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Doing business in Asia Pacific

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Edited by:

Michael Joyce
Partner
Norton Rose Gaikokuho Jimu Bengoshi Jimusho
Norton Rose (Asia) LLP

Andrew Clarke
Associate
Norton Rose Gaikokuho Jimu Bengoshi Jimusho
Norton Rose (Asia) LLP

A NORTON ROSE GUIDE

Norton Rose

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Preface

Doing business anywhere in the Asia Pacific region is extraordinary. At times the challenges can be immense, but so too the rewards. The region is dynamic, entrepreneurial and, now, fully entitled to claim its place on the world stage as the principal driver of global economic and business growth. There is nothing that can compare with the excitement of concluding a successful transaction in any one of the jurisdictions here. One deal leads to another. Relationships accumulate layer upon layer of knowledge and trust.

We have been active here for several decades now. Each year, for the last nine years, we have published a comprehensive guide to doing business in the region. All the facts are here. We cover visas and work permits, types of business entities, business environment, policy on foreign investment, government initiatives, government incentives, taxation, workplace relations, occupational health and safety, and means to forestall or resolve a dispute.

This new edition of *Doing Business in Asia Pacific* bundles up our local market knowledge, our emphasis on quality and our geographic reach to provide you with a key reference source. We wish you great success in all your business dealings in Asia Pacific.

Michael Joyce
Partner
Norton Rose Gaikokuho Jimu Bengoshi Jimusho
Norton Rose (Asia) LLP

Our thanks to

the law firms named below for their contribution to the production of the 2012 edition of *Doing Business in Asia Pacific*.

India	J. Sagar Associates
Japan	Kashiwagi Sogo Law Offices
Malaysia	Jeff Leong, Poon & Wong
South Korea	Barun Law
Taiwan	Alliance International Law Offices

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Contributed by Norton Rose

Visas and work permits
Business entities
Business environment
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Government initiatives and incentives
Taxation
Workplace relations
Occupational health and safety
Dispute resolution

Australia is a democratic country which is based on the liberal democratic tradition. Australia comprises six states and various territories, which became federated in 1901. There are essentially three levels of government: the federal government; the governments of each state; and local governments or councils.

Each state in Australia has its own constitution, which grants broad powers to make laws for the peace, order and good government of the relevant state. At federation, the states agreed to give up certain law-making powers to the federal government. Those powers are enshrined in Australia's constitution, which also provides for the separation of powers between the executive, judicial and legislative branches of government.

The federal government is based on a popularly elected parliament with two chambers, the House of Representatives and the Senate (also referred to as the Lower and Upper Houses, respectively). Ministers appointed from these chambers form the executive government. Each state in Australia, except for Queensland, also has two houses of parliament.

The Australian head of state is the reigning monarch of the United Kingdom. The reigning monarch appoints a Governor-General (on the advice of the elected Australian government) to be the monarch's representative. The Governor-General has wide powers, but generally only acts on the advice of ministers on virtually all matters.

In each state, the monarch is represented by a Governor. Australia welcomes and encourages foreign investment, particularly direct investment, which will foster export-orientated, internationally competitive industries. Joint ventures and new enterprises which will diversify the Australian economy are especially welcome. Foreign capital plays a fundamental role in the development of Australia's industries and resources. Foreign investors, both in partnership with local companies or on their own account, are readily able to pursue opportunities in Australia.

Visas and work permits

Visas for business people and skilled people

The Commonwealth government manages the entry and settlement of people through the Department of Immigration and Citizenship (DIAC). Australian immigration policy requires all non-citizens wishing to enter Australia to hold a visa.

Business people have a number of visa options, depending on the purpose of their entry into Australia. Business visas are broadly grouped into business visit visas, provisional (temporary) business visas and permanent business visas. Skilled people also have a range of temporary and permanent visa options. For people seeking permanent residence in Australia, temporary visas in both the business and skilled categories provide a pathway to permanent visas.

It is important to note that it is becoming increasingly difficult for people over the age of 45 to obtain permanent residence in Australia in both the business visa and skilled workers visa categories. Furthermore, the processing times, application fees and location of application vary between visa subclasses.

Business visits

Business people may wish to visit Australia for a range of reasons – to explore opportunities, conduct business negotiations, attend conferences or seminars or conduct business with an Australian based organisation. The Business (Short Stay) visa and the Sponsored Business Visitor (Short Stay) visa allow business people to visit Australia for up to three months for such purposes.

There is also an electronic travel authority (ETA) available to passport holders from certain countries, which allows the applicant to stay in Australia for up to three months. The advantage of the ETA (Business Entrant) visa is faster processing times and ease of application. DIAC advises applicants to lodge an application at least two weeks before the proposed date of travel. Applications for the ETA (Business Entrant) visa can either be made online or through a travel agent.

Australia is one of the 18 APEC economies currently participating in the APEC Business Travel Card Scheme. The APEC Business Travel Card streamlines travel for business people in the Asia Pacific economies by allowing accredited business people to obtain multiple short-term business visitor entries to participating countries.

Business development – temporary and permanent visas

Business people may seek permanent residence in Australia via temporary (provisional) business visas, which provide a pathway to permanent visas. However, there is a direct permanent residence visa (the Business Talent (Migrant) visa) available for high-calibre business people.

There are provisional business visas for business owners, senior executive employees, independent executives and investors. These visas are valid for four years, although the holder may be eligible for a permanent visa after two years of satisfactory evidence of a specified level of business or investment activity. All applications for these permanent visas must be made in Australia.

Temporary visas for skilled workers

The Temporary Business (Long Stay) – Standard Business Sponsorship visa allows employers to sponsor skilled workers to work in Australia on a temporary basis for a period between one day and four years. The employers can be either Australian businesses or overseas businesses.

The Service Sellers visa is available to representatives of overseas suppliers of services who are negotiating, or entering into, agreements to supply their services in Australia under the General Agreement on Trade and Services. This visa allows representatives to stay in Australia for between six and twelve months.

Skilled workers permanent visas

The Employer Nomination Scheme (ENS) allows Australian employers to sponsor highly skilled employees for a permanent visa to work in Australia. The Regional Sponsored Migration Scheme (RSMS) allows employers in regional areas to fill skilled positions which they are unable to fill from the local labour market.

Registered migration agents

In Australia, it is illegal for a person who is not a registered migration agent to give migration-related advice, even if they are a lawyer. The Register of Migration Agents provides a comprehensive list of individuals who are registered with the Migration Agents Registration Authority (MARA) to provide immigration assistance. The register is public and can be accessed online at www.mara.com.au.

If you are using a migration agent outside Australia, DIAC recommends that you consider using an agent registered with MARA and ensure that the agent meets any local laws or registration requirements in that country.

You do not need to use a migration agent to lodge a visa application, but you may wish to use one if you do not feel confident in lodging the application or if the application is complex.

Business entities

General

A foreign investor has a wide range of business structures to choose from when doing business in Australia. The type of entity an investor chooses will depend on what best suits the particular needs of the investor, including optimal financial and tax considerations. The most common business entities used by non-residents in Australia include:

- representative offices
- branch offices of parent companies
- Australian subsidiaries of parent companies
- partnerships
- limited partnerships
- joint ventures
- trusts.

Representative office

When a foreign corporation wishes to analyse the suitability of the Australian market for its goods or services, a representative office can be opened. This type of business entity cannot conduct business on its own and is subject to several restrictions on the scope of its activities. However, a representative office is allowed to promote the goods and services of the foreign corporation and to refer to the home office any enquiries from Australian customers. A representative office does not have the authority to contract on behalf of the foreign corporation.

In some cases, a representative office may be viewed by the Australian Taxation Office (ATO) as a permanent establishment for taxation purposes. This is not often the case, but if viewed in this way, business profits attributable to the representative office will be taxed in Australia.

Branch office

If the foreign company wants to carry on business in Australia and does not want to establish an Australian company to do so, it must establish a branch office. A branch office must be registered as a foreign company under the Corporations Act 2001 (Cth).

To do so, the foreign company will need to appoint a local agent and have a registered office in Australia. In appropriate circumstances, an Australian legal practice can assist in satisfying these requirements if the foreign company does not initially have an agent or an office in Australia. A branch office set up in this way is not subject to limitations on the scope of its activities and may carry on business in any Australian state or territory.

Income tax and capital gains tax will be levied on the operations of the branch office. The applicable corporate tax rate is 30 per cent. Deductions for head office expenses incurred in relation to the branch may be allowed as deductions for income tax purposes.

Australian subsidiary

A foreign company may wish to incorporate a wholly owned Australian subsidiary as a “resident Australian company”. One advantage of a subsidiary arrangement is that it limits the liability of the parent company in relation to operations carried on in Australia. Both foreign companies and Australian subsidiaries of foreign companies are subject to the requirements of the Foreign Investment Review Board (FIRB) – see below.

The subsidiary may be either a proprietary company or a public company. Each type of company has unique advantages. Professional assistance should be sought to ensure that the most appropriate corporate form is chosen.

The majority of subsidiary companies are proprietary companies (also known as private companies). Proprietary companies are limited to a maximum of 50 non-employee shareholders and are either companies limited by shares or unlimited companies that have a share capital. At least one director of a proprietary company and two directors of a public company must be ordinarily resident in Australia.

Transactions between a parent company and a subsidiary allow more flexibility for tax purposes than transactions with a branch office. However, the ATO may closely scrutinise such transactions especially where a profit-shifting motive is suspected.

Partnership

Partnerships are comparatively inexpensive to establish and can be formed quickly. The agreement creating the partnership does not need to be registered. However, if the partnership trades under a name other than the names of the partners, that name must be registered as a business name. The cost of registering a business name for a partnership is less than the cost of incorporating a limited liability company or registering a foreign company. However, preparing an appropriate partnership agreement can be a costly process.

Each partner is jointly and severally liable with all the other partners for all debts and obligations of the partnership that are incurred while the relevant person or entity is a partner. It is possible to form a limited liability partnership – see below.

A partnership must lodge an income tax return as if it were an ordinary taxpayer. However, partnerships are not actually assessed for income tax. Instead, the individual partners are assessed on their share of the taxable income of the partnership even if

the partnership income has not been distributed to them. The individual partners may also claim a deduction for any losses that the partnership incurs.

The size of partnerships is limited to 20 members. However, there are exceptions for certain types of professional partnerships.

Limited partnership

In most states, the relevant law provides for the creation of limited partnerships in which a "general" partner will have unlimited liability and a limited partner (often a "silent partner") will have their liability for the debts of the partnership limited to a certain amount. Limited partners cannot be involved in the management of business of the partnership. If they are, they will become liable for the obligations of the partnership as if they were a general partner.

Limited partnerships are required to be registered. Limited partnerships are treated as companies for tax purposes and are taxed at the corporate rate.

Unincorporated joint venture

This type of business arrangement should be distinguished from a partnership. A joint venture is created when two separate parties agree to work towards a common goal that is usually a single project rather than an ongoing business. This arrangement is often deliberately structured so as not to be classified as a partnership because the parties to the joint venture do not share the profit of the venture and do not wish to be legally liable for each other's acts. These arrangements usually involve the parties receiving a proportionate share of the goods and/or services produced (for example, mining output) to sell individually on their own behalf. Each party is then separately taxed on the income it receives from its own sales.

Joint ventures are most common in the mining area but are also popular in manufacturing.

Careful legal planning is required to achieve the most favourable tax treatment for unincorporated joint ventures and to avoid undesired classification as a partnership either for tax purposes at general law or both.

Joint venture company

A joint venture company is a normal company that is used to carry on the joint venture project on behalf of its shareholders. Like all companies, a joint venture company is an entity that is legally distinct from the parties which comprise it. It is used where a number of parties wish to carry on business together. The component parties' liability is, subject to certain exceptions, limited to their share of capital investment in the joint venture company. The formalities for establishment are similar to those for a subsidiary company except that a members' or shareholders' agreement is usually recommended.

Trusts

A trust is a popular type of business form for small businesses and may be used as an investment vehicle. A trustee conducts the trust's business on behalf of, and for the benefit of, the "members" (known as beneficiaries) of the trust. The trustee may be a company (usually a proprietary company) created for this purpose. The income generated will belong to the beneficiaries of the trust. The rights and duties of the beneficiaries are set out in the trust deed.

A trust is not an independent legal entity. A trust is, however, still required to submit an income tax return. Trust income will be taxed to the beneficiaries or to the trustee depending on the beneficiaries' entitlements under the trust.

Shelf companies

The most common way to establish a subsidiary is to buy a company which has recently been incorporated and has never traded. Such companies can be obtained from a legal firm or specialised service organisation. This new company is incorporated in the state or territory of the investor's choice but may trade throughout Australia. Investors can then use this company for their own business purposes. The new owners of the company can then "personalise" their company by changing its name, shareholders, directors and rules of management by lodging the necessary documents with the Australian Securities and Investments Commission (ASIC).

Australian Securities Exchange

Investors may wish to consider raising local equity by listing with the Australian Securities Exchange Limited (ASX). Proprietary companies cannot raise capital in this way. Therefore, if a foreign investor plans to raise capital in this way in the future, a public company must be incorporated. This avenue is also available to companies incorporated outside Australia provided that they maintain an Australian share register or facilities for registration of transfers of shares.

Major foreign corporations which are already listed on a recognised foreign stock exchange may list on the ASX as exempt foreign companies. Foreign companies that hold a "foreign exempt" listing on the ASX are exempt from many of the ongoing disclosure requirements imposed on companies that hold a "primary listing".

General admission to the ASX may be sought by a company if they satisfy the ASX's "profit test" or "asset test". The "profit test" requires a company to have an aggregate operating profit for the last three financial years of at least A$1 million (plus A$400,000 consolidated operating profit over the last 12 months) and provided that they meet certain other requirements. The "asset test" requires a company to have net tangible assets of at least A$2 million after deducting the costs of fund raising, or a market capitalisation of at least A$10 million, together with other certain other requirements.

Business environment

General

Australia has a mixed economy in which both the government and the private sector are active.

Intellectual property protection

Australian law recognises intellectual property rights and, in general, Australian legislation protecting intellectual property is consistent with international practice. Australia is a signatory to the World Trade Organization (WTO) Agreement on Trade Related Aspects of International Property Rights (TRIPS) (an agreement scheduled to the General Agreement on Tariffs and Trade (GATT) of the WTO). It is also a signatory to the Patent Cooperation Treaty, and a number of other intellectual-property-related treaties.

Protection is available for a range of intellectual property rights through legislation and the common law.

Patents

The Patents Act 1990 (Cth) provides for the grant of a patent for a patentable invention. A patent is a right granted for any device, substance, method or process which is new, inventive and useful. The term of a standard patent is 20 years from the date of the patent. Micro-organisms, mathematical or business methods and computer programs can be patentable in certain circumstances.

It is also possible to apply for an innovation patent. Since 2001, a new and useful invention that involves an innovative step may be registered as an innovation patent. This option is relatively fast and inexpensive. Protection lasts eight years from the date of the patent. The innovation patent is designed to protect inventions that do not meet the inventive threshold required for standard patents.

Trade marks

Protection of trade marks in Australia is governed by the Trade Marks Act 1995 (Cth). The Trade Marks Act provides for the registration of trade marks for goods as well as services. Under the Trade Marks Act, "a trade mark is a sign used, or intended to be used, to distinguish goods or services dealt with or provided in the course of trade by a person from goods or services so dealt with or provided by any other person". A sign includes the following or any combination of the following, namely, any letter, word, name, signature, numeral, device, brand, heading, label, ticket, aspect of packaging, shape, colour, sound or scent.

The term of registration is ten years, renewable for further periods of ten years. The Trade Marks Act provides for a single application for registration of a trade mark for different classes of goods and services. The 45 classes of goods and services are consistent with the TRIPS classification.

Any trade mark which is distinctive and not similar to another registered mark used for similar goods or services may be eligible for registration in Australia. Under Australian law, unregistered trade marks are protected through the common law

action of "passing off", provided the applicant can establish sufficient reputation in the mark. The benefit of registering a trade mark is that it gives the registered owner a presumption of distinctiveness. This means that it is not necessary for the registered owner to prove reputation in the mark.

Copyright

Copyright protection in Australia is governed by the Copyright Act 1968 (Cth). It provides for copyright in all original literary, dramatic, musical and artistic works, cinematograph films and sound recordings. Computer programs are entitled to protection under the Copyright Act as a literary work. Transfer, assignment and licensing of copyrights, including computer software, is recognised in Australia.

Registration of copyright is not required in Australia. Copyright arises upon the creation of a work that has the requisite amount of originality, once the work has been reduced to a material form. Works of foreign authors first published in Australia are granted protection on a reciprocal basis. Australia is a member of the Berne Convention for the Protection of Copyright in Respect of Literary and Artistic Works and the Universal Copyright Convention.

Three forms of moral rights are recognised in Australia in accordance with the provisions of the Copyright Act. They are:

- the right of attribution of authorship
- the right not to have your authorship falsely attributed
- the right not to have your copyright work subject to derogatory treatment.

Designs

The Designs Act 2003 (Cth) governs industrial designs and protects the aesthetic value of a product. It gives the holder the right to take legal action against anyone reproducing registered industrial designs. The Designs Act provides for an initial registration of five years which can be extended by a further period of five years.

Circuit layouts

The Circuit Layouts Act 1989 (Cth) generally provides protection for eligible circuit layouts for a period starting on the day on which the layout was made and ending ten years after the calendar year in which the layout was first commercially exploited or, in any other case, ten years after the layout was made.

Plant breeder's rights

The Plant Breeder's Rights Act 1994 (Cth) protects new varieties of plants by giving exclusive commercial rights to plant breeders to market a new variety or its reproductive material. Protection lasts for 25 years for trees or vines and 20 years for other species.

Trade secrets

Though Australia does not have specific legislation to protect confidential information, violation of trade secrets or confidential information is protected under common law.

Privatisation

During the 1990s, both Commonwealth and state governments in Australia privatised a significant amount of government-owned assets. The government was committed to reducing its stake in public sector undertakings through strategic sales. Of the assets privatised during the 1990s, approximately 39 per cent of the total value of asset sales was attributed to assets in the electricity and gas sector, 33 per cent to the telecommunications sector and 17 per cent to the finance sector. Since 2000, there has been less privatisation activity generally, although certain sectors have seen some activity, most notably the electricity sector in Queensland and New South Wales, and telecommunications, primarily through the sale of the Australian government interests in Telstra.

Banking sector

The Australian banking sector is dominated by four main trading banks, being the National Australia Bank, Commonwealth Bank, Australia and New Zealand Banking Group, and Westpac. While these banks are protected from foreign takeover under what is known as the "Four Pillars" policy, Australia opened its banking sector to foreign competition in 1987.

Banking sector compliance with relevant legislation and regulations is supervised by the Australian Prudential Regulation Authority.

Competition policy

The Competition and Consumer Act 2012 (Cth) (CCA) is designed to prevent practices that have an adverse effect on competition, to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets. The CCA prohibits anti-competitive agreements, misuse of market power and regulates mergers and acquisitions of businesses.

Environmental laws

Protection of the environment is a high priority in Australia. As such, there are multiple federal laws governing various activities including (but not limited to) hazardous waste importation and exportation, ozone and greenhouse gas production, renewable energy and conservation of the environment generally.

In addition to the federal laws, each state and territory has agencies or departments responsible for environmental protection. The environmental protection agencies deal with a wide range of environmental matters including protecting air, water and soil quality, managing waste, preventing or controlling pollution, managing the state or territory's coastline and promoting sustainable industry. Companies must obtain statutory pollution and environmental approvals before establishing industrial projects.

Franchising in Australia

Franchising is a well-established and credible business method in Australia. Indeed there are more franchise systems in Australia per head of population than in the United States.

The Franchising Code of Conduct (the Code) is a mandatory industry code of conduct having the force of law under the CCA and came into effect on 1 July 1998. The purpose of the Code is to regulate the franchise industry and to otherwise assist franchisors and franchisees in making an informed decision prior to entering into a franchise agreement. It is also intended to provide a framework for dispute resolution.

Pursuant to Part IVB of the CCA, a corporation must not in trade or commerce contravene the Code. A franchisor must, under the Code, give a disclosure document to a prospective franchisee or a franchisee proposing to renew or extend a franchise.

A franchisor must give a copy of the Code, a disclosure document and a copy of the franchise agreement to a prospective franchisee at least 14 days before the prospective franchisee:

- enters into a franchise agreement or an agreement to enter into a franchise agreement
- pays non-refundable money to the franchisor or an associate of the franchisor in connection with the proposed franchise agreement.

Further, the franchisor must not, by virtue of the Code, enter into, renew or extend a franchise agreement unless the franchisor has received from the franchisee or prospective franchisee a written statement that the franchisee or prospective franchisee has received, read and had a reasonable opportunity to understand the disclosure document and the Code. Before a franchise agreement is made, the franchisor must have received from the prospective franchisee signed statements that the prospective franchisee has been given advice about the proposed franchise business from at least an independent legal adviser, business adviser or accountant.

A cooling off period is required whereby a franchisee may terminate an agreement (being either a franchise agreement or an agreement to enter into a franchise agreement) within seven days of entering into the agreement or paying any money under the agreement (whichever comes earlier). If the franchisee terminates such an agreement, the franchisor must, within 14 days, repay all money paid by the franchisee to the franchisor under the agreement, less reasonable expenses that have been disclosed in the disclosure document provided to the franchisee.

Foreign investment policy

General

The Australian government has, for many years, publicly stated that it welcomes foreign investment and recognises the contribution that foreign investment is able to make to the development of Australia's industries and resources. The Australian government states that access to foreign capital, new technology, management skills, overseas markets and economic benefits in terms of growth, employment and development are some of the positive attributes derived from foreign investment in Australia.

The only basis on which the Australian government can object to an investment proposal by a foreign person is if the proposal is contrary to national interest. However, foreign investors can expect that approval will only be withheld on national interest grounds where there are unusual circumstances affecting Australia's vital interests and development.

The Australian government selectively reviews and evaluates foreign investment proposals. Investment proposals by foreign persons are regulated by the Foreign Acquisitions and Takeovers Act 1975 (Cth) (FATA) and applicable policy guidelines issued by the Commonwealth government. The FATA is administered by the Treasurer, who is assisted by FIRB.

Foreign interests

The expression "foreign person" has a very technical meaning under the FATA. There are also complex tracing provisions, which have a broad reach.

In general terms, a foreign person is:

- a natural person who is not ordinarily a resident in Australia
- any corporation, business or trust:
  - which is not ordinarily resident in Australia
  - in which there is a "substantial (controlling) interest" held by a foreign person or corporation.

A substantial interest exists where there is an interest of 15 per cent or more in ownership or voting power (including potential ownership or voting power) by a single person or corporation (together with associates) or 40 per cent or more in aggregate ownership or voting power (including potential ownership or voting power) by two or more persons or corporations (together with their respective associates).

The following proposals must be approved by the Treasurer before they can be implemented and should be notified to FIRB in advance for approval:

- the acquisition of a substantial interest in an Australian company with total shares valued in excess of A$244 million
- the acquisition of the assets resulting in control of any Australian business valued in excess of A$244 million
- with limited exceptions, the acquisition of an interest in urban land (including interests that arise through leasing, financing and profit sharing arrangements) or an urban land corporation or trust, irrespective of value. The exceptions include:
  - an acquisition of non-residential, non-heritage listed, commercial real estate valued at less than A$53 million
  - an acquisition of non-residential, heritage listed, commercial real estate valued at less than A$5 million
  - an acquisition of land being used for industrial, or non-residential commercial purposes that are incidental to the conduct of the business activities of the foreign interest
- takeovers of offshore companies whose Australian subsidiaries or assets are valued in excess of A$244 million and more than 50 per cent of its total assets are in Australia
- direct investments by foreign governments (and their related entities) or

- investments in the media of five per cent or more.

Where there is an obligation to notify FIRB of a transaction, failure to notify can result in the foreign person being fined or jailed. If a foreign person acquires an interest through a transaction that is subject to the FATA, and fails to obtain the consent of the Treasurer, the Treasurer is empowered in certain circumstances to make an order for compulsory divestment of the interest obtained.

Foreign governments and their related entities (State Owned Entities (SOEs))

The definition of what constitutes a foreign government or a related entity includes:

- a body politic of a foreign country
- companies or other entities in which foreign governments, their agencies or related entities have more than a 15 per cent interest (SOEs) or
- companies or entities that are otherwise controlled by foreign governments, their agencies or related entities (also SOEs).

All foreign governments and their related entities must notify the Australian Government and get prior approval before making a "direct investment" in an Australian enterprise, regardless of the value of the investment. A "direct investment" is defined as an investment which:

- involves acquiring an interest of ten per cent or more in an enterprise
- involves acquiring an interest of less than ten per cent in an enterprise if the foreign government or related entity can use that investment to influence or control the enterprise, in particular, investments which include any of the following:
  - preferential, special or veto voting rights
  - the ability to appoint directors
  - contractual agreements including but not restricted to, agreements for loans, provision of services and off-take agreements.

Further, notification is required in respect of any investment that is preparatory to a takeover bid and the enforcement of a security interests over a business' assets or shares will also considered to be direct investments.

When considering direct investments by foreign governments and their related entities, the Treasurer will consider whether the investment is commercial in nature or whether the investor may be pursuing broader political or strategic objectives that may be contrary to Australia's national interest. This includes assessing whether the prospective investor's governance arrangements could facilitate actual or potential control by a foreign government (including through the investor's funding arrangements).

Examination of proposals

Upon receipt of notification of a proposal to FIRB, the Treasurer has 30 days to decide whether the proposal is contrary to the national interest. That 30-day period can be extended by up to a further period of 90 days. Not all proposals that are notified to FIRB are examined in detail.

In particular, where a proposal relates to the takeover of an offshore company with Australian subsidiaries or assets valued at less than A$244 million and more than 50 per cent of its global assets are not in Australia, it will not normally be examined in any detail. However, FIRB must still be notified of the proposal. Proposals involving sensitive industries, such as media, telecommunications, real estate and transport including civil aviation will be scrutinised in greater detail.

Where a proposal is within policy guidelines, FIRB will ordinarily promptly notify the investor that the Treasurer has no objection (usually within the initial 30-day period). Where the proposal is outside policy guidelines and is examinable, FIRB will consult with relevant federal and state government departments and authorities to ascertain their views. These authorities may include the Australian Prudential Regulation Authority and the Australian Competition and Consumer Commission. The consultation is conducted on a confidential basis.

FIRB may impose conditions when giving approval to a proposal. These conditions usually relate to the time period for completion of real estate development or to environmental protection requirements.

Foreign-to-foreign transactions

The acquisition by a foreign interest of an Australian business that is already foreign-owned or controlled is also subject to examination. These proposals fall into two categories:

- foreign-to-foreign takeovers – where a foreign owned business operating in Australia is the target of a takeover by a foreign interest

- offshore takeover – where an offshore company that conducts a business in Australia is acquired by another offshore company and the assets in Australia of the target company are valued at more than A$244 million or constitute more than half the value of the global assets of the offshore target.

Foreign-to-foreign takeovers are assessed against the policy applicable to the relevant sector of the economy and regard is given to the fact that they do not involve any reduction of Australian ownership and control. Offshore takeovers normally do not raise issues that would be contrary to the national interest. In cases where national interest issues are relevant, the Australian government's preferred practice is to seek to resolve any such concerns through consultations with the parties involved.

United States investors

As a result of the implementation of the Australia–United States Free Trade Agreement (AUSFTA), amendments were made to the FATA and its regulations which reflect the obligations on Australia contained within AUSFTA. These include commitments to treat United States investors no less favourably than Australia accords to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments within Australia. Examples of this policy implementation include the higher notification thresholds which apply to United States investors and United States government investors when acquiring substantial interests in existing Australian businesses.

Government initiatives and incentives

Each state may have various programmes to encourage foreign investment in the particular state. Examples of possible incentives are:

- financial (loan) assistance
- loan guarantees
- reduced land and services charges
- payroll tax reductions
- housing for employees
- retail freight subsidies
- labour training subsidies
- consultancy and feasibility study subsidies.

Potential investors should seek professional advice and determine the possible incentives available for their proposed investment so they can determine the most advantageous location and structure for their investment.

The incentives offered by each state government will vary from year to year and from industry to industry. In addition to state government incentives, the federal government offers special tax treatments for investments in certain industries.

Taxation

Taxation policy

To encourage investment in Australia, a competitive range of tax concessions and incentives are available from the Australian government. These provide a very supportive framework for investment in Australia and compare favourably with other industrialised economies. The foreign investor should work closely with a professional Australian legal advisor to ensure compliance with all relevant regulations.

Major aspects of the tax system in Australia

Foreign investors in Australia must pay taxes levied by the federal government and by the state and local councils. The major taxes levied in Australia are summarised below. There are other taxes related to special types of investments and transactions.

Income tax

Income tax is levied only by the federal government on individuals, companies, some trusts and other entities. Income tax is levied on the "assessable income" of Australian residents rather than accounting profits. The assessable income of a resident individual or entity includes income sourced inside and outside Australia. Income tax is also levied on "assessable income" of nonresident individuals and entities which have an Australian source. Australia's jurisdiction to tax will be affected by the existence of a double tax agreement between Australia and the non-resident's country. The purpose of a double tax agreement is to prevent double taxation by a variety of methods. The application of the concept of "permanent establishment" and the limits on withholding tax on passive income are two very important issues in the application of double tax agreements. The following schedules summarise the various income tax rates applicable in Australia for individuals who are residents or non-residents for the 2011/12 financial year (that is, 1 July 2011 to 30 June 2012).

Resident Individuals	
Taxable Income (A$)	**Tax payable (A$)**
$0 – $6,000	Nil
$6,001 – $37,000	15c for each $1 over $6,000
$37,001 – $80,000	$4,650 plus 30c for each $1 over $37,000
$80,001 – $180,000	$17,550 plus 37c for each $1 over $80,000
$180,001 and over	$54,550 plus 45c for each $1 over $180,000

Note: The above tax rates were applicable at the time of editing however, the following changes to the 2012/2013 income tax regime have been announced and apply for the 2012/13 financial year:

- the tax free threshold will be increased from $6000 to $18,200
- the two lowest income brackets will be increased to 19c and 32.5 per cent (from 15c and 30c).

Non-resident Individuals	
Taxable Income (A$)	**Tax payable (A$)**
0 – $37,000	29c for each $1
$37,001 – $80,000	$10,730 plus 30c for each $1 over $37,000
$80,001 – $180,000	$23,630 plus 37c for each $1 over $80,000
$180,001 and over	$60,630 plus 45c for each $1 over $180,000

Residents are also required to pay an additional amount of tax, known as the Medicare levy, which is currently 1.5 per cent of their taxable income (subject to exclusions and discounts for low-income earners).

A special levy — referred to as the "flood levy" — has been imposed in relation to income earned between 1 July 2011 and 30 June 2012 to help communities recover from natural disasters in the early part of 2011. The flood levy is imposed at the following rates:

Taxable income	Flood Levy
$0 – $50,000	0%
$50,001 to $100,000	Half a cent for each $1 over $50,000
Over $100,000	$250 plus 1 cent for each $1 over $100,000

The rate of income tax for public and private companies is 30 per cent.

Capital gains tax

The Commonwealth government also imposes a tax on certain capital gains. The capital gains tax (CGT) regime provides that net capital gains (which are realised when an asset is disposed of) are included in a taxpayer's taxable income. As such they are subject to income tax. CGT applies to the disposal or deemed disposal of assets acquired after 19 September 1985. CGT applies to a wide range of assets held by Australian residents. It applies to a much narrower range of Australian assets held by non-residents. The CGT provisions contain complex rules relating to how the amount of net capital gain must be calculated and which transactions will be deemed to be disposal of assets. Certain taxpayers,

such as individuals and complying superannuation funds, will be entitled to a discount of tax on the capital gain if the asset disposed of has been held for 12 months or more. In the case of an individual the amount of the capital gain subject to tax is reduced by half and in the case of a complying superannuation fund it is reduced by one third. Special rules apply for CGT purposes to persons becoming or ceasing to be Australian residents.

Fringe benefits tax

Fringe benefits tax (FBT) is a separate tax payable by employers on the fringe benefits which they provide to their employees. Employers must calculate their own liability for the tax and, if the employer had to pay FBT of $3000 or more in the previous year, pay it in quarterly instalments with the balance being due at the end of the FBT year when an annual FBT return must be lodged.

The FBT year runs from 1 April to 31 March in the following year. FBT is calculated on the (FBT-inclusive) taxable value of the fringe benefits provided by the employer at the current rate of 46.5 per cent. The cost of providing a fringe benefit (including any FBT incurred) can be deducted from the employer's assessable income for income tax purposes. Benefits subject to FBT include: motor vehicles, free or low-interest loans, some car parking allowances, payment of private expenses, free or subsidised housing, excessive living-away-from-home allowances, and concessional fares for air transport.

Superannuation guarantee scheme

Employers are required to provide a prescribed minimum level of superannuation support for each of their employees in Australia. For the 2011/12 financial year, the prescribed amount is equivalent to nine per cent of each eligible employee's ordinary time earnings for each quarter. Those employers who fail to provide the prescribed amount are liable to pay to the ATO an amount known as a superannuation guarantee charge equal to the potential amount that should have been paid (as well as interest and an administration fee). It is proposed that he prescribed percentage will be increased from nine per cent to 12 per cent from 1 July 2013 to 1 July 2019.

Foreign income provisions

Foreign income provisions were introduced into the Australian taxation system with effect from 1 July 1990. These provisions seek to tax Australian residents upon certain income (such as passive income) derived by non-resident companies and trusts where residents beneficially own or control those foreign entities. Where these provisions apply, residents will be taxed on an accruals basis, that is, on the income they have earned even though it has not been distributed to them. In certain circumstances, such as where an active business is conducted, income derived will be exempt from these provisions. The rules relating to foreign income are quite complex and require careful consideration.

Goods and services tax

In addition to income tax, which is a "direct tax", since 1 July 2000 the federal government has imposed a ten per cent goods and services tax (GST). GST is a broad-based consumption tax. The GST is a ten per cent tax levied on the supply of goods and services made by anyone registered (or required to be registered) for GST, except to the extent that the supply is input-taxed or GST-free. GST is also levied on goods transported into Australia. GST on imports is paid by the entity importing the product into Australia. Certain types of exports and certain other supplies for consumption outside Australia are GST-free. GST is paid at each stage of the supply chain. Entities that are registered for GST which make taxable supplies (and therefore pay GST) receive a credit for the GST they have paid on inputs (input tax credits). This means that, ultimately, the burden of the GST is borne by end users of the goods or service.

Stamp duties

Stamp duties are additional transaction type taxes imposed by each of the states and territories. Duty is variously imposed on specified documents, transactions and instruments at varying rates. There can be differences between the states and territories as to the application of stamp duty to particular transactions. With the introduction of GST, the revenue from which is shared by the federal government with the states and territories, stamp duty has been abolished on a number of types of transactions. The types of transactions that

may typically continue to attract duty in most states include purchases of land (including interests in land-holding entities), businesses and other property, insurances and declarations of trust. Duty is calculated as a percentage of the price or value of the property.

Land tax

Land tax is an annual tax levied by the state governments on the unimproved value of land owned by a person or entity. For example, taxpayers may be assessed on the taxable adjusted unimproved value of all land or interests in land owned by them in a state as of midnight on the last day of the calendar year.

Payroll tax

Payroll tax is a tax on total wages levied by each state government. The requirements and rates of tax, therefore, vary from state to state. Payments to certain independent contractors are also liable to payroll tax in some states. Fringe benefits and superannuation contributions may also be included in the total wages upon which the calculation of payroll tax is made. Each state and territory has specific definitions of who are employees and what amounts must be included in wages.

Local council taxes

Council rates are imposed by the local councils on people and companies who live or work within the local area. These are primary usage rates imposed to pay for local services. They are generally minor taxes. The requirements and rates differ from location to location.

Workplace relations

General

The workplace relations climate in Australia is, generally speaking, favourable for foreign investors. The level of workplace disputes in Australia has been at record lows. The majority of employees employed in the private sector in Australia are covered by the Fair Work Act 2009 (Cth). Certain aspects of employment (for instance in relation to certain leave entitlements) are governed by state laws in conjunction with the Fair Work Act 2009 (Cth).

