

# Luther.

## Doing Business in Malaysia



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# A. Entity Form

When establishing a business presence in a new jurisdiction, it is crucial to choose the right entity form. The entity forms most commonly used by foreign investors are:

- the representative office or the regional office;
- the branch office;
- the *Sendirian Berhad* (“**Sdn. Bhd.**”), a company with limited liability; and
- the Limited Liability Partnership (“**LLP**”).

## i. The Representative/Regional Office

The simplest way for foreign entities to establish a business presence in Malaysia is the registration of a representative or regional office. The entity form serves only as a transitional structure and cannot be used for any commercial activities.

### 1. What is a Representative/Regional Office?

The representative office (“**RO**”) is the appropriate legal entity for entities active in the manufacturing or servicing sector wishing to “test the water” before entering the Malaysian market. The RO has the benefit of enabling a non-Malaysian company to study the local business environment and relevant market without establishing a new legal entity. This structure allows for more flexibility but also has its disadvantages. An RO is registered by a foreign entity and forms part of its company. In other words, the RO is not a separate legal entity and, therefore, the foreign entity is liable for its RO in Malaysia.

A Regional Office (“**RGO**”) is an office of a foreign entity that serves as the coordination centre for the entity’s affiliates, subsidiaries and agents in South-East Asia and the Asia Pacific region. The established RGO is responsible for the designated activities of the entity within the region it operates.

### 2. For How Long Can One Operate an RO/RGO?

An RO/RGO can be registered for an initial period of two (2) years – after which it can be renewed for up to a maximum of three (3) more years, subject to the authorities’ discretion. An RO thus remains a transitional structure as its maximum period of validity will be limited to five (5) years.

Once that period has elapsed, if the business chooses to maintain its presence in Malaysia, it must either incorporate a subsidiary or register a branch office as outlined below.

### 3. Eligibility Criteria

The following conditions must be met for the creation of an RO/RGO:

- the project must be entirely funded by sources exterior to Malaysia; and
- the expected operational expenditure must be at least MYR 300,000 per annum.

### 4. Restricted Activities

Since ROs/RGOs are only meant to be preliminary/transitional structures, they are not allowed to undertake any commercial activities. The following are activities expressly allowed or disallowed:

#### a) Allowed

- planning and coordination of business activities in Malaysia or the region;
- collection and analysis of data, undertaking feasibility studies pertaining to investment and business opportunities in Malaysia and the region;
- identification of sources of raw material, components and industrial products;
- research and product development;
- coordination of subsidiaries, affiliates and agents in the region;
- liaison office;
- identification of suitable partners and agents/distributors; and
- other activities which will not result directly in actual commercial transactions (e.g. local or technical support to Malaysian firms without fees).

#### b) Not allowed

- engaging in any trading (including import and export), business or any form of commercial activity;
- leasing warehousing facilities; any shipment/transshipment or storage of goods shall be handled by a local agent or distributor;
- signing business contracts on behalf of the foreign corporation or providing services for a fee; and
- participating in the daily management of any of its subsidiaries, affiliates or branches in Malaysia.

## 5. Registration

The application for the registration of an RO/RGO in Malaysia should be addressed to the Malaysian Investment Development Authority (“MIDA”) or Bank Negara Malaysia (if related to banking and financial services) and must be accompanied by three (3) sets of the following documents:

- cover letter signed by authorised signatory;
- application forms;
- certificate of incorporation of the parent company;
- latest audited financial statements of the parent company (last two (2) years); and
- company profile (in .pdf or .ppt).

The examination of the application usually takes four (4) to six (6) weeks.

## 6. Fees<sup>1</sup>

Our fee for the registration of an RO/RGO is fixed at MYR 10,000. For the renewal of an RO/RGO the fee is fixed at MYR 7,000. An hourly rate of between MYR 250 and MYR 1,500 applies if specific advice is required. The above fees are exclusive of any expenses incurred in respect of the registration/renewal.

## ii. The Branch Office

### 1. What is a branch office?

The Malaysian Companies Act 2016 allows foreign entities to register a branch office with the Companies Commission of Malaysia (“SSM”). Unlike an RO/RGO, a branch office is able to act independently and to engage in legitimate profit-making activities. However, a branch office will not be viewed as a separate legal entity from the foreign parent company it represents. Consequently, any and all contracts that it enters into, as well as the legal obligations, debts and liabilities arising therefrom, shall be binding and enforceable against the foreign parent company.

