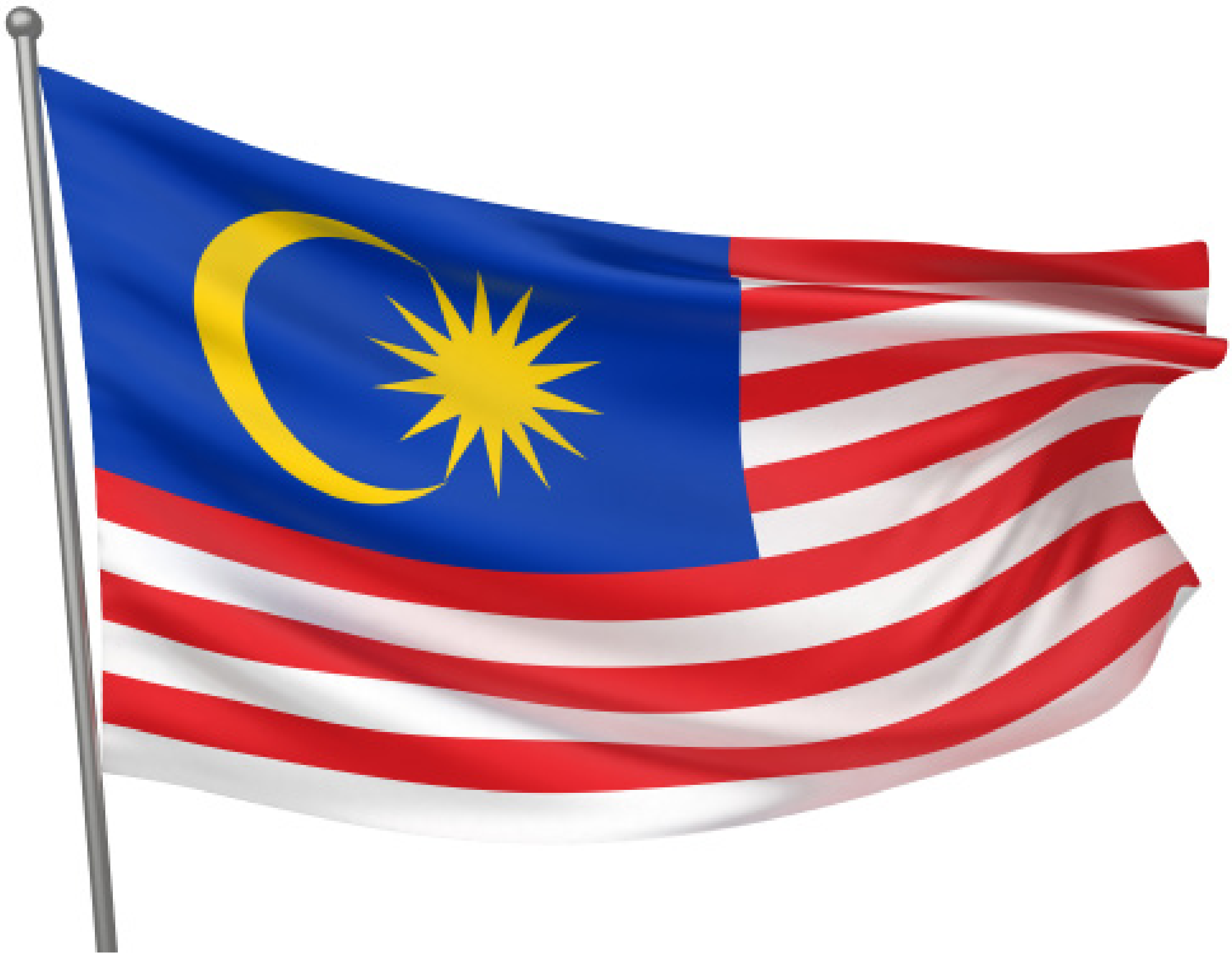
# Malaysia



# Chapter 1: Introduction

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Malaysia consists of 13 states and three federal territories, separated by the South China Sea into two regions: Peninsular Malaysia and Borneo's East Malaysia. Kuala Lumpur is the national capital and largest city, while Putrajaya is the seat of the federal government. With a population of over 30 million, Malaysia is the world's 44th most populous country.

The country is multi-ethnic and multi-cultural. About half the population is ethnically Malay, with large minorities of Chinese, Indians and indigenous peoples. While recognising Islam as the country's established religion, the Constitution grants freedom of religion to non-Muslims.

The official language of Malaysia is Bahasa Malaysia. English is the most common business language. Mandarin and local dialects are widely used forms of communication.

Malaysia is a member of the ASEAN, which is an intergovernmental organisation aimed primarily at promoting economic growth and regional stability among its members.

The overall infrastructure of Malaysia is one of the most developed in Asia. Malaysia is highly ranked for the quality of its roads, port infrastructure and air transport infrastructure. The country has seven international ports and five international airports (all with air cargo facilities). Its telecommunications network is served by digital and fibre optic technology.

Malaysia is a relatively open, state-orientated and newly industrialised market economy. Technological advancement has become an integral part of Malaysia's growth as an industrialised nation through the country's involvement in advanced electronics manufacturing, R&D, biotechnology, photonics, logistics, design, innovation and a highly automated manufacturing sector, to name a few. Industries in Malaysia are predominantly located in over 500 industrial estates and free zones throughout the country. These zones are categorised as export processing zones, which cater to the requirements of export-orientated industries. There are also specialised parks that have been developed to cater to the needs of specific industries. Malaysia's objective is to become a hub for other value chain activities, such as R&D, design and development, procurement, logistics, distribution and marketing, business support services and shared services.

According to the World Bank's *Doing Business 2020* report, Malaysia is ranked 12th among 190 countries, an improvement from 15th in 2019, while the 2020 Index of Economic Freedom, which measures, among other things, investment freedom, trade freedom, judicial effectiveness, government spending and fiscal health, puts Malaysia's economic freedom score at 74.7. This ranks Malaysia 24th in the world and 6th among 42 countries in the Asia Pacific region, above South Korea, Japan, Thailand, Indonesia, the Philippines and a number of other ASEAN countries.

# Chapter 2: The business environment

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## 2.1 Government structure

Malaysia is a federation of 13 states. The Federation of Malaysia practises parliamentary democracy, with a federal constitutional monarch, the Yang di-Pertuan Agong (the 'King'). The King is the Supreme Head of the Federation and is commonly referred to as the head of state.

Based on the Federal Constitution, one of the characteristics of the parliamentary democracy practised in Malaysia is the separation of powers into three parts: legislative, judiciary and executive. The separation of powers also occurs at the federal and state levels, where the federal and state governments are accorded defined law-making powers based on the Federal List, State List and Concurrent List.

### *2.1.1 Legislature*

At the federal level, the bicameral Parliament headed by the King is comprised of two houses: the Upper House (House of Senate or Dewan Negara) and the Lower House (House of Representatives or Dewan Rakyat). The Dewan Negara has 70 Senators, consisting of 44 members appointed by the King and 26 members elected by the State Legislative Assemblies. The Dewan Rakyat, on the other hand, is made up of 222 members elected through a general election every five years.

Primarily, the Parliament enacts and approves federal laws, as well as amends and examines existing federal laws and government policies. The Dewan Rakyat also functions as a forum for its members to debate and question government policies and national issues.

Draft bills may originate from either house, except money bills, which are initiated in the Dewan Rakyat. All draft bills approved by either house are sent to the other house for approval. In each phase, a chamber of Parliament must undergo four stages: the first reading, second reading, discussion at committee level and third reading of the bills. If the bills are passed by both chambers, they are assented by the King through affixing the Public Seal. Thereafter, the bills become law and enforceable upon publication in the Government Gazette.

### *2.1.2 Executive*

The executive authority of the federation is vested in and led by the King subject to the provisions and limitations enshrined in the Federal Constitution. The King appoints a Council of Ministers to form the Cabinet (Jemaah Menteri) to advise the King on the execution of his functions as the head of the executive authority. The ministers are appointed by the King, on the advice of the Prime Minister, and shall be members of either the Dewan Negara or Dewan Rakyat.

In governing the country, the King acts on the advice of the Prime Minister, who leads the Cabinet of Ministers. In short, the Prime Minister acts as the head of the government.

The Cabinet holds the highest administrative authority in the country and is responsible for forming government policy. Each minister is assigned different portfolios and is usually assisted by a deputy minister. The Cabinet is collectively accountable to Parliament for every decision it makes.

In appointing the Prime Minister, the paramount consideration of the King is that the Prime Minister shall be likely to command the confidence of the majority of the members of the Dewan Rakyat. As such, if the Prime Minister ceases to command the confidence of the majority of the members of the Dewan Rakyat, then, unless at his request the King dissolves Parliament, the Prime Minister shall tender his/her resignation of the Cabinet.

#### *2.1.3 Judiciary*

The judiciary refers to the Malaysian court system, which is made up of a body of judges. Judges interpret and implement laws enacted by the legislature, executive and state assemblies. The judiciary is also empowered to interpret the highest law of the land, the Federal Constitution, and declare any written law to be unconstitutional or illegal.

The judiciary body and the court structure are enshrined under Article 121 of the Federal Constitution. The hierarchy of the courts is classified into subordinate courts and superior courts. Subordinate courts refer to the Magistrates' Court and the Sessions Court. The superior courts consist of the two High Courts (High Court in Malaya and High Court in Sabah and Sarawak) and two Appellate Courts, namely the Court of Appeal and the Federal Court, which is also the apex court in Malaysia.

## 2.2 Legal system

There are multiple sources of law in Malaysia. 'Law' is defined under Article 162(2) of the Federal Constitution to include any written law, common law operating in the federation and any custom or usage having the force of law in the federation. Under the Civil Law Act, 1956, the common law of England and the rules of equity of certain cut-off dates are also statutorily recognised as sources of law.

Therefore, Malaysian law can broadly be categorised into two groups: written and unwritten law.

