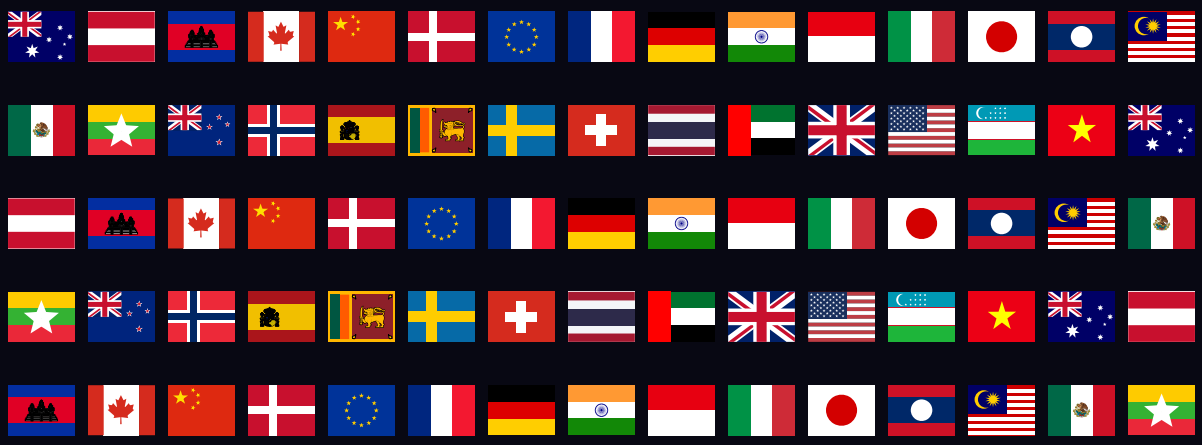
FOREIGN INVESTMENT REVIEW

Malaysia



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Getting The Deal Through

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Foreign Investment Review

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Quick reference guide enabling side-by-side comparison of local insights, including into law, policy and relevant authorities; procedure, including thresholds and timelines; substantive assessment, including interagency and international consultation, remedies and rights of challenge and appeal; relevant recent case law; and other recent trends.

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LAW AND POLICY

Policies and practices

What, in general terms, are your government's policies and practices regarding oversight and review of foreign investment?

Malaysia does not have a central regulatory authority, or legislation or guidelines that regulate all foreign investments into Malaysia. Instead, policies on foreign investment participation in Malaysia are sector-specific and are regulated by the regulatory authorities supervising these sectors.

Typically, policies on foreign investment participation in Malaysia are in the form of equity ownership or board representation restrictions. Presently, there are minimal restrictions on foreign investment participation in Malaysia, but that does not mean that there are no restrictions for foreign investments. Foreign investment participations in different sectors are broadly regulated by way of the following (collectively referred to as local participation requirements):

- a restriction on equity ownership of foreign investors by way of mandating minimum or majority equity ownership to be held by either local Malaysians or bumiputera, the indigenous ethnic group in Malaysia; and
- a requirement for a local Malaysian or bumiputera individual to be appointed as a director on the board of directors.

The maximum permitted percentage of equity ownership of foreign investors differs between sectors. The Malaysian government policies for the imposition of the local participation requirements are part of its nation-building process to encourage the transfer of knowledge, know-how and technologies from well-established foreign practices to local Malaysians, and bumiputera individuals and businesses.

Although Malaysia is generally regarded as friendly towards foreign investors doing business in the country, there are restrictions and prohibitions on doing business with investors from certain countries. For example, Malaysia has a trade embargo against Israel and any resident or non-resident in Malaysia is prohibited from engaging in any dealing or transaction with Israel, its residents and any entity directly or indirectly owned or controlled by Israel or its residents.

In addition to the above, the Malaysian government exercises currency control through Malaysia's own central bank, Bank Negara Malaysia (BNM). As part of its foreign exchange policy framework, BNM issues foreign exchange notices (notices) containing the latest rules relating to dealing of the ringgit and foreign currencies by resident and non-resident entities or individuals. These notices specify, among other things, permissible methods of dealing with the ringgit and foreign currencies, and set out permissible amounts that resident and non-resident entities or individuals may deal with in the ringgit and in foreign currencies.

As an example of currency control, one of the notices provides that non-residents remitting out divestment proceeds, profits, dividends and any income arising from investments in Malaysia must be repatriated in foreign currency, instead of the ringgit. Any deviation from the notices requires the prior approval of BNM.