The registration of a branch office requires substantially more information to be filed with SSM compared to what is required for the incorporation of a limited liability company. The first

step in the registration process is to apply for approval of the business name. The branch office will have to use the same name as its parent entity.

The parent entity’s main place of business, date of incorporation/ establishment, amount of share capital (if any) and core business activities also need to be provided in the filing documents.

### 2. Registration

Provided that the business name is approved, which usually takes about one (1) to two (2) days, the following documents/ information need to be submitted to SSM in order to complete the registration:

- a certified true copy of the foreign parent entity’s certificate of incorporation/establishment, or its equivalent;
- a copy of the latest audited annual financial statement of the foreign parent entity;
- a copy of the foreign parent entity’s current constitution, or its equivalent;
- personal particulars and certified true passport copies of the foreign parent entity’s current directors and the dates of appointment of their respective appointment; and
- information as to the address under which the branch office shall be registered.

All of the above documents must be submitted in English. If any of the original documents (e.g. the certificate of incorporation) are in another language, an official translation must be provided. Where necessary, Luther can of course provide translation services.

The company is furthermore required to appoint a branch agent. It is important to note that such branch agent can be held personally liable in case of any breach of the provisions of the Companies Act 2016.

There is no formal requirement for a branch office to appoint a company secretary. However, its compliance and filing obligations are similar to those of a private limited company where such requirement exists. In order to ensure compliance, we therefore recommend appointing someone to provide company secretarial services.

<sup>1</sup> All fees mentioned in this brochure are exclusive of tax and incidentals.

Compared to a private limited company, the on-going requirements for maintaining a branch office are more cumbersome. Since the branch office is not a separate legal entity, changes related to the parent entity, such as change of its officers as well as its audited annual accounts, must be filed with SSM.

If these documents are not in English, official translations must be provided. Furthermore, a separate set of audited accounts reflecting the branch office's annual "financials", need to be drawn-up and filed with SSM.

In summary, due to the higher filing requirements for a branch office and the corresponding costs, and since the branch office's liability is not separate from its parent entity, most foreign investors tend to prefer setting up a private limited company (for details, please refer to Part IV. below) rather than a branch office.

### 3. Fees

Our fees for the creation and registration of a branch office amount to MYR 10,000. An hourly rate of between MYR 250 and MYR 1,500 applies if specific advice is required. The above fees are exclusive of any expenses incurred in respect of the registration process.

Luther can also act as branch agent. Our standard fee for acting as branch agent is fixed at MYR 12,000 per annum. Due to the high liability risk, we reserve the right to charge a higher amount in exceptional cases. In addition, we offer company secretarial services for a fixed fee of MYR 4,000 per annum.

Where required, Luther can offer a registered address.

Our annual fee in this respect is fixed at MYR 600.

## iii. The LLP

### 1. What Is a LLP?

The LLP offers the internal flexibility of a partnership whilst limiting the partners' liabilities to their respective individual contribution. For tax purposes, this structure can be particularly advantageous if the partners are individuals residing outside of Malaysia or for foreign partnerships, such as a German KG.

Two (2) or more partners, whether private individuals or corporate entities, are required to form a LLP. The duration of a LLP is unlimited. A change in the composition of the partners (whether outgoing or incoming) does not affect the existence of the LLP as such or its rights and obligations.

The LLP is treated as an independent legal entity, distinct from its partners. This means that it can, amongst other functions, buy and sell property, sue and be sued in its own name as well as do such other acts and things in its name as bodies corporate may lawfully do and suffer.

LLPs are tax transparent. This means that profits of a LLP are not taxed on the entity level. Instead, the partners are taxed directly from his/her/its share of the income from the LLP.

As a general rule, considering the LLP is a separate legal entity, any debts and obligations of the LLP are borne by the assets of the LLP and not that of its partners. In other words, the partner's personal liability is limited to his/her/its individual contribution. Nevertheless, when a partner intentionally causes loss or damage through willful misconduct, both the LLP and the defaulting partner are jointly and severally liable, whereas the limited liability of the other partners remains intact.