#### *2.2.1 Written law*

The written law of Malaysia is made up largely of the following components:

- the Federal Constitution and the Constitutions of the 13 states of Malaysia;
- legislation enacted by Parliament and the state assemblies;
- subsidiary or delegated legislation by persons or bodies empowered by the Acts of Parliament or Enactments of the state assemblies;
- ordinances made by the King during a state of emergency; and
- the Islamic law or Syariah Enactments.

#### *2.2.2 Unwritten law*

The unwritten law of Malaysia consists mainly of the following:

- principles of English Law applicable and permitted by the local circumstances and subject to such qualifications as local circumstances render necessary;
- judicial decisions or case law of the two High Courts, the Court of Appeal and the Federal Court;
- judicial decisions of the former superior courts, that is, the Supreme Court, the former Federal Court and the Privy Council;
- customary laws of local inhabitants, including native practices in Sabah and Sarawak; and
- the principles of Syariah in the form of judicial decisions.

# Chapter 3: Business and corporate structures

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## 3.1 Common forms of legal entities

The most common form of legal entity in Malaysia is the private company limited by shares incorporated pursuant to the Malaysian Companies Act, 2016. It is a separate legal entity from that of its shareholders/members, and it can have up to 50 members. A private company shall restrict the transfer of its shares.

Unless regulated by industry or business rules and requirements, a private company can be incorporated with a sole shareholder. A private company must have, at all times, a minimum of one resident director, that is, a director who ordinarily resides in Malaysia.

Other forms of legal entity are a public company limited by shares, a company limited by guarantee and an unlimited company, all of which can be incorporated pursuant to the Companies Act.

The below information focuses on private companies.

## 3.2 Incorporation process

A name search must first be carried out to ensure that the proposed name of the company is available. Once the name is approved, the name can be reserved and an application for registration of the company is to be submitted online within 30 days after the name is approved to the Companies Commission of Malaysia (CCM) with the following information and an incorporation fee of MYR 1,000:

- proposed company name;
- status of a private or public company;
- proposed type of business;

- address of the registered office;
- business address;
- complete details of the directors(s) and promoter(s);
- declaration from the directors(s) and promoter(s);
- declaration of compliance from individuals responsible for incorporation; and
- additional documents (if any).

Upon the submission of complete information, and compliance with all required procedures, the CCM will issue a notice of registration, which signifies that the company has been successfully incorporated. If the company requires, it can submit a prescribed fee to the CCM to request a certificate of incorporation.

The incorporation process is fairly quick and can be completed within a week or two, depending on the compilation and submission of the necessary information, documents and fee required.

## 3.3 Ongoing reporting and disclosure obligations

Apart from ongoing documents and notifications that are required to be filed or lodged under the Companies Act (eg, changes to the directors, register of members and issuance of new shares, every year, a private company is required to lodge with the CCM:

- an annual return not later than 30 days from the anniversary of its incorporation date; and
- the financial statements (which are to be audited unless exempt pursuant to the Companies Act) and directors' report within 30 days of the circulation of the documents to the shareholders of the company. The documents have to be circulated to the shareholders within six months of the private company's financial year end. An auditor is required to be appointed for each financial year of the private company (unless exempt pursuant to the Companies Act according to the conditions determined by the CCM).

## 3.4 Management structures

The board of directors has all the powers necessary for managing, directing and supervising the management of the business and affairs of the company subject to any modification, exception or limitation contained in the Companies Act or in the constitution of the company.

The Companies Act does not impose a limit on the maximum number of directors, but a company may want to limit the number of directors in its constitution. The board of directors can set out their powers in the constitution of a company, and officers can have limits of authority imposed on them. The board of directors may delegate its powers to any committee of the board of directors, director, officer, employee, expert or any other person.

There is no legal requirement to have a risk/compliance/governance committee or officer for a private company.

### 3.5 Director, officer and shareholder liability

A company incorporated in Malaysia can have a constitution to set out the rights, powers, duties and obligations of the company, each director and each member of the company (to the extent that they are permitted to be modified in accordance with the Companies Act and the constitution does not contravene and is not inconsistent with the Companies Act). If a company has no constitution, the company, each director and each member of the company shall have the rights, powers, duties and obligations set out in the Companies Act.

A director of a company shall at all times exercise his/her powers in accordance with the Companies Act, for a proper purpose and in good faith in the best interest of the company. The directors owe a fiduciary duty to the company.

Directors and officers of a company can be personally liable for breaches of the Companies Act. For example, a failure to keep accounting records can result in every officer who is in breach to be liable, on conviction, to a fine not exceeding MYR 500,000 or imprisonment for a term not exceeding three years, or both.

A private company is a separate legal entity from that of its members, and the liability of its members is limited to the amount, if any, unpaid on shares held by the members. While the Companies Act establishes that a company incorporated in Malaysia is a separate legal entity, cases decided in Malaysia have, in certain instances, pierced the corporate veil where there is evidence of actual fraud in common law, or some inequitable or unconscionable conduct amounting to fraud in equity.

# Chapter 4: Takeovers

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### 4.1 Overview of key laws and regulations

Takeovers of public companies in Malaysia are primarily governed by the Malaysian Code on Takeovers and Mergers, 2016 (the 'Code'), the Rules on Takeovers, Mergers and Compulsory Acquisitions, 2016 (the 'Rules') and the Capital Markets and Services Act, 2007 CMSA.

The Code, which is issued by the Securities Commission Malaysia and enacted pursuant to Section 217 of the CMSA, sets out 12 principles to be observed and complied with by all persons engaged in any transaction that is subject to the Code and Rules. This includes, among others, the principle that all shareholders must be treated equally in any takeover transaction and should not be disadvantaged by the treatment or conduct of any relevant party to a takeover.

The Rules stipulate operational and conduct requirements in relation to takeovers, and are issued by the Securities Commission under section 377 of the CMSA.

The Code and Rules apply to mergers and takeovers of listed companies, unlisted public companies with more than 50 shareholders and net assets of MYR 15m or more, business trusts listed in Malaysia and real estate investment trusts listed in Malaysia.

If the disposal, acquirer or target in a takeover is listed on Bursa Malaysia Securities Berhad ('Bursa'), they are also subject to the listing requirements issued by Bursa.

## 4.2 Types of takeover

### *4.2.1 Mandatory offer*

An acquirer, together with persons acting in concert (PAC) with the acquirer (if any), triggers the obligation to extend a mandatory offer to acquire all the shares of a target that are not already owned by the acquirer and any PAC, if the acquirer together with any PAC:

- obtains 'control' of the target (ie, acquires more than 33 per cent of the target); or
- triggers the creeping provisions (ie, acquires more than two per cent of the voting rights or shares of a target in any six-month period where the acquirer and the PAC's shareholding was more than 33 per cent but less than 50 per cent of the voting rights or shares in the target.

### *4.2.2 Voluntary offer*

An acquirer who has not incurred an obligation to make a mandatory offer is allowed to make a voluntary offer to acquire the voting shares or rights of a target that is not already owned by the acquirer.

However, such a voluntary offer must be conditional upon the acquirer having received acceptances that would result in the acquirer holding in aggregate more than 50 per cent of the voting shares or rights of the target.

### *4.2.3 Partial offer*

An acquirer who has not incurred an obligation to make a mandatory offer is also allowed to make a partial offer (ie, a voluntary offer to acquire less than 100 per cent of any class of the voting shares or rights of a target) for the voting shares or rights of a target that is not already owned by the acquirer.

However, an acquirer is not allowed to make a partial offer unless approved by the SC.

## 4.3 Process overview

### *4.3.1 Pre-bid due diligence*

Generally, due diligence on targets that are listed public companies is limited to information that has been publicly announced by the target, or by public searches, such as company searches at the CCM, or bankruptcy or winding-up searches at the Department of Insolvency.

In a friendly takeover a shareholder of the target company is likely to have initiated discussions with the potential acquirer subject to confidentiality undertakings and entry into non-disclosure or confidentiality agreements that would allow the acquirer and its appointed advisers to conduct due diligence on the target. Where a target company is a listed public company, the scope of the due diligence is limited to information on the target that is publicly announced, as the parties have to be very careful not to allow access to information that will be deemed insider information.

### *4.3.2 Definitive agreement*

The shareholder of the target company and the potential acquirer in a friendly takeover may enter into a definitive sale and purchase agreement for the acquisition of a specific block of shares in the target company before the takeover offer is launched. The definitive agreement typically includes provisions such as the purchase consideration, undertakings or covenants, conditions precedent and termination rights.

In the event that the sale and purchase of the shares pursuant to the definitive agreement involves the acquisition of more than 33 per cent of the target or triggers the creeping provision, the acquirer would be under the obligation to extend a mandatory offer to acquire all the shares of a target that is not already owned by the acquirer and any PAC.

## 4.4 Related party transactions

If the potential seller or potential acquirer of the shares is a listed public company or a subsidiary of a public company listed on the Main Market of Bursa the transaction will be a related party transaction and the prior approval of the shareholders (of the listed company) in a general meeting will be required where the transaction has a percentage ratio of five per cent[1] or more.

Where any one of the percentage ratios of a related party transaction is 0.25 per cent or more, such a related party transaction must be announced to Bursa as soon as possible after the terms of the transaction have been agreed, unless, inter alia, the value of the consideration of the transaction is less than MYR 500,000.

A related party includes a person who is or was a director or major shareholder of the listed public company, or persons connected with such director or major shareholder, within the preceding six months of the date on which the terms of the transaction were agreed.

## 4.5 Takeover process

An acquirer who intends to make a takeover offer is required to make an immediate announcement regarding the takeover offer by way of a press notice and send a written notice to the board of the target or adviser designated by the board of the target. The notice is also to be sent to the Securities Commission and Bursa if the acquirer or the target is listed in Malaysia.[2]

The board of the target upon receiving a written notice make an immediate announcement of the receipt of the written notice and dispatch a copy to all shareholders of the target within seven days.

Within 21 days from sending the written notice, the acquirer is required to dispatch the offer documents (upon clearance by the Securities Commission) to the board and shareholders of the target.

Within ten days from the dispatch of the offer documents, the board of the target is required to issue its comments, opinion and views on the takeover offer in a board circular to the shareholders of the target. The independent adviser appointed is also required to issue an independent advice circular to the board and shareholders of the target.