Law stated - 18 December 2021

Main laws

What are the main laws that directly or indirectly regulate acquisitions and investments by foreign nationals and investors on the basis of the national interest?

Malaysia does not have overarching legislation that specifically regulates acquisitions and investments by foreign

nationals and investors on the basis of national interest. Generally, the acquisitions and investments by any person in Malaysia are subject to sectoral requirements, which are typically set out in subsidiary legislation and guidelines issued by the relevant regulatory authorities. Sectoral requirements include requirements to obtain the prior written approval of the relevant regulatory authority before an acquisition process is completed or to obtain operational licences prior to commencement of business. With regard to the acquisition and investments of foreign nationals and investors, apart from the foregoing, there may be additional requirements imposed, in that such foreign nationals and investors may be expected to comply with, among others, the local participation requirements prior to the completing an acquisition or investment. Non-compliance may result in the rejection of the application for approval or for an operational licence from the relevant regulatory authority.

As at December 2021, Malaysia does not have an overarching merger control regime; only the aviation and telecommunications sectors are subject to merger control measures, regulated by the Malaysian Aviation Commission (MAVCOM) and the Malaysian Communications and Multimedia Commission (MCMC) respectively. This makes it easier for foreign nationals and investors to make acquisitions and investments in Malaysia, provided they are not being made in the two aforementioned sectors. It should be noted, however, that the Malaysia Competition Commission (the regulatory body overseeing competition-related matters in Malaysia) has indicated its intent to introduce amendments to the Competition Act 2010, which could see the introduction of an overarching merger control regime in Malaysia.

Law stated - 18 December 2021

Scope of application

Outline the scope of application of these laws, including what kinds of investments or transactions are caught. Are minority interests caught? Are there specific sectors over which the authorities have a power to oversee and prevent foreign investment or sectors that are the subject of special scrutiny?

As the requirements are embedded in different subsidiary pieces of legislation and guidelines issued by the relevant regulatory authorities for each sector, the scope of the application of each requirement differs from one sector to another. The local participation requirements are central to foreign investors' consideration prior to an investment or entering into any transactions in Malaysia. They are enforced by regulatory authorities through the issuance of approvals, operational licences and employment passes, or the purchase of real estate in Malaysia. In this regard, imposition of the local participation requirements as a condition for the application or issuance of operating licences means that the foreign investors must comply with them prior to completing an investment or transaction, regardless of whether such investment or transaction is by way of a share acquisition or subscription or an asset acquisition.

To illustrate, companies providing transportation services to third parties using commercial vehicles (transportation services) are required to obtain the Carrier Licence A from the Land Public Transport Commission (APAD) for operators in Peninsular Malaysia. As a condition to obtain the Carrier Licence A, such companies must have at least 51 per cent local Malaysian equity, 30 per cent of which must be held by bumiputera . This means that a foreign investor who wants to acquire shares or invest in a company that provides transportation services in Malaysia must do the following:

- if it is by way of a share acquisition or subscription, the investor is restricted to acquiring or investing a maximum of 49 per cent of the entire issued and paid-up share capital of such company;
- if it is by way of an acquisition of the transportation services business, the acquiring company in which the foreign investor has interest must apply to APAD for the Carrier Licence A before consummating the transaction and, as such, it must comply with the local Malaysian and bumiputera equity requirements prior to the application.

Along with the imposition of the local participation requirements, there may be other administrative conditions imposed by the regulatory authorities, such as being required to (1) incorporate a private limited company under the laws of Malaysia, (2) acquire or invest a minimum amount of issued and paid-up share capital of the private limited company and (3) hire local Malaysians as a majority part of the workforce. Similar to the local participation requirements, these administrative conditions differ from one sector to another.

Apart from being a condition for obtaining an approval or operating licence, compliance with the local participation requirements could also be a prerequisite for participation tenders for procurement contracts, particularly tenders organised by the Malaysian government or other government-linked companies. This is fairly typical in the construction sector. To be compliant with the local participation requirements, foreign investors commonly enter into joint ventures with bumiputera individuals or companies (or both) to qualify for the tender.

In addition, acquisitions of assets by foreign investors may be prohibited. For example, under the Guidelines on the Acquisition of Properties issued by the Economic Planning Unit of the Prime Minister's Department, any person with a foreign interest is allowed to purchase all types of properties in Malaysia, except for properties valued at less than 1 million ringgit per unit, properties built on Malay reserved land and properties allocated to bumiputera interest in any property development project. This shows that the Malaysian government not only limits foreign investors' ability to comply with the local participation requirements but, in certain sectors, prohibits their participation entirely.