Employment conditions

The Fair Work Act prescribes certain minimum employment conditions for most Australian employees by way of the “National Employment Standards” (NES). By law, no workplace agreement can provide conditions which are less than those in the NES. The NES contain the following ten minimum standards:

Ordinary working hours

Employees may not be required to work in excess of 38 hours per week plus “reasonable additional hours”.

Annual leave

The minimum condition is twenty days’ paid annual leave per year for full time employees (plus an additional week for some continuous shift employees); casual workers are excepted. Annual leave may be accumulated from year to year and cashed out in some cases, in accordance with certain safeguards.

Personal/carer’s leave and compassionate leave

The NES provide for ten days paid personal/carer’s leave per year and two days paid compassionate leave for each relevant occasion, casual workers are excepted. Where this paid personal/carer’s leave has been used up, two days’ unpaid carer’s leave can be taken for each carer’s leave occasion. This unpaid leave is available to casuals.

Unpaid parental leave

Employees who have completed at least 12 months’ continuous service, other than certain casual employees, can take up to 52 weeks’ unpaid parental leave. They also have the right to request an extension of a further 52 weeks. Employers can only refuse a request for an extension on reasonable business grounds.

Right to request flexible working hours

Employees who have completed at least 12 months’ continuous service, and who care for a child that is under school age or under the age 18 with a disability, have the right to request flexible working hours to assist in the care of the child. An employer can only refuse the request on reasonable business grounds.

Long service leave
The NES preserves existing long service leave arrangements that applied prior to the NES, which in many cases will vary from employer to employer. For most employees however, long service leave will still arise under state legislation rather than the NES. The precise long service leave entitlement varies from state but as a rule of thumb it will be approximately two months' paid long service leave after ten years' service, or 13 weeks' leave after 15 years' service with the one employer or group of employers. In some circumstances, employees will also have the right to payment of a pro-rata amount of long service leave if their employment is terminated after a number of years of continuous service.

Public holidays
Employees are entitled to a day off work on a public holiday without loss of pay. Public holidays also vary from state to state. Employers can request an employee to work on a public holiday, however the employee must agree unless it would be "unreasonable" for the employee to refuse the request. An employee required to work on a public holiday is often entitled to additional pay as compensation.

Notice of termination and redundancy
Employees are entitled to up to four weeks' notice of termination (or five weeks' for employees aged over 45 and who have at least two years of continuous service) and up to 16 weeks' redundancy pay. Both notice of termination and redundancy entitlements are based on the length of service of the employee. There are also a number of exemptions that can apply.

Community service leave
Employees are entitled to unpaid leave in order to participate in an eligible community service activity. Employees who engage in jury service (which is an eligible community service activity) are entitled to up to ten days paid leave.

Fair Work Information Statement
Employers are required to provide employees with a "Fair Work Information Statement" when they start their employment. The Fair Work Information Statement is a statement published by the Australian government outlining various rights of employees.

Modern awards
Modern awards build on the NES and include additional conditions of employment for employees employed in certain industries or occupations. Created by the Australian Industrial Relation Commission, modern awards include industry specific conditions relating to such things as minimum wages, types of employment, overtime and penalty rates, allowances, leave related matters, superannuation and dispute resolution.

For example, the Mining Industry Award 2010 sets out minimum conditions on a variety of issues for mining industry employees, including rates of pay, hours of work and overtime rates.

Not all industries and occupations are covered by modern awards, although most are. Modern awards do not always apply to high income or managerial employees. Modern awards also do not apply to employees who are covered by an enterprise agreement.

Enterprise agreements
Enterprise agreements are statutorily recognised collective agreements agreed to between a single employer (or, in some cases, multiple employers) and a group of employees, or their representatives (such as a trade union). The Fair Work Act sets out the matters which can (and cannot) be included in an enterprise agreement. Amongst other things, an enterprise agreement must include provisions on rates of pay, consultation and dispute resolution.

When bargaining to make an agreement, parties are obliged to meet six key "good faith bargaining requirements" stipulated in the Fair Work Act which are concerned with the conduct of representatives when bargaining. They relate to issues such as attending, and participating in, meetings at reasonable times; disclosing relevant information (other than confidential or commercially sensitive information) in a timely manner and responding to proposals made by other bargaining representatives for the agreement in a timely manner; and refraining from capricious or unfair conduct that undermines freedom of association or collective bargaining.

A party negotiating an enterprise agreement can apply to Fair Work Australia (FWA) for a bargaining

order if, among other things, concerns are held that one or more of the bargaining representatives for the agreement have not met, or are not meeting, the good faith bargaining requirements.

An enterprise agreement must be approved by FWA before it comes into operation. FWA may refuse to approve an enterprise agreement on a number of grounds, including if it fails to meet the better off overall test (BOOT). An agreement will pass the BOOT if FWA is satisfied that each employee covered by a modern industrial award would be better off overall if the enterprise agreement applied to the employee rather than the applicable modern industrial award.

Minimum rates of pay

The Minimum Wage Panel of FWA is responsible for setting and adjusting the Federal Minimum Wage (FMW), minimum award classification rates of pay (including apprentices) and casual loadings. From 1 July 2011 the FMW is A$15.51 per hour or A$589.30 per week and the casual loading is 22 per cent. However, most employees will be entitled to a greater minimum wage or casual loading under an industrial award or workplace agreement.

Superannuation

All employees in Australia earning between certain limits are entitled to have minimum superannuation contributions made on their behalf by their employer (currently nine per cent of their ordinary time earnings).

Employee unions

Unions represent the industrial interests of certain categories of employees who are entitled to become members. Typical trade unions actively pursue the making of enterprise agreements with employers on behalf of their members. Membership of a union is not compulsory.

Termination of employment

Most employees may bring claims against their employers for reinstatement or compensation if dismissed unfairly (for example, there was no valid reason to terminate the employee or they were not given procedural fairness). Employees who are dismissed for genuine redundancy reasons are not allowed to pursue an unfair dismissal claim (provided certain other conditions are met). Furthermore, seasonal workers, employees engaged under a contract of employment for a specified period/task, employees on probation, casual employees engaged for a short period, trainees and certain employees earning over A$118,100 per annum cannot bring unfair dismissal claims against their employer. Employees also cannot bring an unfair dismissal claim during the first six months of their employment or, if the employer has fewer than 15 employees, the first 12 months.

Workplace rights

The Fair Work Act also contains a range of general protections. For example, it is unlawful for a person to take adverse action because of another person's workplace rights. Adverse action includes dismissal, discrimination, refusing to employ a person, or prejudicially altering the position of a person. Workplace rights include an entitlement under an award or agreement, or a workplace law.

Anti-discrimination law and equal employment opportunity

There is both federal and state legislation regulating employers' and employees' mutual rights and obligations regarding non-discriminatory workplaces. Generally speaking, it is an offence to discriminate against a prospective or existing employee on a wide variety of grounds including sex, mental and physical disability, race, colour, nationality, sexual preference and age. "Equal employment opportunity" refers to the policy and practice of giving all persons an equal chance to a job, based on merit, irrespective of their gender, race, disability, or other unlawful grounds of discrimination. In addition to anti-discrimination legislation, there is "affirmative action" legislation in Australia which requires large employers to take steps to ensure that any barriers to the employment of women are removed and that positive action is taken to encourage their employment.

Occupational health and safety

Increasing emphasis is being placed on the importance of occupational health and safety in Australia. This trend is reflected in occupational health and safety legislation in the various states and territories which places significant duties on both employers and employees to ensure that

workplaces are safe and without risk to health. Heavy penalties apply for breaches of such legislation. In 2012, Australia continues to move towards a national occupational health and safety system which seeks to harmonise the laws between each state.

Workers' compensation

It is compulsory for all employers in Australia to take out workers' compensation insurance to cover any illness or injury to an employee arising from their work. The insurance must be obtained from a licensed insurer (certain large employers can self-insure). The level of workers' compensation premiums is determined by the industry in which the employer operates and the level of risk associated with that industry.

If an employee is absent from work due to a work related injury, certain restrictions are placed on the employer's ability to terminate the employee's employment by reason of their absence (these obligations arise under both specific workers compensation legislation and under the Fair Work Act). Employers also have obligations in respect of assisting the employee's rehabilitation. The precise obligations and restrictions imposed on employers vary from state to state.

Fair Work Australia and the Fair Work Ombudsman

Fair Work Australia was established under the Fair Work Act as Australia's national employment tribunal. It is an independent body with power to carry out a range of functions relating to employment matters and, specifically, to resolve employment and industrial disputes.

The Fair Work Ombudsman was also created under the Fair Work Act as an independent body which aims to promote workplace rights, investigate complaints and, if appropriate, litigate suspected contraventions of workplace rights.

Dispute resolution

Courts

Australia has a common law system. The judiciary operates the principle of independence from the executive and legislative branches of the government.

Each of the Australian states and territories have their own judicial systems and courts that are generally composed of a Magistrates' Court, District Court, Supreme Court and Court of Appeal of the Supreme Court. The courts of each state and territory have jurisdiction to determine common law matters and matters that arise from state legislation (and associated federal legislation in certain circumstances). State legislation also establishes commissions and tribunals, for example, the Queensland Industrial Relations Commission.

Matters arising under Commonwealth or federal legislation (and associated state legislation in certain circumstances) are determined by the federal courts. The federal court system is composed of the Federal Court, Federal Magistrates' Court, the Family Court and the High Court of Australia, which is the ultimate court of appeal in relation to federal, state and territory matters. Federal legislation also establishes commissions and tribunals, which are responsible for administering federal legislation. Examples of federal commissions and tribunals include the Human Rights and Equal Opportunity Commission, the Australian Industrial Relations Commission, the Social Securities Appeal Tribunal and the Administrative Appeals Tribunal.

Arbitration

Arbitration has become a commonly used mechanism of alternative dispute resolution for parties seeking a binding determination of their dispute. It is an alternative to court-based litigation that is generally more time and cost-efficient. The process is adversarial but, unlike the court system, the parties and the arbitrator can determine the degree of formality.

Most commercial contracts in Australia contain a clause providing for the referral of any dispute arising from that contract to arbitration. The arbitration clause will outline the procedure for

the appointment of an arbitrator or for a panel of arbitrators. A panel of arbitrators will generally contain an expert from the industry relevant to the dispute.

Commercial arbitration legislation governs the arbitration processes in each of the states and territories. The arbitrator's role is to evaluate the parties' arguments and to reach a decision called the "award". The award is deemed to be final and can be enforced in the same manner as a judgment of the court.

Foreign arbitral awards are enforced in Australia under the International Arbitration Act 1974 (Cth) (IA). This Act implements Australia's obligations under the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) and gives force to the UNCITRAL Model Law. Consequently, foreign awards (from countries that have signed the New York Convention) will be binding upon the parties in Australia as if the award was made in Australia.

In Victoria, Tasmania and Western Australia, the enforcement of foreign awards is also regulated by commercial arbitration legislation found at the state level. In the event of an inconsistency, however, the IA will prevail.

Other forms of alternative dispute resolution

Other forms of alternative dispute resolution in Australia include conciliation and mediation. Conciliation is a process where the parties to a dispute engage an independent third party, the conciliator, to assist them in reaching an agreement. Unlike an arbitrator, a conciliator has an active role where they may suggest terms of settlement and provide advice to assist in reaching an agreement.

Mediation is a process whereby the mediator is an independent third party who facilitates (as opposed to having an active role in the decision-making process) the parties to a dispute in endeavouring to reach a mutually beneficial agreement.

China

Contributed by Norton Rose

Visas and work permits
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Since the reforms instituted by the late Deng Xiaoping opened up China to foreign investment, the country has grown at a phenomenal rate, with many predicting it will become the world's largest economy over the course of the next 30 years. China is now the world's largest recipient of foreign capital, with a large number of foreign companies established or exploring opportunities to do business in China.

China's legal environment is a work in progress. Successive reforms since the early 1980s have made China's legal environment more transparent and predictable and have brought it closer to more developed and sophisticated legal systems. However, despite these significant improvements, the legal environment remains challenging: there are gaps and ambiguities in the laws, and policies can change rapidly and vary between locations.

Visas and work permits

Working in China

In order to work in China, foreign nationals must work for an employer who has an employment licence for foreign nationals, issued by the local labour administration bureau. These provincial and local labour departments have considerable autonomy in employment matters and procedures vary from region to region.

An employer will sponsor the application for a work permit, and submit a number of documents to the authorities. If the employer is a foreign-invested enterprise (see below), the documents that must be submitted generally include the employer's incorporation documents, a valid business licence, a statement outlining the reasons for employment and the terms of the employment contract, and a certificate from an employment agency certifying that no Chinese candidates are eligible for that post.

Once the authorities have verified and approved the documents, an employment permit will be issued and will be sent directly to the employee together with a visa notification letter.

To enter China for work purposes, employees should apply for a working visa (Z) at their local Chinese embassy. It is only an entry visa, and must be exchanged for a residence permit within 30 days of entry into China.

The residence permit is tied to the employer and a new application must be made if the employee changes jobs. It must be noted that the Chinese authorities are liable to restrict the number of visas issued without warning.

Travelling to China for business

Foreign nationals travelling to China for business must hold a business visa (F), which can be for single, double, or multiple entries. The F visa is valid for stays of one to six months and may be renewed up to three times in China for a maximum period of one year. A formal invitation letter from an authorised Chinese entity is required to apply for an F visa.

Business entities

Overview

Generally speaking, there are two types of corporate person entities in China: limited liability companies (LLC) and companies limited by shares (CLS). Companies are further identified on the basis of whether they have foreign investors. Companies which have foreign investors are known as foreign-invested enterprises (FIEs) and are treated differently from domestic Chinese companies in a number of respects.

There are three main types of FIEs: the equity joint venture (EJV), the cooperative joint venture (CJV)

and the wholly foreign-owned enterprise (WFOE). These are by far the most common vehicles used by foreign investors and are all LLCs. A foreign-invested company limited by shares (FICLS) can also be set up, though these are rare as they usually require a number of investors and a higher amount of registered capital. If an investor can meet various guidelines as to the number and size of its Chinese subsidiaries, a holding company for these subsidiaries attracting certain benefits can also be set up.

Virtually all new entrants to China will utilise a WFOE, an EJV or a CJV. Brief details of the key features of an LLC and a comparison of the differing features of WFOEs, EJVs and CJVs are provided below. In particular, only companies limited by shares can be listed on Chinese markets, so sometimes existing LLC s are converted into FICLS in preparation for a potential listing.

LLC key features

An LLC is broadly similar to a private company in other jurisdictions in that it is a legal entity which has ownership and property rights and the liability of investors in the company is limited to the extent of their investment. There are, however, some key differences. Capital is not divided into shares – instead, investors hold an "equity interest" in the registered capital based on the amount they have contributed to the registered capital of the company.

Minimum capital contribution injections are required depending on the location and industry in which the FIE will be engaged. Contributions can be made partly in kind (machinery, buildings, etc), but at least 30 per cent of the registered capital must be in cash. Careful consideration should be made to how much cash/assets needs to be injected for the business to operate successfully. Injecting fresh equity into an FIE is not as straightforward as in many jurisdictions and requires a lengthy approval process.

There are various restrictions on how much and what kind of debt an FIE can assume. The "total investment amount" is the amount of the registered capital of an FIE plus the amount borrowed or to be borrowed by it. The total investment amount of an FIE is capped according to the size of its registered capital.

For example, an FIE with a registered capital of between US$2.1 million and US$5 million may only have a total investment amount of twice its registered capital, so (depending on its actual size between US$2.1 million and US$5 million) could only borrow between US$2.1 million and US$5 million. A company with a registered capital of over US$12 million can only have a total investment amount of three times its registered capital. In some service sectors, FIEs are subject to even stricter limits.

The total investment amount of a company needs to be stated in its articles of association. The higher the level of total investment amount, the higher the level of approval required for the establishment of the FIE.

Again, careful consideration needs to be given to the level of the total investment amount bearing in mind the requirement for debt funding and the approval process. The ability of FIEs to borrow from foreign banks is also restricted, especially so in the real estate sector, where it is currently prohibited (though there are indications that this position may be changed).

Key distinctions between a WFOE, an EJV and a CJV

The table below sets out the key distinctions between a WFOE, an EJV and a CJV. It should be noted that certain industrial sectors preclude the use of WFOEs and require a JV with a Chinese party for foreign investment to be permitted. There appear to be increasing difficulties in approval being obtained for CJVs. As such, EJVs are the most common for FIE use.

	EJV	CJV	WFOE
Ownership levels	In strict proportion to the registered capital contributions made by the parties	As set out in the CJV contract	100% foreign-owned (whether by one foreign entity or several)
Highest authority of the company	Board of directors	Board of directors	Shareholders' meeting
Control	Representation on board subject to ownership proportion Unanimous resolutions are required by law for certain matters	Representation on board subject to contractual provisions Unanimous resolutions are required by law for certain matters	Complete investor control if single investor or otherwise as determined in the shareholders' agreement
Profit-sharing	Strictly in proportion to the registered capital contributions made by the parties	As set out in the CJV contract	As set out in the shareholders' agreement
Capital recovery	Net assets are shared in proportion to registered capital contributions upon a sale of the business or a liquidation A capital reduction is possible but rarely approved by the authorities	Early capital recovery is possible although subject to stringent conditions and the approval of the authorities. Net assets are shared as set out in CJV contract upon a sale of the business or a liquidation A capital reduction is possible but rarely approved by the authorities	Net assets are shared as set out in the shareholders' agreement upon a sale of the business or liquidation A capital reduction is possible but rarely approved by the authorities
Set-up speed	Slow – negotiations and approvals can take a long time	Slow – negotiations and approvals can take a long time	Medium – approvals take a set amount of time but there are no negotiations

From the categories in the above table, it may seem that the establishment of a WFOE is preferable to that of an EJV or a CJV. However, this choice will be influenced by a range of business considerations. As noted above, it is not always possible to establish a WFOE in certain sectors. The involvement of a Chinese party in a JV will also greatly assist with local business contacts, suppliers and market knowledge. A joint venture also reduces the amount that it may be necessary to invest to establish a presence in China. Of course, detailed due diligence on the suitability of any JV partner should be performed in advance.

Partnerships

Foreign-investors have, since 2009, been allowed to establish partnerships (foreign-invested partnerships, FIPs). FIPs are likely to be the vehicle of choice for foreign private equity funds willing to set up onshore Renminbi denominated funds.

A FIP may be established by:

- two or more foreign enterprises or individuals without a Chinese partner
- a foreign enterprise or individual and a Chinese individual or body corporate.

Foreign enterprises or individuals may also become partners of existing partnerships by contributing capital to or acquiring participations from an existing partner.

FIPs are not allowed for projects where foreign ownership is subject to a cap under Chinese law. This means that FIPs are only available for projects where a foreign investor is allowed to hold a 100 per cent equity interest. Capital contributions to a FIP may be made in cash or in the form of tangible assets, intellectual property rights, land use rights or other property rights. Foreign general partners may contribute capital in the form of services.

Foreign enterprise representative offices

A representative office is a registered permanent office of a foreign enterprise serving as its presence in China. While there is no requirement for capital investment and the registration procedures are fairly straightforward, a representative office is not considered as an autonomous legal person and its activities are limited to "indirect business operations on behalf of the foreign enterprise in China".

A representative office may engage in activities on behalf of its head office such as business liaison (including the initial negotiation of contracts), recommendation of products, market research, and promotion of technological exchange.

Representative offices are prohibited from engaging in "direct business operations". Although this concept is not defined in the relevant regulations, it seems that direct representation, sales and production activities will be deemed "direct business operations" and are prohibited. They are therefore prohibited from directly engaging in any income-generating activities and no funds should flow through their bank accounts, other than those required to maintain a presence in China.

Neither the representative office nor its head office can have a direct contractual employment relationship with the Chinese employees of the representative office. Chinese staff must be hired through a government-designated labour service company.

Generally speaking, a representative office can apply for an establishment term of three years (which term is renewable).

Overview of approval process

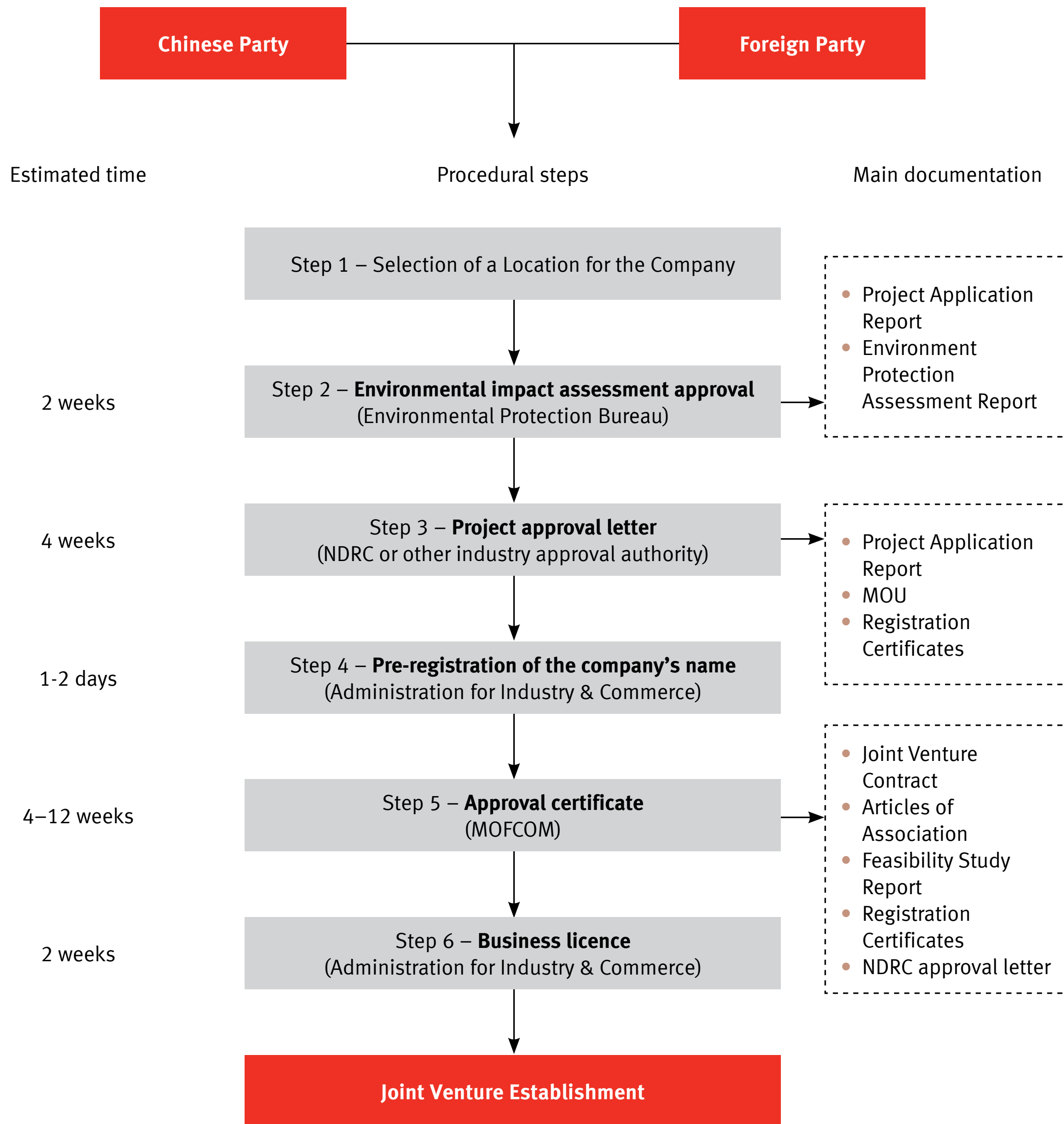
A diagram showing an indicative timeline and the necessary approvals required to establish a joint venture FIE is shown below. In practice, the actual timeline may be extended by difficulties in negotiation or problems with approvals.

The most important approval required is that of the Ministry of Commerce (MOFCOM). MOFCOM is responsible for approving the establishment of the FIE and the terms of the articles of association and shareholders' agreements.

MOFCOM is split into various levels of authority – municipal, provincial and national. The level of approval required generally depends on the proposed total investment amount of the FIE and whether the industry type is encouraged or restricted (except in certain sectors, where national MOFCOM approval is automatically required).

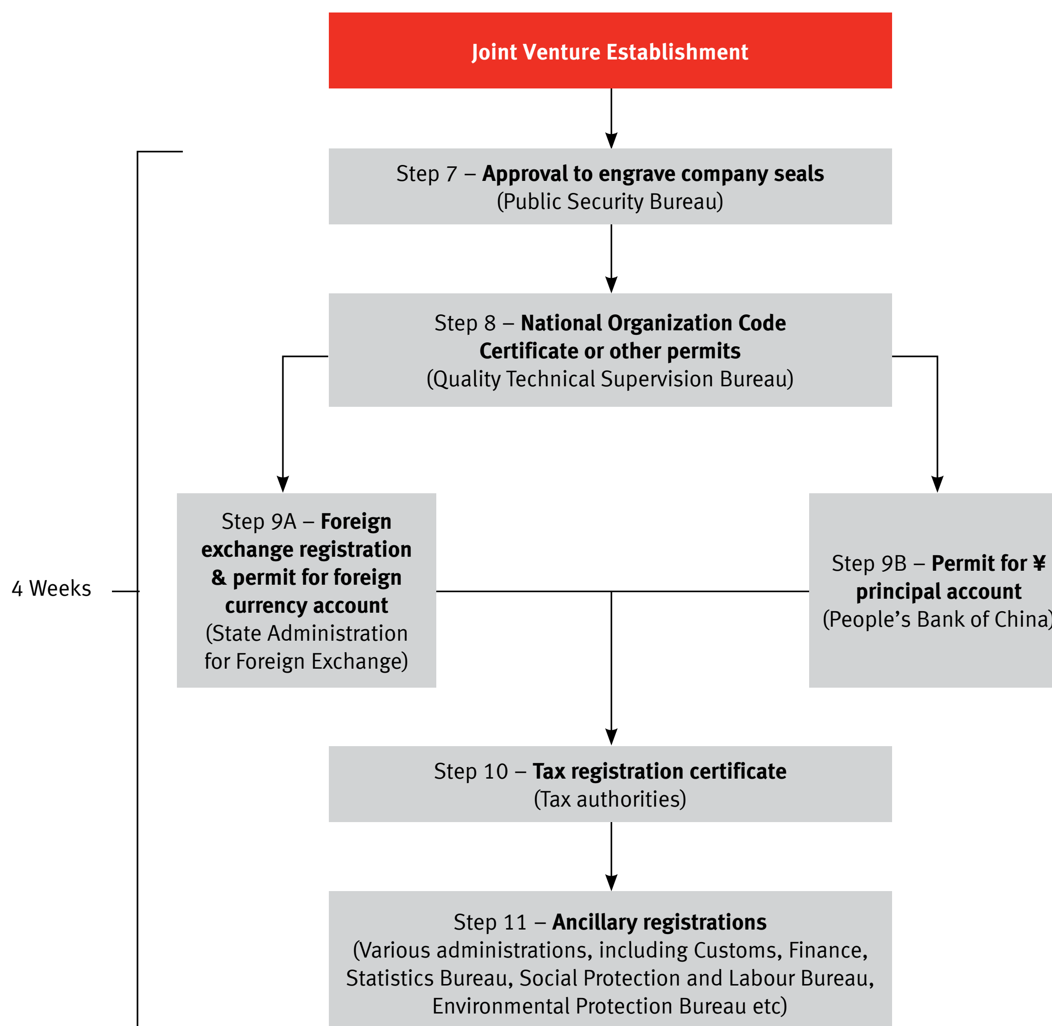
Generally, the higher the approval level required, the more uncertain the outcome of the approval. The level of approval required according to the total investment amount is another reason to plan carefully the size of the proposed total investment amount for the FIE.

FIE pre-establishment procedure



The following diagram describes the steps to be followed after MOFCOM approval.

FIE post-establishment procedure diagram



Doing business in China without establishing a presence in China

Establishing a presence in China in one of the ways described above, with the uncertainty and capital costs involved, may not be suitable for all companies or business models. There are, however, alternative models which may be suitable for manufacturing-based industries.

A foreign company may enter into a distribution agreement or direct sales agreement (perhaps with a well-known distributor who has established an FIE in China) or a Chinese company with an import/export licence. There are still some restrictions on the types of goods that can be imported, particularly with regard to newspapers and pharmaceuticals.

A foreign company may grant a Chinese manufacturer a non-exclusive right to manufacture and package products according to designs and specifications provided by the foreign company.

A closer cooperation arrangement than this is known as “processing and assembling”. In this situation, the foreign company will ship raw materials or semi-finished products to a Chinese manufacturer. The manufacturer will use the imported materials to produce goods which are then exported to the foreign company. The Chinese manufacturer will typically be paid a fee for this.

The tax rules applicable to the above arrangements are complicated. In some cases, customs duties and VAT may be waived, but this will depend on the situation and (for example) it is usually a requirement that all goods made in China from imported goods are exported for these waivers to apply. Careful consideration of the tax implications of any arrangement should be given, as well as which party should bear the cost of any tax charges.

Other issues to be aware of in such an arrangement are the protection of the IP rights of the foreign company and the manner is which disputes between the parties can be resolved.

Business environment

Competition law

In a similar manner to competition regimes in other jurisdictions, “monopolistic agreements” and “concentrations of undertakings” that have or may have the effect of eliminating or restricting competition are regulated under Chinese competition law. Chinese competition law has extraterritorial application – if conduct eliminates or restricts competition in China, it can amount to an infringement of competition law regardless of whether that conduct took place in China or elsewhere.

Therefore when undertakings with sales or other commercial activities in China make decisions on pricing or commercial terms, they must take Chinese competition law into consideration, regardless of whether they have an actual presence there. It should be noted that the extra-territorial effect of the legislation could (and has) resulted in the Chinese authorities blocking or attaching conditions to mergers of foreign companies which happen to do business in China.

Monopolistic agreements

Five types of monopolistic agreement are prohibited:

- agreements to fix prices
- agreements to limit supply
- agreements that divide downstream or upstream procurement markets
- agreements that limit the purchase of equipment
- joint boycott agreements.

There is also a “catch-all” provision – any other agreement deemed to be a monopolistic agreement by the authorities. However, for all types of monopolistic agreement, the agreement will be permitted if an undertaking can demonstrate that the agreement was concluded for a particular beneficial purpose and that the agreement will not seriously restrict competition in the relevant market.

Beneficial reasons include improving technology, developing a new product, increasing efficiency and achieving social or public benefits. In two cases ("securing legitimate interests in foreign trade" or "such other circumstances as might be provided for in law or by the State Council"), a monopolistic agreement is permitted even if it does seriously restrict competition.

This exemption where serious anti-competitive conduct is envisaged is not a feature of most other competition law regimes.

Sanctions can be imposed even where a monopolistic agreement has not been implemented. In catching informal arrangements or understandings (concerted practices) – as well as formal agreements – the law is consistent with international practice.

Where an undertaking enters into a prohibited monopolistic agreement, the relevant anti-monopoly enforcement authority will order it to cease and desist, confiscate any illegal earnings and impose a fine of one per cent to ten per cent (depending on the nature, degree and duration of the violation) of the undertaking's turnover in the preceding year (or if the arrangement has been agreed but not implemented, up to ¥500,000 (around US$72,000 or €46,000)).

Abuse of dominant position

Simply having a particular degree of market power in itself will not amount to an infringement of competition law – an undertaking must be dominant and must abuse its position of dominance.

A dominant market position is one which accords an undertaking the ability to control the price or quantity of commodities or other trading conditions or to prevent and/or affect the access of other undertakings to the market. Market share, competitive conditions in the market and the barriers to entry in the particular market are among the other considerations taken into account when determining dominance.

There is in addition a rebuttable presumption of dominance if certain market share thresholds are met:

- a single undertaking is deemed to be dominant if its market share amounts to at least half of the relevant market
- two undertakings are held to be jointly dominant if their combined market share amounts to at least two-thirds of the relevant market
- three undertakings are jointly dominant if their combined market share amounts to at least three quarters of the relevant market
- this presumption can be rebutted where an undertaking puts forward evidence to show it does not have market power by pointing to such factors – or the absence of them – as those mentioned above.

Examples of abusive conduct that dominant undertakings are prohibited from engaging in include:

- selling or buying goods at unfairly high or low prices
- selling goods at below cost without valid reason
- refusing to trade with another party without valid reason
- restricting another party to a transaction to dealing exclusively with it, or only with designated undertakings, without valid reason.

Where an undertaking abuses its dominant position, the relevant anti-monopoly enforcement authority may order it to cease and desist, confiscate the illegal earnings and impose a fine of one per cent to ten per cent of its turnover in the preceding year.

Where an undertaking causes other parties to suffer loss as a result of abusing its dominant position and/or entering into a monopolistic agreement, it may also face civil liability in the courts.

The competition law framework described above has only recently been implemented, and in common with other Chinese legislation contains general and often open-ended (in some cases obscure) provisions with few defined terms.

As a result, new entrants to the market should be careful not to engage in any practices which might be considered anti-competitive, particularly as it is uncertain how rigorously some of the provisions will be enforced. This would apply in particular to a large undertaking entering a market where it may be considered to achieve a level of dominance.

Foreign exchange controls

China has strict rules concerning the transfer of currency into and out of the country and its official currency, the Chinese yuan (¥) or renminbi (RMB) is not freely convertible in the foreign exchange market. The authority in charge of foreign exchange control in China is known as the State Administration for Foreign Exchange (SAFE) and its approval may be required for any transactions where foreign exchange is being remitted into China, foreign exchange is being converted into RMB or RMB is being converted into foreign exchange.

SAFE draws a distinction between "current account items" (generally, funds for the daily operation of a company, such as revenue from export or provision, payment for imported goods) and "capital account items" (generally items of a non-trade, non-recurring nature such as investment in China and repayment of loans). In general, "current account" transactions do not require SAFE approval, but the documents for the underlying transaction need to be verified by SAFE.

Capital account transactions require SAFE approval. When setting up an FIE, the remittance of funds into China for capitalising the FIE requires SAFE approval. Provided that MOFCOM approval has been granted and all the documentation is in order, this should not be a problem, though time for the approval to be granted should be built into any timetable.

As a result of the strict foreign exchange control and other rules, repatriation of capital out of China is not straightforward. Methods of repatriating cash include paying off interest and loan principal from shareholder loans or paying an offshore entity for legitimate services or royalties on trademarks.

It is possible in theory to reduce an FIE's registered capital and repatriate the capital extracted to the foreign investor. However, the FIE must comply with strict requirements to do this and approval for this is rarely granted by MOFCOM.

Unlike in most other countries, Chinese law does not allow a non-financial institution Chinese company to make a loan to one of its Chinese affiliates. This restricts the ability of a company to manage liquidity and excess RMB within its group of subsidiaries or affiliates. There is a method around this, by way of a concept known as "entrusted loans" involving a bank as a third party, but these must be individually negotiated with the bank and will incur fees and interest.

The most common method for repatriating capital from an FIE is the payment of dividends to foreign shareholders. After an FIE's profit for a year has been calculated, there are certain reserves (including a reserve fund and an employee fund) that must be funded before dividends can be paid. The FIE must also present a statement audited by a certified public accountant demonstrating that the FIE has paid all relevant corporate taxes in China. At this point dividends can be paid. SAFE approval is generally not required to pay dividends – the bank will process the payment provided it has received all the necessary documentation. Dividends are only supposed to be payable yearly, although the authorities can sometimes be flexible on this point. The FIE can apply for permission to pay the dividend in stages.

Protection of intellectual property rights

Protecting intellectual property (IP) rights will be a key consideration of any entity considering doing business in China. Walking round any Chinese city provides many examples of foreign brands being copied or imitated and openly for sale. The copying of knowhow, processes and technology is also widespread in industrial concerns.

China is a member of a large number of international organisations and conventions, has acceded to numerous international treaties and protocols and has developed an extensive legal framework for the protection of IP. Enforcement of these laws, however, is inconsistent and attitudes toward infringement and infringing behaviour vary across the country.

Utmost care must therefore be taken not only in relation to the creation of IP and its protection when operating in China, but also the use within China of IP created outside China. The section below details how various IP issues are dealt with under Chinese law and also suggests methods of trying to prevent IP rights from being infringed.