The acquirer must keep the offer open for at least 21 days from the dispatch of the offer documents (unless the Securities Commission has granted approval for an extended period, in which case the offer must be kept open until the end of the extended offer period).

Unless prior written consent of the Securities Commission has been obtained, the board of the target shall not announce material information relating to trading results, profit or dividend forecasts, or asset valuations until after the 39th day following the dispatch of the offer documents.

The acceptance condition to the takeover offer must be met (ie, the acquirer holding in aggregate more than 50 per cent of the voting shares or rights of the target) within 60 days from the dispatch of the offer documents.

### 4.6 Reporting obligations

Each substantial shareholder of the target is also required to comply with disclosure requirements on a substantial shareholding as set out in the Companies Act 2016.

A substantial shareholder of the target is required to notify the target of its interest or change in its interest in voting shares in the target. Persons ceasing to be a substantial shareholder are also required to notify the target. A copy of such a notice shall also be served to the CCM on the day on which such a person gives notice.

# Chapter 5: Foreign investment

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### 5.1 Foreign investment control/restriction

Over the years, foreign equity restrictions in many sectors across Malaysia have been liberalised. For instance, in April 2012 the government allowed up to 100 per cent foreign equity participation in various services sectors, such as telecommunications, healthcare and education.[3]

Notwithstanding such liberalisation policies, restrictions on foreign equity ownership remain in place for certain sectors. These restrictions may be imposed through the approval of, or issuance of licence by, the relevant ministries or regulatory bodies in Malaysia. Some of the affected sectors include trading, manufacturing, and oil and gas.

Foreign investors looking to set up business in the trading sector need to be aware of the Guidelines on Foreign Participation in the Distributive Trade Services Malaysia (DTG)[4] issued by the Ministry of Domestic Trade, Co-operatives and Consumerism (MDTCC). The DTG regulates the distributive trade sector and requires proposals for foreign involvement in distributive trade to be approved by MDTCC. While the government has gradually liberalised equity ownership in trading companies, those conducted on a larger scale, such as hypermarkets, must still have at least 30 per cent equity participation by Bumiputera.[5] Further, the DTG prohibits foreign involvement in certain distributive trade businesses, such as mini-markets and convenience stores.

In the manufacturing sector, under the Industrial Co-ordination Act, 1975 of Malaysia, companies intending to carry out manufacturing activities are required to submit an application to the Malaysian Investment Development Authority for a licence,[6] unless it is a manufacturing company with shareholders' funds of less than MYR 2.5m and less than 75 full-time paid employees.[7] Equity shareholding in all manufacturing projects were liberalised effective from 17 June 2003, allowing foreign investors to hold 100 per cent of the equity in all investments in new projects, as well as investments in expansion or diversification projects by existing companies irrespective of the level of exports and type of product or activity.[8] Nevertheless, foreign investors seeking a stake in manufacturing companies that were granted manufacturing licences prior to liberalisation of the equity conditions in 2003 will have to be wary that these manufacturing licences may still have equity conditions attached to them. Therefore, their investments may be affected unless the manufacturing company applies for, and is granted, a waiver of the equity conditions that were imposed prior to 17 June 2003.

The Petroleum Development Act, 1974 and the Petroleum Regulations, 1974 are the main legislation governing petroleum activities and operations in Malaysia. Any person wishing to participate in the upstream sector of the oil and gas industry must obtain a licence from Petroliam Nasional Berhad (PETRONAS),[9] which has been vested with the ownership and control of petroleum resources in Malaysia.[10] Foreign companies wanting to participate in exploration operations are required to enter into production sharing contracts with PETRONAS, which will contain the requirements imposed by PETRONAS. Further, no person other than PETRONAS may carry out business in the downstream sector unless the Prime Minister and Ministry of International Trade and Industry have given permission.[11 12]

There are also foreign restrictions on the acquisition of property in Malaysia. There are certain properties that are off-limits to foreigners:

- property valued at less than MYR 1m per unit;
- residential units under the category of low and low-medium cost;
- properties built on Malay reserved land; and
- properties allocated to Bumiputera interest in any property development project.

Further, there is a minimum threshold for foreigners to acquire property in Malaysia, which varies in different states or zones/areas across the states. For instance, the minimum threshold in Kuala Lumpur is MYR 1m, whereas in Kuala Selangor in the state of Selangor, the threshold is a minimum of MYR 2m for residential property and MYR 3m for commercial and industrial property.

## 5.2 Foreign exchange control

Pursuant to the Foreign Exchange Administration (FEA) administered by the Central Bank of Malaysia (Bank Negara Malaysia – BNM), generally non-resident investors are free to:

- undertake any type of investment in ringgit assets or foreign currency assets in Malaysia (direct or portfolio investment) without any restriction;
- open a ringgit account or foreign currency account with a licensed onshore bank; funds are free to be remitted into and out of such accounts, subject to normal due diligence processes by a licensed onshore bank; and
- repatriate divestment proceeds, profits, dividends or any income arising from investments in Malaysia, provided that repatriation is made in a foreign currency.

Non-resident investors also have the flexibility to hedge foreign exchange exposure arising from their investments in Malaysia, either via a licensed onshore bank or an Appointed Overseas Office (AOO). Further details on AOOs is available on the BNM website on www.bnm.gov.my/documents/aoo/FAQ%20on%20AOO.pdf. Further information in respect of the FEA rules applicable to non-residents is also available on www.bnm.gov.my/index.php?lang=en&ch=fea&pg=en_fea_overview&ac=100.

## 5.3 Applicable tax incentive or grants

Malaysia offers a wide range of tax incentives designed to attract foreign investment. These incentives are applicable to, among others, the manufacturing, agricultural, tourism and approved services sectors, including R&D, training and environmental protection.

Direct tax incentives grant partial or total relief from income tax for a specified period, while indirect tax incentives come in the form of exemptions from import or export duty, sales tax and excise duties.

The key tax incentives available in Malaysia are pioneer status, investment tax allowance and reinvestment allowance. There are also ‘special pre-packaged’ incentives covering a number of areas of direct and indirect tax and regional economic corridors.

Other available tax incentives include double deduction of certain expenses, R&D incentives, industrial building allowance, principal hub incentive, incentives in the Labuan international business and financial centre, and tariff-related incentives, such as exemption from import duty on machinery, equipment or raw materials.

# Chapter 6: Restructuring and insolvency

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## 6.1 Main legislation and processes

The main legislation governing corporate restructuring and insolvency is the Companies Act, 2016, while individual bankruptcy is governed by the Insolvency Act, 1967. The main corporate restructuring and insolvency processes are corporate voluntary arrangement (CVA), judicial management (JM), schemes of arrangement, receivership and winding up. The first two processes are new statutory mechanisms that came into force on 1 March 2018. The procedural implementation of these mechanisms is governed by the Companies (Corporate Rescue Mechanism) Rules, 2018.

## 6.2 Corporate voluntary arrangements

The CVA is modelled on the company voluntary arrangement under the UK Insolvency Act, 1986. It is meant to be a quick and cheap restructuring process with little court intervention. As the CVA cannot be applied to public listed companies or companies with charges over its assets or undertakings, its application is limited to private companies with no secured debts.

The CVA is proposed by the directors of a company (which is not under JM and not being wound up) to the company and its unsecured creditors. No court sanction is required for a voluntary arrangement, even after it has been approved by the requisite majority of creditors and members. There is also no requirement to separate creditors into separate classes for the purpose of approving a voluntary arrangement.

A qualified insolvency practitioner is appointed as a nominee to assess the viability and prospect of success of the proposed CVA. He/she has to issue a statement with his/her opinion on whether the proposed arrangement has a reasonable prospect of being approved and implemented; whether the company is likely to have sufficient funds available during the proposed moratorium to enable the company to carry on its business; and that meetings of the company and its creditors should be summoned to consider the proposed CVA.

Upon the filing of a CVA application, a statutory moratorium of 28 days commences (subject to a further extension of 60 days). During this period, no proceedings may be taken by creditors against the company.

Once the requisite majority approval of the creditors (75 per cent of the total value of creditors present and voting at a meeting) and members (simple majority approval of 51 per cent) is obtained, the CVA will be implemented by a supervisor (who is normally the nominee). All parties will be bound by the voluntary arrangement, including non-consenting creditors.

There is no recourse under the Companies Act for aggrieved parties to challenge the proposal/arrangement or outcome of the creditors' meetings. There is, however, provision to challenge the act, omission or decision of the supervisor by way of an appeal to the court.

## 6.3 Judicial management

A company (via its members or board of directors) and its creditors (including contingent or prospective creditors) may apply to the court to appoint a qualified insolvency practitioner as a judicial manager of the company. The court must be satisfied that the company is or will be unable to pay its debts, and that the making of a JM order is likely to achieve one or more of the three statutory purposes: the company may survive; there may be a compromise or arrangement reached under section 366 of the Companies Act; or it would result in a more advantageous realisation of the company assets than on a winding up. Like a CVA, JM cannot be applied to public listed companies. However, JM is more popular than a CVA as it allows the arrangement of secured debts.

Upon the filing of a JM application, a statutory moratorium commences. During this period, no proceedings may be taken by creditors against the company. Only a debenture holder or a secured creditor may appear and oppose the application for JM, while an unsecured creditor may arguably be heard on the nomination of the proposed judicial manager. Once a judicial manager is appointed, the director's power to manage the company is largely stripped and placed in the hands of the judicial manager. If the company is in receivership, the receiver and manager must vacate the office, and if there is any pending winding up petition against the company, the same shall be dismissed. The judicial manager has wide powers, including the power to take control of assets, deal with and dispose of assets (including charged assets, subject to court approval), enter into new contracts, and summon persons to appear and produce documents relating to the company.

The judicial manager needs to come up with a rescue proposal within the first two months of his/her appointment, and the proposal needs to be approved by at least 75 per cent of the total value of creditors present at a meeting and voting.

Once approved, the judicial manager will submit the plan for sanction by the court. The plan will be implemented by the judicial manager and binding on all creditors, including the non-consenting creditors. The JM order remains in force for six months, and can be extended on the application of the judicial manager for another six months.