The other sectors that have restrictions or limits on foreign investors' participation include freight forwarding and shipping, financial services, oil and gas, education, and communications and multimedia.

In past years, attempts to circumvent the local participation requirements by way of nominee arrangements have been ruled unenforceable by the Malaysian courts, most notably in the case of Hj Afifi bin Hj Hassan v Norman Disney & Young Sdn Bhd & Ors 2014 7 MLJ 738 on the basis of illegality. These nominee arrangements include the appointment of local Malaysians or bumiputera as nominee shareholders in joint venture companies and the appointment of such persons as directors.

Law stated - 18 December 2021

Definitions

How is a foreign investor or foreign investment defined in the applicable law?

There are no overarching definitions of 'foreign investor' or 'foreign investment' in Malaysia. Typically, an individual with non-Malaysian citizenship and companies whose voting shares are majority owned by foreigners or foreign companies are regarded as foreign investors in Malaysia. Although the definition of 'majority owned' differs between each sector, it commonly refers to the ownership of more than 50 per cent of the entire issued and paid-up voting shares in a company, and it includes indirect ownership of the voting shares.

Law stated - 18 December 2021

Special rules for SOEs and SWFs

Are there special rules for investments made by foreign state-owned enterprises (SOEs) and sovereign wealth funds (SWFs)? How is an SOE or SWF defined?

Malaysian law does not provide any specific definitions or special rules for investments made by SOEs and SWFs. Like any other foreign investors, SOEs and SWFs must comply with sectoral requirements, including, where applicable, the local participation requirements.

Law stated - 18 December 2021

Relevant authorities

Which officials or bodies are the competent authorities to review mergers or acquisitions on national interest grounds?

As foreign investment participation requirements are sector-specific, the regulatory authorities in those sectors are responsible for reviewing the mergers or acquisitions undertaken by foreign investors, and if applicable, to enforce the local participation requirements. For example, Petronas is empowered by the Petroleum Development Act 1974 to supervise and regulate the oil and gas industry, while BNM is empowered by the Central Bank of Malaysia Act 2009 to supervise and regulate the financial services industry.

Since the aviation and communications and multimedia sectors have their own merger control regimes, MAVCOM and the MCMC are empowered to review mergers or acquisitions or joint venture transactions involving entities in their sectors to ensure that such transactions do not substantially lessen competition in the relevant markets.

Although Malaysia does not have a central regulatory authority, the Malaysian Investment Development Authority (MIDA) oversees the promotion of the manufacturing and services sectors in Malaysia. Foreign investors intending to make investments in Malaysia may access MIDA's website , which provides extensive information on requirements in the manufacturing and services sectors in Malaysia, and also the applicable incentives available.

Law stated - 18 December 2021

Notwithstanding the above-mentioned laws and policies, how much discretion do the authorities have to approve or reject transactions on national interest grounds?

The powers and discretion granted to each regulatory authority in the legislation applicable to them are typically wide. It is not unusual that the legislation confers absolute discretion to the regulatory authority to approve or reject transactions without giving any reasons.

Law stated - 18 December 2021

PROCEDURE

Jurisdictional thresholds

What jurisdictional thresholds trigger a review or application of the law? Is filing mandatory?

Consideration would be given as to whether the foreign investor has complied with the relevant local participation requirements, and other administrative conditions imposed by the regulatory authorities in the relevant sectors. The application process for approval or for an operational licence will require filing with the relevant authorities, together with supporting documents proving the foreign investor's compliance with the local participation requirements and other applicable administrative conditions.

Law stated - 18 December 2021

National interest clearance

What is the procedure for obtaining national interest clearance of transactions and other investments? Are there any filing fees? Is filing mandatory?

The procedures differ from one sector to another and may be determined by the relevant regulatory authority in accordance with the steps and requirements that may be specified under the relevant subsidiary legislation and guidelines. Typically, prescribed filing or application fees are imposed for each application for approval or operational licences and these are usually published on the regulatory authority's website or in the guidelines issued by it.

In practice, the application procedures usually entail the completion of prescribed forms, accompanied by information regarding the applicant's shareholding structure, the composition of the board of directors and share capital information, together with other supporting documents proving the applicant's compliance with the relevant local participation requirements and other applicable administrative conditions.

Law stated - 18 December 2021

Which party is responsible for securing approval?