A LLP is represented by each of its partners, unless the partnership agreement provides otherwise. Consequently, the actions of a partner are binding upon the LLP. It is therefore recommended that the partners conclude a partnership agreement, setting out their respective rights and obligations towards each other.

The LLP must appoint a compliance officer who must be a natural person residing in Malaysia. Although not mandatory, the compliance officer can be one of the partners. The compliance officer does not have the power to carry out any acts binding upon the LLP and he must ensure that the LLP complies with its obligations as stated in the Limited Liability Partnership Act. We can hold the office of your compliance officer, should circumstances require it.

There is no formal requirement for a LLP to appoint a company secretary. However, in order to be compliant with all notification and filing requirements, we recommend appointing someone to provide company secretarial services.

When considering the establishment of an LLP, it is important to know that businesses using this entity form can, *inter alia*,

at the moment not apply for employment passes for foreign workers nor for so called Whole Sale Retail Trade Licenses (“WRT”). While this may change in the future, it is one of the many reasons foreign investors usually prefer to set up a private limited company.

## 2. Registration

A LLP must be registered with SSM.

The first step in the registration process is to check with SSM whether the intended name for the LLP is available. The name of the LLP must include the words “Limited Liability Partnership” or “LLP”.

The LLP must have a registered office in Malaysia. Our office can be used as your registered office in Malaysia.

For the registration itself, the particulars of the partners and manager(s) must be provided (namely the name, address, passport number or, in the case of a corporate shareholder, the company registration number).

The LLP must maintain proper accounts. However, the annual accounts of the LLP do not have to be audited. Additionally, the annual financial statements do not have to be published. The Manager of the LLP must inform SSM on an annual basis, whether the LLP is in a position to fulfil its monetary obligations.

## 3. Fees

Our fee for establishing a LLP is fixed at MYR 5,000. An hourly rate of between MYR 250 and MYR 1,500 applies if specific advice is required. The above fees are exclusive of any expenses incurred in respect of the registration.

If you wish to outsource the position of the compliance officer in order to limit liability risk, we can provide this service. Our fixed annual fee amounts to MYR 12,000 in this respect. Our annual fees for the provision of company secretarial services, where required, are fixed at MYR 4,000.

Finally, our fee for using our office address as your LLP’s registered address amounts to MYR 600.

## iv. Private Limited Company (Sdn. Bhd.)

### 1. What Is a Sdn. Bhd.?

A Sdn. Bhd. is a fully-fledged, independent legal entity. It is the most common legal structure used by investors to carry out their business activities in Malaysia.

### 2. Incorporation of a Sdn. Bhd.

The incorporation of a Sdn. Bhd. usually takes about one (1) week or less. Under the Companies Act 2016, it is no longer compulsory to adopt a constitution (previously called memorandum and articles of association). However, it is advisable to do so in order to have a tailor-made regulation for the company at hand. In the absence of a Constitution, the functioning of the company is governed by the rules of the Companies Act 2016.

The first step for the incorporation of a Sdn. Bhd. is to choose a name for the intended company and check with SSM its availability. Assuming it is available and approved by SSM, the name will be reserved and the application must be submitted within a period of thirty (30) days following the date of approval.

All documents and information required for incorporation must be submitted along with the particulars of the directors and shareholders (namely, but not limited to, their individual name(s), address, passport number and profession). Where relevant, the constitution of the company must also be submitted.

The incorporation of the Sdn. Bhd. will be successful only when all required information and documents are provided and approved by SSM.

As is our common practice, we recommend that the initial application for registration is submitted in trust. In this scenario we would act as your nominee directors and shareholders, and would subscribe for one subscriber share valued at MYR 1.00. This expedites the incorporation. Then, once incorporated, the sole subscriber share can be simply transferred in accordance with your instructions, and the directors can be similarly replaced.

Provided that the business name is granted, which can take about one (1) to two (2) days, the company can be incorporated and registered with SSM.

In order for us to incorporate the Sdn. Bhd., we require the following documents, amongst others:

- a certified true copy of the shareholder(s) or a certificate of incorporation, or equivalent, if the shareholder(s) are corporate entities;
- personal particulars and certified true passport copies of the shareholder(s), current directors and date of appointment as director, if the shareholder(s) are corporate entities;
- personal particulars and certified true passport copies of the shareholder(s) who are natural persons; and
- a group structure chart.