Registration of trademarks

China is a "first to file" jurisdiction, which means that, generally, a trademark holder in another country will not be protected in China unless the trademark is registered in China. It is advisable, therefore, even if there is no intention for its use in China, to register a trademark to prevent registration of that trademark in China by someone else.

English and other foreign language trademarks are registrable, as are devices, logos and even non-textual marks.

A foreign trademark holder should also register a Chinese language version of the trademark as consumers may "invent" a Chinese language version themselves, which may lessen the value of the trademark locally. The protection period of registered trademarks is ten years starting from the registration date. The holder can extend this period by applying for renewal no less than six months before the expiry.

Copyright material

Copyright in original work is automatically protected upon creation, and it does not need to bear any form of notice of copyright to be protected under the law. However, it is advisable that such a notice be displayed, so as to avoid a defence of ignorance of the existence of copyright in the work. Protection is accorded for 50 years after the death of the creator or publication by a company.

If there has been an infringement, direct negotiations should be started as soon as possible. However, if direct negotiations fail or are unsuitable, there are various methods of enforcement a foreign company may use to protect its IP rights. Enforcement action must be taken as the foreign company may be liable for any defects arising from the infringing products or any damage caused by a product carrying its counterfeited trademark since it will be deemed to have been the producer of those goods.

Registration of patents

There are three types of patent that can be registered – invention patents, utility models and design patents. The term of protection for an invention patent is 20 years from the date of filing, while for utility models and design patents the protection is for ten years.

Proceedings to protect IP rights

Local branches of designated state organs are responsible for the enforcement of IP rights and have the power to investigate and prosecute infringements.

However, these agencies have almost no legal training and are mostly insufficiently resourced. As a result, while effective in straightforward cases of infringement, they are likely to refuse to investigate cases where there is a lack of persuasive evidence that infringement has taken place or when the infringement is not merely direct but almost identical counterfeiting. These local agencies are also prone to display local protectionism, especially if the infringing activity is economically important to that area.

If the case is taken on, the agencies are able to issue "cease and desist" orders, impose fines and confiscate the infringing products but have no power to order the infringing party to pay damages.

Civil court procedures may be used for handling more complex cases of infringement. For serious cases of infringement, it is possible for a foreign company to request that criminal charges be brought against infringers and instigate criminal investigations. In the course of a criminal investigation, the authorities may confiscate products, freeze bank accounts and even order the shutdown of the suspect's operations until the case is resolved. No damages are awarded in a criminal prosecution. The criminal penalties are imprisonment and possibly a fine as well, with the length of the prison sentence and maximum amount of the fine varying according to the severity of the crime.

Patents or trademarks should never be registered in the name of a local business partner or even a joint venture company. The registered owner of the patent or trademark should instead licence the use of the patented technology or trademark to the local business partner or joint venture company. The licence agreement should set out clearly limits on the use of the patented technology or trademark, and also contain commercial and financial penalties if such limits are breached.

To protect sensitive commercial information which may be revealed in the course of negotiations or operations, comprehensive and bilingual confidentiality agreements should be entered into with local business partners. Some Chinese companies already insist on confidentiality agreements being entered into to protect their own confidential information, and to insist on one when dealing with a Chinese company is unlikely to hinder the working relationship.

A foreign company should be pragmatic in its approach towards protection of its IP. In addition to the protection strategies outlined above it should allocate an adequate budget for surveillance of the Chinese market for any hint of infringement and be proactive in seeking out infringers and infringing activity. Once sought out, formal enforcement procedures may not be the best solution, and at times it may even be preferable to engage the infringers as legitimate partners so long as adequate supervision can be provided.

The speed at which infringement may occur means that constant vigilance is required, and it is more efficient to invest in "defensive protection" rather than rely on administrative proceedings or litigation. This may mean constantly improving technology, anti-counterfeiting marks or packaging, a high level of customer service and effective marketing campaigns extolling the virtues of buying original products.

Foreign investment policy

Industry-specific restrictions

The last decade has seen a progressive relaxation of the regulatory regime governing foreign investment into China. Notwithstanding these changes a range of foreign ownership restrictions still exist.

Restrictions are imposed through China's Foreign Investment Industrial Guidance Catalogue (most recently revised in December 2011 and the revised catalogue became effective in January 2012) (the Investment Catalogue), through limits on the types of investment vehicles open to foreigners and on the classes of shares foreigners can purchase, as well as through government approval procedures.

The Investment Catalogue classifies all foreign investment as either "encouraged", "permitted", "restricted" or "prohibited", depending upon the industry sector. The category of investment in the Investment Catalogue will affect the investment approval process, the type of investment vehicle and the permitted level of foreign ownership.

In addition to the Investment Catalogue, other restraints, such as licensing requirements, may also be imposed through industry-specific regulations.

As part of China's western development strategy, foreign ownership restrictions may be relaxed for certain projects located in the country's western provinces. Preferential treatment is based on the Foreign Investment in Preferred Industries in the Central and Western Regions Catalogue (the Western Catalogue). The latest revision of the Western Catalogue (which was issued in December 2008) provides that investments in irrigation technology, mineral exploration, telecommunications services and highway passenger transportation, among others, may be eligible for a relaxation of foreign ownership restrictions. It is expected that the Western Catalogue will be revised in accordance with the State Council guidelines issued in April 2010 which was aimed at improving the legal environment for foreign investment.

Partial exemptions from foreign ownership restrictions are available in limited circumstances. For example, concessions may be available where the investment takes place in the west of China, or where the foreign investor can qualify for preferential treatment under the Closer Economic Partnership Arrangement (CEPA). Under the CEPAs with Hong Kong and Macau, qualified Hong Kong and Macau investors are permitted to invest in a range of sectors in advance of China's World Trade

Organisation (WTO) commitments and in some sectors that are not subject to liberalization under those commitments. Goods originating from Hong Kong or Macao can benefit from reduced tariffs in China. In order to qualify for the CEPA concessions, a foreign investor will need, inter alia, to have been incorporated in Hong Kong, to have been doing business in Hong Kong for three to five years and to employ at least 50 per cent local Hong Kong staff.

Many foreign ownership restrictions have been progressively dismantled and this trend is continuing. However, beyond China's WTO commitments, major changes to its foreign ownership legislation are unlikely in the short term.

Mergers and acquisitions

Regulatory basis

Different laws and regulations will apply depending on whether the target of an acquisition is an FIE or a domestic company. Where the target is a domestic company, the acquisition is subject to the Provisions on Merger and Acquisition of Domestic Enterprises by Foreign Investors (the M&A Rules) effective since 2006. If the target is an FIE, or if the transaction involves the injection of new foreign investment into an existing FIE, the acquisition will be governed by the Provisions for the Alteration of Investors' Equity Interest in Foreign-invested Enterprises, effective since 1997.

The acquisition of a Chinese business may be structured either as a share acquisition or an asset acquisition where the main operational assets or contracts of the Chinese target are acquired and injected into an onshore company (a new FIE) established by the buyer. In the event of a share acquisition, the acquisition can be achieved through a direct purchase of the target's shares from the existing shareholders, or through subscription to newly issued shares of the target.

In the event of an assets acquisition by the foreign investor, the acquisition can be achieved through a transfer of employees and title of the relevant assets, or through an assignment or novation of the business contracts of the target. In the case of an asset acquisition, a buyer could generally avoid the risks associated with the outstanding liabilities of the target. However, the transfer of the assets normally requires the consents of major creditors, transferred employees and other parties to any transferred business contract. Also, the transfer of different assets may require the involvement of various governmental authorities at different level, for instance land authorities. This sometimes proves to be a time-consuming process in practice.

Approval controls

Government agencies continue to play a very important role in regulating acquisitions by foreign buyers in China. The primary regulator of foreign investment is MOFCOM. In addition to MOFCOM, the National Development and Reform Commission (NDRC) is responsible for approving the planning aspects of a project while the final business registration is handled by the State Administration for Industry and Commerce.

Chinese approval bodies operate at both national and provincial level. Generally, MOFCOM approval at national level is required where the value of the investment exceeds a certain threshold (for example, US$300 million for an "encouraged" or "permitted" category investment or US$50 million for a "restricted" category investment under the Investment Catalogue). In most other cases, the foreign investor need only seek MOFCOM approval from the province where the investment is located. The time frame for MOFCOM approval varies significantly, but is generally less than 90 days.

While MOFCOM is the primary governmental authority supervising merger and acquisition activity, other additional bodies or ministries will generally be required to provide approval, in addition to, or in place of, MOFCOM. Investments in most industry sectors will be subject to the approval of the relevant ministry or government body that is responsible for that industry.

For example, investments in the banking sector require China Banking Regulatory Commission approval, while investments in the insurance sector require China Insurance Regulatory Commission approval. In addition, transactions involving a listed CLS will involve the China Securities Regulatory Commission (CSRC), foreign exchange matters will involve the State Administration of Foreign Exchange and, as mentioned above, the transfer

of state-owned assets will involve the State-owned Assets Supervision and Administration Commission (SASAC). In addition, a security review procedure was established by the State Council in February 2011. Foreign acquisitions of PRC enterprises where the PRC target is active in economic sectors concerning national security are subject to a review by MOFCOM. Economic sectors concerned include military sector, important agricultural production, important energy and resources, important infrastructure and transportation services, key technology and major equipment manufacturing.

Public M&A issues

Acquiring shares in a listed company is complicated by the restrictions upon foreign investors purchasing certain kinds of shares.

Chinese law provides for four main classes of shares: A and B shares, which are publicly traded: and state-owned and "legal person" shares, which are not listed and are privately traded. B shares are traded on the mainland's exchanges and can be legally purchased by foreign investors. However, they generally represent an insignificant fraction of the issued share capital of issuers, and they are less liquid than A shares. Until an important reform in 2005, only a fraction of a Chinese listed company's shares were tradable on the stock market: most of its other shares were non-tradable and owned by the state, state-owned enterprises and other legal person institutions. This "segmented share structure" inherited from the early days was considered an embarrassing feature preventing necessary reform of the stock exchanges in China and resulting in severe liquidity constraints for listed companies. In 2005, therefore, CSRC launched a reform inviting listed companies to restructure their share capital and float all non-tradable shares (Share Reform).

There are two channels for foreign investors to acquire A shares listed on China's stock exchanges: qualifying as a strategic investor and performing a strategic investment or qualifying as a "qualified foreign institutional investor" (QFII).

Under the Strategic Investment Measures in Listed Companies by Foreign Investors (Strategic Investment Measures) issued in 2005, qualified foreign investors can make a strategic investment in a Chinese listed company's A shares. A foreign strategic investor must acquire a minimum of ten per cent of all the shares of the target listed company. The Strategic Investment Measures do not impose a cap on the proportion of shares which can be held by foreign investors, but the foreign investors will have to comply with any restrictions as regards foreign investment as provided for in the Investment Catalogue and the ceiling on the proportion of permitted foreign investment set out in any industry-specific regulations.

Under these measures, a strategic investment in a listed company by a foreign investor can be performed by way of private share transfer agreement between existing shareholder(s) and the foreign investor, by way of private placement by the listed company to the foreign investor, or by "any other method as allowed by Chinese law".

The Strategic Investment Measures, combined with the Share Reform, open up the public equity markets in China to a new group of foreign investors. Prior to the issue of the Strategic Investment Measures, only a limited number of foreign investors which had QFII status could legally purchase tradable A shares.

The existing QFII scheme targets short-term share trading through major commercial banks or financial institutions. The Strategic Investment Measures, on the other hand, promote mid-to-long-term investments in Chinese listed companies.

The shares acquired by a foreign strategic investor pursuant to the measures (whether by private share transfer or private placement) are subject to a lock-up period of three years, unless special approval is obtained from the Ministry of Commerce. In addition, even after the end of the three-year lock-up period, if the foreign strategic investor wishes to exit the listed company, the listed company must obtain the approval of MOFCOM as regards the change of its share capital structure.

Another major difference between the measures and the QFII scheme is that the measures technically allow strategic foreign investors to control a listed company. The QFII scheme is of limited use to (and

is not designed for) foreign investors wishing to hold a significant stake in a target listed company because QFIIs are not permitted to hold more than ten per cent of the share capital of a single issuer.

Government initiatives and incentives

The preferential tax treatment for FIEs that had been in place since the beginning of the reform and open-up policy in the 1980s in order to attract foreign investment was abolished by the introduction of the Enterprise Income Tax Law (EIT Law), effective since January 2008. Before the EIT Law, FIEs enjoyed preferential tax rates when compared to the rates imposed on domestically funded enterprises. The EIT Law implements the WTO's principles of non-discrimination and national treatment, and introduces a standard 25 per cent enterprise income tax rate applicable to FIEs and domestic companies.

Under the EIT Law, various preferential treatments will be available to both FIEs and domestic enterprises, regardless of the location of these companies in China:

- qualified high/new-technology enterprises enjoy a 15 per cent preferential enterprise income tax rate, and are entitled to tax holidays if they are established in certain special economic zones. In order to qualify as a high/new-technology enterprise, the enterprise must own the IP for producing its core technology and performing its R&D activities

- incomes derived from important infrastructure projects, agriculture, husbandry, fishery and forestry, environmental protection projects, water and energy saving or industrial safety are entitled to tax exemptions or reductions

- venture capital investment enterprises involved in start-up investments are entitled to bonus deductions

- small scale enterprises with a comparatively lower profit level are entitled to preferential EIT rates.

Encouraged enterprises setting up in Western and Central China are entitled to certain tax preferences.

The EIT Law repeals the two-year tax holiday and three-year half-tax holiday (2/3 Tax Holiday) for manufacturing FIEs as well as tax exemptions based on geographical criteria (special economic zones, open coastal cities). FIEs that were established prior to the date of publication of the EIT Law (16 March 2007) and which currently benefit from tax holidays or exemptions are granted a five-year transition period during which they will gradually adapt to the new regime. FIEs which had not begun their 2/3 Tax Holiday will benefit from a tax holiday period which commenced on 1 January 2008. The objective is to establish a level playing field for all companies by 2013. No such grandfathering rules will be available for enterprises set up in China after the promulgation of the EIT Law.

Taxation

Tax planning always plays a crucial role in any business model, and China is no different. Below are the main types of taxes an FIE may have levied on its business. This is only a brief guide to these taxes, and of course detailed research onto what particular taxes any proposed business may be subject to should be carried out before entering the Chinese market. This section does not cover specific customs duties and individual income taxes.

Enterprise income tax

All entities resident in China (both domestic companies and FIEs) are subject to Enterprise Income Tax (EIT) on their taxable income from inside and outside China. The current rate of EIT is 25 per cent.

Unless they are deemed to be a resident enterprise in China, foreign companies with establishments in China, but not considered tax residents in China, would be subject to EIT on the net income from their Chinese operations (but not their worldwide operations).

EIT is charged on income from the sale of goods, the provision of services and the transfer of properties. It is also levied on any dividends received, interest received, leasing income and royalties. Broadly

speaking, the tax deductibles are the costs, expenses, taxes and losses relating to the income derived.

Value-added tax

Value-added tax (VAT) is levied on all entities and individuals (including FIEs) engaged in the sale, processing, repair and replacement of goods within China or the importation of goods into China.

As in other countries, the VAT payable by a particular entity is the difference between the "output tax" collected on the sale of goods or services by that particular entity and the "input" VAT it paid for supplies. As in other countries, certain items of key social utility are exempt from VAT. The rate otherwise varies between three per cent and 17 per cent depending on the goods or services in question.

Business tax

Business tax is levied on those entities which provide taxable labour services, transfer intangible assets or sell immovable property within China or which are engaged in other activities involving intangible goods and services which fall outside the scope of VAT. Business tax is imposed on gross turnover and the tax rate differs across different industries, ranging from three per cent to 20 per cent.

VAT and business tax are not be levied at the same time on income received from goods or services – one or the other applies depending on the particular industry or goods in question.

Consumption tax

Consumption tax is levied on manufacturers and importers of certain types of consumer goods. The tax is collected either when the goods are sold by producers, after processing or upon customs clearance on import. Ultimately, of course, this tax is passed on to the consumer by manufacturers or importers.

Only certain classes of goods (including tobacco and liquor, cars and luxury watches) attract the tax. There are different prescribed rates for different products – for example cosmetics attract a rate of 30 per cent whereas the rate for cars varies between one per cent and 40 per cent.

Withholding tax

The payment of dividends, interest or royalties to foreign investors outside China is governed by tax treaties with many countries. In many cases, the rate of tax withheld is ten per cent (in some cases lower), and if no tax treaty with a particular country is in place, then this ten per cent rate generally applies.

Representative offices

While representative offices are not permitted to carry out many activities (including manufacturing, production, sales and marketing) and so the scope for earning income is low, there are circumstances in which a representative office may be subject to EIT.

Some specific activities are excluded from EIT. However, broadly speaking, income from the activities such as negotiation services and brokering etc, performed in China on behalf of a head office or other foreign enterprises will be taxable.

Foreign employees

Employees who live and work in China will be liable to pay Chinese taxes on all income received whilst in the country in accordance with the relevant bilateral tax treaty. Personal income tax is charged on a sliding scale, ranging from five per cent to 45 per cent but with an allowance of ¥4,800 per month. If an employee also receives income from overseas, the employee will be taxed in China on his or her worldwide income, with a tax credit given against any tax already paid in other countries.

Other taxes

Real estate in particular is subject to a wide range of taxes (including deed tax, land VAT and real estate tax), which can be very punitive, especially on an asset sale of the land (rather than a sale of a company that owns the land in question). The application of taxes and their levels also varies between different regions in China. Any potential investors in real estate should take particular care to ascertain the local tax position and structure their investment accordingly. Various local government taxes are also imposed on individuals and companies depending on the location in China.

Land use rights and buildings

Overview

China applies a system of public ownership to all land. As a general rule, land in urban areas is owned by the state; land in rural areas is owned by "collectives" (rural collective economic organisations). The former is defined as state-owned land and the latter as collectively owned land. The remainder of this section will focus on state-owned land.

State-owned land

State-owned land leases (land use rights or LURs) may be either "granted" or "allocated" by the land authorities to Chinese nationals or Chinese body corporates. LURs are granted in exchange of a premium or allocated on a quasi-free basis. Under Chinese law, buildings are owned by the LURs' title holder and land and buildings must be transferred together.

Granted LURs versus allocated LURs

Granted LURs are usually used for industrial, commercial and residential purposes and rarely used for agricultural purposes. They can be contributed as investment, transferred to third parties, leased and mortgaged by the title holder. Granted LURs are broadly similar to the legal concept of leasehold known in numerous jurisdictions.

Depending on the purpose of use and subject to the LURs' grant contract between land authority and land user, granted LURs can be granted for a period of up to 70 years. During the land use term, the LURs can only be requisitioned in the public interest and upon payment of a compensation corresponding to the residual period of the LURs and for the buildings and other constructions located on the land. The land use term can be renewed if the land authority agrees and a premium is paid. If the land use term is not renewed, the land together with the buildings will be taken back by the government when the term expires and no compensation will be paid.

In contrast, in theory, allocated LURs can only be used for certain prescribed purposes such as military, public interest, construction of infrastructure facility purposes, etc. In practice, allocated LURs remain a common form of title in use principally by state-owned companies. In principle, because of their nature, allocated LURs cannot be contributed as investment, transferred, leased or mortgaged unless they are converted into granted LURs (and the grant premium duly paid).

Unlike granted LURs, there is no clear regulation providing the use term of allocated LURs. How long allocated land can be used is determined in practice by the land authority on a case-by-case basis in accordance with public needs and local development plans.

Allocated land can be requisitioned at any time without compensation (upon requisition of allocated LURs, only the buildings validly registered can give rise to monetary compensation).

In summary, granted LURs are, in practice, fully fledged commercial leaseholds whereas allocated LURs are titles which are revocable ad nutum and which are inadequately protected by law. Allocated LURs are widely considered unsuitable for substantial private investment projects.

Converting allocated LURs to granted LURs

Where it is proposed that buildings on allocated land are to be either leased, mortgaged or transferred, the holder of those allocated LURs has two options, subject to the approval of the local land authority:

- to convert the allocated land to granted land by paying a land grant premium
- to obtain special approval from the land authority to maintain the land as "allocated" LURs.

It is worth noting that LURs held by Chinese state-owned enterprises will often be allocated LURs. Therefore in any joint venture between a state-owned enterprise and a foreign party, such land may not be leased by the state-owned enterprise to the joint venture (or contributed as capital) unless it has been previously converted to granted LURs.

Lease of granted LURs
The leasing of granted LURs does not require specific approval from the land administrative authority provided that the land has been developed in accordance with the law and the provisions of the relevant land use right grant contract.

Granted LURs may not be leased if:

- the grant premium has not paid in full (unless otherwise agreed with the land authority)
- the title certificate has not been issued
- investment for the development of the land has not been made as provided in the LUR grant contract.

Buildings

Under Chinese law, buildings are owned by the LUR title holder. Land and building ownership titles are distinct. However, ownership of a building follows the land – therefore land and buildings may only be transferred or mortgaged together. Building property rights are evidenced by a building ownership certificate. A building under construction may be transferred to a new owner before it has been completed. However, such transfer may be subject to special approval of the local real estate bureau and to other conditions as may be set by the local land authority. Shanghai local regulations, for example, set the following conditions precedent to the transfer of buildings under construction:

- the land use rights must be granted LURs
- the grant premium must be fully paid
- the LURs must have been legally registered and the title certificate issued
- the engineering planning permit and the construction permit must have been issued
- the actual investment must have reached no less than 25 per cent of the total project investment.

Bidding for real estate projects

Four principal types of bidding process have evolved in the Chinese real estate market. These bidding processes are in theory regulated by the Ministry of Land and Resources. However, enforcement of bidding processes may vary from city to city. It is therefore prudent for a foreign developer to identify and understand prevailing local bidding practices early on in its pre-bid preparation.

The four common types of bidding process are:

- invitation to tender – where the local authority invites specific companies to tender to develop a site. A committee appraises the bids and awards the winning tender based on a number of different factors including design and price
- public tender – where the tender is open to all comers. A public tender is appraised in the same way as an invitation to tender
- public auction – where anyone can bid to develop the site, and the sole determinant is highest price
- listed land grants – similar to a public auction where the highest price wins, but where bids are submitted over a longer period of time.

Bid process
The first official announcement of a tender is when the local authority posts details of the development and bid process on its website. Details may include location and size of the development site, minimum bid price, designated usage (commercial, residential, industrial), floor area ratio, construction density, investment density (¥/m2), timetable for the bidding process as well as qualification requirements of potential bidders. One such qualification requirement is for each bidder to remit an amount of money – designated as “surety money” – into a special Chinese bank account, where it will remain for the duration of the bid process.

The timetable set by the local authority may be very tight. A developer therefore may have only a few weeks in which to build a financial model, calculate a bid price, find a strategic local partner (if needs be), draft building designs and submit its bid proposal.

In addition, there are no specifications set by law as to how a bid committee should appraise a bid or determine the winning tender. The time between bid deadline and announcement of the winning tender may be surprisingly short – as little as ten days. This suggests that a local authority may have a good idea of the leading candidates even before the bid deadline. It is therefore recommended for a prospective developer to establish good links with the local authority and other government or municipal bodies well in advance of a bidding process.

Development vehicle
Chinese law requires that a foreign real estate developer operate through a Chinese FIE – here, a foreign-invested real estate enterprise (FIRE). It is important to note, however, that the establishment of a FIRE will not be approved until some time after a bid has been won. Consequently, during the bid process and immediately after a tender is awarded, a foreign developer (or its Chinese partner) will act on behalf of the FIRE until its establishment is approved.

The FIRE may be a WFOE, an EJV or a CJV. A WFOE is currently the most common form of investment vehicle in the real estate market. The corporate structure offshore will chiefly be determined by tax considerations. Any cooperation with a Chinese party may benefit from being structured at offshore level. However, practical obstacles may dictate that such a relationship may only be achieved through an EJV or CJV onshore.

Permission to bid and deposit of surety money
To enter the bidding arena a foreign developer will first need special permission from the local land authority (however, where a tender is by invitation, permission will be deemed to have been granted to invited tenderers). Having obtained local land authority consent, a foreign developer should next apply to the local SAFE for approval to open a special foreign exchange bank account with a designated domestic bank. The foreign developer should then remit foreign currency to the special bank account equal to the amount of surety money as specified on the local authority's website. The bank will issue a certificate evidencing to the local land authority payment of the surety money by the foreign developer. Only if the surety money is remitted within the deadline specified in the tender announcement will the foreign developer obtain full qualification to participate in the tender process.

SAFE will closely supervise the operation of the special bank account and restrict its application to either payment of the deposit payable in respect of the land grant premium in the event that the foreign developer wins the bid, or remittance of the money out of China if the foreign developer fails in its bid.

Surety money versus deposit
Prior to a tender being awarded, money remitted by a bidder into the special bank account is designated as surety money. After having won the tender, the project developer pays the local authority an initial tranche of money in accordance with the land use rights grant contract – which is now designated as a "deposit". "Surety money" and "deposit" are legal terms that receive different treatment under Chinese law. A deposit is a type of security, whereas surety money is not. If a party pays a deposit and subsequently defaults, it is not entitled to any reimbursement of the deposit; and if the party receiving the deposit defaults, it is obliged to refund double the deposit amount. No such default conditions attach to surety money.

During the tender process, the local authority merely wants comfort that a bidder is committed to the bidding process, and therefore requires nothing more onerous than the remittance of surety money. As contractual relations have not at that stage been established between the parties, it would be inappropriate to ask the bidders to pay the "deposit". It would clearly be commercially unattractive if there was any risk that a losing bidder might not automatically be reimbursed any advance payment.

Winning the bid
After the tender is awarded, the winning bidder must enter into a land use rights grant contract with the local authority within the time limit set out in the "tender award confirmation letter" and then pay the deposit.

Land use rights grant contract
The land use rights grant contract contains industry-standard terms and conditions governing

the development process of the site and the relationship between the local authority and the project developer. The contract is governed by Chinese law and any dispute may be conducted either through the courts or arbitration, but in both instances in China. It is generally not a negotiable document. A new form of terms and conditions came into effect on 1 July 2008.

The land use rights grant contract also governs payment of the winning bid price. The winning bid price covers two principal costs: land grant premium, and relocation costs and other preliminary development costs. The cost of relocating the former occupiers of the land will have been borne by the local authority, and the process of relocation and site clearance should have been completed prior to completion of the bidding process.

The land use rights grant contract is intended to be between the local authority and the project developer. As mentioned above, where the developer is a foreign-invested entity, the FIRE will not have been established at this stage. The foreign developer or its Chinese partner (as the case may be) will therefore enter into the land use rights contract on behalf of and prior to the establishment of the FIRE. Immediately after the FIRE is established, a new land use rights grant contract will be entered into between the land authority and the FIRE, whereby the FIRE will assume all the rights and obligations of the foreign developer or the Chinese partner under the previous (and now terminated) agreement.

Payment of the deposit

Under the land use rights grant contract the foreign developer pays a deposit to the local land authority. The deposit is in respect of the winning bid price. To make this payment, the developer must apply to SAFE to convert the foreign currency (until that point, surety money) into RMB, after which the deposit is paid into the designated bank account of the local authority.

If the project developer subsequently fails to pay the remaining winning bid price it will forfeit the deposit. Likewise, if the land authority breaches the land use rights grant contract, it will have to refund double the deposit amount (although this rarely happens in practice).

Conclusion

The regulatory landscape for real estate projects is changing and growing, albeit not as quickly as the skylines over China's tier 1 cities. To complicate matters further, the process whereby bids are awarded may differ hugely between cities.

What remains constant, however, is the benefit to a foreign developer of having on-the-ground local knowledge – either through partnership with domestic parties, or through skilled and experienced foreign professionals – with which to penetrate the tangle of governmental and quasi-governmental rules, regulations and relationships. Whilst the bid process is complex and can be fraught with timetable pressures and bureaucratic hurdles, the potential upside of these developments is clear for all to see.

Workplace relations

Overview

Setting up a presence in China will necessarily involve hiring employees either from China or from abroad. For most companies, the flexibility of a potential labour market is of key importance when making an investment decision.

This section briefly outlines the processes for hiring workers in China and also for terminating employment either on an individual basis or under a mass redundancy plan. The role of trade unions and the ability of foreign workers to be employed in China are also considered.

Hiring employees

Domestic companies and FIEs can hire employees directly. Representative offices in China cannot hire employees directly, and must use certain designated labour agencies to employ their local staff.

There are generally two types of employment contracts: fixed-term and open-ended.

As open-ended contracts can only be terminated on certain statutory grounds (see below), employers have historically preferred to enter into short fixed-term contracts which may or may not be renewed upon expiry. However, new rules have come into

force which stipulate that an open-ended contract is automatically entered into if an employee has worked for the same employer for more than ten consecutive years or has been employed under two consecutive fixed-term contracts, unless the employee in question requests a fixed-term contract instead.

As such, it is likely that there will now be a trend towards longer fixed-term contracts of between three and five years. Employment contracts must be in writing and executed within certain time periods. If no written employment contract is executed within one month of an employee starting work, the employer is liable for a penalty that is double the employee's salary for the period after the first full month of employment until the date a written employment contract is entered into. If there is still no written employment contract after a year, an open-ended contract is deemed to have been formed.

An employer must provide its employees with a number of benefits. These benefits include social insurance (which covers basic pension and medical insurance, unemployment insurance, work-related injury insurance and maternity insurance), payment into a provident housing fund, annual leave, home leave (where employees living apart from their family are entitled to visit them, with pay and travel expenses included), statutory holidays and other forms of paid leave of varying periods (such as funeral leave, marriage leave and maternity leave).

Terminating employment

An employment contract can only be terminated by an employer on statutory grounds, which are divided between those where there is employee fault and those where there is none.

Where there is employee fault, the employer may terminate the employment contract immediately and without making any severance payment to the employee. Where the employee is not at fault, the employer is required to give the employee at least 30 days' written notice of termination and make a severance payment, even if the employee agrees to the termination.

Should the employer terminate the employment contract in breach of the law (that is, not on statutory grounds), the employee may request for reinstatement to his or her position and if such reinstatement is not possible, the employer will be liable for twice the amount of severance payment payable to that employee.

Where an employee terminates the employment contract due to a fault by the employer, the employer will have to make a severance payment to the employee. However, if the employee resigns for any other reason and the employer agrees to the resignation, or if an employee tenders his or her resignation during the probationary period, no severance payment is required to be made. Upon the expiry of a fixed-term contract, an employer is required to make a severance payment to the employee if the contract is not to be extended or renewed, even if this situation arises because the employer is commercially unable to carry on its business. No severance payment is required, however, if the renewal contract was offered on the same or better terms and the employee declines to renew the contract.

An employer may lawfully conduct a mass lay-off if:

- it involves at least 20 employees or ten per cent of the workforce (if the total number of employees is less than 20)
- certain prescribed commercial or economic circumstances exist.

However, the employer is required to consult, at least 30 days in advance, with the trade union or all the employees and to report to the employment authorities of its intentions. Further, certain types of employees are to be given priority to be retained (for example those with open-ended employment contracts or who are the sole breadwinners for their families) and laid-off employees are entitled to severance payments.

Certain types of employees cannot have their employment terminated even if their fixed-term contract has expired. These employees fall within three general categories:

- employees who are, or may potentially be, suffering from employment-related illness or injury

- female employees who are pregnant, in confinement or nursing
- employees who have worked for the employer for at least 15 consecutive years and are within five years of the legal retirement age.

Trade unions

An enterprise is not obliged to set up a trade union for its employees, but the employees may establish, organise and join a trade union on a voluntary basis. Under Chinese trade union law, enterprises with more than 25 "trade union members" must establish a basic-level trade union committee. In practice, this obligation is extended to enterprises with more than 25 "employees", irrespective of whether they are union members. The right of an employee to be a member of a trade union is enshrined in law, and the employer cannot contract out.

In reality, an enterprise will often be pressured by the All China Federation of Trade Unions to set up a grass-roots trade union (the lowest level of trade union) for its employees. If met with resistance by the enterprise, or lack of enthusiasm from the employees, representatives from a higher-level trade union may be dispatched to guide the employees in establishing a trade union.

The trade union is responsible for protecting the legal rights of all the employees of an enterprise, and employers are required to consult the trade union on matters which affect employee interests. Major areas where trade union consultation is required are:

- the formulation of corporate rules and major decisions on the operation, management and development of the company
- collective negotiation of contracts and wage bargaining
- dismissal of employees and employment disputes.

It must also be noted that in an employment dispute, a trade union will provide assistance and expertise to an employee even if that employee is not a member of the trade union. Although massive strikes affecting foreign-invested enterprises such as these are fairly rare, collective labour conflicts are not uncommon in the PRC, especially in the manufacturing clusters of Southern China.

As representative offices are not allowed to hire employees directly, a non-Chinese passport holder seeking to work in a representative office in China should be employed by the head office outside China, and seconded to the representative office.

Dispute resolution

Overview

Many contracts entered into by a foreign investor in China will be governed by Chinese law either because it is a Chinese legal requirement that they are (for example in the case of joint venture documentation) or due to the bargaining strength of the Chinese party.

There is a large degree of scepticism on the part of foreign investors as to the ability of the Chinese courts to resolve disputes effectively and as to their impartiality when hearing disputes between foreign companies and Chinese companies (especially state-owned ones).

Although the predictability and consistency of court judgments does seem to be improving, foreign investors generally prefer to provide for disputes to be resolved by arbitration. Chinese arbitrators generally lack the quality and international sophistication found in offshore centres such as Hong Kong or Singapore and concerns remain as to their impartiality.

As such, the best option for foreign investors is to try and have arbitration proceedings held offshore. This is possible under Chinese law, although offshore arbitration may be held to be invalid by Chinese courts if the dispute is not sufficiently "foreign related" (if, for example, both parties are Chinese – which would include an FIE – and the subject matter of the dispute occurred in China).

There can be practical difficulties in enforcing foreign arbitral awards in China, but the possible inconvenience of enforcement is generally still

thought to be a better option than submitting to Chinese arbitration (where possible).

Chinese companies tend to be less litigious than western companies and are sometimes reluctant to cross borders to settle disputes, even if Chinese law is governing the contract, so a well-drafted dispute resolution clause in contracts can be key to avoiding or resolving problems in the future.

Mediation is also gaining popularity as a means of resolving disputes in China as it avoids the costs and uncertainties of the litigation process.

The main features of the litigation and arbitration processes are set out below.

Litigation in China

The four levels of Chinese court are the Basic People's Court, the Intermediate People's Court, the Higher People's Court (all three of these courts are established in each administrative region in China) and the National Supreme People's Court.

Generally the amount claimed determines which court has jurisdiction. However, cases involving the interests of foreign parties fall within the jurisdiction of the Intermediate People's Court. Appeals are to the next level of court but there is no further right of appeal after the first appeal. China has a civil law system and judges are generally not bound by previous case law as in common law jurisdictions.

Claims must be brought within two years of the date when the plaintiff knew or should have known of the breach or action giving rise to the claim. There is an overall 20-year limit from the date of the defendant's action/breach for a claim to be brought. Generally, litigation in Chinese courts is resolved more quickly than in other jurisdictions, resulting in lower litigation costs than might be expected.

The principal remedy that the courts will order is an award of damages, although these are often conservative in size, especially compared to the punitive damages that can be awarded in jurisdictions such as the United States.

The court may also order other remedies such as restitution, return of property and specific performance. The courts have discretion as to the making of costs awards.

To enforce a judgment, a plaintiff must apply to court. The court can then make orders such as seizing the debtor's funds or goods or requiring a third party owing a debt to the debtor to fulfil the obligations to the creditor instead. In practice, judgments can sometimes be difficult to enforce depending on the Chinese entity and court involved.

It is possible, in theory, to enforce foreign judgments in China (the country has reciprocal enforcement of judgment conventions or arrangements with certain jurisdictions (including France, but not including the United States or the UK)). However, in practice, it is very difficult to persuade a Chinese court to enforce a foreign judgment against a Chinese party.

Arbitration in China

Numerous arbitration commissions have been established throughout China. These bodies receive mainly domestic arbitration cases. Some are permitted to handle investment disputes between Chinese and foreign parties. However, most international commercial, trade and investment cases are handled by the China International Economic and Trade Arbitration Commission (CIETAC).

