Foreign Artistes);
- Ministry of Communications and Multimedia;
- Construction Industry Development Board; and
- Equestrian Association of Malaysia.

The approval and/or supporting letters as stated above are to be submitted for each employment pass application.

Companies which intend to bring in foreign talent for short term engagements ranging from one to 365 days would be required to apply for a professional visit pass. This will allow those with acceptable professional qualifications or skills to provide services to or undergo practical training with a Malaysian company on behalf of an overseas company.

The professional visit pass would cover engagements by Malaysian companies of foreign entertainers who provide commercial services by way of entertainment services/performances as well as foreign talents who provide commercial services by way of their involvement in events/conferences.

Where an employee does not possess a valid employment pass and/or does not comply with a specific term of the employment pass, the following offences may be committed under the Immigration Act 1959/63:



- i. an offence by the employee on the grounds that he/she does not possess a valid employment pass;
- ii. an offence by an employer who employs an employee who is not in possession of a valid employment pass; and/or
- iii. an offence by any company that harbours any person within their premises where there are reasonable grounds for believing that he/she does not possess a valid employment pass.

## Social security

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The Employees Provident Fund Act 1991 requires employers and employees to make monthly contributions to the Employees Provident Fund (EPF) to secure lump sum payments to employees at the age of 60 or earlier in the case of incapacity or upon permanent departure from Malaysia. Contribution is mandatory for employees who are Malaysian citizens or permanent residents. Expatriates and foreign workers, who are Malaysian citizens or permanent residents, are not required to contribute to the EPF although they may elect to do so. The standard rates of contribution by an employer for working personnel are 12% or 13% depending on income threshold, and 11% by the employee.

The Social Security Organisation (SOCSO) is an insurance scheme that covers the Employment Injury and Invalidity Pension Scheme. All Malaysian citizens and permanent residents of Malaysia are covered by the Employment Injury Insurance Scheme (EIS) and Invalidity Pension Scheme (IPS), which are administered by the SOCSO. Effective from 1 January 2019, all employers that hire foreign workers (excluding domestic workers) are required to register and contribute to EIS under SOCSO. Monthly contributions must be made for each eligible employee.

The Employment Insurance System (EIS) is a social security network aimed at helping workers who have lost their jobs by providing financial assistance and support in seeking new jobs. EIS is administered by SOCSO. It is mandatory for all private sector employers to make monthly contributions for each of their employees.

## Prevention of occupational hazards

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Under common law an employer owes a duty of care towards his or her employees to ensure as far as reasonably possible the good health and safety of the employees. The Occupational Safety and Health Act 1994 (OSHA) provides the framework to secure the safety, health and welfare among the workforce and to protect others against risks to safety or health in connection with the activities of people at work. Employers with more than five employees are required to formulate a written safety and health policy. The OSHA specifies the general duties of employers, manufacturers, suppliers and employees. Pursuant to section 30 of the OSHA, every employer must establish a safety and health committee at the workplace if there are 40 or more people employed at the place of work.

Sections 10 to 25 of the Factories and Machinery Act 1967 impose on the occupier of a factory certain minimum standards of safety and welfare for employees who work within factory premises. Examples include foundations and floors to be of sufficient strength, roofs to be of sufficient strength and provisions against fire.



# E-business Legal Framework

## Civil and commercial regulations

The Ministry of Domestic Trade and Consumer Affairs (MDTCA) plays a significant role in regulating online businesses. Just like traditional businesses, online businesses are required to register themselves with the Companies Commission of Malaysia ('SSM'), an organisation that falls within the purview of MDTCA. Via SSM, MDTCA introduced the SSM BizTrust, a standard that can be obtained by online businesses, which certifies that they have complied with SSM BizTrust's principles and criteria, e.g. registration with SSM, online security and protection of information represented by a logo or seal of assurance displayable on the e-commerce platform and linked to SSM's report and other relevant information pertaining to the online business which is accessible to the public.

The MDTCA has collaborated with Lazada Malaysia, one of Malaysia's biggest e-commerce platforms, and the Malaysia Digital Economy Corporation to support local small and medium enterprises and their products on Lazada Malaysia's website as an initiative to stimulate the nation's digital-led economic recovery through campaigns such as 'Buy Malaysia' and 'Penjana Shop Malaysia Online'

When it comes to foreign participation, this is regulated by MDTCA's Domestic Trade Division, which acts in line with the Guidelines for Foreign Participation in Distributive Trade Services in Malaysia (Amendment) 2020. These guidelines are intended to:

- ensure an orderly and fair development in the wholesale and retail industries, while ensuring the growth of local businesses;
- encourage the modernisation and increase the efficiency of the industry and its continued contribution to the growth of the economy; and
- increase Bumiputera and Malay participation in the economic sector, in line with the National Development Policy.