Further documents and information may be required, depending on the group structure and we will be in communication with you in this regard. All the above documents need to be submitted in English. If the original document is in another language, an official translation must be provided. We can provide translation services, if required.

As the Sdn. Bhd. is a separate legal entity, its shareholders are not directly liable for it. Instead, the personal liability of the shareholders is limited to the amount of the company's issued share capital. The issued capital must be fully paid-up.

### 3. Share Capital

The minimum share capital required to constitute a Sdn. Bhd. is MYR 1.00. Nevertheless, a higher share capital is required to carry out certain operations (a minimum share capital of MYR 500,000 is, for instance, required if the company is wholly owned by foreign investors and wishes to hire expatriate employees) or to carry out certain activities (for example, for wholesale and retail companies, a minimum share capital of MYR 1,000,000 is necessary).

The share capital is working capital, which means that it may be fully utilised for salaries, rental, travel expenses and other business related expenses.

### 4. Shareholders

A Sdn. Bhd. can be incorporated with a minimum of one (1) shareholder. The upper limit in terms of shareholders is fifty (50) shareholders. The shares can be held by both natural persons or legal entities.

### 5. Board of Directors

Every company in Malaysia needs to appoint at least one (1) natural person residing in Malaysia as company director ("**Local Director Requirement**"). The corporate function can be exercised by foreigners and third parties as well, as long as such foreigner/third party legally resides in Malaysia, such as a foreign manager holding an Employment Pass.

The Local Director Requirements need to be permanently satisfied, i.e. if the last remaining local director resigns from the board or if there are no permanent residents of Malaysia on the board anymore, the shareholders must appoint a new local director as soon as possible and within six (6) months at the latest.

Once the six (6) months have elapsed, failure to nominate a resident of Malaysia or a local as a director could lead to the shareholders being held personally accountable for the Sdn. Bhd.'s debts and liabilities under the Companies Act 2016.

It is important to understand that the directors of a company have extensive compliance duties with which they should be familiar given the far reaching liability of directors under Malaysian law.

Luther provides nominee director services in order to enable our clients to:

- fulfill the Local Director Requirement;
- have a reliable director on the board who acts in accordance with the instructions of the overseas shareholder(s) appointing the director;
- have an on-site director to carry out all administrative requirements, such as signing off on the company's day-to-day management formalities;
- and ensure a majority and/or quorum during board meetings.

### 6. Company Secretary

The Sdn. Bhd. must, further, appoint a company secretary, who must be a natural person of full age and who has his/her principal or only place of residence in Malaysia. The company secretary is responsible for the necessary filings required by SSM, keeping proper corporate records as well as maintaining the requisite corporate registers. In order to ensure the timely discharge of these duties it is common practice for external

lawyers or accountants to act as a Sdn. Bhd.'s company secretary. If required, we can provide you with full company secretary services.

## 7. Registered Office

A Sdn. Bhd. must, from the date of its incorporation, also have a registered office within Malaysia to which all official communications and public notices may be addressed. Moreover, it has to be open and accessible to the public for a minimum of three (3) hours during ordinary business hours on business days. Non-compliance with these requirements may result in fines. In conjunction with this, the Companies Act 2016 stipulates that the company secretary of each company shall be readily reachable at the company's registered office by telephone or any other means of instantaneous communication.

Given these requirements, it is not surprising that many Sdn. Bhd. choose, initially at least, to have their registered office at the address of their company secretary. The registered office does not have to be at the same address as the company's actual place of business and it does not have to be stated on the Sdn. Bhd.'s letterhead or other correspondence.

## 8. Annual Accounts and Audit Requirements

Every private limited company must prepare an annual set of accounts and appoint an auditor to audit its financial statements. The audited financial statements must be lodged with SSM annually. The Registrar may exempt any private company from having to appoint an auditor. Currently, the audit exemption applies in the following cases:

- dormant companies, i.e. companies which have been dormant since incorporation or dormant throughout the current financial year and during the immediately preceding financial year;
- zero-revenue companies, i.e. companies which do not have any revenues in the current and immediately preceding two (2) financial years, and/or whose total assets do not exceed MYR 300,000 in the current and immediately preceding two (2) financial years; and
- threshold-qualified companies, i.e. companies which have been continuously below the following thresholds during

the current financial year and the immediately preceding two (2) financial years:

- revenue of not more MYR 100,000; and
- total value of assets not exceeding MYR 300,000 in the Statement of Financial Position; and
- company does not employ more than five (5) employees.