There is no right of appeal from an arbitration award under CIETAC rules. A party may, however, apply to the Intermediate People's Court (IPC) where the Commission is located to set aside the award. Such application cannot involve a review of the substantive merits of the claim itself.

Despite efforts by the Chinese authorities, local protectionism and corruption may arise and can hinder or prevent the enforcement of arbitration awards.

An application to the IPC needs to be made to enforce a foreign arbitration judgment in China. If the IPC decides not to enforce the award, the applicant has no right of appeal. The IPC is, however, required to file its refusal with higher courts who may decide that the award should be enforced. This filing mechanism was introduced to try and reduce the risk of local protectionism.

The time limit for starting enforcement proceedings in China is very short, being only six months for companies and 12 months for individuals from the date of the award.

China is a party to the New York Convention, and therefore an award obtained in China can also be enforced in other jurisdictions which have ratified the New York Convention. According to CIETAC, Chinese arbitral awards have been successfully enforced in the UK, the United States, Canada, France, Germany, New Zealand, Japan, Italy and Singapore.

Hong Kong

Contributed by Norton Rose

Visas and work permits
Business entities
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Since 1 July 1997, Hong Kong has been a Special Administrative Region of the People's Republic of China. However, its legal system goes back to its time as a British colony and that system has been largely preserved despite the handover of sovereignty to mainland China. Thus Hong Kong operates a common law legal system with a strong rule of law and an independent judiciary. It is considered to have one of the most reliable legal systems in Asia.

Hong Kong is a particularly attractive business environment due to its simple and low taxes, high quality services, free flow of capital, lack of exchange controls, stable and fully convertible currency, well-educated workforce, excellent infrastructure and its strong rule of law. Hong Kong offers one of the freest economies in the world.

It operates a world-leading financial centre, with a regulatory regime on a par with international standards. Hong Kong is the most significant source of international capital for enterprises in mainland China and a leading banking centre. It also offers top quality education and health facilities for its local and expatriate community.

Hong Kong has a population of over seven million. The official languages are English and Chinese. English is widely used in the Government, business and professional sectors while Cantonese dialect is spoken by most of the population. Mandarin dialect is often used when doing business with mainland entities.

Visas and work permits

Persons requiring entry visas

Any person intending to enter Hong Kong must obtain the requisite visa or entry permit unless that person:

- has the right of abode or right to land in Hong Kong
- is in transit by air and stays within the airport transit area
- is a national of one of the countries (around 170) which fall under the visa-free immigration policy.

General visa requirements

A visa applicant must submit the application to the Hong Kong Immigration Department prior to arrival and is normally required to:

- hold a valid travel document and a return ticket
- be able to support him or herself whilst in Hong Kong
- have a clear criminal record and be no security threat to Hong Kong
- have a local sponsor.

The sponsor must be a Hong Kong resident of at least 18 years of age, and must know the applicant personally.

Sponsors

In relation to work permits, the employer company is usually the sponsor. The sponsor must certify the applicant's suitability for entry into Hong Kong for its stated purpose and must undertake to assume responsibility for the applicant's repatriation.

The employer company must also undertake to report any changes in the conditions of the applicant's stay to the Immigration Department.

Work permits

A person intending to work in Hong Kong must hold a work permit unless the person is a Hong Kong

permanent resident (ie, the holder of a permanent identity card) or a non-permanent resident whose passport is endorsed with permission that does not restrict employment.

In granting a work permit, the Immigration Department will usually consider the following criteria:

- whether there is a genuine vacancy in Hong Kong
- what skills, knowledge and experience are needed for the job in question
- whether the applicant is suitably qualified and experienced for the job
- whether or not the job can be readily filled locally.

Historically, work permits have not been particularly difficult to obtain. Spouses and children of persons holding a work permit are normally permitted to stay in Hong Kong under dependant visas. Since June 2006, adult holders of dependant visas have not been subject to any restriction on taking employment in Hong Kong.

Business entities

General

There are a number of legal forms a business operating in Hong Kong can take:

- representative office
- branch office
- Hong Kong limited liability company
- partnership
- listed company.

Some of these legal forms require registration under relevant rules and regulations. In addition, anyone "carrying on a business" in Hong Kong must apply to the Inland Revenue Department for a Business Registration Certificate. This amounts to a registration for tax. The duty to register applies irrespective of whether the person actually has a place of business in Hong Kong and failure to comply is a criminal offence.

Representative office

Setting up a representative office is often the first step in a foreign company establishing itself in Hong Kong. This enables the company to start evaluating the market and to some extent, begin promoting its product without registering a local entity. A company which has a representative office in Hong Kong will be "carrying on business in Hong Kong" and therefore will need a Business Registration Certificate.

As soon as the company has established a "place of business" in Hong Kong, it must register a formal entity such as a branch office or a Hong Kong subsidiary (see below).

Branch office

It is possible for a foreign company to operate a business in Hong Kong in its own name or the name of one of its overseas subsidiaries. This is known as a "branch office". Since setting up a branch office involves establishing a "place of business" in Hong Kong, a company wanting to do this must register as a "non-Hong Kong Company" under the Companies Ordinance. A Business Registration Certificate is also required because the branch office will be "carrying on business in Hong Kong".

Hong Kong limited liability company

Many businesses which establish themselves in Hong Kong do so through a limited liability company. This has the benefit that the liability of the shareholder or shareholders is limited to the amount they contributed to the company as share capital.

Almost all limited liability companies in Hong Kong are private companies. These cannot have more than 50 shareholders, must have restrictions on the transfer of their shares (eg, pre-emption rights or a directors' discretion to refuse to register the transfer) and cannot invite the public to subscribe for shares. A company that does not fulfill these requirements is a public company. There are notable advantages of maintaining private company status, perhaps the most important of which is the fact that Hong Kong incorporated private companies need not publicly file their audited accounts.

Limited liability companies are governed by their memorandum and articles of association which can only be amended by a special resolution (ie, a 75 per cent majority vote). They may be wholly-owned subsidiaries or joint ventures between two or more shareholders. Single member companies are permitted, and a single director is allowed for private companies. There are no residency requirements for shareholders or directors. The company secretary, however, must be resident in Hong Kong and there are plenty of local businesses that provide this service to foreign-owned companies.

It is possible to buy an already-incorporated private company "off the shelf" or to incorporate one separately. Buying a company off the shelf is considered a quick and inexpensive route if the company is to be a wholly-owned subsidiary or a simple 50:50 joint venture. More complex companies will need to be specially incorporated or it may be possible to buy a shelf company and make changes to the memorandum and articles of association.

Partnership

A partnership is a contractual arrangement between the individual partners who agree to combine their resources and share the risks and rewards of the business. The main advantage of a partnership is that it is inexpensive to form and flexible. Limited liability partnerships are not normally permitted under Hong Kong law and thus partnerships are rarely used except where laws or regulations relating to a business sector make it mandatory to use this form.

Listed companies

A company incorporated in any approved jurisdiction is permitted to raise capital locally by listing on The Stock Exchange of Hong Kong Limited (the Exchange). There are over 1,300 companies listed on the Exchange's main board and around 170 listed on the second board (known as the Growth Enterprise Market). Almost all new listing applicants have a significant part of their operations outside of Hong Kong (most commonly in mainland China) but find Hong Kong's developed regulatory environment and its wide and sophisticated investor base an attractive combination.

Traditionally, the only approved jurisdictions of incorporation for listed entitles were Hong Kong, Bermuda, Cayman Islands and the PRC. However, the Exchange has recently changed its policy and will accept applications from entities incorporated elsewhere, so long as the entity can satisfy the Exchange that the jurisdiction of the place of incorporation offers equivalent standards of shareholder protection to those provided in Hong Kong.

Business environment

General

Hong Kong offers an attractive business environment characterised by simple and low taxes, high quality services, the free flow of capital, the lack of exchange controls, a stable and fully convertible currency, a well-educated workforce, excellent infrastructure and a strong rule of law.

Local economy

The Hong Kong government specifies four industries as being key to the Hong Kong economy, together accounting for approximately 60 per cent of GDP:

Financial services

Hong Kong is home to one of the highest concentrations of banking institutions in the world, with almost all of the largest international banks having operations in the territory. It also supports a very high concentration of stock brokers, fund managers and insurance companies. Almost 20 per cent of Hong Kong's GDP can be attributed to the financial services industry.

Trading and logistics

Historically, Hong Kong was a notable manufacturing centre, particularly in the areas of textiles, clothing, machinery and electrical products. Manufacturing for most industries has now migrated to mainland China. However, Hong Kong continues to be a major re-exporter of Chinese-made goods and a world leading shipping and logistics centre. Trading and logistics still accounts for approximately 25 per cent of Hong Kong's GDP.

Professional and other services
Hong Kong has a highly educated pool of local bilingual workers and also welcomes skilled expatriate employees from Europe, the US, Canada, Australia and other nations. Hong Kong is a vibrant, cosmopolitan city and an attractive place to live and work. As a result, Hong Kong attracts skilled professionals in fields such as law, accountancy, architecture, engineering, design, business management, IT and advertising. Many of these skills are sold regionally, assisted by Hong Kong's excellent transport links and geographic proximity to mainland China and south-east Asia. Professional and other services account for approximately 12 per cent of Hong Kong's GDP.

Tourism
Tourism is a small but growing part of Hong Kong's economy. Hotels and restaurants are high quality and the local transport system efficient. Hong Kong has four locally-owned airlines that provide scheduled passenger services and serves as a regional hub for many more. Hong Kong tourism currently accounts for approximately four per cent of GDP, but the sector is growing rapidly as the territory welcomes more visitors from mainland China.

Legal system
Hong Kong's constitution is (and will be until 2047) governed by The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (the Basic Law). The Basic Law was enacted by the PRC on the reversion of sovereignty to mainland China in 1997. It grants Hong Kong a high degree of autonomy, including executive, legislative and independent judicial power, together with the right of final adjudication.

The Basic Law specifies that the laws in force in Hong Kong prior to its handover to mainland China will be maintained. The result is a system of law based on the English common law system, with local statutes subject to interpretation by the Hong Kong Judiciary. Case law from other common law jurisdictions (such as England, Australia, Canada, New Zealand and Singapore) is persuasive and commonly relied upon.

Hong Kong has an independent judiciary. Anti-corruption legislation is on a par with international standards and is strictly enforced.

Intellectual property protection
Hong Kong operates a system for protecting intellectual property rights similar to that in place in the United Kingdom. This system is entirely independent from that operating in mainland China. Trade marks, patents and designs are protected by registration. Copyright is also protected.

Foreign investment policy

Introduction
Hong Kong is one of the most open economies in the world to foreign investment. Other than in the very limited sectors identified in the table below, foreign investment is unrestricted. Even though no specific incentives are provided for foreign investment, the business environment as a whole makes Hong Kong one of the most attractive cities in the world in which to invest. Foreign companies are not subject to any special regulatory regime and nor are the procedural requirements different to those applicable to a local company. Additionally, the free movement of capital allows the repatriation of profits overseas in any currency.

Gateway to mainland China
Ever since its accession to the World Trade Organisation in 2001, the PRC has reduced its administrative barriers to trade and has rapidly opened up to foreign investment. Hong Kong, already well placed to develop into mainland China's main foreign investment platform, was assisted in achieving this aim by the conclusion of the Closer Economic Partnership Agreement (CEPA) which came into effect in 2004. CEPA gave preferential access to certain mainland markets for Hong Kong products and Hong Kong companies. Aside from this, Hong Kong's geographic location, the sophistication and reliability of its businesses and its cultural fit (as a special administrative region of the PRC) have assured its development as the gateway to mainland China.

Foreign ownership restrictions

Foreign ownership is restricted only in those sectors identified in the table below.

Sector	Foreign investment restriction
Television broadcasting	Prior approval is required for the holding, acquisition or exercise of voting control by non-resident investors of 2% or more of a television licensee. Approval will rarely be given where this would involve control or management of the licensee being exercised outside Hong Kong. In any event, the Broadcasting Ordinance includes provisions which weaken the voting influence of a foreign shareholder in certain circumstances
Audio broadcasting	Foreign ownership of companies licensed to provide audio broadcasting services is limited to 49%

Anti-trust and merger control regulations

On 14 June 2012, Hong Kong adopted its first cross-sector Competition Ordinance which is expected to come into operation within the next two years. Once in force, the Competition Ordinance will replace sector-specific competition rules that currently exist under the Telecommunications Ordinance and the Broadcasting Ordinance.

The Telecommunications Ordinance and the Broadcasting Ordinance, which are now governed by the Communications Authority prohibit licensees in the telecommunications and broadcasting sectors from engaging in conduct that has the purpose or effect of preventing, distorting or substantially restricting competition in the relevant markets. When the Competition Ordinance becomes effective, the licensees will be subject to the new conduct rules like other undertakings, namely, the prohibition of anticompetitive agreements and of abuse of a significant degree of market power that has the object or effect of preventing, restricting and distorting competition in Hong Kong. In addition, the Competition Ordinance introduces a specific prohibition of exploitative conduct by dominant licensees in the telecommunications market.

The telecommunications sector is the only sector where competition merger control applies. Transactions leading to changes in shareholder voting rights in carrier licensees are subject to review by the Telecommunications Authority. The changes subject to merger control are:

- the acquisition by one or more parties of more than 30 or 50 per cent of the voting shares of a carrier licensee
- the acquisition by one or more parties of the power to control a carrier licensee
- the acquisition by one or more parties who hold more than five per cent of the voting shares of another carrier licensee or who control another carrier licensee, of more than 15 per cent but less than 30 per cent of the voting shares of a carrier licensee.

In such circumstances, the Telecommunications Authority has the power to review the transaction, and parties have the option to seek prior consent from the Telecommunications Authority. As part of its review, the Telecommunications Authority will assess whether the transaction leads to any substantial lessening of competition in any relevant telecommunications markets, and if so, direct the licensees to take actions to eliminate or avoid such effect.

On 1 April 2012, the Communications Authority Ordinance will come into force, and with it a new Communications Authority will be established as a unified regulatory body for the telecommunications and the broadcasting sectors, taking over existing statutory powers and functions of the Broadcasting Authority and the Telecommunications Authority.

The Competition Ordinance will not introduce any comprehensive merger control regime; it expressly provides that the conduct rules are not to be applied to merger activities. Nevertheless, the Competition Ordinance preserves merger control in the telecommunications sector, adapting existing rules to a new set of rules which are more in line with international standards and look to the substantive control relationships between transaction parties to decide whether merger control applies.

Government initiatives and incentives

For the last 17 years, Hong Kong has been ranked as the freest economy in the world in the Index of Economic Freedom, published by The Heritage Foundation and The Wall Street Journal.

The government's consistent non-interventionist policy has resulted in the development of an international trade and business hub which operates as the gateway to mainland China. The territory's low tax environment is a particular attraction for businesses, even in the absence of widespread tax exemptions and allowances.

Taxation

General

Hong Kong is a low tax jurisdiction. There is no capital gains tax, inheritance tax, estate duty, value added tax or goods and services tax.

Furthermore, the tax system is not designed to have extra-territorial effect and therefore it is only income with a Hong Kong source which is subject to tax. The following taxes are levied in Hong Kong:

- profits tax
- salaries tax
- property tax
- stamp duty.

The tax year runs from 1 April to 31 March.

Profits tax

Profits tax is payable by individuals and companies who carry on a trade, business or profession in Hong Kong. It is payable on assessable profits acquired through that trade, profession or business which have a Hong Kong source. Receipts of a capital nature and dividends are not subject to profits tax. Interest income and income from intellectual property may be subject to profits tax depending on its source. Expenses are generally deductible to the extent that they are incurred in the production of profits that are chargeable to tax.

Currently, the rate of profits tax is 15 per cent for unincorporated businesses and 16.5 per cent for corporations.

Salaries tax

Salaries tax is chargeable on any income arising in or deriving from Hong Kong, from any office, employment or pension. The location of the employment is only the initial starting point in determining the source of income and income from a non-Hong Kong source can sometimes be deemed to be Hong Kong income, depending on the circumstances.

Income will include wages, commissions, bonuses, cost-of-living allowances, travel or education allowances, stock option gains, and similar benefits. Accommodation allowances are treated slightly differently. The amount actually paid as rent by the employee (or by the employer on behalf of the employee) is not taxable. Instead, the benefit is attributed a deemed value (usually ten per cent) of the individual's gross taxable remuneration excluding the rent actually paid. This approach usually provides significant tax savings for an employee who receives an accommodation allowance.

Two methods of calculating salaries tax are used. Under the first method, the standard flat rate (currently 15 per cent) is applied to the individual's net income before deduction of personal allowances. Under the second method, tax is chargeable at progressive rates of between two per cent and 17 per cent to the net income after deduction of personal allowances. Whichever method gives the lower tax liability is accepted.

Property tax

Property tax is chargeable on rental income from property which is situated in Hong Kong. Permissible deductions are bad debts and rates, together with a statutory allowance of 20 per cent for repairs and outgoings. Interest payments on loans and other actual outgoings cannot then be deducted.

Property tax is charged at the standard rate, which is currently 15 per cent.

Stamp duty

Ad valorem stamp duty is payable on the following documents:

- Conveyances of real property – at a maximum rate of 4.25 per cent (for a consideration of more than HK$21.73 million) on either the sale and purchase agreement or the conveyance on sale. Where residential property bought on or after 10 November 2010 is resold within 24 months, additional "special stamp duty" is payable at a rate of up to 15 per cent.

- Leases of property – at a rate of between 0.25 per cent and one per cent of the yearly or average yearly rent.

- Transfers of Hong Kong stock – at a rate of 0.2 per cent of the consideration or the value of the shares (whichever is higher).

A nominal duty (usually HK$5) is in some circumstances also payable.

Intra-group transfers are exempt from stamp duty if one company is (directly or indirectly) the beneficial owner of 90 per cent or more of the issued share capital of the other, or a third company is (directly or indirectly) beneficial owner of 90 per cent or more of both. There are a number of further exemptions which may be available, depending on the circumstances.

Workplace relations

Introduction

The Employment Ordinance sets out the minimum rights, benefits and protection to which employees in Hong Kong are entitled, and the rights and obligations of employers. No contract of employment in Hong Kong should contain terms which are less favourable than the minimum conditions set out in the Employment Ordinance. Any such terms will be illegal and unenforceable, even where the employer and employee have both consented to the arrangement. Of course, the parties can agree to terms which are more favourable than the minimum standards set out in the Employment Ordinance.

Some companies in Hong Kong may engage an individual as an independent contractor to provide services (for example, as a consultant) so as to avoid the application of the Employment Ordinance. The Hong Kong courts will consider all the circumstances of the engagement (including the extent of control, source of work equipment, parties' own views as to their relationship) to determine whether that individual is engaged by the company as an employee or an independent contractor.

Minimum statutory benefits

The extent of statutory benefits that an employer is required under law to provide to an employee depends on the length of the continuous service provided by that employee.

Statutory holidays

Hong Kong has two systems of holiday: statutory holidays and public holidays. There are 12 statutory holidays. Public holidays include all Sundays, plus the 12 statutory holidays and an additional five other holidays.

An employee is entitled to statutory holidays irrespective of his length of service. Those statutory holidays must be paid if the employee has been continuously employed for the preceding three months.

In practice, as a contractual matter the majority of employers observe all the public holidays and may give additional holidays (including Saturdays).

Wages

The Minimum Wage Ordinance came into effect on 1 May 2011. It applies to all employees, with a few limited exceptions (for example, domestic workers and student interns). Under the Minimum Wage Ordinance, an employee is entitled to paid wages in respect of any wage period (usually one month) of not less than the statutory minimum wage. The statutory minimum wage is the amount derived by multiplying the total number of hours worked by an employee in a wage period by the prescribed minimum hourly wage rate for the employee (ie, currently set at HK$28). Any agreement which purports to extinguish or reduce any right or benefit or protection conferred on the employees by the Minimum Wage Ordinance is void. There may

be criminal penalties for failure to comply with the minimum wage requirements set out in this Ordinance.

Wages must be paid within seven days of becoming due and there are restrictions on the deductions which may be made from an employee's wages.

Working hours and rest days

The Employment Ordinance does not impose any maximum working hours. The employee's working hours may be fixed or subject to change, either by mutual agreement or solely at the discretion of the employer. If an employee is required to work overtime (whether with or without pay), this should be clearly stated in the employment contract.

In Hong Kong, many employees work long hours and usually their contracts of employment acknowledge that they may work additional hours as may be necessary for the proper performance of their duties under the contract of employment. In return, the employees may expressly acknowledge and agree that they will not receive any further remuneration in respect of those additional hours.

An employee working under a continuous contract for four or more weeks with a minimum of 18 hours per week is entitled to at least one rest day in every period of seven days (in addition to any statutory holiday).

Annual leave

An employee is only entitled to paid annual leave after completing 12 months of continuous service. An employee's annual leave entitlement depends on his or her length of continuous service and is subject to minimum statutory entitlements under the Employment Ordinance, which ranges from seven to 14 days. The employer may agree to provide more paid annual leave days to the employee.

Sickness allowance

An employee is entitled to paid sickness days after completing one month of continuous service. The employee will accrue two paid sickness days for each completed month of employment during the first 12 months, and four paid sickness days for each completed month thereafter. Paid sickness days can be accumulated up to a maximum of 120 days. Sickness allowance becomes payable where an employee takes four or more consecutive sick days and is payable at a daily rate equal to 4/5 of the employee's daily average wages during the period of 12 months immediately before the sickness day.

End of year payments

The Employment Ordinance contains detailed provisions on "end of year payments". These provisions relate to a traditional practice in Hong Kong, of paying staff an additional sum (usually a month's salary) at Chinese New Year. This is often referred to as payment of "a 13th month".

There is no requirement under the Employment Ordinance to pay a 13th month or any other bonus or end of year payment. However, if payment is made by virtue of a term or condition (whether written or oral, express or implied) of the employment contract, it will be regarded as contractual unless the contract makes it clear that it is discretionary. Further, even if any bonus payments are labelled as "discretionary", an employee may challenge whether the payments are in fact contractual.

The Hong Kong courts will look at the substance of the agreement between the parties to determine the nature of the payments. Therefore, if the employer wants the end of year payment to be of a gratuitous nature or to be payable at the discretion of the employer, it should be clearly specified in the employment contract. Similarly it is advisable to specify in the employment contract if a 13th month will not be paid.

Housing benefits and allowances

There is no requirement on employers to pay housing benefits or allowances to their staff. However, if an employer pays housing benefits/allowances in cash, they are likely to be considered as part of wages under the Employment Ordinance.

Maternity leave

Where a female employee has been continuously employed by the employer for a period of 40 weeks or more, she is entitled to ten weeks' paid maternity leave payable at the rate of 4/5 of her daily average wages during the period of 12 months immediately

before the date of commencement of the maternity leave.

Severance pay
Generally an employee who has been continuously employed for two years or more is entitled to a severance payment in the event of dismissal by reason of redundancy.

Long service pay
An employer is required to make a long service payment to an employee who has been continuously employed for five years or more where the employee:

- is dismissed in circumstances where the employer is not required to make a severance payment
- resigns in circumstances in which he or she is entitled to do so because of ill health
- retires aged 65 or older or
- dies.

A long service payment need not be made if the employee is summarily dismissed.

Suspension
An employer may suspend an employee for a period of not more than 14 days in limited circumstances. The suspension may be used either as a disciplinary measure for any reason for which the employer could have summarily terminated the employment contract or pending a decision by the employer as to whether the employee will be summarily dismissed.

If criminal proceedings are brought against an employee arising out of or connected with his or her employment, the employer may also suspend the employee pending the outcome of those proceedings.

Termination requirements

Subject to limited exceptions (see below), an employment contract may be terminated by either party by giving the requisite notice or payment in lieu of notice. Generally it is not necessary for an employer to justify or demonstrate any reason for the termination.

Termination with notice
In the case of a continuous employment (ie, for four weeks or more with not less than 18 hours every week), the parties may agree to seven days' notice or, if the agreement is silent on notice period, the notice period is deemed to be one month.

Probationary period
If there is a probationary period under the employment contract, during the first month of a probationary period, either party may terminate the employment contract without giving notice. After the first month of the probationary period, either party may terminate by giving the agreed notice (which must not be less than seven days).

Dismissal without notice
The employer may terminate an employment contract without notice or payment of wages in lieu (ie, summarily dismiss an employee) if the employee:

- willfully disobeys a lawful and reasonable order
- misconducts himself/herself, such conduct being inconsistent with the due and faithful discharge of his/her duties
- is guilty of fraud or dishonesty
- is habitually neglectful of his/her duties.

The employer may also terminate an employment agreement without notice or payment of wages in lieu if it has other grounds to do so at common law (for example, the employee is in fundamental breach of the employment contract).

Notice pay
Both the employer and the employee have the statutory right to make payment of wages in lieu of notice and terminate the employment contract immediately. However, neither party can require the other party to pay wages in lieu of notice.

Unlawful termination

The rights to terminate by giving notice or payment in lieu of notice are subject to limited exceptions. For example, an employer who terminates the employment contract by notice while an employee

is taking paid sick leave or has given notice of pregnancy or is taking maternity leave commits an offence. Further, an employee cannot be terminated by an employer by giving notice of termination when he is taking accrued statutory annual leave.

There are other statutory provisions which prohibit termination by notice. For example:

- the Jury Ordinance prohibits an employer from terminating the employment of any employee who is undertaking jury service
- the Employees' Compensation Ordinance prohibits an employer from terminating the employment of an employee who has suffered incapacity in circumstances which would entitle him to employees' compensation
- the Race Discrimination Ordinance prohibits an employer from terminating on the ground of race
- the Sex Discrimination Ordinance prohibits termination of employment by reason of an employee's gender, pregnancy or marital status
- the Disability Discrimination Ordinance prohibits termination of employment by reason of an employee's disability
- the Family Status Discrimination Ordinance prohibits termination of employment by reason of an employee's family status.

Unreasonable termination

The Employment Ordinance provides that an employee who has been continuously employed for at least two years is entitled to remedies if his/her employment has been unreasonably terminated by the employer in order to extinguish or reduce any right, benefit or protection that the employee has under the Employment Ordinance.

An employer is presumed to have an intention to extinguish or reduce any right, benefit or protection that an employee has under the Employment Ordinance if the employment is terminated without a valid reason. In order to show that an employee has been terminated for a valid reason, the employer must show that the termination is for one of the following five reasons:

- the conduct of the employee
- the capability or qualifications of the employee for performing work of the kind which he or she was employed by the employer to do so
- redundancy or other genuine operational requirements of the employer
- the fact that the employer and/or employee would be in contravention of the law if the employment were to continue
- any other substantial reason which is sufficient to warrant the termination.

Disciplinary procedure

Under Hong Kong law, an employer is not required to have a disciplinary procedure in place and there is no statutory disciplinary procedure or code. Further, it is not legally required for an employer to give a warning before it exercises its right to terminate an employment contract. However, if an employer has a disciplinary procedure in place and the employment contract expressly provides that the procedure must be applied in every situation involving termination, then the employer should follow its disciplinary procedure before terminating an employee's employment.

Mandatory Provident Fund

Other than certain exempt employees, all employees in Hong Kong are required to join a Mandatory Provident Fund (MPF) Scheme (a pension scheme) if the employee is employed for at least 60 days on a continuous contract. Both the employer and the employee are required to contribute a minimum of five per cent of the employee's monthly income to the MPF Scheme, subject to a cap (set at HK$1,000 per month for both employer's and employee's contributions, but HK$1,250 per month for both employer's and employee's contributions from 1 June 2012).

Tax

Generally an employee is responsible for filing an annual tax return and settling the tax liabilities arising out of his or her employment.

Employees' compensation insurance

An employer is required by the Employees' Compensation Ordinance to take out employees'

compensation insurance policies for all its employees to cover its liabilities under the legislation and at common law in respect of injuries suffered by its employees arising out of, and in the course of employment, or in respect of occupational diseases specified in the legislation.

Personal Data (Privacy) Ordinance

The Personal Data (Privacy) Ordinance governs the collection, retention, use (which includes disclosure and transfer), security and access of personal data of individuals in Hong Kong. The Privacy Commissioner has issued a Code of Practice on Human Resources Management (the Code) on how to properly handle employees' personal data and other guidelines on employee monitoring. Whilst the Code does not have the force of law, the Privacy Commissioner recommends employers to observe the guidelines set out in the Code in the management of the personal data of their employees. Failure to abide by the provisions of the Code will weigh unfavourably against the employer in any case under investigation by the Privacy Commissioner.

Labour Tribunal

The Labour Tribunal in Hong Kong has exclusive jurisdiction to hear any monetary claim for breach of employment contract or failure to comply with the Employment Ordinance, the Minimum Wage Ordinance and the Apprenticeship Ordinance if the amount of claim exceeds HK$8,000 or where the number of claimants exceeds ten. There is no upper limit on the amount of claim. Hearings are conducted in an informal manner and neither party may be legally represented. Smaller claims are dealt with by the Minor Employment Claims Adjudication Board.

Dispute resolution

Legal system

Hong Kong laws comprise the Basic Law, common law, rules of equity and statute law. Under the Basic Law, all of the laws in force in Hong Kong prior to the handover of the territory to mainland China on 1 July 1997 remain in force, unless they contravene the Basic Law. The common law system operates on the doctrine of precedent. Article 84 of the Basic Law allows Hong Kong courts to consider other common law judgments, in addition to Hong Kong precedents.

The Hong Kong court system is made up of the District Court, the High Court (comprising the Court of First Instance and Court of Appeal) and the Court of Final Appeal together with a number of lower courts and tribunals. The District Court has limited jurisdiction in both civil and criminal matters. It has civil jurisdiction to hear monetary claims over HK$50,000, but not more than HK$1,000,000 (claims of less than HK$50,000 are generally brought in the Small Claims Tribunal). The jurisdiction of the Court of First Instance is unlimited in both criminal and civil matters. The Court of Appeal hears appeals on all matters, civil and criminal, from the Court of First Instance and the District Court. The Court of Final Appeal (which replaced the function of the Privy Council in 1997) is based in Hong Kong and is Hong Kong's final appellate court.

The legal profession is divided into solicitors (who advise clients on their legal rights and have only limited rights to appear in court) and barristers (who appear as advocates in the Hong Kong courts).

Litigation

Whilst Hong Kong has always prided itself on its fair and efficient judicial system, in order to promote greater efficiency in an increasingly demanding market, the Civil Justice Reform was introduced on 2 April 2009. It is hoped that the Civil Justice Reform will result in a more expedient procedural system that reduces delay and expense whilst still enabling parties to achieve just resolutions of their disputes. This is to be delivered through the use of stricter timetabling and case management provisions, and by encouraging parties to consider alternative dispute resolution mechanisms. In developing the Civil Justice Reform, Hong Kong has considered and drawn from the experiences of a number of other civil justice systems including England, Canada, Australia, New Zealand and the United States.

Arbitration

Hong Kong has well developed and modern arbitration laws and a judiciary that is supportive of arbitration and other forms of alternative dispute resolution. The Hong Kong International Arbitration Centre was established in 1985 and has its own body of institutional arbitral rules which parties can choose to apply to their disputes, and provides a panel of international and local

arbitrators. The HKIAC also provides premises and support facilities for the hearing of arbitrations in Hong Kong. Arbitration in Hong Kong is currently governed by the Arbitration Ordinance which was recently amended. The new Arbitration Ordinance came into force on 1 June 2011, under which the distinction between domestic and international arbitration existing under the previous Ordinance was abolished in favour of a unified regime. The legislation is designed to make Hong Kong arbitration law more user-friendly and attractive for international arbitrations and to enhance the reputation of Hong Kong as a Model Law jurisdiction. The new Arbitration Ordinance introduced and incorporated the amendments made to the UNCITRAL Model Law in 2006. These modifications include the important provisions addressing tribunal-ordered interim measures. While the move towards a unified regime based on the UNCITRAL Model Law is a very welcome simplification of the previous regime, the new Arbitration Ordinance does permit parties to agree to opt in to provisions similar to parts of the old domestic regime. These include provisions concerning the court's power to consolidate arbitrations, the determination of preliminary questions of law by the court, and challenges of awards to the court on a question of law.

The new Arbitration Ordinance will enhance Hong Kong's importance as an arbitration centre in Asia for international users. This is strengthened by the International Chamber of Commerce establishing its branch secretariat office in Hong Kong in late 2008 and strong links between China International Economic and Trade Arbitration Commission and the HKIAC.

The 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (known as the New York Convention), which lays down a detailed framework for the recognition and enforcement of arbitration awards, applies to Hong Kong. Hong Kong arbitration awards are therefore enforceable in over 100 countries which are signatories to the New York Convention. It is to be noted that Hong Kong arbitration awards are not to be enforced in the PRC under the New York Convention. Under the Arrangement Concerning Mutual Enforcement of Arbitral Awards between the mainland and HKSAR (which became effective as from 1 February 2000), Hong Kong arbitration awards may be enforced directly in PRC courts.

Mediation

Whilst the Hong Kong courts have long been supportive of mediation and other alternative forms of dispute resolution, following the introduction of the Civil Justice Reform there has been a greater emphasis on the role of mediation in resolving disputes. One of the key aims of the Civil Justice Reform is to encourage litigating parties to use alternative dispute resolution procedures, such as mediation. A new practice direction on mediation came into effect on 1 January 2010. This applies to most civil proceedings commenced in Hong Kong's Court of First Instance and the District Court. Mediation is not only used in Hong Kong in conjunction with court proceedings but also as a standalone method of dispute resolution or in conjunction with arbitral proceedings and other forms of alternative dispute resolution.

India

Contributed by J. Sagar Associates

Visas and work permits
Business entities
Business environment
Foreign investment policy
Government initiatives and incentives
Taxation
Workplace relations
Dispute resolution

India is a socialist democratic republic. It has a federal form of government, comprising 29 states and six union territories. The Indian parliament is the supreme legislative body and is essentially based on the British parliamentary system. There are two houses: the Rajya Sabha (Council of States) and the Lok Sabha (House of the People). The national executive power is centred on the Council of Members (Union Cabinet), led by the Prime Minister.

India has been one of the best performers in the world economy in recent years with GDP growth exceeding nine per cent in 2008 and 2009. India is the fourth largest world economy ranked by purchasing power parity, and the second fastest economy by GDP growth. India's economy has recovered from the global financial crisis faster than other regional economies with growth expected to be approximately seven per cent in 2011 – 2012.

Besides its economic credentials, India's demographic profile makes it an increasingly attractive investment destination for foreign investors. India's substantial and expanding middle class and youth populations – over 40 per cent of its population are over 21 – are hungry for consumer goods. India, therefore, represents an enormous market for foreign investors with potential for increased growth over the next two decades.

Since 1991, there has been significant deregulation and liberalisation in India. This has opened up many sectors of the economy to private investment, including foreign direct investment. Competition is actively encouraged and with the 2009 re-election of the National Congress Party, with a mandate to implement investor-friendly economic reforms, has been a positive development for foreign investors.

Visas and work permits

Business visas

Foreign nationals wishing to conduct business transactions in India must obtain a business visa from an Indian embassy or consulate abroad. Business visas may be issued for up to five years, with a multiple entry provision, but usually with a cumulative stay of not more than six months. Business visas can be renewed or extended within India. Business and tourist visas are usually not convertible into employment visas while the holder of the relevant visa is in India.

Residential permits

Foreign nationals wishing to work in India must obtain a residential permit from a Foreigners' Regional Registrar Office (FRRO), which are located in all major cities. A foreign national holding a visa (other than a tourist visa) valid for a period exceeding 180 days is required to be registered with the FRRO within 14 days of arrival in India. Certain categories of people are exempt from registration requirements, including United States nationals with a ten-year tourist/business visa, provided their period of stay is less than 180 days.

Employment visa

Foreign nationals intending to take up employment in India also require an employment visa or work permit issued by Indian missions abroad. The duration of the employment visa depend on the nature of employment. For instance in case of high skilled IT employees the duration of employee visa is three years or the term of employment whichever is less.

Income tax clearance certificate

Foreign employees are required to register for tax purposes by obtaining a permanent account number with the Indian income tax authorities upon their arrival in India. This is a one-time registration number, which must be included in correspondences with the tax authorities. A person not domiciled in India, intending to stay for more than 120 days, must produce an income tax clearance certificate, which certifies that the person's stay in India was self-financed.