This depends on the nature of the transaction and the legal requirements in each sector. Typically, if the transaction involves an application for approval regarding a change of shareholder pursuant to a condition imposed by the existing operational licence of the target company, the company will be responsible for securing such approval. However, if a foreign investor is acquiring an aggregate interest in shares of 5 per cent or more in the shares of a financial institution, the foreign investor, in accordance with the Financial Services Act 2013 (FSA), will be responsible for obtaining Bank Negara Malaysia's (BNM) prior written approval. There may also be other instances where the shareholder is required to complete a fit-and-proper test, for example companies involved in aviation services.

Law stated - 18 December 2021

Review process

How long does the review process take? What factors determine the timelines for clearance? Are there any exemptions, or any expedited or 'fast-track' options?

This depends on the regulatory authorities of each sector. A crucial factor to determine the timeline for clearance would be the submission of a complete set of the required documents. This means the regulatory authorities do not have to request further information and, therefore, may accelerate the application process. There are generally no fast-track options available, but it is not uncommon to provide a note on the urgency of the matter to the relevant regulatory authorities for their consideration.

Law stated - 18 December 2021

Must the review be completed before the parties can close the transaction? What are the penalties or other consequences if the parties implement the transaction before clearance is obtained?

This depends on the legal requirements that apply to each transaction. Usually, applications for approvals or operational licences must be submitted, and accordingly such approvals or operational licences must be obtained prior to the closing of a transaction (which means the transaction documents may be executed first). However, for the acquisition or investment in the shares of financial institutions, BNM's prior approval is required before the transacting parties can execute the relevant sale and purchase agreement. The conditions in certain operational licences may also require the licence holder to notify the relevant regulatory authorities of the closing of the transaction. The consequences for non-compliance with the foregoing include monetary penalties, possible legal proceedings by the regulatory authorities to prevent the consummation of the transaction, and revocation of the existing approvals or

operating licences.

Contrary to the above, the Guidelines on Foreign Participation in Distributive Trade Services in Malaysia (the WRT Guidelines) were issued by the Ministry of Domestic Trade and Consumer Affairs (MDTCA) specifically to regulate foreign investment participation in the distributive trade sector. The Guidelines do not carry legal force per se. For example, a foreign investor that is acquiring a majority of the issued and paid-up share capital of a Malaysian company engaging in 'distributive trade' (such as a company distributing personal care products) is required under the WRT Guidelines to obtain the prior approval of the MDTCA. The consequence of not complying with the requirements in the WRT Guidelines tend to be administrative in nature (as opposed to monetary penalties, for example), in that the foreign-owned company may have applications for employment passes for its expatriates rejected by the Malaysian immigration authorities. This is because the approval from the MDTCA is one of the supporting documents required to process the application for an employment pass.

Law stated - 18 December 2021

Involvement of authorities

Can formal or informal guidance from the authorities be obtained prior to a filing being made? Do the authorities expect pre-filing dialogue or meetings?

Yes, formal or informal guidance from the regulatory authorities prior to an application can be made. In some cases, the regulatory authorities may be the ones requesting a dialogue to understand the foreign investor's proposed investment in Malaysia in more detail. Such dialogue may be held in person or online (due to the covid-19 pandemic, an online meeting is now the preferred option).

Law stated - 18 December 2021

When are government relations, public affairs, lobbying or other specialists made use of to support the review of a transaction by the authorities? Are there any other lawful informal procedures to facilitate or expedite clearance?

The regulatory authorities are generally open to discussions. If certain matters have not been clearly regulated under the prevailing laws or if certain provisions under the prevailing laws may lead to various interpretations, the regulatory authorities are typically receptive to discuss and hear any comments put forth by the affected companies. If the company has its own internal government relations department or persons, contact may be established between such persons and the relevant regulatory authorities prior to the application for an approval or an operation licence.

There are generally no options available to expedite clearance, but it is not uncommon to provide a note on the urgency of the matter to the relevant regulatory authorities for their consideration. In our experience, the provision of adequate information that fulfils the documents list specified in the regulatory authorities' guidelines, and a formal meeting prior to submission of an application, could facilitate a smooth application process as this may potentially limit the regulatory authorities' request for further information.

Law stated - 18 December 2021

What post-closing or retroactive powers do the authorities have to review, challenge or unwind a transaction that was not otherwise subject to pre-merger review?

