

Chapter 2

Companies Legislations

2.1 The principal legislations in Malaysia are as follows:-

- Registration of Businesses Act 1956;
- Partnership Act 1961;
- The Companies Act, 1965 – governs the establishment and administration of companies;
- Offshore Companies Act, 1990;

Trade Regulations

- Contracts Act, 1950 – codifies the law of contracts;
- Trade Marks Act, 1976 – legislates and protects trade marks and patents registered in Malaysia;
- Industrial Co-ordination Act, 1975 – licenses and regulates businesses carrying on manufacturing activities except in certain specified circumstances;
- Factories and Machinery Act 1967;
- Trade Description Act 1972;
- Patents Act, 1983 – legislates and protects patents registered in Malaysia;
- Copyright Act, 1987 – protects copyrightable works and peripheral issues pertaining to copyrights;

Security Regulations

- Securities Industry Act, 1983 – provides a legislative scheme for the control and regulation of the securities industry;
- Securities Commission Act, 1993 – an act to establish the Securities Commission and to provide for matters connected therewith and incidental thereto;

Bank Negara Regulations

- Banking and Financial Institutions Act, 1989;
- Offshore Banking Act, 1990;
- Offshore Insurance Act, 1990;
- Insurance Act 1996;

Tax Regulations

- Income Tax Act, 1967;
- Real Property Gains Tax Act, 1976;
- Promotion of Investments Act, 1986;
- Labuan Offshore Business Activity Tax, 1990;
- Labuan Trust Companies Act, 1990;

Employment Regulations

- Employment Act 1955;
- Trade Unions Act 1959;
- Employees Provident Fund Act 1991;
- Employees Social Security Act 1969;
- Workmen's Compensation Act 1952

2.2 Doing Business in Malaysia

Depending on its intended business activities, there are several forms of establishment that a foreign corporation can consider in doing business in Malaysia.

The main forms of establishment are discussed below:

- Representative/regional office
- Branch Office
- Locally incorporated company

Representative Office/Regional Office

As a first step before establishing a more permanent business presence in Malaysia, the foreign corporation can consider establishing a Representative Office/Regional Office. A Representative Office/Regional Office of a foreign corporation in the manufacturing and trading sector is an office approved by the Ministry of International Trade and Industry in Malaysia to carry out permissible activities for its head office/principal. In the same approval letter, MITI may extend its support for the presence of expatriate(s) to head the Office. Approval for the Office is usually for a period of two years and any extension of the period thereafter would be subject to the justifications to be submitted to MITI before the expiry of the approved period. The Office should be totally funded from sources outside Malaysia. The Representative Office/Regional Office is not required to be incorporated or registered under the Companies Act 1965.

The permissible activities are the following:

- Research and product development.
- Planning or coordinating of business activities.
- Gathering, analysis of information or feasibility studies pertaining to investment and business opportunities in Malaysia and in this region.
- Identifying source of raw materials, components or other industrial products.
- As a coordination center for the corporation's affiliates, subsidiaries, agent in this region.
- Other activities which will not result directly in actual commercial transactions.

The Representative Office/Regional Office is not permitted to:

- Engage in any trading (including import and export)/business activities;
- Lease warehousing facilities. (Any shipment/transshipment or storage of goods shall be handle by a local agent or distributors)
- Sign business contract on behalf of the foreign corporation or provide services for a fee
- Participate in the daily management of any of its subsidiaries, affiliates or branches in Malaysia.

Companies wishing to undertake business activities may do so by locally incorporating a company under the Companies Act 1965.

