

Collection Profile Malaysia

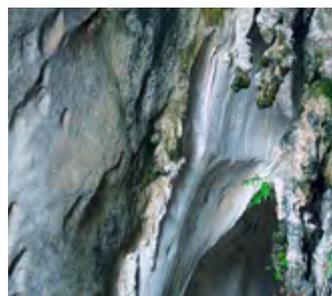
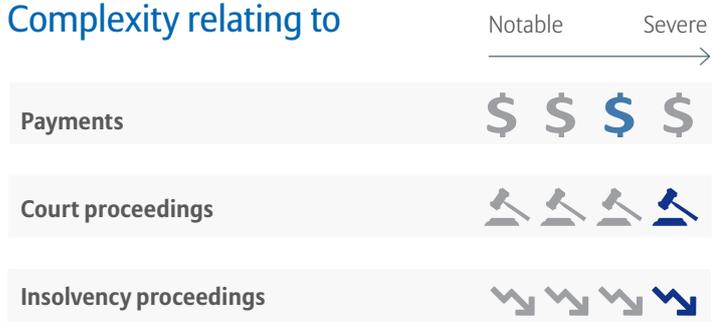
Collecting in Malaysia

- Even though the payment behavior of domestic companies is good with DSO at 35 days, the law provides no framework when it comes to late payment. As a result, interest rates and collection costs should be considered as part of the contract, though they often have little impact.
- Despite recent efforts, the courts' independence and transparency still have margin for improvement. While lawsuits can be slow and should be avoided whenever possible, recent reforms have seen lawsuits resolved more quickly.
- In the absence of an efficient and functional debt restructuring scheme, debtor insolvency would only be dealt with through liquidation proceedings, which generally results in low recovery chances for unsecured creditors

Collection complexity



Complexity relating to



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General information

Availability of financial information

The financial information on Malaysian companies is overall satisfactory since registered companies are required to file their annual audited financials with the Public Authorities (Companies Commission of Malaysia, SSM) six months from the financial year end, otherwise a penalty will be incurred for late submission. However, enforcement of that requirement has a margin for improvement.

Euler Hermes works closely with local information providers and allocates each company a grade reflecting its financial health and how it conducts business. Grades represent a core of Euler Hermes' knowledge and analyses, and help clients identify and avoid risk. Data is continuously monitored to offer the most up-to-date information to support management decisions.

Main corporate structures

Liability for business debts is determined by legal structures, which may be described as follows:

- Sole Proprietorship is available for small businesses managed by an individual and for which no commercial structure is necessary. In this case, the owner is held liable for all business debts. Two or more individuals may also decide to share ownership and responsibilities through Partnerships (under the Partnership Act of 1961), in which case the partners may be jointly and individually liable for the actions of the other partners. Limited Liability Partnerships (governed by the Limited Liability Partnerships Act of 2012) may alternatively offer limited liability to the partners.
- Private Limited Liability Companies (Sendirian Berhad) are the most favored legal entities because they require no minimum capital funds while the shareholders' liability is limited to their contribution. Joint-Stock Corporations (Berhad) are used for larger structures willing to divide their capital into tradable shares. In these entities, the shareholders' liability is limited to the value of their shares.
- Foreign companies may alternatively settle in Malaysia through Representative Offices, provided that the entity does not generate any income. Branch Offices may otherwise be set up to generate revenues but with the condition that they must have been awarded a government contract. As a general rule, the Ministry of International Trade and Industry strongly encourages foreigners to incorporate local subsidiaries. Joint Ventures would also be incorporated as Limited Liability Companies.

Regulatory environment

The judicial system in Malaysia is built upon numerous courts, the main of which may be described as follows. At the lower level, justice is rendered by Magistrate's Courts and Sessions Courts (among other tribunals). At the higher level, two High Courts have jurisdiction to deal with large commercial and insolvency disputes in addition to serving as Appellate Courts for the various claims brought before the subordinate courts mentioned previously. The Court of Appeal considers claims brought against decisions rendered by the High Courts. The Federal Court finally acts as the supreme jurisdiction.



Days Sales Outstanding

(DSO): Payments in Malaysia take place fairly rapidly: the payment behavior is good and delays are rare, with average DSO at 35 days.



The Malaysian legal framework has long been modelled upon British legal rules, but it has been significantly modernized in the past years. On one hand, reforms conducted since 2009 have made the judicial system more efficient insofar as specialized courts (including Commercial Courts) have been set up. On the other hand, civil procedure rules have been harmonized so as to be used more efficiently by lower and higher courts alike. Despite such efforts, the courts' independence and transparency still has margin for improvement, while lawsuits – which can be slow – ought to be avoided whenever possible.



