

DOING BUSINESS IN MALAYSIA

Labuan's Offshore Financial Centre

Introduction

Doing Business in Malaysia – Special Reference to Labuan's Offshore Financial Centre is designed to assist Australian investors and business operators exploring the opportunities for doing business in Labuan, Malaysia.

Malaysia's attractiveness as a location for investors and business operators comes from a strong economy, a highly skilled and multilingual workforce and low operating costs. The time zone for Malaysia is conducive for doing business globally, as Malaysia spans the close of business in the United States and the opening of Europe and Australia's trading day.

International investors are attracted by the stability of the Malaysian political system and the soundness of the nation's economy. They are also attracted by the fact that Malaysia is a prosperous, industrialised nation with relatively low cost wages and structures.

Availability of capital and a highly-educated and multilingual workforce ensure that Malaysia will maintain its position as a large supplier of services to the South East Asia region.

It is worth to note that significant growth has occurred in tourism over the past decade. Malaysia is now one of the most popular tourist destinations within the region, attracting millions of international visitors every year who are attracted by the country's unique natural beauty and relaxed lifestyle.

Malaysia's Forms of Business Organizations

Generally, in Malaysia any business enterprise must take one of the following three forms:-

- a sole proprietorship;
- a partnership;
- a locally incorporated company, or branch of a foreign company.

A) Sole Proprietorship and Partnership

A sole proprietor, as well as a partner of a business, is personally liable for the debts of the business. Partners of a business may draw up partnership agreements or be governed by the *Partnership Act 1961*. All sole proprietorships and partnerships must be registered with the Companies Commission of Malaysia ("CCM") under the *Registration of Businesses Act 1956*. Prior to the establishment of the CCM in April 2002, the functions relating to registration of businesses was undertaken by the Registrar of Businesses.

Please note that no foreign individuals or companies (whether locally incorporated or foreign) can be registered as a sole proprietor or as partners in a partnership with the CCM. The present laws of Malaysia do not permit partnerships with limited liability to be established, except for offshore limited partnerships in Labuan, under the *Labuan Offshore Limited Partnerships Act 1997*.

B) Incorporated Company

Any two or more persons may incorporate a company. Although there are three types of companies that may be formed, the most popular is a company limited by shares where the personal liability of members is limited to the amount if any, unpaid on their shares. A company may be either a private or a public company.

A private company is one whose articles of association restrict the right of its members to transfer their shares, restrict membership to 50 and prohibits any invitation to the public to subscribe for its shares or debentures or to deposit money with it.

A public company however, is generally one that desires to raise capital from the public. Such companies typically go on to seek listing of their shares on the Bursa Malaysia Securities Berhad ("BMSB"), the Malaysian stock exchange.

C) Branch of a Foreign Company

Instead of forming a local company, a foreign company may choose to operate a branch in Malaysia except if the company carries on business in wholesale and retail trade.

Guidelines on Foreign Participation in Wholesale and Retail Trade

The Malaysian *Guidelines on Foreign Participation in Wholesale and Retail Trade* provides that with effect from 1 November 1995, a foreign company is not allowed to establish a branch to carry on business in wholesale and retail trade in Malaysia. Instead, all foreign involvement is required to be through a company incorporated in Malaysia under the *Companies Act 1965*.

Under the *Guidelines on Foreign Participation in Wholesale and Retail Trade* ("WRT Guidelines"), all proposals for foreign involvement in wholesale and retail trade within the meaning of the WRT Guidelines must obtain the prior approval of the Committee on Wholesale and Retail Trade. This includes the opening of new branches or the relocation of existing businesses with foreign involvement.

Wholesale trade is defined as *the re-sale (sale without transformation) of new and used goods to retailers, to industrial, commercial, institutional or professional users or to wholesalers, or acting as agents in buying merchandise for, or selling merchandise to such persons or companies*". Retail trade is defined as *the re-sale (sale without transformation) of new and used goods to the general public, for personal or household/ consumption or utilisation, by shops, department stores, mail order houses, retail motor vehicle dealers, consumer co-operatives, auction houses, etc"*.

Typical Foreign Business Ventures

In practical terms, Australians desiring to carry on a business in Malaysia have the following options:-

- (a) register a branch office in Malaysia if the investor is a foreign company;
- (b) incorporate a separate Malaysian company as its subsidiary;
- (c) acquire all or a majority of the shares of an existing Malaysian company; or
- (d) enter into joint venture with a Malaysian company or individual typically through holding shares in a newly-incorporated joint venture company.

Federal Territory of Labuan - Offshore Financial Centre

When we think of the word “offshore”, the names of “Bermuda”, “Cayman Island”, “ British Virgin Island” or perhaps “Switzerland” are the ones that would probably come to mind before Labuan.