## 6.4 Scheme of arrangement

A scheme of arrangement (or compromise) is another corporate rescue mechanism. It can be adopted by a company that is not insolvent, but is facing financial difficulties. It is commonly used to alter the rights of creditors, reorganise the share capital of the company, or to undertake a reconstruction or merger involving the company.

The advantage of this process is that it enables the company to continue with its daily operations, even during times of financial distress, and the directors continue to be in control of the company.

A scheme of arrangement can be agreed by contract between the company and its creditors without any court intervention. Generally, there are two types of contractual schemes:

- a moratorium scheme of arrangement, where the creditors agree to restructure the debt by the postponement of payment, and the creditors will eventually be paid in full; and
- a compromise scheme of arrangement, where the creditors agree to a full settlement of their debts by accepting a reduced/discounted amount in cash or, sometimes, a share swap.

As contractual schemes are only binding on creditors who have consented to the same, the other non-consenting creditors are still free to pursue their remedies against the company.

In order to bind all creditors to a scheme of arrangement, an application may be made to the court for a statutory scheme of arrangement or compromise under the Companies Act (commonly known as a 'Section 366 Scheme'). The application for a Section 366 Scheme may be made by the company, any creditor or member of the company, a liquidator or a judicial manager. It is normal for such an application to include a request for an order to restrain all proceedings against the company pending the approval of the scheme. Such a restraining order may be granted for not more than three months, and may be extended for not more than nine months by way of application to the court.

The court may appoint an approved liquidator to assess and report to the court on the viability of the proposed scheme. The majority of 75 per cent in value of the creditors or class of creditors present and voting is required to approve the proposed scheme. Once approved and a court sanction is given, the scheme will be binding on all parties, including the non-consenting creditors.

## 6.5 Receivership

A receiver may be appointed privately by a creditor (debenture holder) or by the court.

### *6.5.1 Private receiver*

A private appointment is governed by the terms of the instrument creating the charge. Such an instrument is usually a debenture, often created by a company as a loan security in favour of a financial institution. It is usual for a debenture to provide for the appointment of not only a receiver but also a manager with the power to manage the charged assets. The scope of the debenture is critical, as the receiver/manager is only empowered to take control of assets that are charged under the debenture (either by way of a fixed charge or floating charge). There is a statutory presumption that the receiver/manager acts as the agent of the company, unless the instrument of appointment expressly provides otherwise. The receiver/manager seeks the best means of recovering for the debenture holder, without the need seriously to consider the benefits to the chargor.

### *6.5.2 Court-appointed receiver*

The court may appoint a receiver/manager under the following circumstances:

- the company has defaulted in its payment or obligations to a debenture holder;
- the company proposes to sell or otherwise dispose of the secured property in breach of the terms of any instrument creating the security or charge;
- it is necessary to preserve the secured property for the benefit of the debenture holder; or
- it is necessary to preserve the property of a company pending the disposal of a suit, where there is a good *prima facie* claim of title by the applicant and evidence that the property is in jeopardy.

A court-appointed receiver/manager is an officer of the court, and not an agent of the company.

### *6.5.3 Power and duties of a receiver*

In addition to the powers conferred either under a debenture or by a court order, a receiver shall have the powers set out in the sixth schedule of the Companies Act, which includes, among others, the power to take possession and control of the property in accordance to the terms of that order, grant options over the property, carry on the business of the company, demand and recover income of the property in receivership and exercise the right to inspect books or documents that relate to the property in receivership.

## 6.6 Winding up

There are two types of winding up process: compulsory winding up and voluntary winding up.

### *6.6.1 Compulsory winding up*

The company, its contributory and any creditor (including a contingent or prospective creditor) of a company may petition for the company to be wound up by the court. The commencement of winding up shall be at the date of the winding up order. Section 465(1) of the Companies Act stipulates 12 situations where the court may order a company to be wound up. The most common situation is where the company is unable to pay its debts. A company is deemed unable to pay its debt when it is indebted in a sum exceeding MYR 10,000 and fails to pay the same within 21 days on receipt of a written demand for payment; when an execution or other process issued on a judgment, decree or order of any court in favour of a creditor of the company is returned unsatisfied in whole or in part; or it is proved to the satisfaction of the court that the company is unable to pay its debt after taking into account the contingent and prospective liabilities of the company.

### *6.6.2 Voluntary winding up*

A company may also be wound up voluntarily by its directors and shareholders or creditors. The court is generally not involved in the process. A voluntary winding up shall commence where an interim liquidator has been appointed before the resolution for voluntary winding up is passed and, in any other case, at the time of the passing of the resolution for voluntary winding up.

There are two types of voluntary winding up:

- Members' voluntary winding up: The directors and shareholders of a company may agree for a resolution to be passed to wind up the company, even when the company is solvent. The directors must make a declaration of solvency by confirming that the company will be able to pay its debts in full within 12 months after the initiation of the winding up process. During this process, the assets of the company are sold, liabilities paid and the balance assets distributed among the members. If it is subsequently discovered that the company is insolvent, the members' voluntary winding up is converted into a creditors' winding up.
- Creditors' voluntary winding up: If the directors are unable to make a declaration of solvency, a resolution can still be passed for a creditors' voluntary winding up, whereby the creditors will be involved in charting the course of the liquidation.

### *6.6.3 Effect of winding up*

Once a winding up process has commenced, there shall be no disposition of property of the company other than an exempt disposition, including any transfer of shares or alteration in the status of the members of the company, except with the approval of the court.

Unless a private liquidator (often an accountant holding a liquidator's licence) is appointed, the official receiver will by default be appointed as the liquidator of the wound-up company. The wound-up company continues to exist as a legal entity under the management of the liquidator.

The liquidator's duties include managing the assets of the company, ascertaining its liabilities, investigating the internal affairs of the company, realising the assets, making the appropriate distribution to parties entitled to the assets and applying for the dissolution of the company when the winding up process comes to an end.

### 6.7 Personal bankruptcy

The statutory threshold for the commencement of bankruptcy proceedings against an individual debtor is a judgment debt of a minimum of MYR 50,000. On the making of a bankruptcy order, all the bankrupt's assets shall vest in the Directors General of Insolvency.

Pursuant to recent amendments to the Insolvency Act, 1967, a debtor may propose a voluntary arrangement to his/her creditors any time before he/she is adjudged bankrupt. A debtor who intends to propose a voluntary arrangement shall appoint a nominee to act in relation to the voluntary arrangement or for the purpose of supervising the implementation of the voluntary arrangement.

# Chapter 7: Employment, industrial relations, and work health and safety

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### 7.1 Employees' rights and protection

Employee's rights and other statutory protection for employees in Malaysia depend on several statutes.

The Employment Act, 1955 (EA) applies to employees in West Malaysia who earn a monthly salary of MYR 2,000 and below. They are employed:

- as manual labourers or supervisors of manual labourers;
- to operate or maintain any mechanically propelled vehicle for the purpose of transporting passengers or goods or for reward or commercial purposes;
- as a domestic servant; or
- in certain positions on seagoing vessels;

The Employment Act for minimum terms and conditions of employment, such as wage and hours, and several leaves, which may not be contractually waived.

The states of Sabah and Sarawak in East Malaysia have equivalent legislation (with some differing provisions) that cover similar categories of employees.

### *7.1.1 Working hours and leave*

Employees who come within the scope of the EA ('EA employees') are entitled to protection in terms of maximum hours of work. No EA employee may be required to work more than eight hours a day or more than 48 hours a week, or more than five consecutive hours without a break of at least 30 minutes. Every EA employee is entitled to one whole day of rest each week (rest day).

EA employees are also entitled to paid sick leave, annual leave and public holidays

#### Sick leave

Sick leave is as follows:

- 14 days in each calendar year if he or she has been in employment for a period of less than two years;
- 18 days in each calendar year if he or she has been in employment for a period of two years or more but less than five years; and
- 22 days in each calendar year if he or she has been in employment for a period of five years or more.

If hospitalisation is necessary, an EA employee is entitled to sick leave of 60 days in each calendar year, provided the total number of days of paid sick leave in a calendar year to which the employee is entitled does not exceed 60 days in aggregate.

#### Annual leave

Annual leave is as follows:

- eight days for every 12 months of continuous service if he or she has been in employment for a period of less than two years;
- 12 days for every 12 months of continuous service if he or she has been in employment for a period of two years or more but less than five years; and
- 16 days for every 12 months of continuous service if he or she has been in employment for a period five years or more.

#### Public holidays

There are 11 paid gazetted holidays, five of which must be:

- the National Day (31 August);
- the birthday of the King (Malaysia's monarch and head of state) (the first Saturday of every June);
- the birthday of the ruler of the state (differs from state to state) or the federal territory (1 February) in which the employee wholly or mainly works;
- Workers' Day (1 May); and
- Malaysia Day (16 September).

If an EA employee works in excess of p hours, he or she is entitled to overtime pay, which is calculated as follows:

- for any overtime work carried out in excess of normal hours of work, at a rate that is not less than 1.5 times the hourly rate of pay;
- for work on a rest day:
  - for any period of work that does not exceed half the normal hours of work, wages equivalent to 0.5 times the ordinary rate of pay for work done on that day; and
  - for any period of work that is more than half but that does not exceed the normal hours of work, one day's wages at the ordinary rate of pay for work done on that day;
- for any work carried out in excess of the normal hours of work at a rate that is not less than two times the hourly rate of pay; and
- for work on a public holiday, in addition to the day's wages, two days' wages at the ordinary rate of pay, regardless of whether the period of work done on that day is less than the normal hours of work, and for work in excess of the normal hours of work, at a rate that is not less than three times the hourly rate of pay.

Notwithstanding the payment of overtime pay, no EA employee may be required to work more than 12 hours a day or in excess of 104 hours of overtime in any one month.

Employees who are not covered by the EA ('non-EA employees') do not have any rights to sick leave, annual leave or paid public holidays. Neither do they have any limitations or restrictions on their hours of work and are entitled to overtime pay. Their rights in these matters are subject to contract.