Late payment interest:

Late payment interest must be negotiated as part of the contract in order to be applicable.



Getting Paid

Days Sales Outstanding (DSO)

Payments in Malaysia take place fairly rapidly: the payment behavior is good and delays are rare, although likely if the transaction is not secured. The average DSO is 35 days.

Late payment interest

As the law provides no particular framework for late payers, late payment interest should be negotiated as part of the contract in order to be applicable. In practice, such interest is seldom paid and often only constitutes a negotiation tool. For judgment debts, these currently carry an interest rate of 5% per annum.

Debt collection costs

Similarly, collection costs must be agreed upon in writing when negotiating the contract, though they would essentially be paid upon court request. Therefore, as for late payment interest, they would essentially be used as negotiation tools during pre-legal collection.

Ownership protection

Contractual agreements aimed at preserving the creditor's ownership over goods until the related invoice has been paid in full do not exist in Malaysia.

Payments

The most common payment methods are as follows:

Bank transfers are among the most popular payment means for international transactions as they are fast, secured and supported by an increasingly developed banking network internationally and domestically. Export transactions are usually guaranteed through Export Credit Insurance, which helps minimize the risk of sudden or unexpected customer insolvency. Euler Hermes' worldwide network of risk offices monitors the financial well-being of customers and grants them a specific credit limit up to which clients may trade and claim should something go wrong. Alternatively, Standby Letters of Credit (a bank guarantees the debtor's credit quality and repayment abilities) are often used in relation to export shipment transactions because they constitute reliable guarantees which can be triggered as a 'payment of last resort' if the client fails to fulfil a contractual commitment. Also, irrevocable and confirmed Documentary Letters of Credit (the debtor guarantees that a certain amount of money is made available to a beneficiary through a bank once certain terms specifically agreed by the parties have been met) are increasingly relied upon.

Down payments may be negotiated with local partners, while up to 25% of business transactions also tend to be paid in advance. These advance payment terms can range from 20% to 30%.

Collecting overdues

Amicable action

Negotiating

Amicable settlement opportunities should always be considered as an alternative to lengthy legal proceedings.

Prior to commencing formal legal action, obtaining a payment instalment agreement or, at least, a formal debt recognition title is always worthwhile. In addition, it is vital to verify whether the company is still active and whether the debtor is solvent: if insolvency proceedings have been initiated, it indeed becomes impossible to enforce a debt (see below).

Legal action

Ordinary proceedings

The law provides for relatively fast-track proceedings if the case is straightforward. Failing that, full lawsuits would be necessary. Ordinary legal action would usually commence when amicable collection has failed. The creditor would file a claim with the High Court – or Lower Courts, depending on the size of the claim – and Summons would be served to the debtor who would be required to file a formal appearance in court within a specified timeframe. Failing to do so would allow the claimant to obtain a judgment in default. The courts would normally award remedies in the form of damages, specific performance or injunctions. Punitive damages may be awarded in Malaysia.

Necessary documents

Agreement entered into between both parties, statement of account reflecting the outstanding amount, invoices and all other relevant documents in support of the claim.

Time limitations

Business claims must generally be brought to court within six years. Beyond this time limitation, legal action would normally be barred.

Provisional measures

Provisional measures may help preserve the creditor's interests pending a final judgment. Upon request, the courts would typically order interim measures aiming at avoiding irreparable damage (attachment, injunction to do something or to prevent from doing something, protection of rights, etc.), or at preserving evidence. Since the Subordinate Courts (Amendment) Act of 2010 entered into force, both the lower and higher courts are now entitled to order interim measures. It is however necessary to demonstrate that the measure would prevent imminent damage or maintain the status quo and the court would often order the claimant to provide security on costs in order to protect the respondent from irresponsible action.



Lodging an appeal

Decisions rendered by High Courts in the first instance may be appealed before the Court of Appeal within one month from the date of the decision. Decisions rendered by Lower Courts may be appealed before the High Court within 14 days from the date of decision. Decisions rendered in second instance may be appealed before the Federal Court (within 30 days), but a leave for appeal must be obtained. Leave will only be granted if there are special circumstances: (i) if it is a matter of public interest, and/or (ii) if there is new evidence which was not available at the previous stage.

Enforcing court decisions

A judgment is enforceable as soon as it becomes final (i.e. when pronounced, barring a stay of enforcement). In most cases, the debtor would fail to satisfy the judgment, thus forcing the creditor to request a mandatory enforcement order from the court in the form of an attachment order, a liquidation petition or a garnishee order (allowing payment of the debt to be obtained from a third party owing to the debtor). Overall, enforcement would be efficient as long as the debtor's assets can be identified.

