



C L I F F O R D
C H A N C E

Malaysia:
Essential tips for
successful investment



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Malaysia has a population of over 29 million people and a rising middle class. With an educated and skilled workforce, sound infrastructure and business friendly policies, it continues to be a competitive destination for foreign investments.

Malaysia attracted foreign direct investments of US\$10.16 billion in 2012, and is the third largest recipient of foreign direct investment in Asean. Much of this investment is in new and emerging technologies, particularly in aerospace, semiconductors, solar, machinery and equipment, biotechnology, petroleum and petrochemical products and medical devices as well as the services sector.

Here are our top legal tips for successfully investing in Malaysia.

Relationships are key

As with other Asian countries, establishing and maintaining relationships is at the heart of doing business in Malaysia. Decisions made by Malaysian conglomerates can be influenced by the strength of business relationships. It is therefore important to invest the time and effort to build trust and a rapport with your proposed Malaysian partner.

The importance of due diligence

You should conduct a comprehensive due diligence exercise to understand and evaluate the risks associated with the target and/or your proposed Malaysian partner. Some of the risks include legal and regulatory challenges such as the foreign investment restrictions described below, as well as corruption and bribery risks. You should also be mindful of the history of your proposed Malaysian partner's other joint venture relationships, which could provide a useful insight into the way it does business.

Foreign investment restrictions and Bumiputera policies

Investments in certain industry sectors are subject to foreign shareholding limits imposed by the relevant sector regulators. For example, the insurance and banking sector is regulated by the Central Bank of Malaysia and the Ministry for Finance (where the maximum permissible foreign shareholding ranges from 30% to 100% depending on the activities conducted). The wholesale and retail industry is regulated by the Ministry of Domestic Trade and Consumer Affairs (where hypermarkets are subject to a 70% maximum permissible foreign shareholding but 100% foreign ownership is allowed for department stores, superstores and speciality stores).

The general requirement that all foreign investment in Malaysian companies be limited to 70% of the voting equity, with the remaining 30% being held

by "Bumiputeras" (Malays and Malaysian incorporated companies in which Malays hold more than 50% of the voting rights), was removed on 30 June 2009. The Bumiputera restriction now only applies in strategic industries such as telecommunications, aviation, ports, water and energy.

At the outset, you should seek to understand what the applicable relevant foreign investment restrictions are for your sector.

Joint venture arrangements

Most decisions of a Malaysian company require the approval of only a simple majority of shareholders, so a majority shareholding is normally sufficient for effective control of a company. However, there are some decisions which require the approval of 75% of shareholders, such as changes to the company's constitutional documents, reductions in share capital or the winding up of the company. You should bear the relevant shareholder approval thresholds in mind when determining the size of your investment.

Minority protection rights (eg reserved matters) are common in joint venture agreements and articles of association, and are enforceable under Malaysian law.

Public company issues

In certain circumstances, the acquisition of shares in a public company in Malaysia will trigger a mandatory general offer. This means that the acquirer must make an offer to acquire all remaining shares of the public company at a price which is the highest price paid by the acquirer and its concert parties within six months of the offer and during the offer period. An acquirer may be required to make a mandatory offer when:

- it (and parties acting in concert with it) acquires more than 33% of the voting shares in the company; or

- it (and parties acting in concert with it) owns more than 33% but less than 50% of the voting shares in the company, and acquires more than 2% of the voting shares in the company within a six month period.

Where a takeover offer is made and acceptances are received in respect of 90% or more of the shares to which the offer relates (other than shares already held at the date of the takeover offer by the acquirer and certain of its related parties) within four months of the making of the offer, the acquirer may compulsorily acquire the shares of the non-accepting shareholders.

Resident directors

The business and affairs of a Malaysian company must be managed by a board of directors. A company is required to have at least two directors who must have their principal or only place of residence in Malaysia (but they can be Malaysian or non-Malaysian citizens). If you are looking to establish a Malaysian incorporated company, you should consider who in your organisation might be an appropriate director, or identify local individuals to be directors.

Acquisition of interests in real property

The Guidelines on the Acquisition of Properties regulate the direct and indirect acquisitions of real property interests.

The following direct and indirect acquisitions resulting in a dilution of Bumiputera and/or government agency ownership of real property interests will require the approval of the Economic Planning Unit of the Prime Minister's Department of Malaysia (EPU):

- the direct acquisition of real property valued at more than MYR20 million;
- the indirect acquisition of real property via the acquisition of control (management control or more than 50% equity interest) of the shares in a company which holds total real property valued at more than MYR20 million and constituting more than 50% of the company's total assets.

In addition to having to obtain approval from the EPU, the company in which a foreigner invests and which holds real property will be subject to the Bumiputera Requirement and will need to have paid-up capital of at least MYR250,000. For a direct acquisition, these conditions have to be complied with before the transfer of the real property but for an indirect acquisition (via acquisition of shares), these conditions must be complied with within one year of the issuance of written approval from the EPU.

Merger control

Malaysian law does not have any merger control provisions. However, you will need to seek advice on whether the merger control regimes of any other jurisdictions are triggered by your transaction.

Foreign exchange controls

There are foreign exchange controls in Malaysia, which you should be mindful of when structuring your funds flow. In particular:

- a financial guarantee issued by a resident to a non-resident or a financial guarantee obtained by a resident from a non-resident must be registered with the Central Bank of Malaysia if the aggregate amount of the financial guarantee exceeds MYR50 million;
- a resident requires the prior approval of the Central Bank of Malaysia to obtain credit facilities in foreign currency in excess of MYR100 million in aggregate on a corporate group basis from non-residents (other than from a non-resident within the same corporate group in Malaysia);
- an investment in foreign currency assets by residents of Malaysia is permitted, except where the resident has domestic credit facilities and it funds the investment either through the conversion of Malaysian Ringgit, in which case its investment is limited to MYR50 million per calendar year on a corporate group basis; or from foreign currency credit facilities, in which case its investment is limited to MYR100 million per calendar year on a corporate group basis;
- a resident is permitted to pay another resident in foreign currency for settlement of goods and services only from its export earnings.

Enforcement

A foreign court judgment is enforceable in Malaysia under the Reciprocal Enforcement of Judgments Act 1958 only if it is registered in the appropriate Malaysian court. Amongst other requirements, the registration of a foreign court judgment is only possible if the judgment was given by a superior court from a limited number of foreign jurisdictions. Foreign court judgments from other jurisdictions are not enforceable unless a Malaysian judgment is secured by suing on the judgment in the Malaysian courts. On the other hand, Malaysia is party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, so foreign arbitral awards from a jurisdiction which is also party to the New York Convention should be recognised in Malaysia. If you enter into a commercial arrangement where any dispute is to be resolved outside Malaysia, it may be preferable to choose arbitration over court proceedings.

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These tips are just the starting point. Like investments anywhere, careful structuring, adequate due diligence and properly drafted documentation are essential and there are always industry and regional legal issues to consider.

We would be happy to share more of our Malaysia expertise with you to make your investment a success.