All female employees (including non-EA employees) are entitled to paid maternity leave of no less than 60 consecutive days. This entitlement is limited to employees who have been in employment for no less than 90 days in the nine-month period immediately preceding confinement, which must include employment in the four months immediately preceding confinement. An employee is also not entitled to paid maternity leave if she has five or more surviving children.

### *7.1.2 Termination*

All employees in Malaysia, regardless of salary or nationality, enjoy protection against unjust dismissal. Pursuant to the Industrial Relations Act, 1967 (IRA), an employee may only be terminated for just cause or excuse. 'Just cause or excuse' is not defined by the IRA or any other legislation. Generally, misconduct, poor performance and redundancy are accepted as just cause for termination.

Where termination is on the ground of redundancy, termination or retrenchment benefit is payable. Case law dictates that if the financial position of the employer permits it, and especially if the retrenchment exercise is carried out with the aim of increasing efficiency and profits, fair and reasonable benefits should be made available. Currently, one month's salary for each year of service is considered fair and reasonable.

EA employees are entitled to minimum termination benefits as follows and pro rata in respect of an incomplete year of service, calculated to the nearest month:

- ten days' wages for every year of employment if he or she has been employed for a period of less than two years;
- 15 days' wages for every year of employment if he or she has been employed for a period of two years or more but less than five years; and
- 20 days' wages for every year of employment if he or she has been employed for a period of five years or more.

If the EA employee's contract of employment provides for a more favourable termination/retrenchment benefit, he or she is entitled to that contractual benefit.

#### *7.1.3 Retirement*

Permanent employees are entitled to the minimum retirement age of 60 years as provided for by the Minimum Retirement Age Act, 2012.

#### *7.1.4 Freedom of association*

Every employee has the right to freedom of association. The IRA prohibits any person from interfering with or restraining an employee from forming, assisting in the formation of or joining a trade union.

#### *7.1.5 Safety, health and welfare*

Pursuant to the Occupational Safety and Health Act, 1994, employees have a right to safety, health and welfare at work. Employers' duties extend, but are not limited to:

- the provision and maintenance of systems of work that are, so far as is practicable, safe and without risk to health;
- the provision of such information, instruction, training and supervision as is necessary to ensure, so far as is practicable, the safety and health at work of employees;
- so far as is practicable, the maintenance of any place of work in a condition that is safe and without risk to health;
- the provision and maintenance of the means of access to and egress from a place of work that are safe and without such risk; and
- the provision and maintenance of a working environment for employees that is, so far as is practicable, safe, without risk to health and adequate as regards facilities for welfare at work.

### 7.1.6 Data protection

The Personal Data Protection Act, 2010 (PDPA) gives employees the right to be informed by way of a Personal Data Protection notice (that is to be issued to them in both English and Malay) of the purpose of collection of their personal data, how their personal data will be processed and their rights as data subjects. These rights include the right to access personal data; to correct personal data where it is inaccurate, incomplete, misleading or not up-to-date; and to withdraw consent to the processing of personal data. In certain circumstances, for example, where sensitive personal data is processed or where data is transmitted beyond borders, the employee's explicit consent is required.

## 7.2 Statutory contributions and minimum wage

Employees' entitlement to statutory contributions and minimum wages are governed by the following legislation outlined below:

### 7.2.1 Employees Provident Fund Act, 1991

Employees Provident Fund Act, 1991 (EPF) makes it mandatory for all employers and most employees (except for those excluded from the application of the EPF Act) to contribute to a state-managed provident fund at contribution rates that are no less than the rate prescribed by the EPF Act. Contributions by foreign nationals employed in Malaysia and domestic servants are voluntary.

### 7.2.2 Employees' Social Security Act, 1969

The Employees' Social Security Act, 1969 provides social security for all employees in the event of contingencies, such as employment injuries. The act makes it mandatory for employers and employees to contribute to the fund at the rate prescribed by the act.

### 7.2.3 Employment Insurance System Act, 2017

The Employment Insurance System Act, 2017 provides certain benefits and a re-employment placement programme for insured persons in the event of the loss of employment, and makes it mandatory for employers and employees to contribute to the fund at the prescribed rate.

### 7.2.4 Minimum Wages Order, 2020

The Minimum Wages Order, 2020 provides different minimum wage rates payable to an employee, depending on the employee's place of employment. The minimum wage rate payable to an employee who works in a place of employment in any of the 16 City Council areas or the 40 Municipal Council areas specified in the Schedule to the Order is MYR 1,200 per month or MYR 5.77 per hour. The minimum wage rate payable to an employee who works in a place of employment in any areas other than the City Council or Municipal Council areas specified in the Schedule to the Order is MYR 1,100 per month or MYR 5.29 per hour.

## 7.3 Work permits

There are several types of work permit or visa available to foreign nationals who are gainfully employed in Malaysia. The types of pass issued by the immigration authorities of Malaysia are outlined below:

### *7.3.1 Short-term social visit pass*

Short-term social visit passes are issued at the entry point to foreign citizens for social and business visits, and are usually valid for 30 days or less. The duration is discretionary, but is usually for a period of 30 days. Examples of limited business purposes include attending meetings, conferences, business discussions or seminars; inspecting or setting up factories; auditing a company's accounts; signing agreements; and surveying business opportunities and investment potential.

### *7.3.2 Professional visit pass*

Professional visit passes are issued to foreign citizens who hold acceptable professional qualifications for the purpose of taking up professional work in Malaysia for a Malaysian entity for a short-term period (including extensions) not exceeding 12 months. Applications must be made by the Malaysian entity concerned.

### *7.3.3 Employment pass*

Employment passes are issued to foreign citizens who enter Malaysia to take up paid employment under a contract of service with an employer, referred to as expatriates. The duration of employment passes depends on the nature of employment and the needs of the employer. The maximum period for any employment pass is five years, and the norm is between two and three years.

Applications must be made by the employer, and the requirements below must be met before an application will be considered by the Immigration Department:

- minimum paid-up capital of employer ranging between MYR 250,000 and MYR 1m;
- recommendation from monitoring agencies;
- registration of employer with relevant monitoring agencies;
- minimum monthly salary of at least MYR 3,000;
- the skill, qualification and experience required for the expatriate position must be such that it cannot be fulfilled by local candidates; and
- the expatriate's role must be relevant to the activities of the employer.

### *7.3.4 Residence Pass–Talent*

The Residence Pass–Talent is only available in Peninsular Malaysia and is issued to foreign citizens considered to be high-achieving individuals with the capacity to drive business results that contribute towards the national key economic areas (NKEA). The 12 industries forming the NKEA are Greater Kuala Lumpur/Klang Valley; oil, gas and energy; palm oil; financial services; tourism; business services; communication, content and infrastructure; electronics and electrical; wholesale and retail; education;

healthcare; and agriculture. A high-achieving individual with the capacity to drive business results that contribute towards Malaysia's economic transformation may apply for the Residence Pass–Talent. Applications must be submitted by the foreign citizen online at https://rpt.talentcorp.com.my.

Applications are reviewed against a set of criteria designed to gauge both the applicant's qualifications and economic contributions to the country. The applicant is required to:

- have worked in Malaysia for a minimum period of three continuous years;
- hold a valid employment pass with more than three months' validity at the time of the application;
- hold a PhD, master's degree, bachelor's degree or diploma in any discipline from a recognised university, or a professional or competency certificate from a recognised professional institute;
- hold a Malaysian income tax file number and have paid income tax for at least two years;
- possess five years of total work experience; and
- earn a basic salary of MYR 15,000 per month.

#### *7.3.5 Visit pass (temporary employment)*

These passes are issued for the employment of foreign nationals as semi-skilled, unskilled or domestic helpers, from specific source countries in certain sectors of the economy, such as agriculture, construction, manufacturing, plantation and various types of services.

Different procedures for the recruitment of foreign workers are applicable to employers in Peninsular Malaysia, Sabah, Sarawak and the Federal Territory of Labuan.

# Chapter 8: Tax

*Preetha Pillai, Skrine, Kuala Lumpur*

## 8.1 Taxes applicable to individuals

#### *8.1.1 Tax resident employees*

Individual income tax is payable by tax resident employees at rates of between zero and 30 per cent (effective from the year of assessment 2020) on gross income in respect of gains and profits from employment exercised in Malaysia (after deducting personal relief and tax rebates).

The tax is deducted from the employee's salary and remitted to the tax authorities by the employer under the Monthly Tax Deduction (MTD) scheme. Under the MTD scheme, the employer must deduct and remit stipulated amounts of tax from the employee's emoluments to the Inland Revenue Board on a monthly basis. The amount to be deducted varies depending on multiple factors including, among others, the employee's residence status, marital status, contribution to retirement funds and number of dependents: see Income Tax (Deduction from Remuneration Rules), 1994.

Employees who have been subject to MTD and who fulfil the criteria of MTD as final tax are exempt from filing income tax returns. They can elect for the MTD as their final tax payment.

### 8.1.2 Non-tax resident employees

Non-tax resident employees do not qualify for tax relief or rebates and must pay tax at 30 per cent of their Malaysian source income.

For gains and profits from employment exercised in Malaysia, tax is deducted from the employee's salary and remitted to the tax authorities by the employer under the MTD scheme. Non-tax resident employees who exercise employment in Malaysia for a period or periods that together do not exceed 60 days in a calendar year are exempt from tax. However, the income of a non-resident individual who is a public entertainer is not exempt from tax.

## 8.2 Taxes applicable to businesses

### 8.2.1 Corporate income tax

Companies, limited liability partnerships and business trusts are subject to a 24 per cent income tax rate. Income of any person, other than a resident company carrying on the business of banking, insurance, or sea or air transport, for the basis year for a year of assessment derived from sources outside Malaysia and received in Malaysia, is exempt from tax.

From the year of assessment 2020 onwards, tax resident companies and limited liability partnerships with a paid up capital/capital contribution of MYR 2.5m and below (and which are not controlled by or do no not directly or indirectly control another company with a paid up capital of more than MYR 2.5m, and have a gross business income of less than MYR 50m) are subject to 17 per cent for the first MYR 600,000 of chargeable income. Any subsequent chargeable income will be taxed at 24 per cent.