Business entities

Introduction
Foreign companies wishing to do business or establish a presence in India have a number of options as discussed below.

Distributorship arrangement
Before establishing a representative office, it is common for foreign companies to test market potential by appointing a sales representative or distributor. This provides a relatively low-risk and low-cost method of testing the marketplace.

India's distribution channels are diverse, and there are few established retailers that operate on a national level. It is important to investigate a potential distributor's creditworthiness, reputation and capabilities before selecting them.

Foreign direct investment
Automatic route
Foreign direct investment (FDI) in the equity share capital of an Indian company is permitted in all sectors under the "automatic route" (without prior approval) of the Foreign Investment Promotion Board (FIPB), except with respect to the following:

- manufacture of cigars and cigarettes of tobacco and manufactured tobacco substitutes
- commodity exchanges
- courier services
- credit information companies
- print media companies
- manufacture of items exclusively reserved for the small-scale sector with more than 24 per cent FDI
- proposals in which the foreign collaborator had an existing financial/technical collaboration in India in the "same" field prior to 12 January 2005
- manufacture of electronic aerospace and defence equipments (all types)
- further specialised sectoral limitations as noted in the FDI Policy such as 49 per cent automatic route allowed in the private banking sector.

Under the automatic route, foreign companies may acquire shares in existing Indian companies without obtaining prior regulatory or government approval. The Indian company, however, must notify the relevant regional office of the Reserve Bank of India (RBI) within 30 days of receiving investment funds from the foreign investor, and must file certain documents with the regional office within 30 days after the issue of shares to the foreign investor.

FDI is prohibited in certain sectors. A non-exhaustive list of sectors includes gambling, lottery business, atomic energy and retail trading (except single brand product retailing, which is allowed up to 100 per cent under Government Approval Route).

Wholly owned subsidiaries
Foreign companies are permitted to establish wholly owned subsidiaries in India. Such companies may be established as a private limited or public limited company, subject to the requirements of the Companies Act 1956. Foreign equity ownership may be up to 100 per cent except in certain specified sectors. The Indian subsidiary company must register with the Register of Companies (ROC) and is subject to the same laws as domestic companies. The steps for establishing a private company in India are set out in Annex A.

Joint ventures
As with wholly owned subsidiaries, foreign companies are permitted to incorporate a company locally in India as a joint venture company with an Indian partner/other shareholders as either a private limited or a public limited company. Equity ownership restrictions apply to certain industry sectors, as mentioned above

FDI beyond automatic approval
In cases where the automatic approval route is not available, clearance from the FIPB is required. Additionally, in certain cases, the approval of the RBI may also be required.

Repatriation of investment capital and profits earned in India

Investment capital and profits earned may be repatriated without restrictions, except in the case of non-resident Indians (NRIs) who choose to invest specifically under non-repatriable schemes.

Repatriation of sale proceeds of investments in India is permitted with prior approval of the RBI and tax clearance from the income tax authorities.

Liaison office

Foreign companies wanting to establish an initial presence in India often set up a liaison office. Prior approval of the RBI is required before setting up a liaison office in India.

A foreign company may open a liaison office in India to represent its parent company or the group in order to: promote the export or import of goods and services from or to India, to facilitate technical or financial collaborations between its parent or the group of companies to which it belongs and an Indian entity, to act as a communication channel between itself and an Indian entity. Liaison offices are not permitted to undertake any commercial, trading or industrial activity, or earn any income in India. Liaison offices are prohibited from charging any commissions or receiving other income from Indian customers for providing liaison services. Permission to establish a liaison office is initially granted for three years but may be extended beyond this period.

Branch office

Foreign companies engaged in manufacturing and trading activities may open a branch office in India for any of the following purposes:

- undertaking export and import activities
- rendering professional or consultancy services
- carrying out research work in which the branch office’s parent company is engaged
- promoting technical or financial collaborations between Indian companies and the branch office’s parent company or the group of companies to which it belongs
- representing the parent company in India and acting as its buying/selling agent
- rendering services in information technology and development of software in India
- rendering technical support to the products supplied by the branch office’s parent or the group of companies to which it belongs
- undertaking activities of foreign airline or shipping company
- manufacturing and providing services in a Special Economic Zone (SEZ).

Prior approval of the RBI is required before setting up a branch office in India. For income tax purposes, a branch office is treated as an extension of the foreign company in India, and is taxed at the rate applicable to foreign companies in India. A branch office is also required to register with the relevant ROC.

Project office

Foreign companies may establish a project office if it is intended that its business presence in India will be for a limited period of time. Essentially, a project office is set up with the purpose of executing a specific project.

According to the Foreign Exchange Management (Establishment in India of Branch or Office or other Place of Business) (Amendment) Regulations 2003, a foreign company may open a project office in India, provided it has secured from an Indian company a contract to execute a project in India, and one of the following conditions is satisfied:

- the project is funded directly by offshore funds
- the project is funded by a bilateral or multilateral international financing agency
- the project has been cleared by an appropriate authority
- a company or entity in India awarding the contract has been granted a term loan by a public financial institution or a bank in India for the project.

The foreign company is required to furnish a report to the relevant regional office of the RBI under whose jurisdiction the project office is set up, giving certain details.

Foreign companies engaged in turn-key construction will normally set up a project office for their operations in India. Such offices cannot undertake activities other than activities relating and incidental to the execution of the relevant project.

Foreign technology agreements

Foreign companies may enter into technology agreements with Indian companies provided that:

- the technical know-how lump sum payment does not exceed US$2 million (per technology)
- royalties from wholly owned subsidiaries to their parent companies do not exceed eight per cent on exports and five per cent on domestic sales (net of sales).

In situations where there is no technology transfer, remittance outside India for use of a trade mark or franchise right in India is permitted, without prior approval, so long as such payment does not exceed two per cent of export sales and one per cent of domestic sales. Where there is a transfer of technology, royalties that may be received for the granting of the right to use a trade mark, brand name or franchise right cannot exceed the maximum amounts referred to in the second point above.

Business environment

General

India has a mixed economy with an active state and private sector. India's five-year plan from 2007 to 2012 contemplates rapid industrial development, focusing on technological advancement and international competitiveness in sectors such as steel, electronics, machinery, information technology and infrastructure.

India's political and legal systems are similar to many countries as they are based on the British systems. Its geographical and cultural diversity, however, make it a challenging and complex place to do business.

Intellectual property protection

Indian law recognises and protects intellectual property rights consistent with international practices. India is also a signatory to the WTO Agreement on Trade Related Aspects of International Property Rights (TRIPS) and to the Patent Cooperation Treaty.

Protection is available for the four main types of intellectual property: patent, trade mark, design and copyright. Additionally, geographical indications, layout designs of integrated circuits and plant varieties are also accorded protection in India under specific legislation.

Patents

Patent registration in India is governed by the Patents Act 1970 (last amended in 2005) and the Patent Rules 1972 (last amended in 2006).

The Patents Act provides for the grant of a patent for an "invention". An "invention" as defined in the Patents Act means a new product or process involving an inventive step and capable of industrial application. The term of every patent is 20 years from the date of filing the application for the patent. Microorganisms, mathematical or business methods and computer programs per se are not patentable.

The protection of product patents extends to drugs, food and chemicals. Compulsory licensing for the export of health care products applies to countries that have no or insufficient manufacturing abilities. Further, any pre-grant opposition to patent applications can be made at any time before the grant of the patent. Post-grant oppositions are also allowed. Patents may not be granted prior to the date that is six months from the date of the application.

The Patent Rules were amended in 2006 to provide for greater transparency and to simplify the procedures for the registration of patents. Patent applications must be published within one month after expiration of the statutory period of 18 months from the date of filing of the relevant application.

Trade marks
Protection of trade marks in India is governed by the Trade Marks Act 1999 and the Trade Marks Rules 2002. The Act provides for the registration of trade marks for goods as well as services.

Under the Trade Marks Act, the definition of "trade mark" includes graphical representations and the registration of shapes of goods, their packaging and combinations of colours. The term of registration is ten years, perpetually renewable for a further period of ten years. The Act also provides for a single application for registration of a trade mark for different classes of goods and services. Injunctive relief is available for any infringement of registered trade marks.

Any trade mark which is distinctive and not similar to another mark used for similar goods may be registered in India. Under Indian law, unregistered trade marks are protected through the action of "passing off".

Copyright
Copyright protection in India is governed by the Copyright Act 1957. It provides for copyright in all original literary, dramatic, musical, artistic works, cinematograph films and sound recordings. Computer programs are entitled to protection under the Copyright Act as a literary work. Transfer, assignment and licensing of copyrights, including computer software, is recognised in India.

Registration is not compulsory, although it is recommended, as it provides evidence of a copyright in a court of law. Works of foreign authors first published in India are granted protection on a reciprocal basis. India has been a contracting party to the Berne Convention since 1974.

Designs
The Designs Act 2000 governs industrial designs and protects the aesthetic value of a product. It gives the holder the right to take legal action against anyone reproducing registered industrial designs. The Act provides for an initial registration of ten years that can be extended by a further period of five years.

Geographical indications
The Geographical Indications of Goods (Registration and Protection) Act 1999 provides for the registration and protection of geographical indications (indications which identify a good as originating in a particular territory where a certain quality, reputation or other characteristic of the good is essentially attributable to its geographical origin) relating to goods in India, and aims to protect the use of such geographical indications from infringement by others.

Semiconductor integrated circuits layout-designs
The Semiconductor Integrated Circuits Layout-Design Act 2000 provides protection for semiconductor integrated circuit layout-designs for a period of ten years calculated from the date of filing an application for registration or from the date of first commercial exploitation anywhere in any country, whichever is earlier.

Trade secrets
Although India does not have specific legislation to protect undisclosed information, violation of trade secrets or undisclosed information is protected under general contract law.

Under the Information Technology Act 2000, a breach of confidentiality and privacy with respect to electronic records, including the disclosure of electronic information that is accessed without authorisation, has been recognised as a chargeable offence.

Banking sector
The banking sector was earlier dominated by state owned institutions. Banks in India are segregated as public or private sector banks, cooperative banks and regional rural banks.

The entry of new private banks following reforms in the early 1990s means that the state banks account for a smaller share of the system's assets than in the past. These institutions now offer more sophisticated financial services. It is advisable that foreign businesses establish banking relationships with one of the newer privately owned banks.

Foreign banks are permitted to set up wholly owned subsidiaries in India. The limit for foreign shareholding in private banks (including foreign institutional investors and NRIs) other than in the case of wholly owned subsidiaries of foreign banks, is 49 per cent under the automatic route. Additionally, at least 26 per cent of the paid-up capital of private banks is required to be held by Indian residents. Foreign institutional investors' shareholding in a private banking company cannot exceed 24 per cent of the paid up capital, except through a resolution of the board of directors followed by a special shareholders' resolution, to increase the holding up to 49 per cent, provided that the investment does not exceed the 74 per cent overall foreign investment ceiling.

Foreign and portfolio investment in public sector (nationalised) banks are subject to overall statutory limits of 20 per cent as provided by the Banking Companies (Acquisition & Transfer of Undertakings) Acts 1970/80.

Competition policy

The Competition Act 2002 is designed to prevent businesses engaging in practices that have an adverse effect on competition, to promote and sustain competition in markets, to protect the interests of consumers, and to ensure freedom of trade carried on by other participants in markets in India. The Competition Act 2002 prohibits anti-competitive agreements, abuse of dominant position, and regulates mergers and amalgamations of enterprises. It replaces the Monopolies and Restrictive Trade Practices Act 1969.

Environmental laws

Following the Bhopal gas tragedy in 1984, the Indian government increased its focus on environmental protection.

Companies are required to obtain statutory pollution and environmental approvals before establishing industrial projects in India. However, if investment in a project is less than Rs1 billion (approximately US$22.2 million) for a new project and Rs500 million (approximately US$11.1 million), an environmental clearance is not necessary, except in cases of pesticides, bulk drugs and pharmaceuticals, asbestos and asbestos products, integrated paint complexes, mining projects, tourism projects of certain parameters, tarred roads in Himalayan areas, distilleries, dyes, foundries and electroplating industries.

The establishment of industries in certain locations considered ecologically fragile (for example Aravalli Range, coastal areas, Doon Valley, Dahanu) are regulated by separate guidelines issued by the Ministry of Environment and Forests.

The Environment Protection Act 1986 lists a number of industries, including oil refineries and cement, petrochemicals, dye and paper products, which require Ministry of Environment approval. The government also prescribes guidelines on the quality standards of air, water and soil for different areas, and the maximum levels of emissions to which industries must adhere.

Franchising

Whilst there are no franchise-specific laws in India, there are a number of other laws that impact on franchise arrangements in India. These include the law of contract, intellectual property law, competition law and consumer protection law.

The RBI regulates the terms of payment under franchise agreements (such as franchise fees, management fees, development fees, administrative fees, royalty fees and technical fees) where one party is a non-Indian entity. The RBI prescribes certain requirements that must be complied with, including that a franchisee must provide a tax clearance and a chartered accountant's certificate at the time of remitting royalty payments to a franchisor outside India.

The Indian government permits foreign franchisors to charge royalties up to one per cent for domestic sales and up to two per cent for exports for use of the franchisor's brand name or trade mark, where there is no transfer of technology. Where there is a transfer of technology (know-how) franchisors may charge royalties up to five per cent for domestic sales and up to eight per cent involving payment of US$2 million lump sum fee, for export sales for use of the franchisor's technology and brand name or trade mark.

Franchise arrangements are governed by the Indian Contract Act 1872. India's intellectual property laws are also relevant to the licensing of the franchisor's intellectual property to the franchisee. A franchise arrangement may involve restrictions on the production, supply and distribution of goods and services, thereby attracting provisions of the Competition Act 2002. Additionally, consumer protection laws, which provide for remedies to consumers in case of defective products and services, may also impact on franchise arrangements.

Foreign companies who wish to leverage their brands in India can enter into franchising arrangements such as:

- direct franchising
- franchising through a subsidiary or branch office
- franchising through an area development agreement – under this arrangement, the developer is given the right to open a multiple number of units in accordance with a pre-determined schedule and within a given area
- master franchising
- joint ventures
- licensing arrangements.

Foreign investment policy

General

Most sectors are now open to 100 per cent foreign ownership. In other sectors, FDI caps are gradually being reduced. Very few sectors now completely disallow foreign ownership. Those sectors that are completely closed are contained in a negative list published by the Indian government; for example, sectors prohibited for FDI are retail trading (except single brand product retailing where specific approval is required), atomic energy, lottery, gambling and betting.

The table below sets out the FDI caps for the corresponding sectors:

Sector No.	Sector or activity	FDI cap/equity	Entry route	Conditions
1	Civil aviation sector			
1.1	Airports			
a	Greenfield projects	100%	Automatic route	Subject to sectoral regulations notified by Ministry of Civil Aviation
b	Existing projects	100%	Up to 74%. FIPB approval would be required beyond 74%	Subject to sectoral regulations notified by Ministry of Civil Aviation

Sector No.	Sector or activity	FDI cap/equity	Entry route	Conditions
1.2	Air transport services			Subject to the following conditions, and other sectoral guidelines: • Air transport services would include domestic scheduled passenger airlines, non-scheduled air transport services, helicopter and seaplane services • Foreign airlines are allowed to participate in the equity of companies operating cargo airlines, helicopter and seaplane services, at certain pre-defined limits • Foreign airlines are allowed to invest in the capital of Indian companies, operating scheduled and non-scheduled air transport services, up to the limit of 49% of their paid-up capital. Such investment would be subject to the following conditions: a) It would be made under the Government approval route b) The 49% limit will subsume FDI and FII investment c) The investments so made would need to comply with the relevant regulations of SEBI, such as the Issue of Capital and Disclosure Requirements Regulations/ Substantial Acquisition of Shares and Takeovers Regulations, as well as other applicable rules and regulations d) A Scheduled Operator's Permit can be granted only to a company that is registered and has its principal place of business within India e) The Chairman and at least two-thirds of the Directors of which are citizens of India f) The substantial ownership and effective control of which is vested in Indian nationals
a	Scheduled air-transport services	49% FDI; 100% – for NRI investment	Automatic route	
b	Non-scheduled air transport services	74% FDI; 100% – for NRI investment	Up to 49% – automatic route. However FIPB approval would be required for investment beyond 49% and up to 74%	

Sector No.	Sector or activity	FDI cap/equity	Entry route	Conditions
1.3	Helicopter services/ seaplane services requiring DGCA approval	100%	Automatic route	
a	Ground handling services	74% – FDI 100% – for NRI investment	FDI – up to 49% under the automatic route. FIPB approval required between 49% and 74%	Subject to sectoral regulations and security clearance
b	Maintenance and repair organisations; flying training institutes; technical training institutions	100%	Automatic route	
2	Alcohol – distillation and brewing	100%	Automatic route	
3	Asset reconstruction companies	49% of the paid up capital– FDI only	Prior FIPB approval required	Individual investment greater than 10% requires compliance with Section 3(3)(f) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act 2002
4	Mining and Exploration of metal and non-metal ores including diamond, gold, silver and precious ores but excluding titanium bearing minerals and its ores; subject to the Mines and Minerals (Development & Regulation) Act 1957	100%	Automatic	Subject to sectoral regulations and the Mines and Minerals (Development & Regulation) Act 1957 and the following conditions: • Value addition facilities are set up within India along with transfer of technology. • Disposal of tailing during the mineral separation shall be carried out in accordance with regulations framed by the Atomic Energy Regulatory Board such Atomic Energy (Radiation Protection) Rules 2004 and the Atomic Energy (Safe Disposal of Radioactive Wastes) Rules 1987.
5	Coal & Lignite mining for captive consumption by power projects, iron & steel and cement units and other eligible activities permitted under and subject to the provisions of Coal Mines (Nationalization) Act, 1973			

Sector No.	Sector or activity	FDI cap/equity	Entry route	Conditions
6	Setting up coal processing plants like washeries	100%	Automatic route	The company shall not do coal mining and shall not sell washed coal or sized coal from its coal processing plants in the open market and shall supply the washed or sized coal to those parties who are supplying raw coal to coal processing plants for washing or sizing
7	Mining and mineral separation of titanium bearing minerals & ores, its value addition and integrated activities subject to sectoral regulations and the Mines and Minerals (Development and Regulation Act 1957)	100%	Prior FIPB approval required	Subject to sectoral regulations and the Mines and Minerals (Development & Regulation) Act 1957 and the following conditions: • Value addition facilities are set up within India along with transfer of technology. • Disposal of tailing during the mineral separation shall be carried out in accordance with regulations framed by the Atomic Energy Regulatory Board such Atomic Energy (Radiation Protection) Rules 2004 and the Atomic Energy (Safe Disposal of Radioactive Wastes) Rules 1987. FDI will not be allowed in mining of prescribed substances listed in the Notification No. S.O. 61(E) dated 18.1.2006 issued by the Department of Atomic Energy
8	Banking – private sector	74% (FDI + FII)	Automatic route up to 49% However FIPB approval will be required for investment between 49% and 74%	At all times, at least 26% of the paid up capital will have to be held by residents, except in regard to a wholly-owned subsidiary of a foreign bank Foreign banks subject to RBI guidelines for setting up branches or subsidiaries

Sector No.	Sector or activity	FDI cap/equity	Entry route	Conditions
9	Broadcasting			
a	Teleports (setting up of uplinking HUBs and teleports)	74%	Automatic up to 49% and FIPB approval up to 74%	Subject to relevant sectoral guidelines
b	Direct to home		Automatic up to 49% and FIPB approval up to 74%	Subject to relevant sectoral guidelines
c	Cable network		Automatic up to 49% and FIPB approval up to 74%	Subject to relevant sectoral guidelines
d	Mobile TV		Automatic up to 49% and FIPB approval up to 74%	Subject to relevant sectoral guidelines
e	Headend in the Sky Broadcasting Service		Automatic up to 49% and FIPB approval up to 74%	Subject to relevant sectoral guidelines
f	Cable networks (multi system operators not undertaking upgrades of networks towards digitization and addressability and local cable operators)	49%	Automatic	Subject to relevant sectoral guidelines
	Broadcasting content services			
g	Terrestrial broadcasting FM (FM Radio)	26%	FIPB approval	Subject to relevant sectoral guidelines
h	Up-linking of "news and current affairs" new channels	26%	FIPB approval	Subject to relevant sectoral guidelines
i	Up-linking of non-news and current affairs TV channels/down linking of TV Channels	100%	FIPB approval	Subject to relevant sectoral guidelines
10	Commodity exchanges	49% (FDI + FII + NRI + PIO) Investment by registered II under PIS will be limited to 23% and investment under FDI Scheme limited to 26%	Prior FIPB approval required	FII purchases shall be restricted to secondary market only No foreign investor/entity, including persons acting in concert, will hold more than 5% of the equity in these companies

Sector No.	Sector or activity	FDI cap/equity	Entry route	Conditions
11	Construction development projects			
a	Townships, housing, built-up infrastructure and construction-development projects (which would include, but not be restricted to, housing, commercial premises, hotels, resorts, hospitals, educational institutions, recreational facilities, city and regional level infrastructure)	100%	Automatic route	Subject to the following conditions, and other sectorial guidelines: • Minimum capitalisation of US$10 million for wholly owned subsidiaries and US$5 million for joint ventures. Capital must be invested within six months of commencement of business of the company. • At least 50% of the project must be developed within a period of five years from the date of obtaining all statutory clearances.
b	Industrial Parks	100%	Automatic route	Conditions for townships etc. will not apply if it would comprise of a minimum of 10 units and no single unit shall occupy more than 50% of the allocable area and the minimum percentage of the area to be allocated for industrial activity shall not be less than 66% of the total allocable area
12	Courier services for carrying packages, parcels and other items which do not come within the ambit of the Indian Post Office Act 1898	100%	Prior FIPB approval required	Subject to existing law, Indian Post Office Act, 1898 and exclusion of activity relating to distribution of letters
13	Defence production	26%	Prior FIPB approval required	Subject to licensing under Industries(Development & Regulations) Act 1951 and guidelines on FDI in production of arms and ammunition Three-year lock-in period for transfer of equity from one non-resident investor to another non-resident investor (including NRIs and OCBs with 60% or more NRI stake) and such transfer would be subject to prior approval of the Government

Sector No.	Sector or activity	FDI cap/equity	Entry route	Conditions
14	Floriculture, horticulture, development of seeds, animal husbandry, pisciculture, aquaculture, cultivation of vegetables, mushrooms, under controlled conditions and services related to agro and allied sectors	100%	Automatic route	
15	Infrastructure companies in Securities Markets, namely, stock exchanges, depositories and clearing corporations, in compliance with SEBI Regulations	49% (FDI (26%) + FII (23%))	Prior FIPB approval required	FII purchases shall be restricted to secondary market only
16	Credit information companies (CICs)	49% (FDI+ FII) investment by registered FII under PIS will be limited to 24% only in the CICs listed at the Stock Exchanges within the overall limit of 49% foreign investment	Prior FIPB approval required	Foreign investment in CICs will be subject to the Credit Information Companies (Regulation) Act 2005 FII investment will be subject to the conditions that: • No single entity should directly or indirectly hold more than 10% equity.. • Any acquisition in excess of 1% will have to be reported to RBI as a reporting requirement. • FIIs Investing in CICs shall not seek a representation on the Board of Directors.
17	Insurance	26%	Automatic route	Subject to licensing by the Insurance Regulatory & Development Authority
18	Non-banking finance companies (NFBC) approved activities			

Sector No.	Sector or activity	FDI cap/equity	Entry route	Conditions
a	Merchant banking	100%	Automatic route	Subject to: • US$0.5 million to be brought upfront for FDI up to 51%; US$5 million to be brought upfront for FDI above 51% and up to 75% and US$50 million out of which US$7.5 million to be brought upfront and the balance in 24 months for FDI beyond 75% and up to 100% • Minimum capitalisation norms for non-fund-based NBFC activities – US$0.5 million. • 100% foreign owned NBFCs with a minimum capitalisation of US$50 million can set up step down subsidiaries for specific NBFC activities, without any restriction on number of operating subsidiaries and without bringing in additional capital. • Joint venture NBFCs with or less than 75% foreign investment are can set up subsidiaries to undertake other NBFC activities subject to the subsidiaries compliance with the applicable minimum capital inflow requirements. • compliance with RBI guidelines. In this context, NBFCs means: • Having foreign investment more than 75% and up to 100%. • With a minimum capitalisation of US$50 million, can set up step down subsidiaries for specific NBFC activities, without any restriction on the number of operating subsidiaries and without bringing in additional capital.
b	Underwriting			
c	Portfolio management services			
d	Investment advisory services			
e	Financial consultancy			
f	Stockbroking			
g	Asset management			
h	Venture capital			
i	Custodial services			
j	Factoring			
k	Credit rating agencies			
l	Leasing and finance			
m	Housing finance			
n	Forex broking			
o	Credit card business			
p	Money-changing business			
q	Micro credit			
r	Rural credit			

Sector No.	Sector or activity	FDI cap/equity	Entry route	Conditions
19	Banking – Public Sector	20 % (FDI + Portfolio investment)	Government approval required	Subject to the provisions of the Banking Companies (Acquisition & Transfer of Undertakings) Acts 1970/80. This ceiling (20%) is also applicable to the State Bank of India and its associate Banks
20	Petroleum and natural gas sector			
a	Exploration activities of oil and natural gas fields, infrastructure related to marketing of petroleum products and natural gas, marketing of natural gas and petroleum products, petroleum product pipelines, natural gas/pipelines, LNG Regasification infrastructure, market study and formulation and Petroleum refining in the private sector	100%	Automatic route	Subject to the existing sectoral policy and regulatory framework in the oil marketing sector and the policy of the Government on private participation in exploration of oil and the discovered fields of national oil companies
b	Petroleum refining by the Public Sector Undertakings (PSU), without any disinvestment or dilution of domestic equity in the existing PSUs	49%	Prior FIPB approval required	Subject to sectoral policy and no divestment or dilution of domestic equity in the existing PSUs
21	Print media			
a	Publishing of newspapers and periodicals dealing with news and current affairs	26% (FDI + FII + NRI + PIO)	Prior FIPB approval required	Subject to the Guidelines for Publication of Indian editions of foreign magazines dealing with news and current affairs issued by the Ministry of Information & Broadcasting on 4.12.2008
b	Publication of Indian editions of foreign magazines dealing with news and current affairs	26% (FDI + FII + NRI + PIO)	Prior FIPB approval required	Subject to the Guidelines for Publication of Indian editions of foreign magazines dealing with news and current affairs issued by the Ministry of Information & Broadcasting on 4.12.2008

Sector No.	Sector or activity	FDI cap/equity	Entry route	Conditions
c	Publication of a facsimile edition of foreign newspapers	100%	Prior FIPB approval required	• FDI should be made by the owner of the original foreign newspapers whose facsimile edition is proposed to be brought out in India. • Publication of a facsimile edition of foreign newspapers can be undertaken only by an entity incorporated or registered in India under the provisions of the Companies Act, 1956. • Publication of a facsimile edition of foreign newspapers would also be subject to the Guidelines for publication of newspapers and periodicals dealing with news and current affairs and publication of facsimile edition of foreign newspapers issued by Ministry of Information and Broadcasting on 31.3.2006, as amended from time to time.
22	Tea sector including tea plantation	100%	Prior FIPB approval required	Subject to divestment of 26% equity in favour of Indian partner/Indian public within five years and prior approval of state government concerned in case of any change in future land use
23	Telecommunication			
a	Basic and cellular, unified access services, national/ international long distance, V-Sat, public mobile radio trunked services (PMRTS), global mobile personal communications services (GMPCS) and other value-added telecom services	74% (including FDI, FII, NRI, FCC Bs, DRs, GDRs, convertible preference shares, and proportionate foreign equity in Indian promoters or investing company)	Automatic route up to 49%; requires prior FIPB approval between 49% and 74%	Subject to guidelines notified in the PN 3 (2007 Series)
b	ISP with or without gateways, radio-paging, end-to-end bandwidth	74%	Automatic route up to 49%; requires prior IPB approval between 49% and 74%	Subject to licensing and security requirements notified by the Department of Telecommunications

Sector No.	Sector or activity	FDI cap/equity	Entry route	Conditions
c	(a) infrastructure provider providing dark fibre, right of way, duct space, tower (category I) (b) electronic mail and voice mail	100%	Automatic route up to 49%; requires prior IPB approval between 9% and 100%	Subject to the condition that such companies shall divest 26% of their equity in favour of Indian public in five years, if these companies are listed in other parts of the world. Also subject to licensing and security requirements, where required
24	Trading			
a	Wholesale/cash and carry trading	100%	Automatic route	• Procurement of the requisite licenses/registration/permits required by the relevant Governmental Acts/Regulations/Rules/Orders. • Subject to other sectoral requirements.
b	E-commerce (can only engage in e-commerce on a business to business basis)	100%	Automatic route	
c	Test marketing of such items for which a company has approval for manufacture	100%	Prior FIPB approval required	
d	Single brand product retailing	100%	Prior FIPB approval required	(a) Products to be sold should be of a “Single Brand” only. (b) Products should be sold under the same brand internationally ie, products should be sold under the same brand in one or more countries other than India (c) “Single Brand” product-retail trading would cover only products which are branded during manufacturing (d) The foreign investor should be the owner of the brand (e) In respect of proposals involving FDI beyond 51%, mandatory sourcing of at least 30% of the value of products sold would have to be done from Indian “small industries/village and cottage industries, artisans and craftsmen”

Sector No.	Sector or activity	FDI cap/equity	Entry route	Conditions
e	Multi Brand Retail Trading	51%	Prior FIPB approval required	Subject to the following conditions and other sectoral requirements: • Minimum amount to be brought in, as FDI, by the foreign investor, would be US$100 million. • At least 50% of total FDI brought in shall be invested in "back-end infrastructure" within three years of the first tranche of FDI, where "back-end infrastructure" will include capital expenditure on all activities, excluding that on front-end units. • Multi brand retail trade may be allowed in only those states which will agree to allow the same. • Retail trading, in any form, by means of e-commerce, would not be permissible, for companies with FDI, engaged in the activity of multibrand retail trading.
25	Satellites – establishment and operation	74%	Prior FIPB approval required	Subject to sectoral guidelines issued by Department of Space/ISRO
26	Power Exchanges registered under Central Electricity Regulatory Commission (Power Market) Regulations 2010	49% (FDI + FII)	FIPB approval for FDI	

Foreign institutional investors

Companies and other entities and non-residents, may also invest in India under the Portfolio Investment Scheme as foreign institutional investors (FIIs). FIIs may also register as sub-accounts on behalf of third parties who wish to invest in Indian securities. FIIs and their sub-accounts are required to register with the Securities and Exchange Board of India (SEBI), the principal capital markets regulator in India under the SEBI (Foreign Institutional Investors) Regulations 1995. Registered FIIs can buy and sell securities on the Indian stock exchanges. They can also invest in listed and unlisted securities in off-market transactions subject to pricing restrictions.

A single FII or an approved sub-account of an FII cannot hold more than ten per cent of the paid-up capital of an Indian company, or ten per cent of the paid-up value of each series of convertible debentures issued by an Indian company.

FIIs and their sub-accounts together cannot hold more than an aggregate of 24 per cent of an Indian company's issued and paid-up share capital. However, the limit of 24 per cent may be increased

up to the sectoral cap for the relevant industry, on the passing of a resolution by the board of directors of the Indian company followed by the passing of a special shareholders' resolution to approve the increase. The ceiling includes shares and convertible debentures acquired through the primary market or the secondary market. However, the ceiling does not include investment made by the FII through offshore funds, global depository receipts and euro convertible bonds.

Small-scale industry reservation policy

Since 1964, the Indian government has reserved many areas of production for the small-scale industry, such as garments, sporting goods, shoes and toys. This policy is aimed at protecting labour intensive industries from competition by larger corporations. Although the number of reserved industries has reduced, the reservation policy is still a barrier to entry for foreign investors who may not invest more than 24 per cent in those industrial undertakings who are not micro, small or medium enterprises, but manufacture items reserved for this sector, under the automatic route. However, if the investor intends to invest more than 24 per cent government approval will be required.

Government initiatives and incentives

Tax incentives

The government offers a range of tax incentives to investors to promote industrial growth and foreign investment. These incentives include:

- deduction of scientific research and development costs
- deduction of preliminary expenses in five annual instalments
- full or partial deduction of foreign exchange earnings by hotels and construction companies
- a ten-year deduction of 90 per cent of the profits and gains derived by any undertaking that is located in a free-trade zone or a export processing zone
- a ten-year deduction of such profits and gains as are derived by a 100 per cent export-oriented undertaking from the export of articles or things or computer software. This deduction is available only until 31 March 2011
- a ten-year tax holiday on profits and gains of a new industrial undertaking, set up anywhere in India, for power-generating projects
- a ten-year tax holiday to any enterprise that builds, maintains, and operates any infrastructure facility, such as roads, highways or expressways, new bridges, airports, ports, or rapid rail transport systems on a BOT (build, operate, transfer), BOOT (build, own, operate, transfer), or similar basis.

Special economic zones

The government has offered incentives for establishing special economic zones with the following benefits:

- 100 per cent foreign ownerships
- accelerated approval processes
- exemption from value added tax/central sales tax, excise duty, custom duty and service tax on domestic procurements and imports
- 100 per cent income tax exemption on export income for first five years;
- 50 per cent income tax exemption for next five years; and 50 per cent of the ploughed back export profit for next five years
- 100 per cent deduction for a block of ten years out of 15 years in respect of profit and gain of a special economic zone developer and co-developer for the purpose of income tax
- single point clearance to the SEZ unit under various state acts and rules
- external commercial borrowings by units up to US$500 million a year allowed without any maturity restrictions

- freedom to bring in export proceeds without any time limit
- flexibility to keep 100 per cent of export proceeds in EEFC account
- SEZ units allowed to write-off unrealised export bills
- SEZ units allowed to sub-contract part of process abroad
- inter-unit sales permitted provided payment in foreign currency.

Other incentives

State governments also encourage investment and seek to attract capital by offering various incentives. These commonly take the form of investment incentives, power tariff incentives and other physical benefits.

Taxation

General

Indian taxes can be broadly classified into direct and indirect taxes. Direct taxes cover income tax and corporate tax.

Corporate taxes

The tax year runs from 1 April to 31 March.

The current rates of taxation (as a percentage of net income) are as follows:

- domestic companies – 30 per cent (for the assessment year 2011/12)
- foreign companies – 40 per cent (for the assessment year 2011/12).

A surcharge is payable on income tax where the total taxable income exceeds Rs10 million at the rate of five per cent for domestic companies and two per cent for foreign companies.

Surcharge is payable for domestic companies at the rate of five per cent if the total income is in the excess of Rs1,000,000. Surcharge is payable for foreign companies at the rate of five per cent if the total income is in the excess of Rs1,000,000. Additionally, an education levy of three per cent on the amount of tax and surcharge are also payable.

Corporate residency

An entity incorporated in India or having its entire management and control in India is a resident and is taxed on its worldwide income. A non-resident corporation (foreign company) is taxed only on income received or deemed to be received in India from Indian operations, or income that is accruing or arising in India or deemed to accrue or arise in India (subject to treaty benefits wherever available).

Personal income tax

Income tax is levied on:

- income from salary
- income from house property
- profits and gains of business or profession
- capital gains
- income from other sources, including dividends, interest income and other income not covered under of any of the first four above.