Any company electing to be exempted from audit must still lodge its unaudited financial statements with the Registrar.

**Important note:** Currently, despite the audit exemptions provided by the Registrar, the Malaysian Inland Revenue Board ("MIRB") still requires audited financial statements to be prepared for corporate tax purposes. However, the MIRB is expected to amend its requirements in order to match those of SSM.

## 9. Tax

The taxable income of a regular Sdn. Bhd. is currently subject to a corporate income tax rate of 17% on its first MYR 600,000 chargeable income.<sup>2</sup> The remaining chargeable income will be taxed at 24%. Further tax reductions and rebates are available but vary from year to year. We can provide advice in this respect upon request.

## 10. Fees

Our fee for incorporating a Sdn. Bhd. is fixed at MYR 5,000. An hourly rate of between MYR 250 and MYR 1,500 applies if specific advice is required. The above fees are exclusive of any expenses incurred in respect of the incorporation.

Our annual fees for acting as local director are fixed at MYR 12,000.

Our company secretary service fees are fixed at MYR 4,000. Finally, our fee for using our office address as your company's registered address amounts to MYR 600 per annum.

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<sup>2</sup> Subject to certain limitations regarding the group-wide paid-up capital and gross turnover as well as management and control of company.

## B. Licenses

Despite its increasing participation in international trade, Malaysia still applies significant protectionist measures. Access to certain activities is thus subject to restrictions and, in particular, to licensing requirements. These licenses are often accompanied by specific obligations, such as a minimum amount of share capital and equity participation of Malaysians and/or Bumiputera (original ethnic group of Malaysia).

Prior to commencing any commercial activities in Malaysia, it is thus essential to determine which licenses are required for carrying out your business activities as well as whether there are any additional obligations to comply with.

We help our clients determine if and which license they require as well as assisting with licensing applications with the relevant local authorities. We apply flat-rates according to the type of licenses concerned. In the event that specific advice is required or our intervention exceeds the scope of the forfait, an hourly rate between MYR 250 and MYR 1,500 is applicable according to the seniority of the expert in charge of the case.

## C. Work Permits

Foreigners require a work permit prior to commencement of employment in Malaysia.

In order to be able to apply for work permits, companies must register in most cases with the Expatriate Services Division (“ESD”)<sup>3</sup> of the Ministry of Immigration. If the company is exclusively owned by foreign investors, this registration is subject to a minimum share capital requirement of MYR 500,000.

Two of the most frequently requested work permits are detailed below. As this is only a brief overview, we remain at your disposal to discuss any other existing residence permits.

### i. The Employment Pass (“EP”)

This work permit is suitable for long-term missions. It should be obtained before the employee enters Malaysia, as it is no longer possible for expatriate employees to enter the country with a tourist visa, while waiting for their work permit to be issued.

There are three categories of Employment Pass:

	Cat. I	Cat. II	Cat. III
<b>Experience and qualification conditions</b>	<b>Possession of university degrees or diplomas of vocational education or a Technical Certificate or equivalent and a certain number of years of professional experience (from 3 to 7 years according to the case at hand)</b>		
<b>Monthly salary</b>	<b>≥ MYR 10.000</b>	<b>Between MYR 5.000 and MYR 9.999</b>	<b>Between MYR 3.000 and MYR 4.999</b>
<b>Duration of the contract</b>	<b>Maximum of 5 years</b>	<b>Maximum of 2 years</b>	<b>Maximum of 12 months (twice renewable)</b>
<b>Dependent Pass</b>	<b>Yes</b>	<b>Yes</b>	<b>No</b>

Source: ESD

<sup>3</sup> For certain industries, the registration and the application must be submitted to other authorities; e.g. for IT related companies, EP application will be directed to MDEC.