Effective from 2008, Malaysia has implemented the single-tier system. Under the single-tier system, the tax on a company's chargeable income is the final tax and the dividends received in the hands of the shareholders is tax exempt. There is no WHT on Malaysian dividends.

### 8.2.2 Sales tax

Sales tax is a single-stage tax levied on goods manufactured and sold, used or disposed of in Malaysia by a registered manufacturer or imported into Malaysia by any person. Sales tax rates differ between five and ten per cent, depending on the group of taxable goods. There are specific sales tax rates applicable on other taxable goods, such as petroleum products.

### 8.2.3 Service tax

Service tax is charged and levied on taxable services provided in Malaysia by a registered person in the carrying on of his/her business at the rate of six per cent. However, an exemption of service tax is available for intra-group services.

## 8.3 Other taxes

### *8.3.1 Stamp duty*

Stamp duty is imposed on certain instruments and documents under the Stamp Act, 1949. The rate of stamp duty depends on the nature of the instrument involved and varies from a fixed charge, *ad valorem* or a certain percentage of the value of the subject matter of the transaction.

### *8.3.2 Digital service tax*

Digital service tax at the rate of six per cent is imposed on any foreign service provider who provides any digital service delivered or subscribed over the internet or other electronic network, which cannot be obtained without the use of IT and where delivery of service is essentially automated.

### *8.3.3 Excise duty*

Excise duty is levied on selected Malaysian manufactured products and selected imported goods, such as cigarettes and motor vehicles. Excise duty rates range from five to 105 per cent, depending on the category of the product.

### *8.3.4 Capital gains*

Malaysia does not impose tax on capital gains, save for gains on disposal of real property and shares in a real property company, which are chargeable to tax under the Real Property Gains Tax Act, 1976 at a rate (for a company) between 30 per cent for a disposal within the first three years of acquisition, and ten per cent for disposals in the sixth or subsequent years.

### *8.3.5 Customs duties*

Customs duties (including import duty and export duty) are imposed under the Customs Act, 1967. The rates, and any applicable exemptions, are set by subsidiary legislation made under the act and depend on the type of goods imported or exported. Most goods are subject to import duties ranging from zero to 60 per cent. Higher rates apply to luxury goods, automobiles, tobacco, alcoholic beverages, and processed and high-value food products.

### *8.3.6 Withholding tax*

When a payer who is a tax resident in Malaysia makes a payment to a payee who is a non-resident in Malaysia for a service rendered in Malaysia, the payer is required to withhold an amount according to the prescribed rate (varying between five and 25 per cent, depending on the nature of the payment and subject to the double taxation agreement) and remit the same to the Inland Revenue Board of Malaysia within the stipulated period.

# Chapter 9: Intellectual property

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## 9.1 Patents

The Patents Act, 1983 and Patents Regulation, 1986 provide for the law on the patentability, rights, ownership, infringement and offences relating to patents. An invention is patentable if it:

- is new;
- involves an inventive step;
- is industrially applicable; and
- does not fall into any non-patentable invention category, such as discoveries, scientific theories, mathematical methods, plant or animal varieties, or essentially biological processes for the product of plants or animals, schemes, and rules or methods for doing business.

An application for a grant of a patent can be filed with the Intellectual Property Corporation of Malaysia (MyIPO). As Malaysia has also acceded to the PCT, PCT applications can also be filed through MyIPO.

The duration of a patent shall be 20 years from the filing date of the application. However, where a patent application was filed before 1 August 2001, and was pending on that date, the duration of the patent granted on that application shall be 20 years from the date of filing or 15 years from the date of grant, whichever is longer. The duration of a patent granted before 1 August 2001 and still in force on that date shall be 20 years from the date of filing or 15 years from the date of grant, whichever is longer. Patent applications derived from PCT applications are protected for a maximum of 20 years from the international PCT filing date.

The owner of a patent has exclusive rights to exploit the patented invention, assign or transmit the patent and conclude licence contracts. The owner of a patent shall have the right to institute court proceedings against any person who has infringed or is infringing the patent by performing any act exploiting the owner's rights in the patent without the owner's agreement. The owner of the patent may obtain remedies, such as damages, an account of profits or injunctions.

Utility innovations are also protected under the Patents Act, 1983, and require the same elements as patents, except for the requirement of an inventive step. The duration of protection for a utility innovation is an initial term of ten years, which can be extended for two additional periods of five years each.

## 9.2 Trademarks

The Trademarks Act, 2019 and Trademarks Regulations, 2019 provide for the law on the use, registrability, duration, ownership, infringement and offences relating to trademarks.

A trademark means any sign capable of being represented graphically that is capable of distinguishing goods or services of one undertaking from those of other undertakings. A sign includes any letter, word, name, signature, numeral, device, brand, heading, label, ticket or shape of goods or their packaging, colour, sound, scent, hologram, positioning, sequence or motion, or any combination thereof.

Any person claiming to be a bona fide proprietor of a trademark may apply for the registration of the trademark if the person is using or intends to use the trademark, or has authorised or intends to authorise another to use the trademark in the course of trade. A trademark cannot be registered if:

- it is not capable of being represented graphically;
- it is not capable of distinguishing goods or services of one undertaking from those of other undertakings;
- it is not distinctive;
- it consists exclusively of signs or indications that may serve to designate the kind, quality, quantity, intended purpose, value, geographical origin or other characteristics of goods or services;
- it consists exclusively of signs or indications that have become customary in the current language of the territory or in the bona fide and established practices of the trade;
- it consists exclusively of the name of a country; or
- it contains or consists of recognised geographical indications.

Applications for registrations of a trademark must be made to MyIPO. Malaysia has acceded to the Madrid Protocol; thus, trademark owners may also obtain protection abroad by filing one international application through MyIPO.

The duration of protection is for ten years from the date of registration. This can be extended for additional ten year periods upon subsequent payment of renewal fees.

The registered proprietor of a trademark has the exclusive rights to use the trademark and authorise others to use the trademark in relation to the goods or services for which the trademark is registered. A registered proprietor of a trademark can also institute court proceedings against infringers for the infringement of a trademark. In enforcing trademark rights, the registered proprietor can seek remedies, such as damages, an account of profits in lieu of damages, injunctions and additional damages.

## 9.3 Copyright

The Copyright Act, 1987 provides for the law on the subsistence, duration, ownership, infringement and offences relating to copyright.

The following works are eligible for copyright:

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

- films;
- sound recordings; and
- broadcasts.

Derivative works of original works, such as translations, adaptations and arrangements, are eligible for copyright. Copyright protection does not extend to any idea, procedure, method of operation or mathematical concept.

In order for copyright to subsist, it must be shown that sufficient effort has been expended to make the work original in character, the work has been reduced to a material form and the author is a qualified person and that the work was first published in Malaysia. There is no registration requirement. There is a voluntary notification of copyright mechanism; however, failure to notify does not mean that copyright does not subsist in the said work. First ownership will vest with the author unless:

- the work is commissioned, in which case ownership will be deemed to be transferred to the person who commissioned the work; or
- the work was made in the course of the author's employment, in which case ownership will be deemed to be transferred to the author's employer.

The duration of protection for literary, musical or artistic works is for the life of the author plus 50 years. The duration for protection for published editions, films, sound recordings, broadcasts and performances is for 50 years from the beginning of the calendar year after which the work was first published or performed.

The rights conferred by copyright are the exclusive right to control the reproduction in any material form; communication to the public; performance, showing or playing to the public; distribution of copies to the public by sale or other transfer of ownership; and commercial rental to the public. The owner of a work that is protected by copyright can institute civil proceedings against any person who infringes the copyright, and seek remedies, such as damages, account of profits in lieu of damages, statutory damages or injunctions.

## 9.4 Designs

The Industrial Designs Act, 1996 provides for the registration, duration, ownership, infringement and offences relating to industrial designs.

Industrial design means the features of shape, configuration, pattern or ornament applied to an article by any industrial process or means, being features which in the finished article appeal to and are judged aesthetically. Industrial design does not include a method or principle of construction, or features of shape or configuration that are dictated solely by the function that the article has to perform or 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. The author of an industrial design shall be treated as the original owner of the industrial design unless:

- the industrial design is commissioned, in which case the person commissioning the industrial design shall be treated as the original owner of the industrial design; and

- the industrial design is created by an employee in the course of employment, in which case the employer shall be treated as the original owner of the industrial design.

The owner of an industrial design is entitled to make an application for the registration of the industrial design. An industrial design shall not be registered unless it is new. An application to register an industrial design must be made to MyIPO.

The duration of protection is five years from the date of filing. The period of registration of an industrial design may be extended for four further consecutive terms of five years each.

The owner of a registered industrial design shall have the right to institute legal proceedings against any person who has infringed or is infringing any of the rights conferred by the registration of the industrial design to obtain remedies, such as damages, account of profits in lieu of damages or injunctions.

## 9.5 Other

### *9.5.1 Geographical Indications Act, 2000*

The Geographical Indications Act, 2000 protects geographical indications. Geographical indication means an indication that identifies any goods as originating in a country or territory, or a region or locality in that country or territory, where a given quality, reputation or other characteristic of the goods is essentially attributable to their geographical origin. An application for the registration of a geographical indication can be made; however, protection will be given to a geographical indication regardless of whether or not the geographical indication is registered.

### *9.5.2 Layout-Designs of Integrated Circuits Act, 2000*

The Layout-Designs of Integrated Circuits Act, 2000 protects the layout of integrated circuits. Layout-design means 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.

### *9.5.3 Protection of New Plant Varieties Act, 2004*

The Protection of New Plant Varieties Act, 2004 provides for the protection of the rights of breeders of new plant varieties. An application for the registration of a new plant variety and a grant of a breeder's right can be made to the Plant Varieties Board.