Collection @ Euler Hermes

It is always advised to attempt collection prior to any legal action in order to maximize chances of successful recovery and avoid legal costs and delays. Our key principle is to collect in close proximity to the debtor, using a series of letters, emails and phone calls in the local debtor language. Our World Collection Network of Euler Hermes offices and external providers are experts in professional trade debt collection and negotiation, ensuring positive outcomes while retaining important client relationships. Euler Hermes can handle the complete collections process from amicable, pre-legal action through to judgment and enforcement.

How long could legal action take?

As previously mentioned, various reforms have been introduced and strict compliance requirements have been imposed. These have had a significant impact on delays, with nine out of ten claims brought to the High Courts dealt with within nine months. When a claim is disputed, however, proceedings may last for three years on average (inclusive of hearings at first instance and appeal).

Alternatives to legal action

Alternative Dispute Resolution methods (ADR)

Alternative Dispute Resolution methods such as conciliation, mediation or arbitration are becoming increasingly popular in Malaysia because they may provide an alternative to complex trials.

Foreign forums

In addition, the law does allow the granting of jurisdiction to the laws of a Commonwealth Country and to the courts of certain other countries in a contract, but possibilities of relying on a foreign court to avoid time consuming proceedings before domestic courts would otherwise be limited.

Enforcing foreign awards

Enforcing a decision issued by a foreign court against a debtor owning assets in Malaysia is possible but time consuming. In fact, it is often said that obtaining a decision before domestic courts would be faster and more efficient than seeking a decision abroad.

Under the Rules of Court 2012, any decision rendered by a foreign country must be recognized as a domestic judgment in order to become enforceable (through an exequatur procedure). First, Malaysian courts would only recognize decisions issued in countries with which a reciprocal Recognition and Enforcement Agreement has been signed. These countries (Brunei, Hong Kong, India, New Zealand, Singapore, Sri Lanka and United Kingdom) would be listed under the Reciprocal Enforcement of Judgment Act of 1958. Second, in addition to verifying the reciprocity requirement, Malaysian courts would also consider whether the decision is indeed final and enforceable in the issuing country. Third, Malaysian courts would tend to retain exclusive jurisdiction over various legal areas (tax matters, insolvency, etc.) which, if considered in the foreign decision, would make the latter non-receivable. They would therefore also verify that the foreign court indeed had sufficient jurisdiction to deal with the dispute at stake. Finally, the courts would verify that the enforcement claim was brought within specified time limitations (normally six years from delivery).

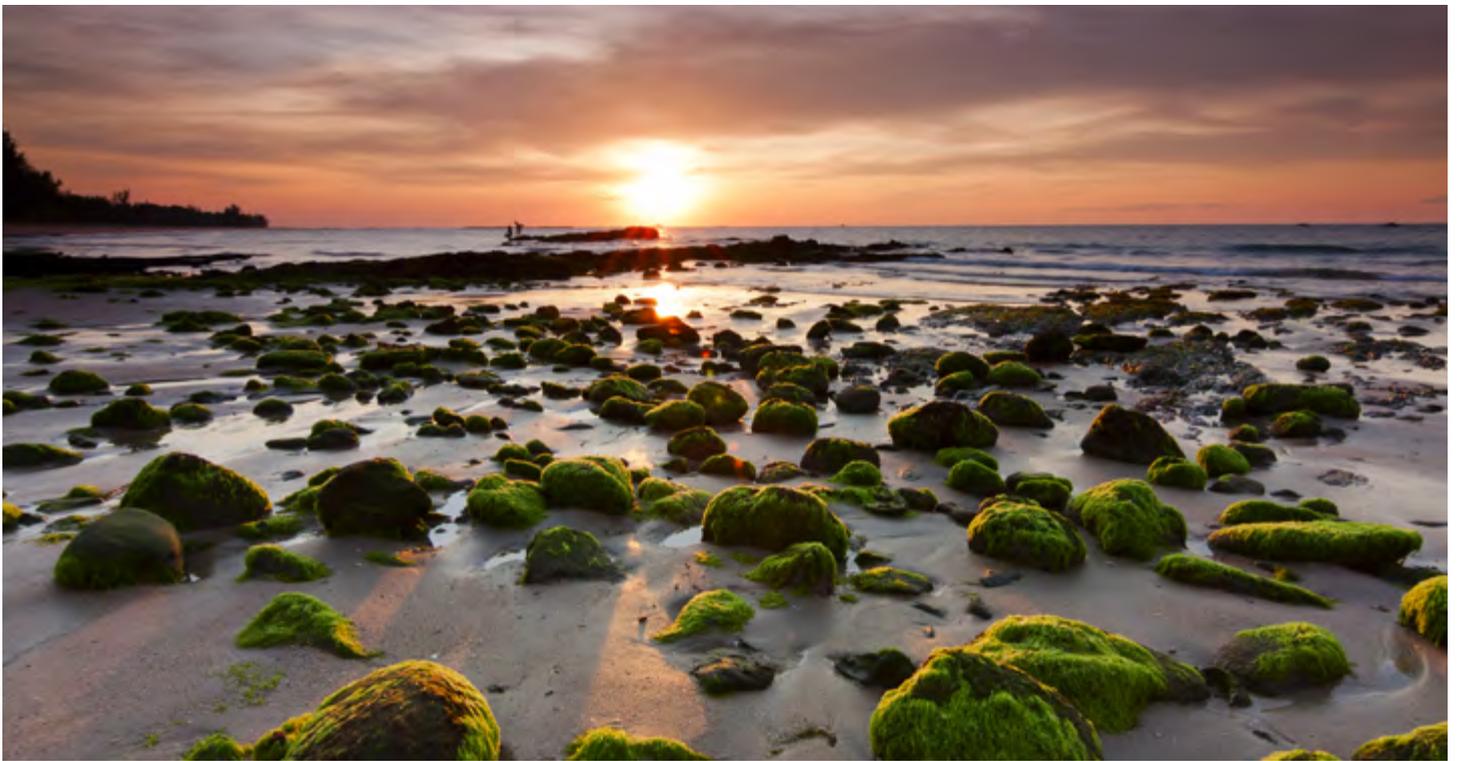
Malaysia is a signatory to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958, therefore, domestic courts also ought to recognize and enforce decisions rendered through international arbitration