The powers vested in the regulatory authorities are specific to the legislation that governs them. Certain legislation,

such as the FSA, empowers the relevant regulatory authorities to issue orders to the defaulting parties to unwind the transaction. Taking the FSA as an example, if a transaction is completed without BNM's approval, in contravention of the requirements under the FSA, BNM is vested with powers to order the defaulting party to cease operating or to relinquish its control over the financial institution. In other cases, even if the regulatory authorities are not vested with such powers under the relevant legislation, if the transactions were carried out in contravention of the relevant legislation, they may resort to other legal remedies, such as instituting legal proceedings in the Malaysian courts to estop or unwind the transaction on grounds of illegality.

Law stated - 18 December 2021

SUBSTANTIVE ASSESSMENT

Substantive test

What is the substantive test for clearance and on whom is the onus for showing the transaction does or does not satisfy the test?

The substantive test for clearance on foreign investment will predominantly focus on the compliance of foreign investors with the laws and regulations in the relevant sectors, including but not limited to the local participation requirements (if applicable) in the sector they are investing in, minimum capital requirements if any, and other administrative conditions.

Specifically for the financial sector, Bank Negara Malaysia (BNM) has set out certain technical requirements with respect to the establishment of companies engaged in the financial sector with regard to their financial liquidity. Similarly, other sectors may also have specific requirements that are technical and operational in nature.

Law stated - 18 December 2021

To what extent will the authorities consult or cooperate with officials in other countries during the substantive assessment?

This would depend on the regulatory authorities in each sector. For highly regulated sectors such as financial services or capital markets, BNM and the Securities Commission may consult or cooperate with their counterparts in other countries.

Law stated - 18 December 2021

Other relevant parties

What other parties may become involved in the review process? What rights and standing do complainants have?

Unless there is a dispute with regard to the particular transaction (eg, prior consent of another regulatory authority was not obtained or there was a breach of other terms in a contract), other parties will not become involved in the review process.

Law stated - 18 December 2021

Prohibition and objections to transaction

What powers do the authorities have to prohibit or otherwise interfere with a transaction?

The powers and discretion granted to each regulatory authority in the legislation applicable to it are typically wide. It is not unusual that the legislation confers absolute discretion to the regulatory authority to prohibit transactions without assigning any reasons. Generally, however, if the requirements in the applicable legislation and guidelines have been complied with, it is highly unusual for a regulatory authority to interfere with a transaction.

Law stated - 18 December 2021

Is it possible to remedy or avoid the authorities' objections to a transaction, for example, by giving undertakings or agreeing to other mitigation arrangements?

Yes, if there are any potential issues with an application for approval or to obtain an operational licence, the foreign investors may have a dialogue or consultation with the relevant regulatory authorities and agree on any mitigation arrangement. However, this is subject to the regulatory authorities' discretion.

Law stated - 18 December 2021

Challenge and appeal

Can a negative decision be challenged or appealed?

Although it is legally possible to challenge any negative decisions in the Malaysian courts, this rarely happens. Typically, if the legislation or guidelines provide an avenue for appeal, a negative decision may be appealed to the relevant regulatory authorities. Otherwise, a fresh application may be resubmitted for the regulatory authorities' consideration, once any non-compliance in the initial application has been rectified.

Law stated - 18 December 2021

Confidential information

What safeguards are in place to protect confidential information from being disseminated and what are the consequences if confidentiality is breached?

The laws do not provide specific safeguards to protect confidentiality of an application during a review process and any confidentiality obligations would have to be contractually agreed. It is not common practice, however, for a regulatory authority to agree to enter into a non-disclosure agreement with the applicant with regard to the application and information being submitted. Practically, all information submitted as part of an application should be labelled as confidential information to make the officers in charge aware of the sensitivity of the information.

Notwithstanding the above, although the review process differs between each sector, the regulatory authorities generally do not publish information regarding an application for an approval or operating licence that is under review and, in this regard, we are not aware of any lists containing such information that exist in the public domains operated by the regulatory authorities.

Law stated - 18 December 2021

RECENT CASES

Relevant recent case law

Discuss in detail up to three recent cases that reflect how the foregoing laws and policies were applied and the outcome, including, where possible, examples of rejections.

The review of an application for an approval or an operating licence is confidential and neither the outcome nor the reasoning is typically released to the public.