The different rates of taxes for individuals (resident and non-resident) for the period April 2011 to March 2012 are set out in the following tables:

Taxable income	Rate
Not exceeding Rs180,000	Nil
Over Rs180,000 but not exceeding Rs500,000	10%
Over Rs500,000 but not exceeding Rs800,000	20%
Over Rs800,000	30%

Taxable income	Rate
Not exceeding Rs190,000	Nil
Over Rs190,000 but not exceeding Rs500,000	10% of the amount by which the total income exceeds Rs190,000

Taxable income	Rate
Over Rs500,000 but not exceeding Rs800,000	Rs31,000 plus 20% of the amount by which the total income exceeds Rs500,000
Over Rs800,000	Rs91,000 plus 30% of the amount by which the total income exceeds Rs800,000

The different rates of taxes as applicable to resident women assessed (resident as well as non-resident) below the age of 60 years are set out in the following table:

Taxable income	Rate
Not exceeding Rs250,000	Nil
Over Rs250,000 but not exceeding Rs500,000	10% of the amount by which the total income exceeds Rs250,000
Over Rs500,000 but not exceeding Rs800,000	Rs25,000 plus 20% of the amount by which the total income exceeds Rs500,000
Over Rs800,000	Rs85,000 plus 30% of the amount by which the total income exceeds Rs800,000

The different rates of taxes as applicable to resident persons above age of 60 years but less than 80 years and resident persons above 80 years of age are set out in the following table:

Taxable income	Rate
Not exceeding Rs500,000	Nil
Over Rs500,000 but not exceeding Rs800,000	20% of the amount by which the total income exceeds Rs500,000
Over Rs800,000	Rs60,000 plus 30% of the amount by which the total income exceeds Rs800,000

Education levy of three per cent on the amount of tax and surcharge (if applicable) are payable. A deduction of up to a maximum of Rs100,000 is available on taxable income on investment, made in certain specified savings schemes.

Withholding tax

Withholding tax is payable on certain payments, including interest, salaries paid to employees, professional fees, payments to contractors, commissions, winnings from games, lotteries, horse races, etc. Responsibility for the deduction of withholding tax is fixed on the person responsible for making the payment. The rate of withholding tax applicable to non-residents varies depending on the nature of the income.

Capital gains tax

Capital gains arising from the transfer of capital assets situated in India are taxable. Capital assets include all kinds of property except stock-in-trade, raw materials and consumables used in business or professions, personal effects (except jewellery), agricultural land and notified gold bonds.

Profits gained from the transfer of long-term capital assets are taxed as long-term capital gains. Long-term capital gains are defined as capital gains on assets held for over three years (one year for listed shares and certain specified securities). Profits gained from the transfer of short-term capital assets (that is, assets that do not qualify as long-term capital assets) are referred to as short-term capital gains.

The tax rates applicable to capital gains for the period April 2012 to March 2013 are set out in the table below:

Particulars	Short-term capital gains tax rates	Long-term capital gains tax rates
Sale of an equity share or units of an equity oriented fund	15%	Nil
Sale transactions other than mentioned above		
Individuals (residents or non- residents)	Progressive rates	20% with indexation; 10% without indexation (for units/zero coupon bonds)

Particulars	Short-term capital gains tax rates	Long-term capital gains tax rates
Firms including limited liability partnerships (resident or non-resident)	30%	20% with indexation; 10% without indexation (for units/zero coupon bonds)
Resident companies	30%	20% with indexation; 10% without indexation (for units/zero coupon bonds)
FIIs	30%	10%

The securities transaction tax (STT) is payable on the value of transacted securities. The rates of STT, as a percentage of transaction value, are set out below:

Taxable securities transaction	Rate	Payable by
Purchase or sale of equity shares, units of equity-oriented mutual fund – delivery-based	0.1%	Purchaser/seller
Sale of equity shares, units of equity-oriented mutual fund (nondelivery-based)	0.025%	Seller
Sale of an option in securities	0.017%	Seller
Sale of an option in securities where option is exercised	0.125%	Purchaser
Sale of units of an equity oriented fund to a mutual fund	0.25%	Seller
Sale of a futures in securities	0.17%	Seller

Income from other sources

Income from other sources includes interest income, dividends and other income. This is a residual category in the heads of income. Income under this head is taxed at normal rates as applicable for individuals, companies and firms. However, the following incomes in the case of non-residents are taxed at special rates on a gross basis:

Nature of income	Rate (April 2012 to March 2013)
Dividends other than dividends on which dividend distribution tax has been paid	20%
Interest received on loans given in foreign currency to Indian concern or government of India	20%
Income in respect of units purchased in foreign currency of specified mutual fund/UTI	20%
Interest on FCCB/FECB/ dividends on GDRs	10%

Income from royalties and technical fees in case of non-residents

Any income derived in the form of royalties or technical fees by non-residents in India is taxed at a concessional rate of ten per cent[1]. However, where a non-resident has a permanent establishment in India and the royalty or fees for technical services is effectively connected with the permanent establishment, the non-resident may be taxed at 40 per cent plus surcharge and education.

Repatriation of profits

Before foreign companies can repatriate profits, the Income Tax Department must be satisfied that they have paid tax owing and issued a no-objection certificate. Applications require a certificate from a chartered accountant stating that all tax obligations have been fulfilled.

Repatriation of earnings

Dividends declared and paid by domestic companies are exempt from tax in the hands of their shareholders. However, the company is liable to pay dividend distribution tax of 15 per cent (plus applicable surcharge and levies) on such dividends.

1 If agreement with respect to the royalty or fee for technical services has been executed (a) after 31 May 1997 but before 1 June 2005 at the rate of 20 per cent and (b) after 1 June 2005 at the rate of 10 per cent.

Advance rulings

A system of advance rulings is currently available to non-residents and specified residents. This scheme enables the applicant to obtain in advance a ruling on issues which could arise in determining their tax liability. Advance rulings are pronounced by an authority known as the Authority for Advance Rulings. The ruling is binding on the relevant income tax authorities and the applicant in respect of the specific transaction.

Double tax treaties

India has double tax avoidance agreements with over 60 counties, including Australia. Non-residents can be taxed under the double tax treaty or the domestic law, whichever they choose. A list of the agreements and the relevant rates is attached as Annex B.

If no double tax agreement exists, a resident company can claim a foreign tax credit for the foreign tax paid by it. The amount of credit granted is the lower of the Indian tax payable on the income that is subject to double taxation and the foreign tax discharged.

Transfer pricing

India has introduced comprehensive transfer-pricing regulations, effective from 1 April 2001, with the objective of preventing multinational companies from manipulating prices in intra-group transactions such that profits are not shifted outside India. Under the transfer pricing regulations, income and expenses (including interest payments) with respect to international transactions between two or more associated enterprises (including permanent establishments) must be at arm's length prices.

Indirect taxes

Excise duty

Excise duty is a tax applicable on the manufacture of goods within the country. The term "manufacture" has been interpreted to mean bringing into existence new articles having a distinct name, character, use and marketability. Basic excise duty is levied at a uniform rate of eight per cent. Excise duty is mostly levied on an ad-valorem basis, but certain commodities may attract excise duty at specific rates, based on quantity or weight. Excise law in India provides for a CENVAT Credit Scheme, which limits the cascading effect of duty incidence on a number of excisable goods, which are used as inputs in the manufacture of other excisable goods.

Customs duty

Customs duty is levied on the import of goods into India. It comprises basic customs duty, additional customs duty and special additional customs duty. The peak rate of basic customs duty is now ten per cent. The primary basis for valuation of goods is the transaction value.

Service tax

Service tax is levied on certain identifiable taxable services provided in India by specified service providers, currently applicable to over 111 services. The service tax rate is currently 10.36 per cent (which is inclusive of education levies and secondary and higher education levies charged, on the service tax). Generally the liability to deposit tax is on the service provider. Where the service provider is a non-resident or person outside India, the liability to pay service tax is on the service recipient.

Central sales tax

Levied on sale of movable goods, this tax is imposed by the central government if the goods are sold interstate. The collection and administration of central sales tax is the responsibility of state governments. Interstate sales tax is currently at the rate of two per cent. However, movement of goods between the states as stock transfers from factory to depots are not liable for levy of central sales tax.

Value-added tax

Value-added tax (VAT) on sales was introduced at the state level in April 2003 and replaced the existing sales tax. Most Indian states have now adopted the VAT system. While internationally VAT is implemented such that it replaces all indirect taxes except customs duty, in India, VAT replaces local sales tax only. Since VAT was implemented at the state level, central sales tax and all other indirect taxes such as customs, excise, service tax, etc, continue as before.

Workplace relations

General

India has extensive labour law legislation covering labour employment and dismissal terms, health and safety and pension obligations.

Labour laws

The government has enacted comprehensive labour law legislation. The following are the key labour laws:

- The Industrial Disputes Act 1947, which regulates industrial relations including closures and retrenchment.
- The Factories Act 1948, which governs working conditions in factories. The Act establishes minimum standards for working conditions and facilities related to manufacturing processes, handling and storage of materials, working hours etc.
- The Minimum Wages Act 1948, which empowers the appropriate government (central or state) to fix and revise minimum wages and allowances payable to workers and also to regulate the conditions of work such as hours of work and overtime.
- The Payment of Bonus Act 1965 requires payment of the bonus to certain categories of employees.
- The Payment of Gratuity Act 1972 requires the payment of gratuity, as recognition of continuous service to an employer, to certain categories of employees when they leave their employment.
- The Employees' Provident Fund and Miscellaneous Provisions Act 1952, which applies to workers whose wages do not exceed Rs6,500 per month in applicable industries and establishments. The employer and the employee are required to make matching contributions to the fund. Effective from November 1995, workers who have put in a minimum of ten years' eligible service and have attained the age of 58 years are entitled to a superannuation/retirement pension.
- The Workmen's Compensation Act 1923, which provides for the payment to workmen for injuries arising out of or in the course of their employment.
- The Contract Labour (Regulation) Act 1970, which regulates the employment of contract labour in certain establishments and provides for its abolition in certain circumstances.
- The Employees State Insurance Act 1948, which provides for certain benefits to employees in the case of sickness, maternity and employment injury.
- The Industrial Employment (Standing Orders) Act 1946, which requires employers in industrial establishments formally to define conditions of employment under them.

Dispute resolution

Courts

India has a written constitution and codified central and state laws. It has a three-tiered court system comprising the Supreme Court of India, the High Court located in each state, and lower civil, criminal and revenue courts and various tribunals. There are also specialised legal forums such as industrial courts, cooperative courts, family courts, consumer courts and other judicial tribunals.

For the settlement of company disputes, there is a Company Law Board constituted under the Indian Companies Act 1956 (to be replaced by the National Company Law Tribunal), direct and indirect tax tribunals, Competition Commission etc. Listed companies are regulated by the SEBI and its appellate tribunal. Intellectual property disputes such as infringement actions and trade mark objections may be settled before boards constituted under the relevant statutes.

The time taken for a suit to be heard by an Indian court can be lengthy. As a result, interim relief has assumed great importance. Specifying remedies available in a contract assists with the grant of interim relief. Negotiable instruments, guarantees and written contracts providing for a liquidated sum can be enforced through a summary procedure.

Recognition of foreign judgments

Indian courts will consider foreign judgments conclusive after their validity is determined according to the following principles:

- the foreign judgment is determined by a court of competent jurisdiction
- the foreign judgment is not contrary to natural justice
- the foreign judgment is not obtained by fraud
- the foreign judgment is not founded on an incorrect view of international law
- the foreign judgment is given on the merits of the case
- the foreign judgment is not founded on breach of any law enforced in India.

Arbitration

The Arbitration and Conciliation Act 1996 provides for dispute resolution through arbitration and conciliation as an alternative to litigation. Most companies choose arbitration as the most suitable method for resolving disputes. India's Arbitration and Conciliation Act is based on the United Nations Commission on International Trade Law.

Arbitration in India can be an efficacious remedy, and the law allows interim relief in the course of arbitration proceedings. However, arbitration can only be initiated in the case of a dispute between parties. Arbitral awards are enforceable as decrees of Indian courts.

Indian courts can, however, refuse enforcement of a foreign award on certain grounds, including if enforcement of the relevant award would be contrary to public policy. To limit the possibility of challenges to foreign awards, parties can agree to exclude the application of the relevant provisions of the Arbitration and Conciliation Act.

India is a signatory to both the Geneva Convention on the Execution of Foreign Arbitral Awards 1923 and the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1960.

An arbitral award obtained in a signatory nation to either the Geneva or New York Conventions is enforceable in India pursuant to the Arbitration and Conciliation Act.

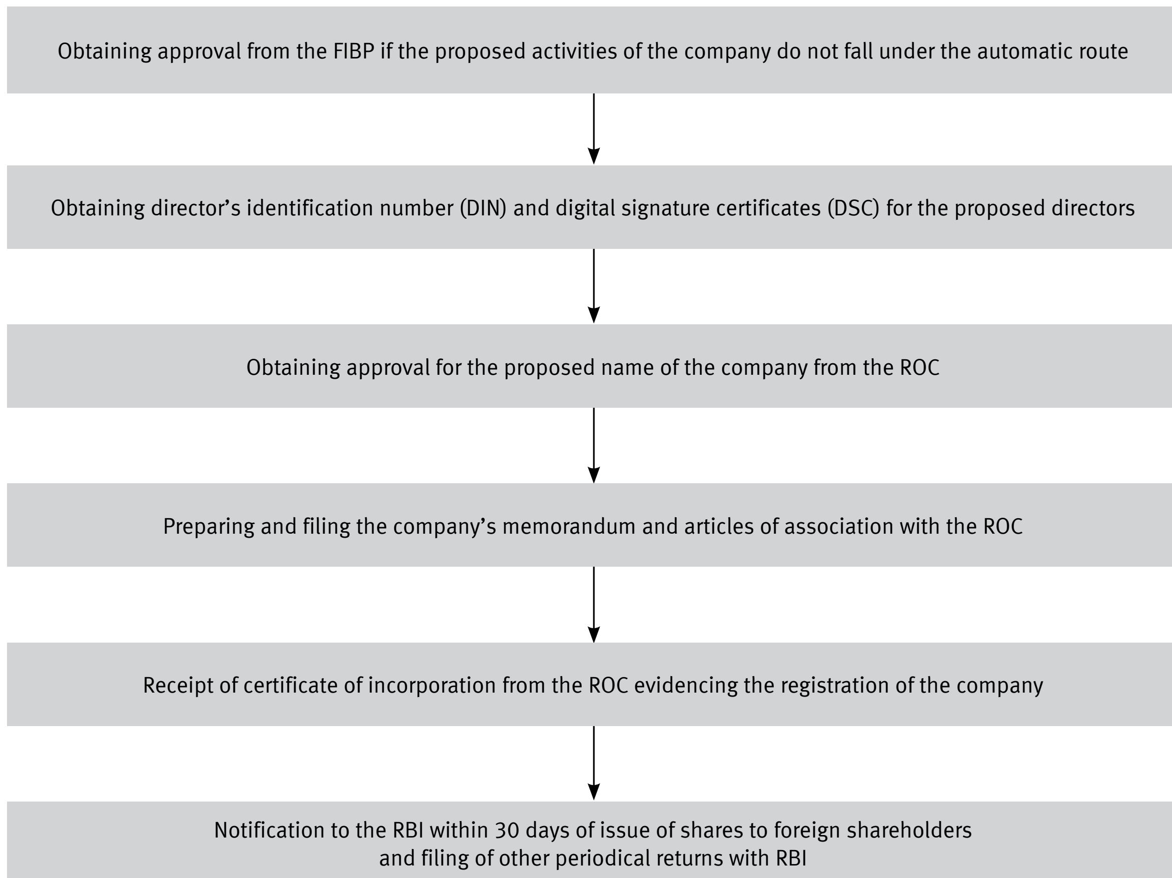
Choice of law

Indian private international law follows the English private international law rules. It therefore allows the parties to choose a proper law of contract provided the choice is not contrary to public policy.

The laws of India, which are considered "mandatory" laws, cannot be excluded. For example, in the case of foreign collaboration agreements, which require government approval, the government imposes a condition that the contract must be governed by Indian law.

Annexure A

Company formation



The above process (following FIPB approval, if applicable) takes approximately 4–6 weeks provided all documents are filed on time. While the process is sequential, the documents may be prepared and kept ready in parallel.

Annexure B

Table: Tax rates under some tax treaties signed by India

	Dividend (not being covered by section 115-O)		Interest		Royalty		Fees for technical service	
	Right of state to tax	Tax rate	Right of state to tax	Tax rate	Right of state to tax	Tax rate	Right of state to tax	Tax rate
Armenia	Both	10%	Both	10%	Both	10%	Both	10%
Australia	Both	15%	Both	15%	Both	(Note 3)	Both	(Note 3)
Austria	Both	10%	Both	10%	Both	10%	Both	10%
Bangladesh	Both	10% (if at least 10% of the capital of the company paying the dividend is held by the recipient)	Both	10%	Both	10%	No separate provision	No separate provision
Belarus	Both	10% if paid to a company holding 25% shares; otherwise 15%	Both	10% (Note 2)	Both	15%	Both	15%
Belgium	Both	15%	Both	15% (10% if granted by a bank)	Both	10%	Both	10%
Brazil	Both	15%	Both	15% (Note 2)	Both	25% for use of trade mark; 15% for others	No separate provision	
Bulgaria	Both	15%	Both	15% (Note 2)	Both	15% of royalty relating to literary, artistic, scientific works other than films or tapes used for radio or television broadcasting; 20% in other cases	Both	20%
Canada	Both	15% if at least 10% of the shares of the company paying the dividends is held by the recipient of dividend; 25% in other cases	Both	15% (Note 2)	Both	10%–20%	Both	10%–20%
China	Both	10%	Both	10% (Note 2)	Both	10%	Both	10%

	Dividend (not being covered by section 115-O)		Interest		Royalty		Fees for technical service	
	Right of state to tax	Tax rate	Right of state to tax	Tax rate	Right of state to tax	Tax rate	Right of state to tax	Tax rate
Cyprus	Both	10% if at least 10% of the capital of the company paying dividend is held by the recipient, 15% in all other cases	Both	10% (Note 2)	Both	15%	Both	10%
Czech Republic	Both	10%	Both	10% (Note 2)	Both	10%	Both	10%
Denmark	Both	15% if at least 25% of the shares of the company paying the dividend is held by the recipient; 25% in other cases	Both	10% if loan is granted by bank; 15% for others (Note 2)	Both	20%	Both	20%
Germany	Both	10%	Both	10% (Note 2)	Both	10%	Both	10%
Finland	Both	10%	Both	10% (Note 2)	Both	10%	Both	Same as in case of royalty
France	Both	10%	Both	10% (Note 2)	Both	10%	Both	10%
Greece	source	20%	Source	20%	Source	30%	No separate provision	No separate provision
Hungary	Both	10%	Both	10% (Note 2)	Both	10%	Both	10%
Indonesia	Both	10% if at least 25% of the shares of the company paying the dividend is held by the recipient; 15% in other cases	Both	10% (Note 2)	Both	15%	No separate provision	No separate provision
Ireland	Both	10%	Both	10% (Note 2)	Both	10%	Both	10%
Israel	Both	10%	Both	10% (Note 2)	Both	10%	Both	10%
Japan	Both	15%	Both	10% if the recipient of interest is bank; 15% for others (Note 2)	Both	10%	Both	10%
Jordan	Both	10%	Both	10% (Note 2)	Both	20%	Both	20%
Kazakhstan	Both	10%	Both	10% (Note 2)	Both	10%	Both	10%

	Dividend (not being covered by section 115-O)		Interest		Royalty		Fees for technical service	
	Right of state to tax	Tax rate	Right of state to tax	Tax rate	Right of state to tax	Tax rate	Right of state to tax	Tax rate
Kenya	Both	15%	Both	15% (Note 2)	Both	20%	Both	17.50% (Referred as Management and professional fees)
Korea	Both	15% if at least 20% of the capital of the company paying dividend is held by the recipient; 20% in other cases	Both	10% if interest is paid to a bank; 15% for others (Note 2)	Both	15%	Both	15%
Kyrgyz Republic	Both	10%	Both	10%	Both	15%	Both	15%
Libyan Arab Jamahiriya	Source	20%	Source	20%	Source	30%	No separate provision	No separate provision
Malaysia	Both	10%	Both	10%	Both	10%	Both	10%
Malta	Both	10% if at least 25% of the shares of the company paying dividend is held by the recipient company; 15% in other cases	Both	10% (Note 2)	Both	15%	Both	10%
Mauritius	Both	5% if at least 10% of the capital of the company paying the dividend is held by the recipient; 15% in other cases	Both	20% (Note 2)	Both	15%	No separate provision	No separate provision
Mongolia	Both	15%	Both	15% (Note 2)	Both	15%	Both	25%
Morocco	Both	10%	Both	10% (Note 2)	Both	10%	Both	10%
Nepal	Both	10% if at least 10% of the shares of the company paying the dividend is held by the recipient; 5% in other cases	Both	10% if is paid to bank 15% for others (Note 2)	Both	15%	No separate provision	No separate provision
Netherlands	Both	10%	Both	10% (Note 2)	Both	10–20%	Both	10–20%

	Dividend (not being covered by section 115-O)		Interest		Royalty		Fees for technical service	
	Right of state to tax	Tax rate	Right of state to tax	Tax rate	Right of state to tax	Tax rate	Right of state to tax	Tax rate
New Zealand	Both	15%	Both	10% (Note 2)	Both	10%	Both	10%
Norway	Both	15% if at least 25% of the capital of the company paying the dividend is held by the recipient; 20% in other cases	Both	15% (Note 2)	Both	10%	Both	10%
Oman	Both	10% if at least 10% of shares are held by the recipient; 12.5% in other cases	Both	10% (Note 2)	Both	15%	Both	15%
Philippines	Both	15% if at least 10% of the shares of the company paying the dividend is held by the recipient; 20% in other cases	Both	10% if interest is received by a financial institution or insurance company; 15% in other cases	Both	15% if it is payable in pursuance of any collaboration agreement approved by the government of India		
Poland	Both	15%	Both	15% (Note 2)	Both	22.50%	Both	22.50%
Portuguese Republic	Both	10% if at least 25% of the shares of the company paying the dividend is held by the recipient; 15% in other cases	Both	10%	Both	10%	Both	10%
Qatar	Both	5% if at least 10% of the shares of the company paying the dividend is held by the recipient; 10% in other cases	Both	10% (Note 2)	Both	10%	Both	10%
Romania	Both	15% if at least 25% of the shares of the company paying the dividend is held by the recipient; 20% in other cases	Both	15% (Note 2)	Both	22.50%	Both	22.50%

	Dividend (not being covered by section 115-O)		Interest		Royalty		Fees for technical service	
	Right of state to tax	Tax rate	Right of state to tax	Tax rate	Right of state to tax	Tax rate	Right of state to tax	Tax rate
Singapore	Both	10% if at least 25% of the shares of the company paying the dividend is held by the recipient; 15% in other cases	Both	10% if loan is granted by a bank/ similar institute including an insurance company; 15% for others	Both	15% for copyrights; 10% for others	Both	15% for copyrights; 10% for others
South Africa	Both	10%	Both	10% (Note 2)	Both	10%	Both	10%
Spain	Both	15%	Both	15% (Note 2)	Both	(Note 4)	Both	20%
Sri Lanka	Both	15%	Both	10% (Note 2)	Both	10%	Both	No separate provision
Sudan	Both	10%	Both	10% (Note 2)	Both	10%	Both	10%
Sweden	Both	10%	Both	10% (Note 2)	Both	10%	Both	10%
Swiss Confederation	Both	10%	Both	10% (Note 5)	Both	10%	Both	10%
Syria	Residence	5% if at least 10% of the shares of the company paying the dividend is held by the recipient; 10% in other cases	Both	10% (Note 2)	Both	10%	No separate provision	No separate provision
Tanzania	Both	10% if at least 10% of the shares of the company paying the dividend is held for a period of at least six months prior to the date of payment of the dividend; 15% in other cases	Both	12.50%	Both	20%	Both	20
Thailand	Both	15% if dividend is paid by an industrial company and at least 10% of capital of such company is held by the recipient; 20% in other cases	Both	10% for financial institutions and insurance company; 25% for others (Note 2)	Both	15%	No separate provision	

	Dividend (not being covered by section 115-O)		Interest		Royalty		Fees for technical service	
	Right of state to tax	Tax rate	Right of state to tax	Tax rate	Right of state to tax	Tax rate	Right of state to tax	Tax rate
Turkey	Both	15%	Both	10% if recipient is bank, etc; 15% in other cases (Note 2)	Both	15%	Both	15%
Turkmenistan	Both	10%	Both	10% (Note 2)	Both	10%	Both	10%
Uganda	Both	10%	Both	10% (Note 2)	Both	10%	Both	10%
Ukraine	Both	10% if at least 25% of the capital of the company paying dividend is held by the recipient; 15% in other cases	Both	10%	Both	10%	Both	10%
United Arab Emirates	Both	10%	Both	5% if loan is granted by a bank/similar financial institute; 12.5% for others	Both	10%	No separate provision	No separate provision
United Arab Republic	Source	20%	Source	20%	Source	30%	No separate provision	No separate provision
United Kingdom	Both	15%	Both	10% if interest is paid to a bank; 15% for others (Note 2)	Both	(Note 3)	Both	(Note 3)
United States	Both	15% if at least 10% of the voting stock of the company paying the dividend is held by the recipient; 25% in other cases	Both	10% if loan is granted by a bank/ similar institute including insurance company; 15% for others	Source	(Note 3)	Source	(Note 3)
Uzbekistan	Both	15%	Both	15% (Note 2)	Both	15%	Both	15%
Vietnam	Both	10%	Both	10% (Note 2)	Both	10%	Both	10%

Notes

1 Ten per cent of the gross amount of the interest on loans made or guaranteed by a bank or other financial institution carrying on bona fide banking or financing business or by an enterprise which holds directly or indirectly at least ten per cent of the capital of the company paying the interest.

2 Dividend/interest earned by the government and certain institutions such as the Reserve Bank of India, are exempt from taxation in the country of source.

3 Royalties and fees for technical services are taxable in the country of source at the following rates:

- Ten per cent in case of rental of equipment and services provided along with know-how; and technical services.

- Any other case:

(i) during first five years of the agreement

– 15 per cent if the payer is government or specified organisation

– 20 per cent in other cases

(ii) subsequent years, 15 per cent in all cases.

The income of government and certain institutions will be exempt from taxation in the country of source.

4 Royalties and fees for technical services are taxable in the country of source at the following rates:

- Ten per cent in case of royalties relating to the payments for the use of, or the right to use, industrial, commercial or scientific equipment.

- 20 per cent in case of fees for technical services and other royalties.

5 Ten per cent of the gross amount of the interest on loans made or guaranteed by a bank or other financial institution carrying on bona fide banking or financing business or by an enterprise which holds directly or indirectly at least 20 per cent of the capital of the company paying the interest.

Indonesia

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Visas and work permits
Business entities
Business environment
Foreign investment policy
Government initiatives and incentives
Taxation
Workplace relations
Dispute resolution

Indonesia offers many opportunities to foreign investors. The Indonesian government has recognised the significant role foreign investors can play in the growth and development of the business sector and the national economy. Continuing deregulation and reduction in bureaucracy is creating a wider range of investment activities for foreign investors. In addition, Indonesia's rich natural resources, large human resource pool and strategic geographical position offer further investment incentives.

Recent legal initiatives that allow for more streamlined investment procedures are evidence of Indonesian policy objectives to address some investor concerns. Further progressive measures taken to attract foreign investment include tax concessions, regional incentives, industry incentives and free trade areas.

Visas and work permits

The Ministry of Law and Human Rights (*Kementrian Hukum dan Hak Asasi Manusia* or MOLHR) through the Immigration Office (*Direktorat Jenderal Imigrasi*) regulates visa and immigration matters. Visa applications should be made at an Indonesian diplomatic mission outside Indonesia and work permit applications at an office of the MOLHR in any capital city within Indonesia. Numerous Indonesian migration agencies provide visa and work permit services.

Business visas are valid for 60 days and multiple visit business visas are available for longer stays of up to two months for each visit and valid for one year from the date of the first arrival. However, business visitors are not able to conclude any business transactions, engage in local employment or perform professional or technical services and are limited to "business investigation".

The longest temporary resident permit is a limited stay permit card (*Kartu Ijin Tinggal Terbatas* or KITAS), which allows foreigners to stay in Indonesia for a period of 12 months (renewable annually). To obtain a KITAS, a foreigner will require the sponsorship of an Indonesian company or representative office.

Foreign investors are authorised to appoint their own management but must use local personnel for other positions, unless qualified Indonesians are unavailable. Work permits must be obtained for expatriate employment. Expatriate employment is permitted on the basis that an Indonesian national will eventually assume the expatriate position and that regular training will be provided to local personnel to ensure this.

Employers are required to obtain a Permit to Employ Foreign Manpower (*Ijin Mempekerjakan Tenaga Kerja Asing* or IMTA) for foreign employees.

Business entities

General

The foreign investment company (*Penanaman Modal Asing* or PMA) is the most common vehicle for foreign investment (see below). Other vehicles used by foreign investors in Indonesia include:

- branch of a foreign company
- representative office
- regional representative office.

Foreign investment company

Indonesian law recognises three forms of companies:

General Indonesian companies (*Perseroan Terbatas Biasa*)
These are:

- 100 per cent Indonesian-owned
- subject to the MOLHR company regulatory regime.

Domestic capital investment companies (*Penanaman Modal Dalam Negeri* or PMDN)
These are:

- 100 per cent Indonesian-owned
- able to take advantage of taxation facilities
- subject to the MOLHR and the Capital Investment Coordinating Board (*Badan Koordinasi Penanaman Modal* or BKPM) company regulatory regimes.

PMA companies
These:

- may have any amount of shares held by foreign companies/individuals, subject to industry-specific restrictions
- may be established as a joint venture and partly owned by foreigners and Indonesians. A former limitation of 30 years on business licences for PMA companies has been abolished and a business licence is generally perpetual, subject to the PMA company continuing to operate its business
- are able to take advantage of taxation facilities
- are subject to the MOLHR and BKPM company regulatory regimes.

BKPM must approve most foreign investments in Indonesian companies. Where the PMA company is 100 per cent foreign-owned, previous foreign investment rules required divestment of an unspecified percentage of shares to Indonesian interests within 15 years (as a rule of thumb, five per cent was considered acceptable). While Foreign Investment Law No. 25 of 2007 (*Undang Undang Penanaman Modal Asing*) abolished the divestment requirement, it has still not been settled whether this rule change applies only to newly incorporated companies or extends to companies incorporated under the previous regime.

PMA companies are permitted to establish subsidiaries. However, the parent PMA company cannot merely act as a "holding company" and must conduct a business in its own name.

PMA and PMDN companies are subject to regulation by both the MOLHR and the BKPM and industry-specific company regulatory regimes. As such, the PMA company, as distinct from general Indonesian companies, is subject to different obligations and enjoys different incentives, although the stated policy of the government is to eventually have one regulatory regime for all companies. The PMA company:

- may take advantage of taxation facilities offered to PMDN and PMA companies (this relates mainly to exemptions from duties on import of equipment, referred to as "Master List" equipment)
- must submit a report on its business activities (*Laporan Kegiatan Penanaman Modal* or LKPM) to BKPM semi-annually.

The Foreign Investment Law contemplates that certain tax benefits conferred upon PMA and PMDN companies will be extended to general Indonesian companies.

In December 2009, BKPM issued a regulation which is intended to make BKPM a "one-stop shop" with respect to licensing of PMA companies. In other words, BKPM will be able to issue both general and industry-specific business licences, rather than the PMA company being required to approach industry-specific ministries for additional licences. To implement the one-stop shop system, BKPM issued further regulations in July 2011, although industry-specific licenses were still required in practice at the time of writing, in summer 2012.

Branch of a foreign company

A foreign company wishing to establish a branch in Indonesia will only be authorised to do so in certain circumstances. In practice, only banks and oil and gas companies have been able to establish branch offices.

The majority of branch office operations in oil and gas are based on “production sharing contracts.” The production sharing contract is a business agreement between a foreign company and an Indonesian company where revenues are divided according to the agreement and the Indonesian company develops and manages the project.

Representative office

With exceptions (including banks, which must apply to Bank Indonesia for a representative office permit, and construction companies, which must apply to the Ministry of Public Works), foreign companies may establish a representative office in Indonesia after obtaining a licence from either the Ministry of Trade or BKPM. In general, this type of business entity cannot conduct business or receive income and it does not have the authority to contract on behalf of its foreign parent. A representative office is restricted to promotional, quality control or procurement work. This type of business entity is a good option for a foreign corporation testing the Indonesian market or for raising local awareness of its goods and/or services.

Regional representative office

Applications for the establishment of regional representative offices (*Kantor Perwakilan Wilayah Perusahaan Asing*) must be made to BKPM. Multinational corporations may establish regional representative offices.

Partnership

Long-standing government policy has been to not permit foreign participation in Indonesian partnerships (*Commanditaire Vennootschap*). This policy holds for basic partnerships, disclosed partnerships and limited partnerships.

Foundations

A foundation (*yayasan*) is similar to a non-profit incorporated association. Foundations are now liable to pay income tax at the same rates as apply to companies generally. The permitted activities of a foundation are limited to social, religious and humanitarian activities. Under the Foundation Law No. 16 of 2001 (as amended), the management structure of a foundation must have three tiers, including the Board of Founders with the ultimate authority, the Board of Management, which is responsible for day-to-day activities, and the Board of Supervisors, which advises the Board of Management.

Business environment

Anti-Monopoly and Unfair Competition Law

Indonesia’s Anti-Monopoly and Unfair Competition Law No. 5 of 1999 (*Undang Undang Tentang Larangan Praktek Monopoli dan Persaingan Usaha Tidak Sehat*) came into force in March 2000. The Anti-Monopoly and Unfair Competition Law provides that a business entity that has more than 50 per cent of the market for its type of goods or services will be deemed to be carrying on a monopolistic practice if its business practices are unfair or illegal and detrimental to society. However, the Anti-Monopoly and Unfair Competition Law is not very clear on a number of points. First, it is silent as to what sort of business practices will be deemed to be unfair or detrimental to society. Second, there is no definition of the term “type” of goods or services. As such, it is not clear whether this definition refers to a broad or narrow classification of goods or services. Third, the definitions of “monopolistic practice” and “unfair competition” are unclear.

In addition to the prohibition on monopolistic practices, business entities are prohibited from either directly or indirectly taking advantage of their dominant position in a relevant market. A business entity is deemed to have a dominant position in a relevant market for its type of goods or services if it controls more than 50 per cent of the relevant market or if it is one of two or three corporate groups that control more than 75 per cent of the market.

There are certain types of agreements and other business practices that are prohibited, including price fixing and the formation of monopolies and cartels. Companies are not allowed to divide

geographical markets among themselves, expand to achieve vertical integration that "could" result in a monopolistic practice detrimental to society, or be involved in boycotts. Collusion is also prohibited, as is the formation of anti-competitive corporate groups where a small number of buyers influence the market with respect to price and the costs that competitors must pay.

A Business Competition Supervisory Commission (*Komite Pengawas Persaingan Usaha* or KPPU) was established in 2000 to enforce the Anti-Monopoly and Unfair Competition Law. The Commission may require termination of agreements, mergers, acquisitions and business practices that violate the Anti-Monopoly and Unfair Competition Law. The Commission can also fine violating companies up to Rp25 billion and can demand that compensation be paid to affected parties. Failure to pay a fine may result in a prison sentence of up to six months for the directors and/or commissioners of an offending company.

A voluntary pre-notification process has been established under Regulation No. 1 of 2009 on Pre-notification of Mergers, Consolidations and Takeovers. Parties may pre-notify the KPPU and seek approval for transactions that may result in:

- combined assets greater than Rp2.5 trillion (Rp10 trillion for the financial services sector)
- combined sales greater than Rp5 trillion (Rp15 trillion for the financial services sector)
- an increase in the degree of market share to 50 per cent of the relevant market
- the acquisition of shares with at least 25 per cent of the voting rights of the target company
- the acquisition of less than 25 per cent of the voting rights in the target company, but where the transaction results in a "change in control" of the target company or where the acquisition of assets will lead to a change in control of the target company.

In 2008, 2009, 2010 and 2011, KPPU issued a number of guidelines aimed at clarifying certain points that are unclear under the Anti-Monopoly and Unfair Competition Law.

Consumer protection

Indonesia's first Consumer Protection Law No. 8 of 1999 (*Undang Undang Tentang Perlindungan Konsumen*) came into force in April 2000.