## Intellectual and industrial property rights and domain names

In Malaysia, domain names are protected and regulated by Malaysian Network Information Centre Berhad ('MYNIC'), the sole administrator for web addresses that end with .my in Malaysia. In particular, domain names with '.my', '.com.my', '.net.my', '.org.my', '.edu.my' and '.gov.my' may be registered by organisations and individuals with MYNIC, whereas applications for '.my', '.com.my', '.biz.my', '.net.my', '.org.my' and '.name.my' domain names may be submitted through MYNIC's officially appointed partners, called resellers.





MYNIC is a company limited by guarantee, and an agency under the Ministry of Communications and Multimedia Malaysia that is regulated by the Malaysian Communications and Multimedia Commission. Under the MYNIC's Domain Name Dispute Resolution Policy (MYDRP), in order to initiate a domain name dispute proceeding, a complaint pertaining to a third party's registration or use of an identical or similar domain name must be filed to the Kuala Lumpur Regional Centre for Arbitration (KLRCA). The complainant must be able to establish that the disputed domain name is identical or similar to the trademark or service mark to which he or she has the rights and that the respondent used the domain name in bad faith. If the complaint is successful, the complainant may request for a transfer of the disputed domain name to him or her or a deletion of the registration of the domain name. However, the complainant is not entitled to pecuniary damages. One may prove that their registration and/or use of the domain name was not in bad faith by establishing that they have rights and legitimate interests in the domain name. This can be evidenced by, for example, being commonly known by the domain name even in the absence of trademark or service mark rights.

# Appendix

## Reference websites

Ministry of Energy, Science, Technology, Environment and Climate Change	<a href="https://mastic.mosti.gov.my/">https://mastic.mosti.gov.my/</a>
Ministry of Highway Authority/Lembaga Lebuhraya Malaysia	<a href="http://www.llm.gov.my">www.llm.gov.my</a>
Malaysian Investment Development Authority	<a href="http://www.mida.gov.my">www.mida.gov.my</a>
Ministry of International Trade and Industry	<a href="http://www.miti.gov.my">www.miti.gov.my</a>
Ministry of Finance	<a href="http://www.mof.gov.my/index-en.html">www.mof.gov.my/index-en.html</a>
Ministry of Health	<a href="http://www.moh.gov.my">www.moh.gov.my</a>
Ministry of Home Affairs	<a href="http://www.moha.gov.my/index.php/en/">www.moha.gov.my/index.php/en/</a>
Ministry of Education	<a href="http://www.moe.gov.my/en/">www.moe.gov.my/en/</a>
Ministry of Transport	<a href="http://www.mot.gov.my/en">www.mot.gov.my/en</a>
Ministry of Works/Kementerian Kerja Raya	<a href="http://www.kkr.gov.my/en">www.kkr.gov.my/en</a>
Malaysia Competition Commission	<a href="http://www.mycc.gov.my/">www.mycc.gov.my/</a>
Malaysian Qualifications Agency	<a href="http://www.mqa.gov.my">www.mqa.gov.my</a>
Intellectual Property Corporation of Malaysia	<a href="http://www.myipo.gov.my/">www.myipo.gov.my/</a>
Northern Corridor Implementation Authority	<a href="https://www.ncer.com.my/">https://www.ncer.com.my/</a>
Public Service Department	<a href="http://www.jpa.gov.my/en/">www.jpa.gov.my/en/</a>
Public Works Department/Jabatan Kerja Raya	<a href="http://www.jkr.gov.my/en">www.jkr.gov.my/en</a>
Regional Corridor Development Authority	<a href="http://www.recoda.com.my">www.recoda.com.my</a>
Royal Malaysia Police	<a href="http://www.rmp.gov.my/">www.rmp.gov.my/</a>
Securities Commission	<a href="http://www.sc.com.my/">www.sc.com.my/</a>
Sustainable Energy Development Authority	<a href="http://www.seda.gov.my">www.seda.gov.my</a>
Sabah Economic Development and Investment Authority	<a href="http://www.sedia.com.my">www.sedia.com.my</a>
Tenaga Nasional Berhad	<a href="http://www.tnb.com.my/">www.tnb.com.my/</a>
Public Private Partnership Unit/Unit Kerjasama Awam Swasta	<a href="http://www.ukas.gov.my/en">www.ukas.gov.my/en</a>

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right size  
right solutions

**PKF International Ltd.**

Studio 215-216, Great Western Studios, 65 Alfred Road, London, W2 5EU, United Kingdom  
Telephone: +44 20 3691 2500

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