Although it is not an example of recent case law, Hj Afifi bin Hj Hassan v Norman Disney & Young Sdn Bhd & Ors may be of particular interest. In this case, the petitioner, Hj Afifi bin Hj Hassan, had filed a petition to wind up the company in court, which the respondents challenged. The company's business was being carried out in breach of the statutory requirements of the Registration of Engineers Act 1967 (REA). The Court of Appeal found that the company's directors had deceived and misrepresented the authorities and the public that the company was owned and controlled by bumiputera . In fact, the company was controlled by an Australian company through an elaborate nominee scheme involving the execution of various agreements and the use of power of attorney. The Court found that the establishment of the company was illegal as it was against Malaysian public policy and the agreements were also illegal ab initio as they were executed to circumvent the statutory requirements of the REA. Ultimately, the Court also found that if the winding-up order was not granted, the company would continue to exist and carry on its business in blatant disregard of the REA. Therefore, the Court held that it must act on the illegality and a winding-up order was granted as the Court could not endorse the existence of a company tainted with illegality.

Similarly, in Hasmah Bte Abdul Rahman v Kenny Chua Kien Lam 2006 5 MLJ 236, the respondent, Kenny Chua, 'sold' shares in a company to the nominee appellant, Hasmah Bte Abdul Rahman (without any payment by the nominee). The respondent subsequently made a statutory declaration to the Kuala Lumpur Stock Exchange and the Securities Commission, giving the impression that the 30 per cent bumiputera equity participation in companies that intend to list on the Second Board of the Kuala Lumpur Stock Exchange had been complied with. The respondent subsequently demanded the return of, among other things, the shares 'sold' to the appellant. The Federal Court opined that the sale of shares to the appellant was 'a transaction entered into for an unlawful purpose to achieve an unlawful end', and that by filing the statutory declaration, the regulatory bodies had been deceived. Accordingly, the Court regarded the trust arrangement between the respondent and the appellant nominee to be tainted with illegality. Consequently, the Court allowed the shares to 'lie where they fall' – namely, in the hands of the appellant nominee.

Thus, based on the foregoing case law, if foreign investors enter into a nominee arrangement to circumvent any local participation requirements, although the circumvention may not attract monetary penalties per se, the foreign investors will face difficulties in enforcing the nominee arrangement.

Law stated - 18 December 2021

UPDATE AND TRENDS

Key developments of the past year

Are there any developments, emerging trends or hot topics in foreign investment review regulation in your jurisdiction? Are there any current proposed changes in the law or policy that will have an impact on foreign investment and national interest review?

In March 2021, the Malaysia Competition Commission (MyCC) announced that it was aiming to propose amendments to the Competition Act 2010 by the end of 2021. The proposed amendments seek to introduce an overarching merger control regime in Malaysia. Although the draft bill has not been released, the MyCC seems to be leaning towards

making the merger control regime mandatory in nature. This would mean that mergers and acquisitions and joint venture transactions would be subjected to filing with the MyCC if certain thresholds are met and such transactions may not be completed until clearance has been obtained from the MyCC.

As part of the Malaysian government's measure to combat the effect of covid-19 on the economy, on 5 June 2020 the Prime Minister announced a series of short-term economic recovery measures called 'Penjana' with a total value of approximately 35 billion ringgit. Certain initiatives are targeted at encouraging more foreign direct investment into Malaysia and include the provision of advantageous tax rates and allowances to assist companies intending to relocate their operations to Malaysia – for example, a zero per cent special tax rate for 10 years for new investments in the manufacturing sector with capital investment of between 300 million ringgit and 500 million ringgit. Further information on Penjana can be found on the MIDA's website .

Law stated - 18 December 2021

Jurisdictions

Australia	Gilbert + Tobin
Austria	Barnert Egermann Illigasch Rechtsanwälte
Cambodia	Tilleke & Gibbins
Canada	McCarthy Tétrault LLP
China	Global Law Office
Denmark	Bech-Bruun
European Union	Allen & Overy LLP
France	White & Case LLP
Germany	Blomstein
India	AZB & Partners
Indonesia	Nagashima Ohno & Tsunematsu
Italy	Gianni & Origoni
Japan	Tokyo International Law Office
Laos	Tilleke & Gibbins
Malaysia	Nagashima Ohno & Tsunematsu
Mexico	White & Case LLP
Myanmar	Tilleke & Gibbins
New Zealand	Russell McVeagh
Norway	CMS Kluge
Spain	White & Case LLP
Sri Lanka	Tiruchelvam Associates
Sweden	BOKWALL RISLUND Advokatbyrå
Switzerland	Lenz & Staehelin
Thailand	Nishimura & Asahi
United Arab Emirates	Afridi & Angell

USA	Cleary Gottlieb Steen & Hamilton LLP
Uzbekistan	Winfields
Vietnam	Tilleke & Gibbins