The Consumer Protection Law sets out basic rights of consumers (including the right to bring class actions) and the obligations of business entities (manufacturers, distributors, retailers and importers) with respect to the sale of their products and services in Indonesia. The Consumer Protection Law provides that business entities must:

- include an expiry date or "best before" date on their products
- follow "halal" production processes (that is, processes in accordance with or permitted under Islamic Shariah law) for products with "halal" labels
- include labels on their products stating the name of the product, its size, weight, volume (gross or net) and composition, directions for use, production date, details of any side effects, name and address of the "business entity" (it is not clear whether this refers to the manufacturer, the distributor or some other entity) and other information required to be included on the label by law
- provide information in the Indonesian language relating to the use of the products
- ensure that their products comply with the information contained on the product labels and any required standards under the general law.

Business entities are prohibited from offering, promoting or advertising particular products or services involving the provision of misleading or false information to consumers. When advertising, promoting or offering their products or services for sale, business entities are also prohibited from directly or indirectly disparaging other goods and/or services. In addition, business entities are prohibited from using descriptions such as "safe",

"not harmful", "not risky" or "no side effects" without including a detailed explanation of these warranties. Pursuant to the Consumer Protection Law, advertisers may be liable for all consequences arising from any false or misleading advertising carried out by them.

Under the Consumer Protection Law, a local importer (other than an agent or foreign representative of the foreign manufacturer) will be treated the same as a manufacturer. In practice, this means that a consumer who suffers damage arising from the purchase of a defective product can make a claim against the importer, which will be liable to the consumer for any such damage.

A violation of the Consumer Protection Law may result in a fine of up to Rp2 billion or imprisonment of a violating company's management for up to five years. In light of the harsh sanctions that may be imposed under the Consumer Protection Law, it is important for foreign companies to be fully aware of their obligations and the restrictions that now apply concerning the sale of products and services in Indonesia.

Intellectual property rights

Indonesia is a signatory to the Trade Related Aspects of Intellectual Property Rights Agreement (TRIPS), an agreement scheduled to the General Agreement on Tariffs and Trade (GATT) Agreement of the World Trade Organization. As such, Indonesia enacted a raft of new legislation from 1997 onwards in order to enhance Indonesia's compliance with the TRIPS requirements.

The problem with enforcement of intellectual property rights in Indonesia comes from a number of sources – industrial, technical, social, cultural and legal. The Indonesian government is hoping to tackle the issue of enforcement through new laws. On the positive side, there is a general coherence amongst the laws in terms of the definitions, alternative dispute settlement procedures, civil proceedings and criminal sanctions available for intellectual property rights enforcement. Although enforcement of intellectual property rights is, at present, difficult, it is hoped that over time Indonesia will create a comprehensive and structurally sound intellectual property rights protection regime. Indonesia also has substantial interest in providing protection for indigenous intellectual property and, to a lesser extent, geographical indicators. The government has indicated that it intends to enhance regulations with respect to enforcement, although it is not yet clear when this will take place.

The Directorate General of Intellectual Property Rights (*Direktorat Jenderal Hak Atas Kekayaan Intelektual*) under the MOLHR administers the enforcement of intellectual property rights in Indonesia. Registration is the basis upon which intellectual property rights in Indonesia are claimed. While Indonesia is party to various international treaties with respect to, among others, trade marks and copyright, in practice a local registration is required for optimum enforcement. In theory, a new streamlined procedure should result in significant reductions in registration times, but that has not yet happened in practice.

Enforcement of intellectual property rights is now provided through the Commercial Court. The Commercial Court was initially established for bankruptcy proceedings, and the perception of the court is of speedy and effective, if not more expensive, legal proceedings. However, in practice, intellectual property rights are usually enforced through more practical remedies. Infringements can sometimes be remedied by a "cease and desist" letter and/or by following up with a notice published in newspapers concerning the intellectual property owner's intention to take further enforcement action.

Copyright

The Indonesian Copyright Law No. 19 of 2002 (Copyright Law) came into effect in July 2003.

The Copyright Law distinguishes between copyright and related rights in terms of the period of protection and penalties. These "related rights" are exclusive rights held by a licensed agent, a sound recording producer or a broadcast institution. While the period of protection of copyright is granted for 50 years, the protection period for related rights of a licensed agent and a sound recording producer is 50 years, and 25 years for a broadcasting institution. Different civil and criminal penalties apply to infringements.

Matters covered by the Copyright Law include:

- protection of databases
- usage of wire or wireless devices, including the internet, to operate optical disc products through audio, audio-visual and other telecommunication devices
- court injunctions
- a time limit for settling copyright disputes in the Commercial Court and on appeal to the Supreme Court
- electronic information management and technological control device rights
- protection for hi-tech products
- penalties for violation of related rights
- a penalty for the reproduction of computer programs for illegal and unlawful
- commercial purposes.

Indonesia ratified the World Intellectual Property Organisation Phonograms and Performance Treaty, which came into effect in 2002. This treaty prohibits the unauthorised exploitation of recorded or live performances on the World Wide Web.

Domain names

In April 2008 Indonesia introduced its first electronic information and transactions law dealing with electronic commerce, domain names and related intellectual property rights.

Currently, domain name registration is available at the Indonesian Internet Domain Name Management Organisation (PANDI), which has the authority to assign, check and reject domain name registration in Indonesia.

Indonesia has several domain name registrations, including: ac.id, sch.id, co.id, net.id, go.id, mil. id, or.id and web.id. The applicant must hold an Indonesian taxpayer registration number and trading licence number in order to obtain a "co. id" domain name. In contrast, the documentation for obtaining a "web.id" domain name does not rely upon the applicant having a local presence in Indonesia, and a foreign company can register a "web.id" domain name provided it has a "local administrative contact address."

Patents

The Patent Law No. 14 of 2001 provides, amongst other things, that petty patents are limited to tangible items only, while a patent for a process must be a full patent. Patents are valid for 20 years and are not renewable. Simple patents are valid for ten years and are also not renewable.

Holders of a patent have the right to grant licences to other parties based on a licence agreement. A licence agreement must be registered and announced in the Official Gazette of Patents.

Trademarks

The Trademark Law No. 15 of 2001 addressed a primary concern of foreign investors as it provided for further legislative measures to be taken to stop use of a brand name where the name is registered as a trademark in another country. The Trademark Law prevents the registration in Indonesia of trademarks that are registered and "well-known" overseas, in cases where the applicant is acting in bad faith.

Trademark registrations are valid for ten-year periods and are renewable. Assignment of a trademark must be in writing, confirming that the trademark to be assigned will be used for the trade of goods and services. Goodwill, reputation or other related aspects of the trademark may also be assigned.

The Trademark Office accepts applications for trademarks with "priority rights" where the trademark has been registered in another country under the 1883 Paris Convention for the Protection of Industrial Property and the 1994 GATT. A priority application must be submitted within six months of the filing date of the application for registration of the trademark in the other country.

The Trademark Law requires trademark licences to be registered. However, at the time of writing, no

system had been established within the Trademark Office for such registration.

The registered owner of a trademark may submit a claim for damages against an infringer and apply for interlocutory injunctions. The Trademark Law also provides for alternative dispute resolution, including arbitration.

Trade secrets

Indonesia's first law on trade secrets came into effect in December 2000. Trade secrets refer to information not identifiable by the public in technology and/or business fields that has economic value (ie, has commercial or profit-making value). The information must be "secret", in that it is only identifiable by certain parties, and must have been disclosed in circumstances where confidentiality was intended to be protected.

Trade secret holders have the sole right to use, to license and to prohibit other parties from using or revealing the trade secret. Ownership of trade secrets may change by inheritance, grant, written agreement or assignment. Under the Trade Secrets Law, changes in ownership of trade secrets licences must be registered and announced in the official Gazette of Trade Secrets. However, at the time of writing, the registration and announcement procedures had not been established.

Industrial designs

The Indonesian Law on Industrial Designs, Law No. 31 of 2000, refers to the creation of forms, configurations or compositions of lines or colours, or combinations thereof in a two or three-dimensional form. Industrial designs may only be registered where there has been no previous disclosure of the design in exhibitions in Indonesia, the design has not been publicly exhibited, and is not already being used in Indonesia by designers in the framework of trial assets for educational, research or development purposes.

Industrial design rights are granted for ten-year periods. The industrial design right holder has exclusive rights to prohibit other parties from making, selling, exporting, importing and distributing goods using the industrial design right in question without their approval. Transfers and licences of industrial design rights must be registered and recorded in the Official Gazette of Industrial Designs and registered at the office of the Directorate General of Intellectual Property Rights.

Technical assistance agreements

Technical assistance agreements are entered into in order to transfer expertise and valuable information on the making and marketing of various manufactured goods. The owner of certain patent or trademark rights relating to particular licensed products may provide a licence to a subsidiary body or franchise partner. Information generally shared is the technically and commercially useful information necessary for the manufacture and sale of a particular licensed product. Information usually includes technical information, know-how, plant layout, drawings, specifications and treatment of materials relating to the manufacture and sale of a particular licensed product.

Technical assistance may also take the form of coordination and liaison services between the parties, visits of technical officers and other communications.

E-commerce

In April 2008, Law No. 11/2008 Regarding Electronic Information and Transactions (E-Commerce Law) was enacted to regulate matters relating to information and electronic transactions in all electronic forms. The E-Commerce Law is the first piece of legislation to regulate electronic transactions in Indonesia.

The E-Commerce Law sets out the legal basis for electronic transactions, including defining terms such as information technology, computers, electronic information, electronic contracts, electronic signatures, and electronic certificates. The E-Commerce Law prescribes a method for determining when electronic information is deemed to have been transmitted and received. It also provides for the creation of a certification body that can audit and issue certificates on the reliability of parties engaged in, and products the subject of, electronic trading.

The E-Commerce Law applies to all electronic transactions and all persons or institutions involved

in electronic transactions (that is, local and foreign subjects), and ensures those transactions are legally protected. For the first time, electronic evidence can be used in court. The E-Commerce Law also covers registration and use/misuse of domain names, the protection of certain electronic information as intellectual property, and the use by electronic media of information that affects an individual's right to privacy. It also prohibits dissemination of material relating to pornography, gambling or violence by means of computer or electronic systems.

Environment

The Ministry of State for the Environment regulates the control of pollution and works closely in cooperation with the Ministry of Trade. The Ministry of Trade requires all companies to exercise control over the impact of their activities on the environment. An environmental impact analysis must be undertaken for all activities, the extent of which depends on the potential level of damage. Activities are divided into categories in order to determine the level of environmental assessment that must be undertaken.

A 2009 law requires all companies with activities that affect the environment to obtain an Environmental License (*Izin Lingkungan*). This is in addition to the requirement imposed upon certain companies to obtain approval of an environmental impact analysis.

A company that has failed to comply with its environmental reporting requirements will receive a 30-day warning and, if the company still fails to submit the required report, the company's business licence may be revoked. Indonesia maintains a strict liability principle of "polluter pays," whereby liability for contamination always remains with the party that caused it.

The Company Law No. 40 of 2007 (*Undang Undang Perseroan Terbatas*) came into effect on 16 August 2007. The new law replaces the antiquated Limited Liability Companies Law No. 1 of 1995 and provides that all companies engaged in environmentally sensitive industries must implement a programme of corporate social responsibility (CSR). On 4 April 2012, the government implemented legislation in respect of the CSR obligations. This is a long-awaited piece of legislation that clarifies the nature of the required CSR activities including that 1) limited liability companies have social and environmental responsibilities, and 2) that companies in, or related to, the natural resources sector have an obligation to exercise such responsibilities both within and outside the company's business activities.

Additionally, waste management has become a significant issue in Indonesia and is subject to increased public scrutiny due to several recent waste-related incidents in Indonesia. To address this, the government passed the Waste Management Law No. 18 of 2008 on 9 April 2008 (Waste Law).

The government will be primarily responsible for administering the Waste Law and achieving the objectives it has set. However, individuals will also have the ability to enforce obligations under the Waste Law, including the right to bring a class action against the government and regional administrations over improper waste management. The government will have the power to impose fines and custodial sentences on those in contravention of the Waste Law.

Foreign investment policy

General

Foreign investment is encouraged as an important step towards the revitalisation of the Indonesian economy and continued development of the country in general. Foreign and domestic investment is administered by the BKPM. The BKPM Chairperson is also the Minister of State for Mobilising Investment Funds and a member of the Cabinet.

The MOLHR is the primary board that regulates the Company Law and the Foreign Investment Law. These two pieces of legislation are of primary importance to foreign investors. The BKPM must approve most new foreign investment and expansion of existing projects. Foreign investment and expansion of existing projects in the industries of oil and mining, banking and non-bank financial institutions need the approval of industry-specific regulating bodies.

Foreign Investment Law

Indonesia's previous Foreign Investment Law No. 1 of 1967 established the BKPM (and later its regional offices) to approve foreign and direct investment for all industries except (among others) the banking, insurance, mining, oil and gas industries where investment approval must be sought from other relevant government ministries. The BKPM and its regional offices liaise with MOLHR, the Ministry of Finance and the Ministry of Manpower and Transmigration (*Kementrian Tenaga Kerja dan Transmigrasi*) as well as regional and local authorities in respect of investment by foreigners and locals.

The Foreign Investment Law came into effect in April 2007. Some of the key features of the law are:

- a one-stop shop for foreign investment, as mentioned above
- tax incentives and improved property rights for Indonesian investment companies, both domestic and foreign-owned
- equal treatment of foreigners and locals, providing for compensation at market value in the event of nationalisation of assets, and granting rights to transfer and repatriate profits
- a host of government incentives (if certain criteria are met) such as reductions in corporate tax, exemptions and reductions in import duties, and reductions in property tax for various qualifying investments such as projects in labour-intensive industries, infrastructure, promotion of technology transfer, and involving scientific research and innovation
- granting stronger property rights to foreign investors; for example, subject to satisfaction of certain specified requirements, longer land title periods such as the Right to Cultivate (*Hak Guna Usaha*) for up to 95 years (previously 35 years); and the Right to Build (*Hak Guna Bangunan*) for up to 80 years (previously 50 years)
- prohibition against nominees holding shares on behalf of other parties
- removal of the requirement for foreign investors to divest a portion of their shareholdings in Indonesian companies after 15 years
- easier immigration procedures for obtaining residence permits and multiple entry visas
- an enhanced role for BKPM which it is proposed will now serve as a one-stop licensing and service centre for all investors
- the introduction of special economic zones (*Kawasan Ekonomi Khusus*) to accelerate economic development in certain regions.

Restrictions on investment

The Indonesian government determines which industries are closed to foreign investment through the Negative Investment List (*Daftar Negatif Investasi*), which in theory is issued every three years unless revised before then. The previous Negative List (Presidential Regulation Number 77 of 2007 Regarding List of Business Fields Closed and Open to Investment under Certain Conditions, as amended by Presidential Regulation No. 111/2007) was replaced by a new Negative List on 25 May 2010 (Presidential Regulation No. 36/2010). This Presidential Regulation specifies which business lines are closed absolutely to all private investment, closed absolutely to foreign investment, and open to foreign investment subject to restrictions. The new Negative List opens up certain industries to greater foreign investment whilst reducing or closing foreign investment in other sectors. The structure of the new Negative List has also changed. Under the new Negative List, prohibited or restricted activities are now categorised by reference to "sectors" as opposed to "business lines" under the old Negative List. Subject to the transitional provisions discussed below, the New Negative List applies to all investment in Indonesia on and from 25 May 2010.

Significantly, the new Negative List:

- introduces new categories in respect of entities carrying out geothermal activities, including Geothermal Drilling Services, with a maximum 95 per cent foreign ownership, and Geothermal

Power Plants, with a maximum 95 per cent foreign ownership

- introduces a new category of internet service provider with a maximum foreign investment of 49 per cent
- increases foreign investment limits in respect of some categories of construction from 55 per cent to 67 per cent. However, there are a number of categories, including Construction Consultancy, which retain the maximum limit of 55 per cent foreign shareholding as set out in the old Negative List
- continues to prohibit both domestic and foreign investment in the alcohol production industry and in gambling and casinos.

The new Negative List contains transitional provisions which, whilst somewhat unclear, provide that, to the extent that a company with foreign investors has already received an investment licence from BKPM, the foreign shareholders will not be required to divest shares to comply with the new restrictions on foreign investment. Our interpretation of this is that if a PMA company has already obtained a permanent business licence (*Izin Usaha Tetap* or IUT), shareholders will be permitted to hold shares in accordance with the limits imposed under that IUT. However, if the PMA wishes to change its existing IUT, then divestment may be required.

In January 2012, the BKPM verbally indicated that all PMA companies must have a minimum investment of Rp10 billion (approximately US$1.2 million) – a departure from previous practice, which allowed establishment of PMA companies with significantly lower investment amounts. It is not yet clear how this new policy will be applied in practice.

Nominee arrangements

Nominee arrangements have commonly been used in Indonesia when foreign investors wish to invest in areas that are closed to foreign investment. The concept of "trust" or "beneficial ownership" is not specifically recognised under Indonesian law. It has always been unclear, therefore, whether an Indonesian court would uphold a written agreement providing that an Indonesian shareholder holds shares on trust for a foreign investor. The idea of nominee arrangements is that the foreign investor obtains as much control as possible and is put in a position, insofar as it is possible, comparable to that of a registered shareholder.

The Foreign Investment Law now prohibits agreements whereby one party declares that it holds shares on behalf of another. This is clearly an attempt to abolish nominee structures. It is not yet clear whether this will result in loan/security structures, which are designed to have the same effect as nominee arrangements but do not refer expressly to one party holding shares on behalf of another, being struck down.

Franchising in Indonesia

The concept of franchising has been known in Indonesia since the 1970s, although laws on franchising were enacted only in recent years. In the early 1990s there was a boom for foreign franchisors in Indonesia. In the absence of any Indonesian franchise laws, however, foreign laws were used in franchise agreements. This was perceived as unfair and was at times incomprehensible to Indonesian franchisees, with Indonesian judges being reluctant to apply such laws in the event of disputes. Further, in a highly bureaucratic society where multiple licences and permits may be required from various government authorities for almost any conceivable form of business activity, some confusion existed as to which government authority had ultimate control over a franchise arrangement. As a result, the government enacted the first franchise law in 1997. In 2007, the Franchise Law was changed with the introduction of Government Regulation No. 42 of 2007, which has since been supplemented by the Regulation of the Minister of Trade No. 31/ M-Dag/ Per/8/2008.

The objectives of the franchise law are to establish certainty and protection for Indonesian franchisees and, where possible, to foster local business development. While the franchise regulations require a franchise agreement to be executed in the Indonesian language, to be governed by Indonesian law, and to include specific matters, ultimately the commercial arrangements remain a matter for negotiation between the parties. The elucidation

to the franchise regulations provides that the franchisor is obliged to "nurture, guide and train" the franchisee. Assistance and facilities offered to the franchisee by the franchisor include financial assistance, marketing assistance, book-keeping assistance and work guidelines.

Foreign franchisors are now required to register a prospectus with respect to the franchise at the Ministry of Trade before execution of the franchise agreement (which replaces a former disclosure statement requirement). Information about the franchisor and its business – including its profit and loss statement for the last two years ,"track-record" in terms of experience, and details of past and current franchise arrangements – must be disclosed, along with details of the proposed technical assistance and intellectual property rights. Evidence must also be provided on the identity of the corporate franchisors, which must be obtained from authorities in the franchisor's country of incorporation. The disclosure requirement is intended to provide particular protection to the franchisee, as opposed to the franchisor.

The Ministry of Trade will issue a Certificate of Franchised Business Registration once all disclosure and documentary requirements have been fulfilled. While the Ministry now has ultimate authority in relation to the registration and deregistration of franchises, in practice multiple licences must still be obtained by franchisees from various government ministries with jurisdiction in the area of the franchisee's business. On termination of a franchise arrangement, the Ministry will not deregister a franchise until it has received a written statement signed by the franchisor and franchisee confirming that all obligations between the parties have been settled.

Under the franchise regulations, the franchisors are required to give priority to small and medium-scale enterprises as franchisees and sub-franchisees and/or suppliers. Franchises are only permitted in provincial capitals and other particular cities or places in second-level regions that the Minister of Trade and Industry may stipulate from time to time, in an effort to promote small-scale industry.

Government initiatives and incentives

A broad range of deregulatory and de-bureaucratisation measures have been taken by the Indonesian government to enhance the investment climate. Licensing requirements have been streamlined and a new raft of legislation has addressed various long-standing concerns of the business community and provides new legal certainty in areas such as franchising, intellectual property and bankruptcy. Furthermore, the Negative List has been amended, increasing the number of sectors open to foreign investment. Import and export sectors now enjoy reduced tariffs and duty exemptions in certain circumstances. There is no formal minimum capital requirement for company incorporation in Indonesia, although as previously stated, the BKPM has indicated a minimum investment of Rp10 billion will be required for new PMA Companies.

Despite rumours to the contrary, transfer of foreign capital is unrestricted and, as discussed above, 100 per cent foreign-owned companies are now permitted for certain business activities.

A number of governments provide investment guarantees to foreign investors in their countries. In most cases, these guarantees cover compensation in case of nationalisation or expropriation, damages or losses caused by incidents of war, revolution or insurrection, and payments for any approved remittance pursuant to the investment in case of non-convertibility of currency of the host country.

To provide security for foreign investment, the government of Indonesia concluded an Asean Comprehensive Investment Agreement dated 26 June 2009 that was ratified by the government of Indonesia on 8 August 2011 through Presidential Regulation No. 49 of 2011. In addition, Indonesia has signed bilateral investment promotion and protection agreements with more than 60 countries, namely: Argentina, Algeria, Australia, Bangladesh, Belgium, Luxembourg, Bulgaria, Cambodia, Chile, People's Republic of China, Croatia, Cuba, Czech Republic, Denmark, Egypt, Finland, France, Germany, Hungary, India, Iran, Italy, Jamaica, Jordan, Kyrgyzstan, Laos, Malaysia, Morocco, Mauritius, Mongolia, Mozambique, the Netherlands,

North Korea, Norway, Pakistan, the Philippines, Poland, Qatar, Romania, Russia, Singapore, Slovak Republic, South Korea, Spain, Sri Lanka, Sudan, Suriname, Sweden, Switzerland, Syria, Tajikistan, Thailand, Tunisia, Turkmenistan, Turkey, Ukraine, United Kingdom, Uzbekistan, Venezuela, Vietnam, Yemen and Zimbabwe.

To create a favourable international investment climate, Indonesia has also signed multilateral agreements to promote foreign direct investment in Indonesia. Indonesia is now a member of the Multilateral Investment Guarantee Agency, which will protect investment against various political risks. To deal with foreign investment disputes, Indonesia has become a signatory member of the International Centre for Settlement of Investment Disputes and is a party to the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards.

In 2011, Indonesia signed an agreement with Norway aimed at reducing deforestation in Indonesia. To implement this agreement, the Indonesian President has announced a moratorium on the issuance of licenses to conduct activities in peat and natural forests.

Taxation

Tax system

Indonesia's taxation system is based on broad-based value-added tax on revenues combined with a self-assessment system. Taxes are imposed at regional and national levels. The Indonesian tax system classifies taxes into:

- national taxes: including income tax, value-added tax, sales tax on luxury goods, stamp tax, property tax (on land and buildings), and fiscal departure tax
- regional taxes: including development tax, motor vehicle tax, other minor taxes (household, entertainment, road, advertisement, radio and television taxes)
- customs and excise taxes: including export duty, import duty, tobacco, sugar, beer and alcohol, and gasoline taxes.

The Ministry of Finance and the Director General of Taxation regulate compliance with the main taxation rules. Unfortunately, the Tax Court, which is the court of appeal on tax matters, does not make its decisions readily available. The Tax Court is a judicial institution with jurisdictional authority for taxpayers or tax guarantors seeking settlement of tax disputes. A request for re-examination of a decision of the Tax Court by the Supreme Court will only be granted where certain conditions are fulfilled.

A Large Taxpayer Tax Service Office was established in Jakarta in July 2002 and took over responsibility for "large" taxpayers. It is common practice for the financial year of companies to follow the calendar year.

In September 2008, Parliament passed a new income tax law which reduced the number of income tax brackets from five to four, and lowered the maximum rate of income tax from 35 per cent to 30 per cent (for salaries of Rp500 million or greater). In addition, the then current corporate tax rates of ten per cent, 15 per cent, and 30 per cent disappeared in 2009 in favour of a single corporate tax rate of 28 per cent. In 2010, this corporate tax rate fell to a flat 25 per cent.

Income taxes

The wide definition of income tax in Indonesia's taxation law applies equally to both individuals and businesses operating through corporate structures. This definition of income tax includes such income sources as:

- wages and salaries
- interest and dividends
- compensation for work performed
- compensation for use of assets
- commissions and bonuses
- rent
- pensions and royalties
- lottery prizes and awards
- bonuses and awards
- foreign exchange gains
- insurance and reinsurance premiums
- capital gains on property.

Taxpayers are classified as:

- resident taxpayers: this includes companies, partnerships and cooperatives domiciled or incorporated in Indonesia. If a foreign business has a "permanent establishment" (that is, an "establishment regularly used to carry on business in Indonesia by an organisation or enterprise not set up or domiciled in Indonesia"), it is considered a resident for tax purposes. Any individual present in Indonesia for more than 183 days in any 12-month period or a person who intends to reside in Indonesia is also classified as a tax resident of Indonesia

- non-resident taxpayers: a non-resident taxpayer is one who receives benefit from activities in Indonesia. Double tax treaties that Indonesia has signed with various countries can provide some relief.

Withholding taxes

Withholding taxes apply to:

- payments made for a range of services performed within Indonesia

- payment of fees to partnerships or individuals

- payment to offshore funds (these include interest, royalties, technical service fees, dividends)

- certain classes of income, including transfer of title to land/buildings, rent paid on land/buildings and income from construction and construction consulting services.

Other taxes

Other taxes of relevance to foreign investors include:

- land and building tax, which is an annual tax on land, buildings and permanent structures. Taxpayers are those with the rights over the land or those who possess or control structures to obtain benefit from them

- value-added tax applies to the supply of most goods and services in Indonesia

- stamp duty on execution of certain documents (this is nominal and not an ad valorem tax)

- foreigners' tax, which is payable by companies for expatriate employees

- fiscal tax on departure from the country (currently Rp1 million on each departure of Indonesians and foreign residents). From 2009, any person with an Indonesian tax file number (*Nomor Pokok Wajib Pajak* or NPWP) is exempted from fiscal exit tax.

Workplace relations

General

A new labour law came into effect in March 2003 in the form of Labour Law No. 13 of 2003. Additional laws and Presidential and Ministerial Decrees have been passed to implement this regime.

The Indonesian government is working closely with the International Labour Organisation (ILO) to resolve Indonesia's labour problems. The government is pushing for greater foreign investment to increase business activities in Indonesia, so this may provide further employment opportunities.

Regional autonomy laws have also had a major impact on labour relations. The standard minimum wage has been raised in each province on a more frequent, almost annual basis. This has a significant impact on companies in the import and export sectors, which rely on wage-specific rates to maintain international competitiveness.

Minimum rates of pay

Minimum rates of pay are decided by the Ministry of Manpower and Transmigration on the basis of regional considerations. Therefore, wages vary significantly according to industry and location within Indonesia. Companies are free to compensate above the set minimum wage level. It is commonplace for employers and employees to negotiate individual and/or collective labour agreements.

The Labour Law provides for a six-day week with a total of 40 hours. The Ministry of Manpower and Transmigration can permit, upon request, a 40-hour, five-day week and can also provide permits for overtime.

Statutory contributions

The employer is the prime provider of social welfare for employees in Indonesia. Employees receive a number of fringe benefits that add to labour costs significantly. Employees are paid a compulsory annual allowance (*Tunjangan Hari Raya* or THR) at Christmas or *Hari Raya Lebaran* (Eid) holiday period. Employers generally provide medical care for employees and their families and may also subsidise employee housing. A cash allowance for meals, transportation and work clothing is also a common practice.

Employers of all national, private, foreign and government companies with a labour force in excess of ten or with a monthly payroll of Rp1 million or more must register their employees with *Jaminan Sosial Tenaga Kerja* (Jamsostek), a state-owned company, which provides a Worker's Social Security Programme. Jamsostek manages compensatory payments to employees or their surviving family members in case of death or accident.

Contributions to Jamsostek are made by the employee and by the employer. They consist of accident insurance, retirement, death insurance and medical care insurance. The latter may, however, be taken out by the company with another insurance company. Foreign employees are not required to be included under the Jamsostek programme.

Employers in various high-risk industries, including mining, construction, fisheries and plantations are required to set up compensation schemes for payments to employees or their families to cover employee injuries incurred during the course of their duties.

The Safety Act requires the employer to maintain facilities to ensure the health and safety of employees and specifically to prevent industrial accidents and provide protection against fires and defective building structures.

Leave entitlements

Maternity leave with full pay is provided for female employees for a period of up to three months, which may be taken before or after birth. Employees are entitled to a minimum leave period of 12 working days with full wages once they complete 12 months' continuous service. This increases to 20 days after six years' service. Whilst the Labour Law allows for forfeiture of the paid holiday entitlement if it is not taken within six months of entitlement, it is not common for foreign companies to enforce this forfeiture sanction.

Expatriate employees

In order for a PMA company to employ an expatriate, the company must prepare an employee utilisation plan (*Rencana Penggunaan Tenaga Kerja Asing* or RPTKA) for submission to BKPM for validation.

Termination of employment

The Labour Law regulates the procedures for, and compensation payable to, permanent employees of companies in Indonesia on termination of their employment.

The categories of employment termination include:

- voluntary resignation of an employee
- termination of employment by an employee due to employer's fault
- termination of employment due to employee's fault.

The law provides for three categories of compensation to employees on termination of payment: service payments, severance payments and "other" compensation. "Other" compensation will be paid if the employer has provided any housing, medical or relocation benefits or if there are any outstanding entitlements for unused annual leave or unused long service leave during the employee's term of employment.

The formal procedure for termination of the employment of an employee starts with initial negotiation between the employer and employee or union. If agreement is reached, it is not necessary for the Ministry of Manpower and Transmigration and/or the Industrial Relations Court to become involved. If agreement is not reached, the termination must be consented to by the Ministry of Manpower, which consent may be appealed to the Industrial Relations Court (formerly a system

of dispute settlement tribunals). The Industrial Relations Court was established in January 2006 with the aim of reducing the costs of and speeding up the old tribunal system. However, concerns have been expressed that the forum for industrial dispute resolution has moved from the control of government-appointed mediators to the judiciary.

Dispute resolution

Background

Foreign court judgments are not enforceable in Indonesia unless a reciprocal enforcement treaty exists between Indonesia and the country in which the foreign judgment is handed down. No such treaties are currently in force. Accordingly, a judgment handed down by a foreign court against an Indonesian company would be enforceable against the Indonesian company only to the extent that the Indonesian company has assets located in the jurisdiction of the judgment (against which the judgment may be satisfied).

Indonesian governing law

The most practical choice of law and jurisdiction in agreements would be the laws and courts of Indonesia. As an alternative to Indonesian law and jurisdiction, it is possible to state that:

- the laws of Indonesia govern the agreement
- disputes are to be referred exclusively to foreign arbitration and may not be referred to Indonesian courts for resolution (see below).

If an agreement is governed by Indonesian law, certain standard provisions need to be included (for example, an express waiver of certain provisions of the Civil Code 1847 would be required to prevent the need for a court order to allow early termination of an agreement).

The Indonesian Parliament issued a law in 2009 requiring all agreements to which Indonesian nationals or Indonesian entities are parties to be executed in the Indonesian language, regardless of the governing law. This has resulted in the common practice of agreements being executed in a dual-language format. At the time of writing (summer 2012), implementing regulations for the 2009 law were still pending, and the consequences of failure to execute an agreement in the Indonesian language are as yet unclear.

Foreign governing law

While theoretically possible, in practice Indonesian courts are reluctant to apply foreign law (in the event that an agreement stated it was governed by a foreign law but disputes were to be referred to Indonesian courts for resolution). We are aware of some cases where an Indonesian party to an agreement governed by foreign law has referred a dispute to an Indonesian court despite the governing law clause, and the judge has accepted jurisdiction but applied Indonesian law.

Foreign arbitration

While foreign court judgments are not practicably enforceable in Indonesia, Indonesia is a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Accordingly, an arbitral award handed down overseas may be enforced in Indonesia, provided that:

- the country in which the award is handed down is also a party to the New York Convention
- the award does not contravene national order
- the District Court has provided an execution order in relation to the award.

The likelihood of the District Court refusing to provide an execution order in relation to a foreign arbitral award is reduced where the agreement in question is governed by Indonesian law.

Issues with enforcement

Indonesian judges have indicated a tendency to question foreign arbitral awards in cases where enforcement has been sought through the District Court. In a particularly controversial recent case, the Central Jakarta District Court overruled the decision of a Swiss arbitration panel ordering the state-owned oil and gas company Pertamina to pay US$261 million to the local independent power producer, Karaha Bodas (which is controlled by American interests). The District Court claimed that the Swiss arbitration panel had

overstepped its authority in ordering Pertamina to pay compensation. The decision is now being challenged on the basis that only Swiss courts have the right to annul the ruling.

As a result of this case, the issue of the governing law and dispute resolution method to be used in agreements has become less certain. Generally, unless a client has strong reasons to the contrary, these agreements should be governed by Indonesian law so as to avoid the potential enforcement issues referred to above.

Japan

Contributed by Kashiwagi Sogo Law Offices

Visas and work permits
Business entities
Business environment
Foreign investment policy
Government initiatives and incentives
Taxation
Labour, employment and industrial relations
Legal profession and dispute resolution

Japan is an island nation with a population of approximately 128 million (2011 est.) and it has the third largest national GDP in the world after the United States and China. Its government is a parliamentary democracy, headed by a Prime Minister who is elected by the members of the House of Representatives. The House of Councillors and the House of Representatives constitute the Diet, the national legislative body. Although Japan is a multi-party democracy, the Diet was dominated by the Liberal Democratic Party for more than 50 years after the end of the Second World War. However, since 2009, the Democratic Party of Japan has been in control of the Diet. Japan also has a royal family, which serves as a symbol of the nation and whose lineage goes back over 1,000 years. The current emperor is Emperor Akihito, who has served in that role since 1989. Tokyo is the largest city in Japan, with a population of about 13 million, and serves as the business, political, cultural and educational centre of Japan.

Japan's economy developed at a rapid rate after the end of the war, and there was even a perception in the late 1980s that it might come to dominate the world economy. In the years leading up to 1990, Japan experienced an asset price bubble in the real estate and stock markets, leading to astronomical valuations. After the bubble burst in 1990, the economy has struggled to recover from its after-effects. Japan's economy was further battered in 2011 by the after-effects of the Great East Japan Earthquake and the ensuing tsunami and nuclear disaster.

Japan has an export-oriented economy, and its reputation is especially strong in automobiles and consumer electronics. Recently, many manufacturing jobs have been lost to China and other lower-cost countries. On the positive side, Japan's popular culture, such as its animation (*anime*) and comic books (*manga*), have become increasingly popular overseas, especially in Asia.

Many recent governments have attempted to spend their way out of the economic malaise, resulting in a government debt of 220 per cent of GDP, the highest in the world (2010 IMF estimate). On the other hand, its export-oriented economy has caused the country to accumulate foreign currency reserves of about US$1.30 trillion (December 2011 figure), the second highest in the world after China.

Most Japanese students study English in junior and senior high school, but these studies tend to focus on reading skills geared to preparation for college entrance exams. People interested in studying conversational English mainly do so at private English conversation schools. Employees of companies engaged in international business are generally conversant in English.

Business attire is formal and conservative as to colour and design. When first meeting a Japanese person in a business context, one will normally be expected to exchange business cards so that everyone is able to confirm each other's name and affiliation, as well as rank and place within their organisation. In a business environment, Japanese people almost always address each other by their last names.

Large Japanese companies have traditionally maintained a system of lifetime employment, but that has changed in recent years as globalisation has forced many of them to adopt more flexible measures to compete in the global arena. Employees of large companies are usually rotated through different departments and offices every few years to build their skill set and give them a broader view of the company, and the employees generally have no say in their assignments. Most Japanese companies have office setups where employee desks are grouped together in "islands" with the desk of the department head at the head of the island. This arrangement allows the employees to be aware of what their colleagues are doing and allows for economic use of office space.