Branch Of Foreign Corporation

A foreign corporation may establish a branch to carry on a business (apart from wholesale/retail trade) in Malaysia. The branch must register with the Companies Commission of Malaysia (“CCM”) (formerly the Registry of Companies) before commencing business or establishing a place of business within Malaysia. The following documents must be lodged with the CCM at the time of registration:-

- a certified copy of the certificate of its incorporation or registration in its place of incorporation or origin or a document of similar effect;
- a certified copy of its charter, statute, memorandum and articles of association, or other instruments defining its constitution;
- a list of directors and certain statutory particulars regarding them;
- where there are local directors, a memorandum stating the powers of these directors;
- a memorandum of appointment or power of attorney authorizing one or more persons resident in Malaysia as its agent;
- statutory declaration in the prescribed form made by the agent of the company.

If the authorities grant approval to establish a branch, the profits of the branch are then not subject to Section 108 of the Income Tax Act, 1967, on the repatriation of profits.

One or more agents must be appointed and they must be resident in Malaysia. The appointed agent is answerable for the performance of all acts required to be done by the company under the Companies Act, 1965. Any changes in agents must be reported to the CCM.

The activities of a Malaysian agent of a foreign corporation may constitute the carrying on of a business in Malaysia, in which case the foreign corporation is deemed to be operating a branch in Malaysia.

Under certain circumstances, the existence of an agent of a foreign corporation within Malaysia may not constitute the carrying on of a business in Malaysia, and in such cases, the registration as a branch of a foreign company is not required under the Companies Act.

An agent of a foreign company who imports goods for the purpose of display, exhibition or demonstration as trade samples with the view to re-export them subsequently does not constitute the carrying on of a business in Malaysia. Other activities not considered as “carrying on a business in Malaysia” include :-

- sale through an independent contractor;
- obtaining any order to be accepted outside Malaysia;

- an isolated transaction that is completed within 31 days (provided similar transactions are not repeated from time to time);
- collecting any debts or enforcing rights with regard to any securities relating to debts;
- maintaining any bank accounts;
- holding meetings of its directors or shareholders or carrying on other activities concerning its internal affairs.

To ascertain whether a foreign company is “carrying on a business in Malaysia”, it is advisable to consult an accountant and/or lawyer regarding this aspect of the Companies Act, 1965 as well as possible tax implications relating thereto.

Locally Incorporated Company

There are three types of companies provided for under the Companies Act, 1965 based on the liability imposed on its shareholders. They are:

- Companies limited by shares - where the personal liability of members is limited to the par value of their shares.
- Companies limited by guarantee - where the members guarantee to meet liability up to a nominated amount if the company is wound up.
- Unlimited companies - where there is no limit to the members’ liability.

The most common company structure in Malaysia is a company limited by shares. In practice, it is the recommended type of company which should be contemplated by a foreign corporation interested in investing in Malaysia. Such limited companies may be either public (Berhad or Bhd.) or private (Sendirian Berhad or Sdn. Bhd.).

The main differences of a private and a public company are as follows

Private Companies	Public Companies
<ul style="list-style-type: none"> • Transfer of shares is restricted • Number of shareholders limited to 50 • Cannot invite the public to subscribe for shares • Not subject to regulations and requirements under the Securities Commission and the Kuala Lumpur Stock Exchange. 	<ul style="list-style-type: none"> • For listed companies, the transfer of shares is not restricted • No restriction in the number of members • Can invite the public to subscribe for shares provided approvals from the relevant authorities have been obtained. • All public companies that are listed on the KLSE are subject to regulations and requirements under the Securities Commission and the KLSE.

2.3 Incorporation of Companies

Professional advice from accountants and/or lawyers should be obtained before deciding to establish a company in Malaysia.

A Malaysian company can be incorporated with a recommended authorized and minimum paid-up capital of RM100,000 and RM2 respectively.

Below is a non-exhaustive list of some requirements when incorporating a company.

Approval of Name

Before a company is incorporated, approval must be obtained from the CCM for the use of the proposed name. Generally, the proposed name must not be such that it will be easily confused or mistaken for the name of another company. The promoters will be required to lodge with the CCM a copy of the “Memorandum of Association” (define the essential components of the structure of the company and specifying its authorized capital) and the “Articles of Association” (constitute the internal regulations governing its management and the conduct of its business), and certain other documents.