# Chapter 10: Financing

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## 10.1 Licencing requirements for banks

Malaysia has a dual banking system, where the conventional banking system operates side-by-side with the Islamic banking system. The key statute governing the conventional banking industry is the Financial Services Act, 2013 (FSA), whereas the Islamic Financial Services Act, 2013 (IFSA) governs the Islamic banking industry. The regulator of banks licensed under the FSA and IFSA is Bank Negara Malaysia (BLM). BNM has broad powers of supervision and control over banking institutions licensed under the FSA and the IFSA. BNM has also issued various guidelines, standards and directives relating to, among others, prudential matters applicable to banking institutions, including standards relating to capital adequacy, liquidity, corporate governance, risk management and related party transactions.

A bank may be licensed under the FSA as a commercial bank or investment bank. Investment banks that undertake capital market activities in addition to banking activities are also regulated by the Securities Commission and are licensed to carry on business in dealing in securities under the CMSA. BNM and the Securities Commission work hand-in-hand to regulate investment banks and have both issued guidelines regulating investment banks.

BNM also regulates development financial institutions prescribed under the Development Financial Institutions Act, 2002 to promote the industrialisation of important sectors of the Malaysian economy.

The FSA regulates, among others, licensed business. Licensed businesses are businesses licensed by the Minister, on the recommendation of BNM under section 10 of the FSA. Licensed business includes the following activities with the following definitions under subsection 2(1) of the FSA:

1. banking business, which means
   '(a) the business of— (i) accepting deposits on current account, deposit account, savings account or other similar account; (ii) paying or collecting cheques drawn by or paid in by customers; and (iii) provision of finance; and (b) such other business as prescribed under section 3 [of the FSA]';

2. insurance business;

3. investment banking business, which means '(a) the business of— (i) accepting deposits on deposit account; and (ii) provision of finance; Act 671; (b) any regulated activity carried on pursuant to a Capital Page 18 of 180 Markets Services licence under the Capital Markets and Services Act 2007; and (c) such other business as prescribed under section 3 [of the FSA]'.

An applicant for a commercial banking licence, investment banking licence or Islamic banking licence under the FSA or IFSA must be a public company incorporated under the Companies Act, 2016.

A Labuan company may carry on business in Labuan as a Labuan bank licensed under the Labuan Financial Services and Securities Act, 2010 (LFSSA) or the Labuan Islamic Financial Services and

Securities Act, 2010 (LIFSSA). The Labuan banks are subject to the regulation and supervision of the Labuan Financial Services Authority (the 'Labuan FSA').

The LFSSA regulates, among others:

1. Labuan banking business, which means:

   '(a) the business of receiving deposits on current account, deposit account, savings account or any other account as may be specified by the [the Labuan FSA]; (b) Labuan investment banking business; (c) Labuan financial business (d) Labuan Islamic banking business; (e) such other business as the [Labuan FSA], with the approval of the Minister, may specify, in any currency (including ringgit where permitted by the Exchange Control Act 1953 or such other relevant law in force)';[13] and

2. Labuan investment banking business, which means:

   '(a) the business of providing credit facilities; (b) the business of providing consultancy and advisory services relating to corporate and investment matters, including dealing in securities, or making and managing investments on behalf of any person; (c) the business of undertaking foreign exchange transactions, interest rate swaps, dealings in derivative instruments or derivative financial instruments or any other similar risk management activities; (d) Labuan Islamic investment banking business; (e) Labuan financial business; or (f) such other business as the [Labuan FSA], with the approval of the Minister, may specify, in any currency (including ringgit where permitted by the Exchange Control Act 1953 or such other relevant law in force)'.[14]

For a person who carries on Labuan banking business, Labuan investment banking business or Labuan financial business to be a Labuan company, a foreign Labuan company (which is a corporation incorporated or registered under the Labuan Companies Act, 1990) or a Malaysian bank, he/she must hold a valid licence to carry on such business.[15]

# Chapter 11: Privacy laws and data protection

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The PDPA came into force on 15 November 2013. Certain industries, for instance, financial institutions and private hospitals, are subject to industry-specific secrecy requirements.

The PDPA applies to personal data held, used or to be used in Malaysia (whether recorded/processed manually or electronically), subject to certain exemptions.

Under the PDPA, personal data means any information in respect of commercial transactions, which is:

- processed wholly or partly by means of equipment operating automatically in response to instructions given for that purpose;

13 Sub-s 2(1) of the LFSSA.

14 Sub-s 2(1) of the LFSSA.

15 Sub-s 87(1) of the LFSSA.

- recorded with the intention that it should wholly or partly be processed by means of such equipment; or
- recorded as part of a relevant filing system or with the intention that it should form part of a relevant filing system;

that relates directly or indirectly to a data subject, who is identified or identifiable from that information or from that and other information in the possession of a data user, including any sensitive personal data and expression of opinion about the data subject.

The term ‘processing’, in the context of personal data, has a wide meaning. Under the PDPA, ‘processing’ means collecting, recording, holding or storing personal data, or carrying out any operation or set of operations on personal data.

## 11.1 Personal Data Protection Principles

The PDPA stipulates various principles that form the basis of protection of personal data and the free flow of information. The seven principles (the ‘Personal Data Protection Principles’) and a brief description on each principle are set out below.

### *11.1.1 General Principle*

The General Principle relates to the processing of personal data, including sensitive personal data. A data user shall not process personal data from the data subject unless consent is given. In the case of sensitive personal data, the data user shall not process such personal data unless it is with explicit consent or under very limited circumstances. This principle also states that the collection of data must be lawful, purpose-related and not excessive in nature.

### *11.1.2 Notice and Choice Principle*

Under the Notice and Choice Principle, a data user shall, by written notice in the national and English language, inform an individual of eight matters:

1. that personal data of the data subject is being processed by or on behalf of the data user, and shall provide a description of the personal data to that data subject;
2. the purposes for which the personal data is being or is to be collected and further processed;
3. of any information available to the data user as to the source of that personal data;
4. of the data subject’s right to request access to and the correction of the personal data and how to contact the data user with any inquiries or complaints in respect of the personal data;
5. of the class of third parties to whom the data user discloses or may disclose the personal data;
6. of the choices and means the data user offers the data subject for limiting the processing of the personal data, including personal data relating to other persons who may be identified from that personal data;

7. whether it is obligatory or voluntary for the data subject to supply the personal data; and
8. where it is obligatory for the data subject to supply the personal data, the consequences for the data subject if he/she fails to supply the personal data.

### 11.1.3 Disclosure Principle

The Disclosure Principle provides that personal data shall not, without the consent of the data subject, be disclosed for any purpose other than the purpose for which the personal data was to be disclosed at the time of collection of the personal data or a purpose directly related to it, or be disclosed to a third party other than that specified in the notice.

However, this principle is subject to section 39 of the PDPA, which sets out the circumstances where personal data may be disclosed without the consent of the data subject. The exemptions include the following circumstances:

- prevention of crime;
- investigations;
- court orders;
- reasonable belief of such a right to disclosure; and
- public interest.

### 11.1.4 Security Principle

This principle states that a data user shall, when processing personal data, take practical steps to protect the personal data from any loss, misuse, modification, unauthorised or accidental access or disclosure, alteration or destruction.

This principle is extended further to cover situations where the processing of personal data is carried out by a data processor on behalf of the data user. In such a situation, the data user shall, for the purpose of protecting the personal data from any loss, misuse, modification, unauthorised or accidental access or disclosure, alteration or destruction, ensure that the data processor:

- provides sufficient guarantees in respect of the technical and organisational security measures governing the processing to be carried out; and
- takes reasonable steps to ensure compliance with those measures.

### 11.1.5 Retention Principle

The Retention Principle provides that personal data processed for any purpose shall not be kept longer than is necessary for the fulfilment of that purpose. This principle mandates that the data user must take reasonable steps to ensure that all personal data is destroyed or permanently deleted if it is no longer required for the purpose for which it was to be processed.

#### *11.1.6 Data Integrity Principle*

The Data Integrity Principle specifies that personal data must be accurate, complete, not misleading and kept up-to-date.

#### *11.1.7 Access Principle*

The Access Principle provides that a data subject shall be given access to his/her personal data and be able to correct that personal data, except where compliance with a request to such access or correction is refused under the PDPA.

In light of the foregoing, so long as data to be processed falls within the definition of Personal Data, the PDPA applies and the Personal Data Protection Principles outlined above will have to be adhered to.

The processing of data without consent, unless exempt under the PDPA, is prohibited. The PDPA provides that anyone who contravenes the Personal Data Protection Principles commits an offence and shall, on conviction, be liable to a fine not exceeding MYR 300,000 or imprisonment for a term not exceeding two years, or both.

### 11.2 Offshore transmission and retention of data

The PDPA aims to regulate the flow of personal data outside Malaysia by prohibiting the transfer of personal data to any place outside Malaysia, unless consent to the transfer has been obtained. The PDPA sets out certain exceptions to the requirement of consent, such as where the transfer is necessary for the performance of a contract between the data subject and the data user.

# Chapter 12: Competition

*Tan Shi Wen, Skrine, Kuala Lumpur*

### 12.1 Legislation and the regulator

Competition law in Malaysia is governed by the Competition Act, 2010 and the relevant competition authority is the Malaysian Competition Commission (MyCC) which has been given wide powers of investigation and enforcement under the Competition Act.

### 12.2 Anti-competitive agreement

Section 4 of the Competition Act prohibits both horizontal and vertical agreements between enterprises that have the object or effect of significantly preventing, restricting or distorting competition in any market for goods or services (the ‘Chapter 1 Prohibitions’).

The act deems as anti-competitive all ‘horizontal agreements’ between enterprises that have the object of: (1) fixing purchase or selling prices or any other trading conditions; (2) sharing market or sources of supply; (3) limiting or controlling production, market outlet or market access, technical or technological development, or investment; or (4) bid rigging.

There is no similar deeming provision for 'vertical agreements', but the MyCC has set-out in its Chapter 1 Prohibition Guidelines the types of vertical agreements that the MyCC will initially consider as its enforcement priorities:

- those involving price (in particular, the MyCC states that it would take a strong stance against minimum resale price maintenance); and
- those involving non-price restrictions (eg, tying, exclusive distribution agreements, agreements that require the buyer to purchase all/most of its supplies from the supplier, exclusive customer allocation agreements, franchise agreements and up-front access agreements).