proceedings. This rule may also be found under the Arbitration Act of 2005, which makes it clear that international arbitral awards are final and binding, and must thus be enforced as domestic judgments.

Litigation @ Euler Hermes

Should legal action be necessary, Euler Hermes can provide support throughout the legal process from judgment to enforcement via our World Collection Network of Euler Hermes offices and external providers. Legal action can often be complicated and expensive, so you will be informed of all costs prior to any action and advised on which route is best to take.



Handling insolvent debtors

The Bankruptcy Act of 1967 defines bankruptcy as the legally declared inability of a debtor to pay its creditors. In order to proceed with bankruptcy proceedings or winding up orders, however, the debt must exceed MYR 30,000 and MYR 500 respectively (the latter is subject to changes in legislation).

So far, insolvency in Malaysia has been considered a mere matter of liquidation and proceeds redistribution. However, it is relevant to emphasize that the country is currently undergoing a significant reform process insofar as its corporate insolvency laws might soon come in line with a new approach (embodied in the U.S. Chapter 11) which introduced a corporate rescue culture on the international plane. As a result, since 2005 the Malaysian Corporate Law Reform Committee has developed the argument that the current insolvency framework ought to move forward with the rehabilitation of fragile but viable businesses, and recently recommended the introduction into Malaysian law two schemes: a Corporate Voluntary Arrangement, and the Judicial Management System (similar to a judicial restructuring scheme).

Insolvency proceedings

Out-of-Court proceedings

In the absence of an efficient and working debt restructuring scheme, out-of-court proceedings are a significant alternative to liquidation as they allow an informal and confidential debt renegotiation between a debtor and its creditors (as long as the former has not been recognized as being insolvent).

Winding up proceedings

Liquidation aims at obtaining cash from the debtor's assets and may

occur upon request of the debtor (voluntary liquidation) or of the creditors (involuntary liquidation). A liquidator is normally appointed by the High Court to sell the company's assets and distribute the proceeds to the various creditors.

Priority rules

Complex priority rules normally apply while distributing the proceeds to the creditors. Liquidation costs, secured debts and preferential debts would be repaid first, followed by debts to employees and the federal tax office. Debts secured by a floating charge would finally be given priority over unsecured debts. As a result, there is little chance of recovery left for unsecured creditors in practice. Furthermore, in practice the debtor would tend to pay the debt (whenever this is possible) as soon as they become aware of the insolvency proceedings.

How long could insolvency proceedings take?

Insolvency proceedings last six months to one year on average, but this timescale may extend when the cases are rather complex. Liquidation proceedings may exceed 10 years in the most complex cases.

Necessary documents

Judgment against the debtor, statement of account, invoices and all relevant documents in support of the claim.

Insolvency @ Euler Hermes

Euler Hermes works closely with debtors, creditors and lawyers to provide support during insolvency and restructuring processes. With many options available when it comes to insolvency action, we can offer advice on which option is most suitable.

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