In a way that is unsurprising, as Labuan, is the nearest to Australia, is one of the newer additions to the list of the world’s offshore jurisdiction.

Labuan, an island of the coast of East Malaysia, is an integrated international financial offshore centre offering a wide range of financial products and services. Labuan was established as an International Offshore Financial Centre on 1 October 1990. It caters to promote offshore banking operations, offshore insurance and its related activities, trust and fund management and offshore investment holding companies.

Labuan benefits from a deep water port and position at the confluence of Eastern Asian’s trade routes, is also a free port where there is no sales tax, no service tax and import and export are levied.

There are various legislation enacted for the creation of the Labuan Offshore Financial Centre including the establishment of offshore companies which enjoy protection against public scrutiny of their existence and records.

The *Labuan Offshore Companies Act 1990* (hereinafter referred to as “OCA”) provides for the establishment of offshore companies and the registration of foreign offshore companies in Labuan. In addition, a foreign company incorporated under the laws of another country may also apply to be registered as being continued in Labuan.

Every offshore company may be a company limited by shares or by guarantee. The Offshore Companies may participate in the offshore activities and enjoy attractive tax treatment provided under the *Labuan Offshore Business Activity Tax Act 1990*.

The *Labuan Offshore Business Activity Tax Act 1990* provides for the reduction or complete exemption of income tax in respect of offshore business activities carried on by offshore companies in Labuan. Under the *Labuan Offshore Business Activity Tax Act 1990*, subject to certain provisos, **“offshore business activity”** means an offshore trading or an offshore non-trading activity carried on in or from Labuan in a currency other than the Malaysian currency by an offshore company with non-residents or with another offshore company, but excluding shipping operations other than charter of ships on a bareboat basis.

The offshore trading activities include banking, insurance, trading, management, licensing or any other activity which is not an offshore non-trading activity. Offshore non-trading activities refer to activities relating to the holding of investments in securities, stocks, shares, loans, deposits and immovable properties by an offshore company on its own behalf. Where an offshore company carries on both an offshore trading activity and an offshore non-trading activity, it shall be deemed to be carrying on an offshore trading activity.

Please note that banking, insurance and insurance related businesses, fund management, leasing, factoring and company management would require the offshore company to be licensed.

It is a requirement under the OCA that an offshore company must employ the services of a trust company, which is a company incorporated or registered under the *Offshore Companies Act 1990* and registered under the *Labuan Trust Companies Act 1990*, to carry on trust company business to the offshore companies.

The trust company acts as the agent for incorporating or registering offshore companies under the OCA and provides the registered office, Resident Secretary and performs the secretarial duties of the offshore company, such as lodgment of any documents required under the OCA. The trust company may also provide management and accounting services to the offshore companies and make available any of its trust officers for appointment as Resident Director.

Johnson Lawyers has in the past few years has a very good relationship with two prominent trust companies namely EC Trust (Labuan) Berhad (offshore Co. No. LL03637) and Bumiputra Commerce Trust Limited (offshore Co. No. LL04054)

To be an Offshore company, it must have at least one director and Resident Secretary who must be a Trust Officer of a trust company. There is no minimum capital requirement and the company may issue shares of different classes and of different rights but no bearer shares are allowed.

Offshore companies are required at all times to have a registered office in Labuan. No person in an offshore company could divulge to others any information concerning share holding, management and any business, financial or other transactions of the company.

Generally, an offshore company may only carries on business activities with persons other than residents of Malaysia except where permitted by Labuan Offshore Financial Services Authority Malaysia (LOFSA) and deal in currencies other than the Malaysian Ringgit, except for the purpose of defraying administrative and statutory expenses and receiving fees and commission.

The annual fee for offshore company is RM 2,600.00 (approximately AUD 870.00) while for foreign offshore company is RM 5,300.00 (approximately AUD 1,780.00)

Non-citizens employed in a managerial capacity in an offshore company in Labuan enjoy income tax exemption up to 50% of gross income until year of assessment 2006.

There are some tax incentives for offshore companies in Labuan.

The tax incentives are as follows:

- Offshore business transactions by an offshore company (including M&A of an offshore company and transfer of shares in an offshore company) are exempted from stamp duty.
- Operators and investors could stand to benefit from double tax agreements (DTA) between Malaysia and Australia as well as over other 50 countries.
- Malaysia has signed investment guarantee agreements (IGA) with more than 60 countries including Australia, providing additional protection against nationalization of investment undertaken in Labuan.
- Labuan is a duty free island where goods are brought in free of import duties, making it a shopping heaven for tourist and business travellers.

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