## D. Data Protection

The application for an EP must be accompanied by a certain number of supporting documents, attesting in particular to the employee's professional qualifications. In the event that certain documents are not in English, a certified translation of each document must be filed separately.

Family members (spouse and unmarried children under eighteen (18)) of a Category I or II Employment Pass holder may also apply for a Dependent Pass. This will usually be granted at the same time as the Employment Pass.

From experience, the work permit application process takes about four (4) weeks upon submission of the required documentation.

### ii. The Professional Visit Pass (“PVP”)

This work permit is issued for a maximum of twelve (12) months and is usually non-renewable. It is suitable for short-term missions.

A PVP can only be granted in one of the following three cases:

- transfer of skills and expertise, or
- research project, or
- accomplishment of an internship.

This work permit does not allow the Professional Visit Pass holder's family members to apply for a Dependent Pass.

In 2010, Malaysia implemented legislation regarding the protection of personal data.

### i. Scope of the Legislation

Any organisation established in Malaysia and involved in the processing of personal data for commercial purposes, regardless of its size and legal form, is required to comply with the Personal Data Protection Act 2010 (“**PDPA**”).

Personal data is defined as “any data directly or indirectly related to an identified individual or identifiable by this data or a combination of this data and other information”. The data collected from employees, customers and shareholders may therefore be personal data falling within the scope of this law.

The processing of personal data includes the following operations:

- the collection, registration, possession or retention of personal data;
- the organisation, adaptation or modification of personal data;
- the extraction, consultation or use of personal data;
- the communication of personal data by transmission, transfer, dissemination or any other form of provision of information; and
- the reconciliation or interconnection, deletion or destruction of personal data.

The scope of the PDPA is therefore relatively broad.

Furthermore, the EU General Data Protection Regulations (“GDPR”) applies to all organisations processing personal data of subjects residing in the EU, no matter of the organisations location.

Even organisations with no direct presence in the European Union, have therefore to comply with the GDPR when they process personal data of EU residents, for example, when offering goods or services to EU citizens.

### ii. Rules Applicable to the Processing of Personal Data

Organisations involved in the processing of personal data are required by the PDPA to comply with a number of principles. In particular, the processing of personal data can only take

place in specific cases and in compliance with certain rules. The transfer of personal data outside of Malaysia is also subject to specific regulations.

Failure to comply with the rules and principles of the PDPA applicable to the processing of personal data is punishable by a fine of MYR 300,000 and/or two (2) years imprisonment. Fines for compliance failures under GDPR can even be significantly higher, with up to EUR 20,000,000 or more for serious breaches.

Organisations involved in the processing of personal data and operating in certain fields, as determined in a list fixed by decree, must also register with the Personal Data Protection Commissioner.

Given the increasing relevance of data protection in these digital days and the broad application of data protection regulations beyond borders, companies are well advised to familiarise themselves with their obligations under the PDPA, the GDPR and other relevant data protection legislation.

### iii. Data Protection Services

Luther can support you in this respect comprehensively.

#### 1. Policy Drafting

One measure ensuring compliance with the relevant data protection regulations is the establishment of data protection policies, which inform customers of their rights, the use of their data and other mandatory information. The policies can also provide rules for staff members as regards to how personal data should be handled internally.

#### 2. Contact Person

Data subjects must also be informed how they can contact the organization collecting and processing their data to effectively control their personal data. Therefore, organisations must provide contact details.

It is recommended that all requests are handled by one person or a team who has been trained for this purpose.

However, this can also be outsourced and we can act as the contact person for all requests or complaints in data protection matters. Our fixed fee for naming us as the contact person is MYR 1,200. For the further handling of requests, an hourly rate between MYR 250 and MYR 1,500 applies.

#### 3. Audits

We can also screen your business in a comprehensive data protection audit.

Here, we would establish to which extent personal data is collected and how it is processed, locate any gaps in the data handling and assess what is required for compliance with the relevant data protection regulations.

Our fees depend on the size of the organisation and the extent of data processing.

#### 4. Training

Additionally, we offer training sessions in data handling and data protection for employees. Our fees for this service depend on the scope of the individual training.

**If you have any inquiries as to the above, feel free to email us: [malaysia@luther-services.com](mailto:malaysia@luther-services.com)**

#### Imprint

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