## 12.3 Abuse of dominance

Section 10 of the Competition Act prohibits an enterprise that is in a dominant position from engaging, either independently or collectively, in any conduct that amounts to an abuse of that dominant position in any market ('Chapter 2 Prohibitions').

'Dominant position' is when one or more enterprises possess significant power in a market to adjust prices, output or trading terms, without effective constraint from competitors or potential competitors. The act does not define 'abuse of dominant position', but provides a non-exhaustive list of what may amount to such conduct, such as imposing unfair prices or unfair trading conditions on any supplier or customer, refusing to supply an enterprise or a category of enterprises and so on.

The MyCC has set out in the Chapter 2 Prohibition Guidelines two categories of anti-competitive conduct in this regard: (1) 'exploitative conduct': taking advantage of the market structural conditions and charging an excessive price (eg, if a dominant entity believes that there are no new entrants likely, then it will set a high price to exploit customers); and (2) 'exclusionary conduct': conduct that prevents efficient new competitors from entering or significantly harming equally efficient competitors, either by driving them out or preventing them from effectively competing.

### *Exception/defence to a finding of an abuse of dominance*

A conduct will not amount to an 'abuse' of dominance if the enterprise in a dominant position has a reasonable commercial justification for its actions or such actions represent a reasonable commercial response to the market entry or market conduct of a competitor.

## 12.4 Merger controls

M&A are not subject to merger control under the Competition Act, but based on publicly available information, it is likely that the MyCC will be introducing merger control provisions in Q3 or Q4 of 2020.

Currently, merger controls have been introduced to regulate enterprises carrying on commercial activities relating to aviation services under the Malaysian Aviation Commission Act, 2015. Parties must notify the Malaysian Aviation Commission (MAVCOM) if a merger may result in a substantial lessening of competition within any aviation service market.

MAVCOM is unlikely to investigate a merger situation unless:

- the combined turnover of the merger parties in Malaysia in the financial year preceding the transaction is at least MYR 50m; or
- the combined worldwide turnover of the merger parties in the financial year preceding the transaction of the merger parties is at least MYR 500m.

## 12.5 Exemption orders

Parties may also apply to the MyCC for an individual exemption of a particular agreement or a block exemption of a category of agreements from the Chapter 1 Prohibitions. The applicant must show that they meet all the criteria set out in section 5 of the Act (the 'Exemption Criteria').

On 13 November 2019 the MyCC issued a block exemption order (BEO) for certain liner shipping agreements, namely vessel-sharing agreements (VSAs) between liner operators in which the parties agree on the operational arrangements relating to the provision of liner shipping services through transport by sea pursuant to section 8 of the Competition Act.

This BEO, which is effective for the period 7 July 2019 to 6 July 2022 (unless it is withdrawn by the MyCC), is the third BEO issued by the MyCC in respect of the said VSAs. The previous BEOs expired on 6 July 2017 and 6 July 2019. The liner shipping industry remains the first and only industry in Malaysia to receive formal block exemptions under the Competition Act.

## 12.6 Enforcement and penalties

An investigation by the MyCC has no duration and may arise in three ways: (1) the MyCC can initiate investigations; (2) by the direction of a minister for domestic trade and consumer affairs; (3) by third-party complaints.

The MyCC has wide powers under the Competition Act, which include:

- the power to enter and search premises with or without a warrant;
- the power to require access to or require the production of documents and information; and
- the power to impose interim directions during an investigation, such as prohibiting parties from acting in accordance with any agreement that may be in breach of the act.

Upon the finding of an infringement, the MyCC is empowered to impose a financial penalty of up to ten per cent of the worldwide turnover of an enterprise for any infringement of the prohibitions over the entire period during which the infringement occurred.

# Chapter 13: Dispute resolution

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## 13.1 Structure of the courts

The Malaysian judicial system is composed of subordinate and superior courts. The jurisdictions and powers of the courts are stipulated in the Subordinates Courts Act, 1948 (SCA) for the subordinate courts and Courts of Judicature Act 1964 (CJA) for the superior courts.

The hierarchy of the courts begins from the Magistrates' Court, Sessions Court, High Court, Court of Appeal and the Federal Court as the highest court of the land.

The Magistrates' Court and the Sessions Court form the subordinate courts, while the High Courts (consisting of the High Court in Malaya and the High Court in Sabah and Sarawak), the Court of Appeal and the Federal Court make up the superior courts.

The SCA and CJA outline the different jurisdictions of the courts in both criminal and civil matters. The sentences permissible to be delivered by the courts are also encapsulated in the SCA and CJA.

### *13.1.1 Magistrates' Courts*

For criminal matters, the First Class Magistrates' Courts have jurisdiction to try offences punishable by fines only (not exceeding MYR 100,000) or where their maximum term of imprisonment does not exceed ten years. Further, the two offences of: (1) robbery; and (2) lurking, house-trespass or housebreaking by night in order to commit an offence punishable with imprisonment are specifically stated to be under the jurisdiction of the First Class Magistrates' Courts. On the other hand, the Second Class Magistrates' Courts only have the jurisdiction to try offences for which the offence is punishable by a fine only or where the maximum imprisonment term does not exceed one year.

For civil matters, the First Class Magistrates' Courts can try all actions and suits where the amount in dispute or value of the subject matter does not exceed MYR 100,000. The Second Class Magistrates' Courts are only empowered to try original actions or suits of debt recovery or liquidated monetary demand of not exceeding MYR 10,000.

### *13.1.2 Sessions Court*

For criminal matters, the Sessions Courts have jurisdiction to try all offences, except offences punishable by death.

For civil matters, the Sessions Courts have unlimited jurisdiction to try matters pertaining to motor vehicle accidents, landlords and tenants, and distress. The Sessions Courts also have jurisdiction to try all actions and suits where the amount in dispute or the value of the subject matter does not exceed MYR 1m.

### 13.1.3 *High Court*

High Courts have unlimited original jurisdiction to try any criminal and civil matter, and pass any sentence and award allowed by law. High Courts also exercise supervisory, revisionary and appellate jurisdiction. For instance, High Courts may decide on Constitutional questions and hear appeals from subordinate courts, subject to the applicable laws.

The decisions of subordinate courts must involve an amount in dispute exceeding MYR 10,000 to be appealable except on a question of law. High Courts are also empowered to hear all appeals from subordinate courts where they concern the maintenance of wives or children, regardless of the amount in dispute.

### 13.1.4 *Court of Appeal*

Generally, every proceeding in the Court of Appeal shall be heard and disposed of by a panel of three judges or a greater uneven number of judges.

The Court of Appeal has jurisdiction to hear all appeals against any decision made by the High Court in the exercise of its original jurisdiction and in the exercise of its appellate or revisionary jurisdiction in respect of any criminal matter originated from the Sessions Court.

For civil matters, the Court of Appeal has jurisdiction to hear and determine appeals from any judgment or order of any High Court in any civil cause or matter, provided that, among others, the amount in dispute must exceed MYR 250,000 unless with leave of the Court of Appeal; the judgment or order sought to be appealed against is not a consent judgment or order; and the judgment or order sought to be appealed against is not one that relates to costs only unless with leave of the Court of Appeal.

### 13.1.5 *Federal Court*

The Federal Court was established under Article 121(2) of the Federal Constitution. It is the final court of appeal and/or the apex court in Malaysia.

Similar to the composition of the Court of Appeal, every proceeding in the Federal Court is usually heard and disposed of by a panel of three judges. That said, the law provides that Federal Court cases may be presided over by a panel of a greater uneven number of judges. For example, in 2019 an unprecedented bench of nine judges was convened to hear and deliver a landmark case in Malaysia.

The Federal Court has jurisdiction to hear and determine any criminal appeal from any decision of the Court of Appeal in its appellate jurisdiction in respect of any criminal matter decided by the High Court in its original jurisdiction.

For civil matters, the Federal Court only has jurisdiction to hear the following matters, subject to leave of the Federal Court being granted:

- the decision of the Court of Appeal in respect of any civil matter decided by the High Court in exercise of its original jurisdiction where it involves a question of general principle decided for the first time;
- the decision of the Court of Appeal in respect of any civil matter decided by the High Court in exercise of its original jurisdiction where it involves an important question of law and the further deliberation of the law will be for public advantage; or
- the decision of the Court of Appeal is in relation to any questions on the Federal Constitution, including the validity of any written law relating to any such provision.

## 13.2 Use of arbitration

In Malaysia, other than resolving disputes through court proceedings, which is the most commonly used method, there are also other forms of ADR, such as arbitration and mediation.

Arbitration proceedings are presided over by arbitrators and governed by the Arbitration Act, 2005. Arbitration proceedings may be held in the Asian International Arbitration Centre or any other premises agreed upon between the parties. Parties are also free to agree on the procedure to be abided by the arbitral tribunal in the conduct of the proceedings. An arbitration award is final, conclusive and enforceable, like any other court orders.

Parties entering into commercial agreements may agree to resolve their disputes through arbitration, which is often spelled out in the contract. Many opt for arbitration for various reasons and the most hailed advantage of arbitration is its confidentiality. In contrast to court proceedings, arbitration is a private process whereby only the parties to the dispute and the arbitrator presiding over the matter will be privy to the matter. The parties are prohibited from publishing, disclosing or communicating any information relating to the arbitration proceedings or an award made in those arbitral proceedings to any third party.

## 13.3 Other forms of dispute resolution

Other than court proceedings and arbitration, parties may also resolve their disputes through mediation. The mediation procedure is governed by the Mediation Act, 2012. In a mediation procedure, parties may jointly appoint a mediator from the list of Certified Mediators registered with the Malaysian Mediation Centre.

Mediation focuses on the interests and needs of the parties over and above the rights and legal positions of the parties under the law. Hence, mediation is a more relaxed and flexible procedure where parties are free to negotiate and voice their wants and expectations. Further, all admissions and concessions made or documents produced during mediation occur on a without-prejudice basis. A successful mediation will result in the signing of a settlement agreement or recording of a consent order.

In reality, mediation is often directed by courts before trials. There is an in-built mediation mechanism in the court proceedings. Mediation under the Mediation Act will not prevent the commencement of any civil action in court or arbitration.