A certificate of incorporation will be issued by the CCM once the name has been approved and the relevant documentation submitted to the CCM. The company can then commence operations using the name registered. The company is required to state the registration number in all its official documents.

Registration Fees

The capital duty payable on incorporating a company is set out below:-

Authorized Capital	Capital Duty
RM	Up To RM
-	100,000
100,001	500,000
5,000,001	1,000,000
1,000,001	5,000,000
5,000,001	10,000,000
10,000,001	25,000,000
25,000,001	50,000,000
50,000,001	100,000,000
100,000,000 and above	70,000

The maximum capital duty payable, for an authorized capital exceeding RM100,000,000 is RM70,000.

Directors

Every company must have at least two directors, both of whom must have a residential address in Malaysia. All directors must be natural persons of full age and capacity. An expatriate holding a working visa in Malaysia and residing in the country qualifies as one of the two directors referred to above. There is no statutory limit on the number of directors unless the Articles of the company has provided a maximum number. If there are only two resident directors remaining in the office, the resignation of any of them is invalid unless the director is disqualified by the Act or any written law. A director who has directorships in public listed companies is only allowed to hold 10 directorships in public listed companies and 15 directorships in a private limited companies. Directors of private limited companies are excluded from this restriction.

Company Secretary

Every company must have at least one Company Secretary who must be a natural person and a resident in Malaysia and is a member of any one of the prescribed professional bodies.

Auditors

Every company must appoint one or more auditors who must be approved auditors in Malaysia.

Registered Office

Every company must have a registered office in Malaysia to which all notices may be addressed.

2.4 Other Forms of Business Organizations

Apart from limited liability companies, there are other forms of business organizations:

Sole Proprietorships and Partnerships

All sole proprietorships and partnerships must be registered with the Companies Commission of Malaysia (“CCM”) (formerly the Registrar of Business) under the Registration Of Businesses Act 1956. The Partnership Act, 1961 will apply to all partnerships unless a formal agreement has been drawn up setting out the rights or obligations of the partners. Limited liability partnerships are not allowed in Malaysia.

Exempt private companies

An exempt private company is a private limited company, the shares of which are not held directly or indirectly by any corporation and which has not more than 20 members. An exempt private company need not file its annual accounts with the CCM for the information of the public as long as the company files a certificate, signed by a director of the company, the secretary and the auditor of the company, that:

- 1 the Company has kept proper accounting records and other books during the financial year;
- 2 the audit report on the accounts is not qualified neither did it contain any comment made under Section 174(3) of the Act.
- 3 as at the date to which the accounts are drawn up, the Company appears to be able to meet its liabilities as and when they fall due.

2.5 Accounts and Audits

The Companies Act 1965 requires the company to lay before the members at its annual general meeting a duly audited set of accounts made up to a date not more than six months before the date of the meeting.

The annual general meeting (“AGM”) has to be held once every calendar year at intervals of not more than fifteen months of the preceding AGM or six months from the financial year end, whichever is earlier. For the first AGM, it must be held within eighteen months of its incorporation or six months from the financial year end, whichever is earlier.

The accounts of “exempt” private companies are required by law to be audited but need not be filed with the CCM.

A foreign company operating in Malaysia as a branch of a foreign incorporated company must file with the Registrar, within two months of its Annual General Meeting, the audited accounts of its Head Office as well as the audited accounts of its Malaysian operations. The accounts of the Malaysian operations often referred to as S336 accounts, should be in compliance with S336 of the Companies Act 1965. The S336 accounts must be audited by an approved auditor and the accounting records of the Malaysian operations must be kept in Malaysia and recorded in Ringgit Malaysia currency. By the same virtue, all transactions must be recorded within 60 days into accounts.

A Representative/Regional Office is not required to have its accounts audited or file its accounts with the Companies Commission of Malaysia.