Legal and other important corporate documents are executed by placing a seal impression of a corporate representative on the document. The seal impressions are registered with the government so that their authenticity can be confirmed. Other corporate seals are used for bank and other transactions. The bank seals are registered with the subject bank. Most bank accounts are maintained through passbooks (as opposed to monthly statements). Internet banking has also become popular recently. The most common methods of payment are cash, electronic funds transfer made from ATMs, and credit cards. Personal and corporate cheques are not widely used.

Foreigners make up less than two per cent of the population, though the percentages are higher in Tokyo and other large cities. The largest groups of foreigners are Korean and Chinese nationals. Those from Korea and Taiwan who lived in Japan before the end of the Second World War and their descendants were granted special permanent residency status after the war. The western expatriate community represents a very small percentage of the population and consists mainly of business people and English teachers. The western business expatriate community is centred in Tokyo and is supported by a network of social clubs, international schools, chambers of commerce and other business organisations.

Visas and work permits

Note: The provisions of this section are subject to change as of July 2012, based on the changes in immigration laws and regulations referenced in the second to last paragraph of this section.

Visas generally and visa exemptions

Foreigners who wish to enter Japan must have a valid visa stamp in their passport issued by a Japanese embassy, consulate, or other diplomatic authority. However, if the person's country and Japan have executed a visa exemption agreement, the person may enter Japan without a visa, subject to the conditions of the agreement. The maximum period of stay under the exemption varies by country. Visa exemption agreements are generally directed to persons entering Japan to sightsee, visit friends, or attend business meetings, and persons entering under visa exemptions are thus prohibited from performing work for remuneration while in Japan.

Work visas

Foreigners who wish to work in Japan for an extended period of time will generally need to obtain a work visa, unless they hold another type of visa that allows them to work (for example, a spouse visa based on being married to a Japanese national). Work visas are divided into "status of residence" categories which describe the type of work to be performed. Possible status of residence categories for expatriate business persons include investor/business manager, legal/accounting services, engineer, specialist in humanities/international services, intra-company transferee, and skilled labour.

People wishing to obtain a work visa will generally first obtain a certificate of eligibility, which certifies that the work the person intends to pursue in Japan is consistent with the status of residence of the work visa they are seeking. The application for the certificate of eligibility is normally made to the immigration authorities in Japan by the person's prospective employer. After the certificate is issued, the prospective employer will send it to the person in their home country, who will submit it to the local Japanese embassy, consulate, or other diplomatic authority together with their application for the work visa.

Work visas are valid for a limited period of stay, which depends on the status of residence category and the specific case. Currently, the most common periods of stay are one year and three years. If the person wishes to remain in Japan longer than their allowed period of stay, they may apply to the immigration authorities for an extension of their period of stay. These procedures can be completed in Japan so that the person does not need to leave Japan.

Dependant visas

Spouses and dependant minor children accompanying a foreigner with a Japanese work visa may apply for dependant visas. An application for a certificate of eligibility and visa may be made concurrently with the procedures for the work visa. The period of stay for a dependant visa is generally

the same as the period of stay for the work visa on which it is based. Persons holding dependant visas are, in principle, not allowed to work during the period of their residence in Japan. However, if the person applies to the immigration authorities for permission to work, the immigration authorities may grant such permission, although this permission is generally limited to a maximum of 28 hours per week.

Visas based on family relationship with a Japanese national

A foreigner who marries a Japanese national may apply for a visa in the category of "spouse, etc of Japanese national". Similarly, a foreigner with a parent who is a Japanese national can apply for a visa in the same category. A foreigner who has at least one grandparent who is a Japanese national can apply for a "long-term resident" visa (often referred to as a *nikkei* visa).

Temporary visitor visas

Foreigners who wish to enter Japan for a short period for sightseeing, business, or other purposes, but whose country of origin has not executed a visa exemption agreement with Japan, will be required to obtain a temporary visitor visa.

Foreigner registration

Any foreigner residing in Japan for more than 90 days must register at the local government office having jurisdiction over their place of residence. The government office will then issue the person an alien registration card, which serves as an identification card and which the person is legally required to keep with them at all times. The person is also obligated to report certain changes in their situation to the local government office, such as change of address, change of employer, change or renewal of visa.

Marriage to Japanese national

If a foreigner marries a Japanese national, the foreigner will need to complete various administrative procedures and consider various issues. Assuming the foreigner holds a work visa, they will need to consider whether or not to change their visa status to one based on their marital relationship with a Japanese national, as referenced above. One advantage of this visa is that the foreigner is free to engage in any type of work, while the work visa limits them to the work category of the visa. The foreigner will also be required to register the marriage with their local government office and notify their home country's embassy.

The married couple will normally establish a new family registry at the government office of the locality that the Japanese national considers their "home town". The family registry (koseki) system is used to keep a record of births, deaths, and marriages among the Japanese populace. Each family registry has a "head" of the family unit. Normally, the head of the family unit will be the husband but in the case of a marriage between a foreigner and a Japanese national, the Japanese national will be the "head" of the family unit, regardless of gender.

The foreigner, regardless of gender, has the right to change their last name to that of their Japanese national spouse. If the foreigner chooses to do so, they will need to complete the necessary administrative procedures in both Japan and their home country, including the issuing of a passport and alien registration card under the new name.

Re-entry permits

Foreigners residing in Japan under proper visas who wish to leave and re-enter Japan during the period of stay of their visa must first obtain a re-entry permit from the immigration authorities. The re-entry permits come in two types: single re-entry, which allows for only a single re-entry during the period of stay; and multiple re-entry, which allows for multiple re-entries during the period of stay.

Fingerprinting requirement

Since 20 November 2007, all foreigners entering Japan (with a few exceptions) are required to be photographed and fingerprinted at the port of entry. The purpose of this requirement is apparently to identify potential terrorists and other criminals by comparing the fingerprints with information in international criminal databases, and to identify foreigners who were previously deported or previously overstayed their visas and who are attempting to re-enter Japan under a different name.

New regulations applicable to foreigners from July 2012

The Japanese government has made major changes to the immigration laws and regulations, which are scheduled to go into effect in July 2012. Some of the changes include lengthening of the maximum period of stay under visas from three years to five years, the abolishment of the foreigner registration system at local government offices and replacement by a new registration system at national immigration offices, and abolishment of the need for re-entry permits so long as the person re-enters Japan within one year after their departure from Japan. There is a phase-in period for the new regulations' application to foreigners who were living in Japan prior to the effective date of the changes.

Assistance from attorneys and administrative scriveners

Foreigners and their employers may seek assistance from attorneys or administrative scriveners (*gyoseishoshi*) in connection with immigration matters. Attorneys and administrative scriveners who specialise in immigration matters and are registered with the immigration authorities are authorised to act as agents for their clients (that is, foreigners and their employers), so that the clients will not be required to personally appear at the immigration offices to complete the necessary procedures.

Business entities

Representative office

A foreign company may open a representative office for the purpose of performing preliminary work before commencing sales activities in Japan. Typical preliminary work includes market research, other information-gathering activities and advertising activities. With the exception of banks, securities companies, insurance companies, and certain other financial services companies, a foreign company is not required to register its representative office with the government. The representative office cannot open a bank account or enter into a real estate lease in its own name. If a bank account or lease is needed, it is generally opened/entered into by the head of the representative office in their individual capacity, but with a notation of his relationship to the representative office. As the representative office does not generate income it is not subject to corporate income tax.

Branch office

A branch office is the simplest way for a foreign company to engage in sales or other profit-making activities in Japan. The branch office must register with the local Legal Affairs Bureau having jurisdiction over the branch office within three weeks of its establishment. For certain industries, such as those relating to national defence, clearance from the national government is needed prior to establishment.

A branch office is required to have at least one designated representative with the authority to represent the foreign company with regard to its business in Japan. The representative's name and residential address are listed in the branch office's registration so that members of the public can confirm their authority. At least one designated representative must be resident in Japan, though they may be either a Japanese national or a foreign national. A branch office is not a separate legal entity so its assets and debts are legally owned/owed by the foreign company. Subject to this, the branch office can open bank accounts and lease real estate in its own name.

Subsidiary company

A foreign company wishing to set up a wholly owned subsidiary company will normally do so through either a joint stock company (*kabushiki kaisha*) (KK) or a limited liability company (*godo kaisha*) (LLC), both of which limit the liability of the owner to its invested capital.

Unlike United States LLCs, Japanese LLCs do not offer the advantage of pass-through taxation and are therefore subject to corporate income tax. LLCs generally are administered more informally than KKs. For example, LLCs are not required to hold formal shareholder meetings. Because of the more informal nature of LLCs compared to KKs and their relatively recent introduction in Japan, LLCs are generally viewed as smaller-scale operations or special-purpose vehicles and do not yet confer the same prestige and recognition as KKs. As most

foreign companies will wish to project an image of a well-established business operation of significant size, they are much more likely to choose to form their subsidiary as a KK. For this reason, the remainder of this discussion will be limited to KKs.

KKs are further divided into various sub-types, depending on certain statutory elections made by the KK. The nature of the governing body/bodies of the KK as well as the number of members of such body/bodies depends on the KK sub-type. However, in all cases, it will be necessary to appoint at least one company executive/director who is resident in Japan, although this person may be either a Japanese national or a foreign national. The foreign company must register the KK with the local Legal Affairs Bureau having jurisdiction over its head office. Upon the registration, the KK is incorporated and can begin its business operations. It must also provide a notification of inward direct foreign investment to the national government, through the Bank of Japan, after its incorporation. For certain industries, such as those relating to national defence, clearance from the national government is needed prior to incorporation.

The process for establishing and registering a KK is more complicated, expensive, and time-consuming than the process for incorporating a subsidiary company in most other developed countries. The foreign company can expect it will take approximately two months to prepare the necessary documentation and complete the incorporation process.

Business licences/registrations and reports

If the branch office or KK will operate in a regulated industry (for example banking, construction, employee dispatch, medical products, food service), it must also obtain the necessary business licences/registrations and/or submit the necessary reports in order to commence and continue the business.

Certificate of matters registered for branch offices and KKs

Once a foreign company registers its branch office or KK subsidiary with the local Legal Affairs Bureau, it may obtain from the Bureau copies of certificates of matters registered. The certificates serve as certified proof of certain corporate matters, such as the amount of a KK's or foreign parent company's capital, or identify a KK or branch office's representative/director(s). The certificate will often be requested by third parties, for example a bank when the KK/branch office opens a bank account, a government office when the KK/branch office applies for a business licence/registration and/or submits a required business report, a business partner entering into an important contract with the KK/branch office.

Assistance from attorneys, judicial scriveners, and administrative scriveners

Foreign companies may seek assistance from attorneys or judicial scriveners (*shihoshoshi*) in connection with the legal aspects of the establishment and registration of branch offices and KKs. Those intending to conduct business in regulated industries may also seek assistance from attorneys or administrative scriveners (*gyoseishoshi*) in connection with applications for the necessary business licences/registrations and/or submission of the necessary reports.

Business environment

Intellectual property

The following discussion highlights certain intellectual property issues that are often of concern to foreign companies.

Trademarks

Foreign companies considering the possibility of conducting business in Japan should plan to register their important trademarks in Japan at the earliest possible time, because the availability or non-availability of the trademarks can significantly impact their business in Japan. Furthermore, unscrupulous parties will sometimes register trademarks of foreign companies that they believe may enter the Japanese market in the future, to either pressure the foreign company to utilise them as a distributor, to manufacture and sell counterfeit products if the foreign company's goods become popular in Japan, or for other nefarious reasons. A foreign company may submit an application for registration of a trademark in Japan, even if it does not have a subsidiary or other office in Japan.

The Japan Patent Office maintains an online trademark database which the general public can access through a related administrative agency to confirm whether a trademark has been registered. The online database, however, does not include the most recent filings. Some, but not all, of the database search pages are available in English. The website is as follows: http://www.ipdl.inpit.go. jp/homepg_e.ipdl.

Trademark registrations are effective for ten years and can be renewed thereafter for ten-year renewal terms indefinitely. However, if a trademark is not used in Japan during any three-year period during the registration term, it is subject to cancellation.

Trademarks can be registered prior to actual use of the trademark in Japan, as long as the trademark holder uses the trademark in Japan within three years after the date of registration. Japan currently utilises the Nice international classes of goods and services for new applications, but older registrations may utilise the local Japanese classes that were used prior to Japan's adoption of the international classes.

Registered trademarks can consist of written characters, a logo, a combination of written characters and a logo, or three-dimensional objects (for example, the life-size Colonel Sanders figures that sometimes appear in front of KFC restaurants). The written characters can be English characters, Japanese characters, or any other foreign language characters. Most foreign companies register their character trademarks in both the original language and as translated into Japanese characters. There are usually a number of ways in which the trademark can be translated into Japanese characters, and the foreign company will need to decide which of the translations will be most appealing to the Japanese market.

An application for trademark registration will be rejected if the trademark is similar as to appearance, pronunciation, or meaning to another person's registered trademark with an earlier application date and with the same or similar designated goods or services. One potential problem that is sometimes not foreseen by foreign companies with English trademarks is the possibility that, while the English trademark may be available for registration in Japan, the application for registration may nonetheless be rejected because the pronunciation of the trademark is, by chance, similar to the pronunciation of a registered Japanese character trademark that is totally unrelated to the foreign company's trademark.

In addition to the Trademark Act, unregistered trademarks may be protected under the Unfair Competition Prevention Act if the trademark is well known in Japan. These legal provisions aim to prevent unscrupulous parties from registering famous trademarks for improper purposes.

Internet domain names

Japan uses the ".jp" internet domain name suffix. The ".co.jp" suffix is used for corporate webpages, and registration of such domain names is limited to registered Japanese companies, including subsidiaries and branch offices of foreign companies. Alternatively, a foreign company may utilise a ".jp" domain name without the ".co" (for example, www.abc.jp). Such registrations may be made by anyone and are not limited to registered companies. The foreign company may also forego a ".jp" domain name altogether and set up its Japanese market webpage within subdirectories or subdomains of its parent company webpage (for example, www.abc.com/japan or www.japan.abc.com).

Owners of ".jp" domain names, upon registration of the domain names, contractually agree to submit all related disputes to the Japan Intellectual Property Arbitration Centre (JIPAC). However, either party to such dispute resolution proceedings has the right to submit the matter to a District Court having jurisdiction over the matter prior to, during, or within a certain period after the completion of the JIPAC proceeding. Domain name disputes are generally resolved based on the Unfair Competition Prevention Act, which prohibits a party from registering a domain name that is similar to a registered trademark or trade name of another party for the purpose of unfairly profiting from the use of the domain name or damaging the other party by use of the domain name.

Patents

Patents are protected by the Patent Act. Patent applications are published 18 months after application. Patent applications that are submitted in Japan as well as other countries are subject to international patent agreements, and great care should be taken to comply with all relevant rules and deadlines, to avoid losing one's priority and other rights. The two main international agreements which Japan has joined are the Paris Convention and the Patent Cooperation Treaty (PCT).

Under the Paris Convention, if a patent application is filed in a foreign member country, the applicant can generally maintain the original filing date as its priority date for purposes of a Japanese application, if the Japanese application asserting a priority claim is filed within one year after the original application.

Under the PCT, if the "international phase" of a PCT application is initiated in a foreign country, the applicant can generally maintain the original filing date as its priority date for purposes of a Japanese application, if a "national phase" is initiated in Japan within 30 months after the filing of the international application.

Product liability

Injured users of products can bring claims for product liability under three main legal theories: contract, tort (negligence), and strict liability under the Products Liability Act. Strict liability claims under the Products Liability Act may generally be brought against the manufacturer and/or the importer (assuming it was manufactured outside Japan) of the product.

UN Convention on Contracts for the International Sale of Goods

Japan has ratified the United Nations Convention on Contracts for the International Sale of Goods. The Convention applies to all relevant contracts entered into on or after 1 August 2009 between a party from Japan and a party from another country that has ratified the Convention, unless the parties expressly exclude the Convention's application.

Foreign investment policy

The official Japanese government position is that Japan welcomes inward foreign direct investment (FDI). However, compared to other developed economies, Japan has a relatively low level of inward FDI for cultural reasons and as a result of government policies. For example, Japan's net inward FDI in 2010 was actually negative US$1.4 billion (net withdrawal of investment by foreign investors), compared to a positive US$236 billion for the United States and US$46 billion for the United Kingdom (UK) in the same year.

Japanese corporations generally achieve a lower rate of return on invested capital compared to their counterparts in other developed economies. One result is that the price-to-book ratios of public companies are generally lower than in other developed economies. This situation has caused many foreign companies to consider buying Japanese companies for the purpose of trying to increase their value through western-style cost cutting and other measures to increase the efficiency of their operations. However, these efforts have been hampered somewhat by a number of factors, including differences in business cultures and labour laws that make it difficult to terminate employees for cost-cutting reasons.

Another factor is the difficulty of completing hostile takeovers, which Japanese business culture has traditionally frowned on. Over the past several years, a few foreign and domestic companies and investment funds have attempted hostile takeovers of Japanese companies. Steel Partners Japan Strategic Fund, a United States investment fund, has been especially active in this regard. It continues to be difficult for a foreign company or investment fund to successfully complete a hostile takeover of a Japanese company. However, many Japanese companies fearing the possibility of an attempted hostile takeover have implemented poison-pill defences and other defensive measures.

As of 1 May 2007, a wholly owned Japan subsidiary of a foreign company can merge with or purchase all of the shares of a Japan company through a "triangular merger" (or share-for-share exchange), that is, by offering shares of the foreign parent

company as compensation to the shareholders of the target company. This mechanism allows the foreign company to complete the transaction without cash financing. At least one successful transaction has been accomplished using the mechanism – Citigroup's purchase of the remaining shares of Nikko Cordial Corp. (a Japanese securities company) that it did not already own. The tax rules allow the shareholders of the target company to carry forward any accrued capital gains in their shares so that the transaction will not trigger a capital gains tax obligation, subject to certain conditions including, for example:

- the Japan subsidiary has employees engaged in substantive business, and is not a paper company established for purposes of the merger
- the target company is engaged in the same or related business as the Japanese subsidiary (that is, the Japanese subsidiary cannot be a private equity fund or other investment vehicle).

Government initiatives and incentives

The Japan External Trade Organisation (JETRO) is the main government-related organisation tasked with facilitating inward FDI. JETRO has over 70 overseas offices in over 50 countries, which serve as liaison offices for foreign companies interested in doing business in Japan. For example, there are JETRO offices in Atlanta, Chicago, Houston, Los Angeles, New York, and San Francisco and two JETRO offices in London. JETRO also operates support centres, referred to as Invest Japan Business Support Centres (IBSCs), in six major cities in Japan to provide foreign companies with relevant information and referrals to professionals who can provide legal, accounting, industry consulting, and other services. JETRO's webpage provides a wide range of useful information in English and is a good starting point in the information-gathering process.

Incentive programmes for inward FDI are offered by the national government and local governments of the various prefectures. Details of these incentive programmes can be obtained from JETRO.

Taxation

The following discussion highlights certain tax issues that are often of concern to foreign companies and their foreign national employees. It is not intended as an overview of tax law in Japan. Furthermore, due to the need to fund reconstruction activities following the Great East Japan Earthquake, the government has recently made frequent changes to tax policies and regulations, and such frequent changes may continue in the near future. Thus, foreign companies should seek advice from tax professionals (see last paragraph in this Taxation section) to confirm the then-current tax regulations.

Corporate tax

A foreign company conducting business in Japan, whether through a subsidiary company or branch office, will be taxed on its Japanese source income. A Japanese subsidiary company will be taxed on its worldwide income, which will be relevant if it conducts business outside Japan. A representative office is generally not subject to income tax because its purpose is to perform preliminary, non-income-generating work prior to the initiation of sales activities.

The main corporate taxes are:

- national corporate tax
- local corporate inhabitant tax
- local enterprise tax.

The national corporate tax and local enterprise tax are based on the company's income. The local corporate inhabitant tax is based on a combination of the company's income, registered capital amount, and number of employees.

The following are the 2011 basic tax rates applied to taxable income (for business years ending between 1 April 2011 and 31 March 2012).

Marginal tax rates based on income (assumes company registered in Tokyo, with capital of ¥100 million or less, corporate tax amount is ¥10 million or less, taxable income is ¥25 million or less, offices or factories located in two prefectures or less; and not wholly-owned by a company with capital of ¥500 million or more):

	¥4 million or less	Over ¥4 million to ¥8 million	Over ¥8 million
National tax	18.00%	18.00%	30.00%
Prefectural tax	0.90%	0.90%	1.50%
Municipal tax	2.21%	2.21%	3.69%
Enterprise tax	2.70%	4.00%	5.30%
Special local corporate tax	The standard rate is 81% of applicable enterprise tax rate		
Effective tax rate	24.87%	26.48%	40.87%

Inhabitant tax amounts based on capital amount and number of employees:

If 50 employees or fewer and the following capital amounts:	
¥10 million or less	¥70,000
¥10 million to ¥100 million	¥180,000
¥100 million to ¥1 billion	¥290,000
¥1 billion to ¥5 billion	¥950,000
¥5 billion	¥1,210,000

If more than 50 employees and the following capital amounts:	
¥10 million or less	¥140,000
¥10 million to ¥100 million	¥200,000
¥100 million to ¥1 billion	¥530,000
¥1 billion to ¥5 billion	¥2,290,000
¥5 billion	¥3,800,000

Even if a foreign company has no operations in Japan, it may nevertheless be subject to Japanese withholding income tax if it receives income from a Japanese source. In such cases, the Japanese payer is obligated to withhold the appropriate amount of Japanese withholding income tax from the payment and pay such amount to the tax authorities on behalf of the foreign payee. The withholding tax rate depends on the existence and contents of a relevant tax treaty between Japan and the payee's home country. The Japanese payer will then provide the foreign payee with a certificate evidencing the withholding, which the foreign payee may then be able to use to seek a foreign tax credit on its home country tax return, if appropriate.

Consumption tax

Consumption tax is currently (2011) assessed at a rate of five per cent, of which four per cent is national tax, and one per cent is local tax. Because of the high level of the government's debt and the need to fund rebuilding efforts necessitated by the 2011 Great East Japan Earthquake and its after-effects, a general consensus seems to have formed that the consumption tax rate will have to be raised to at least double its current rate in the near future to help close these fiscal gaps.

Individual income tax

Foreign nationals who reside and generate income in Japan will be subject to national income tax and local residential tax. The following are the 2011 basic (marginal) tax rates applied to taxable income:

National tax rates (income amounts rounded down to nearest ¥1,000)	
¥1,950,000 or less	5%
¥1,950,000 to ¥3,300,000	10%
¥3,300,000 to ¥6,950,000	20%
¥6,950,000 to ¥9,000,000	23%
¥9,000,000 to ¥18,000,000	33%
¥18,000,000	40%

Local tax rates	
Prefectural tax	4% (uniform rate)*
Municipal tax	6% (uniform rate)*
Enterprise tax	3–5% (only applicable to persons engaged in certain businesses

* These are standard local tax rates, and the actual rates may differ depending on the local government.

Resident foreign nationals are divided into two categories: non-permanent residents and permanent residents (actually "residents other than non permanent residents", but referred to here as "permanent residents" for the sake of simplicity). Foreign nationals who have resided in Japan for an aggregate period of five years or less during the last ten years and retained their foreign citizenship are assumed to be non-permanent residents (though the assumption can be overcome if it is demonstrated that the foreign national intends to reside permanently in Japan). Non-permanent residents are taxed on their income sourced in Japan but not on their income sourced outside Japan as long as the income is paid outside Japan and is not remitted to Japan. Foreign nationals who have lived in Japan for more than an aggregate period of five years during the last ten years are considered to be permanent residents for tax purposes (regardless of whether they hold permanent residence status for immigration purposes) and are subject to tax on their worldwide income.

Foreign nationals who do not reside in Japan but nonetheless derive income from Japanese sources (for example, by performing work outside Japan for a Japanese employer/customer) will generally be subject to withholding income tax on the Japan-sourced income, analogous to the withholding income tax imposed on companies as described above.

If the foreign national's home country taxes the person on their worldwide income, a tax treaty between Japan and the foreign national's home country may apply to reduce the double taxation burden.

Assistance from certified tax accountants and certified public accountants

Foreign companies having a working relationship with an international accounting firm (such as one of the "Big Four") will usually rely upon the firm's Japanese office to handle the company's Japanese tax matters and assist with the company's international tax planning. Tax professionals in Japan are certified tax accountants (zeirishi), who mainly handle preparation and filing of tax returns for corporations of all sizes and individuals, and certified public accountants (koninkaikeishi), who mainly handle auditing of financial statements and general accounting matters for large corporations.

Labour, employment, and industrial relations

Foreign employers

One of the biggest challenges facing foreign employers is attracting and retaining high-quality employees. For this reason, many foreign employers have tried to distinguish themselves by offering working conditions and benefits that are more attractive than those traditionally offered by Japanese companies.

Recruitment

Employees are hired through a variety of methods, including advertisements in newspapers and magazines, employment agencies and "headhunting" firms. Often, the foreign employer will seek to hire Japanese nationals with good English skills to facilitate communications with the parent company and other group companies. Certain employment-related publications and agencies specialise in locating such employees.

Employment contracts

Foreign employers should engage local legal counsel to prepare employment contracts that are compliant with all relevant labour laws.

A few characteristics of employment practices in Japan are worth mentioning. First, many large Japanese companies have traditionally rotated their personnel through different departments and offices every few years to provide them exposure to different parts of the company, in preparation for management duties. This often means that the employee will spend time performing work that is completely different from their educational background and work history. Foreign companies generally do not engage in this practice because their operations tend to be smaller, and the practice is not part of their corporate culture.

Remuneration systems in Japanese companies tend to provide employees with certain allowances, in addition to basic wages and the usual benefits such as health insurance. The allowances may include housing allowances, dependant allowances based on the number of the employee's dependants, and commuting allowances (because most employees in urban areas will commute by train or other public transport).

Japanese companies also generally provide a significant portion of their remuneration through discretionary bonuses, usually twice a year, based on the business results of the company, not the individual performance of the employee. This practice allows the employer to adjust its payroll expenses according to its business results.

Work rules

Employers who continuously employ ten or more employees are required to prepare a set of work rules and submit them to the local Labour Standards Inspection Office. Foreign employers should engage local legal counsel to prepare work rules that are in compliance with all legal requirements.

Termination of employment

The labour law issues that are often of most concern to foreign employers are those concerning the termination of employees. This is especially true during the early years of the Japanese operations when they are not fully adjusted to the environment in Japan and may end up hiring a number of employees whom they later realise are not well-suited to the organisation.

Terminating employees in Japan is more difficult than in many other developed countries, in particular the United States. The employer must have an "appropriate reason" to terminate the employee, and general economic reasons, such as a drop in sales or transfer of part of the Japanese operation to another office to reduce costs, are generally not considered appropriate reasons. The employee's failure to properly perform their job functions or substantial violations of the work rules may be considered an appropriate reason, though the employer should have sufficient proof to support its position.

Foreign employers who wish to terminate an employee for economic reasons that do not constitute "appropriate reasons" (such as a lay-off) will often need to induce the employee to voluntarily resign by offering a cash payment, though some employees may be willing to resign without such a payment. When a cash payment is required, it needs to be enough to convince the employee that they will be better off taking the cash and looking for a new job than staying in their current position. If the work rules or employment contracts provide for severance pay, those provisions will apply as well.

Labour and social insurance

Companies are required to provide "labour insurance" and "social insurance" for their employees. "Labour insurance" comprises workers' accident compensation insurance and unemployment insurance. "Social insurance" comprises health insurance, nursing care insurance, and pension insurance (that is, social security).

Pension insurance provided by employers (kosei nenkin) is funded by a payroll tax (as of December 2011, the rate was 16.412 per cent), half of which is paid by the employer, and half of which is paid by the employee through deductions from their wages. Generally speaking, people paying into the system for at least 25 years are eligible to receive pension benefits from age 65. Thus, foreign nationals who do not expect to live in Japan permanently may face the prospect of paying into the system with no expectation of ever receiving pension benefits. However, if the foreign national's home country has entered into a social security treaty with Japan, the treaty may provide certain relief, such as exempting the person from paying the employee premiums and/or counting the premiums paid in Japan when calculating the person's pension benefits in their home country. Even without such a treaty, the foreign national will generally be entitled to receive a partial refund of their premiums paid when they leave Japan, though this will usually be considerably less than the full amount of premiums paid.

Employers may seek assistance from certified social insurance and labour consultants (shakaihoken-romushi) in connection with social insurance matters, such as calculation of premiums and preparation and submission of reports to government offices. Some accounting firms will have certified social insurance and labour consultants on their staff, while other certified social insurance and labour consultants operate independently.

Legal profession and dispute resolution

General approach

Japanese people and companies have traditionally been reluctant to use the court system to resolve their disputes due to a distaste for open conflict and the damaging effects of such proceedings on the relationship between the parties. The great majority of disputes are thus resolved informally, either through a negotiated settlement or the aggrieved party simply giving up.

In the business arena, written contracts have traditionally not been emphasised as much as in other developed economies. Even when such contracts exist, they are generally brief and lack complicated legal provisions. Businesses have generally relied more on building long-term relations based on trust rather than written legal obligations. Thus, when disputes arise, the parties generally attempt to resolve them through negotiations based on basic ideas of fairness, taking into consideration the parties' past dealings, rather than on written contracts, even if such documents were executed.

In recent years, however, the prevailing attitudes have started to change, and Japanese people and companies have begun to place more emphasis on executing and enforcing written contracts as well as the use of the judicial system to resolve disputes. In particular, Japanese companies have recently placed more emphasis on implementing internal control systems and defining the legal responsibilities of its employees and directors. In that context, more companies have turned to the judicial system to resolve disputes because doing so is viewed as providing more objective and predictable resolutions to disputes, compared to the traditional method of relying on informal settlements based on principles of fairness.

Lawyers

Consistent with this national philosophy, the number of lawyers has traditionally been kept very low, primarily by severely limiting the number of people who are allowed to pass the national bar examination. Lawyers have been viewed primarily as litigators, similar in status to barristers in the UK. The legal aspects of business transactions have been mainly handled by company employees who studied law at college or were otherwise trained in the subject matter, but who are not licensed lawyers.

Until about 1990, the national bar exam pass rate was approximately two per cent, yielding only about 500 new lawyers a year nationwide. Because of the difficulty of passing the bar exam, preparation for the exam was generally treated as a full-time endeavour that the aspiring lawyers would pursue for many years, typically after graduating from college with an undergraduate degree in law.

Eventually, the Japanese government determined that a larger number of lawyers were needed. There was a perception that many people were being denied access to justice simply because there were not enough lawyers available to assist them. There was also a feeling that Japanese companies needed to receive more sophisticated legal advice, especially in connection with their dealings with foreign companies. Lawyers are also reaching beyond their traditional litigator role to more often provide advice on business transactions.

Starting from approximately 1990, the number of new lawyers has increased from about 500 a year to about 2,100 a year in 2011. In addition, professional (graduate) law schools were set up for the first time to give aspiring lawyers the opportunity to acquire a deeper and more specialised understanding of the law. Graduates of the law schools take a bar exam (started in 2006) different from the traditional bar exam, which is designed to have a much higher pass rate (24 per cent in 2011) than the traditional bar exam. Law school graduates are allowed to take this new bar exam a maximum of three times. There was no limit under the traditional bar exam, and certain very determined applicants would devote ten to 20 years of their lives to trying to pass the exam. The traditional bar exam has been phased out and is no longer offered. This basically means that a person wishing to sit for the bar exam must now first attend and complete law school. (There is a special test that persons who did not attend law school can take to waive the law school requirement and qualify to sit for the bar exam, but very few people who take this special test are able to pass.)

Because lawyers have traditionally focused on litigation, attorneys' fees have traditionally been calculated based on fixed-fee formulas that take into consideration the amount at issue in the litigation and the results of the case. However, lawyers who provide legal services to foreign companies understand that the clients are used to hourly billing and will generally offer to bill in that manner.

Foreign lawyers and law firms

As the Japanese economy has become more intertwined with the international economy, Japanese companies need to receive more advice on international business matters and similarly, foreign companies doing business with Japanese companies increasingly need to receive advice on Japanese legal matters. There has traditionally been a shortage of Japanese lawyers with the requisite training to provide advice on complicated international business transactions. Thus, foreign lawyers and law firms, especially from the United States and the UK, have sought to fill the gap.

Lawyers licensed in other countries who wish to provide legal services to clients in Japan must first obtain a foreign lawyer (gaikokuho jimu-bengoshi) licence from the Ministry of Justice. The foreign lawyer is required to have a minimum of three years of experience under their home country licence, of which a maximum of one year may be experience obtained while residing in Japan. The foreign lawyer licence authorises the lawyer to provide legal advice to clients in Japan within the scope of their home country qualification. Licensed foreign lawyers do not have the right to appear in Japanese courts on behalf of their clients, but they are able to represent their clients in arbitrations in Japan.

Initially, there were significant restrictions on the activities of foreign law firms, such as prohibitions against directly employing or entering into partnerships with Japanese lawyers. Those restrictions have largely been eliminated, so that foreign law firms now basically operate on equal footing with domestic law firms.

Other legal professionals

Patent attorneys (benrishi) are subject to a different bar exam from regular lawyers (bengoshi). They handle patent and other intellectual property applications and provide general advice on intellectual property matters. Regular lawyers are permitted to perform the same work that patent attorneys are permitted to perform.

As mentioned in previous sections, there are other legal professionals, such as administrative scriveners (gyoseishoshi) and judicial scriveners (shihoshoshi), who are authorised to provide certain limited types of legal services.

Court system

Although Japan is divided into prefectures and other political units, the court system is national. The courts are basically divided into three levels: trial courts, intermediate appeals courts and a Supreme Court. The trial courts are divided between civil, criminal, and family matters and there are certain courts that further specialise by subject matter, such as intellectual property courts.

Civil cases at the trial court level are generally adjudicated through a series of hearings, generally lasting an hour or less, which take place on a monthly basis. The judge will determine the proceedings at each hearing, such as witness examination, oral argument and submission of legal briefs. Cross-examination of adverse witnesses is common, but parties have a very limited ability to compel another party to submit evidentiary documents in its possession, as the court will generally only compel submission of documents if they feel the information is of a certain importance to the case. The court also has discretion to compel the appearance of third-party witnesses or the submission of documents in the possession of third parties. Punitive damages are not awarded, because such relief is viewed as a criminal-type sanction.

Court records are open to the general public for review, subject to trade secret and certain other exceptions. However, only the parties and other persons who can establish some relationship to the case or the case records are permitted to make copies of the records. Court-administered mediation plays an important role in the civil court system. Parties to a dispute may choose to participate in mediation in lieu of litigation, and, in many cases, they are able to resolve their differences

through the mediation process. There is a system of shareholder derivative lawsuits. The number of such lawsuits has been limited but is increasing. The Consumer Contract Act allows qualified consumer organisations to bring claims for injunctive relief (but not damages) against business operators. A system of class action lawsuits has not yet been established.

Enforcement of foreign judgments

If a foreign company obtains a foreign court judgment against a Japanese national or entity and is unable to enforce the judgment in its home country because, for example, the defendant does not have business operations or assets in the country, the foreign company may be able to bring the judgment to Japan and enforce it against the defendant's Japanese assets. Due to the absence of any major international treaty governing the execution of foreign court judgments, this issue is governed by Japanese statute, specifically Article 118 of the Civil Procedure Code. The statute and cases interpreting the statute provide that, in order to enforce a foreign court judgment in Japan, the following conditions must be met:

- The foreign court judgment was issued by a civil court (not a criminal court, administrative tribunal, etc.) and is final, binding on the parties thereto, and not subject to appeal.

- The foreign court had proper jurisdiction over the matter based on jurisdictional standards under Japan law. Even if the foreign court found that the Japanese defendant had sufficient contacts with the foreign forum to establish personal jurisdiction, the Japanese court may find that such contacts were insufficient under Japanese standards and reject the petition to enforce the judgment.

- The Japanese defendant received service, other than by publication or some similar method, of the summons or other similar document notifying it of the commencement of the legal action, or appeared in the action without being served.

- The contents of the judgment and the procedure leading to the judgment are not contrary to public policy in Japan.

- The foreign country where the judgment was issued enforces court judgments issued in Japan (reciprocity), and the foreign country's standards for enforcement are not substantially more strict than Japan's standards for enforcement of foreign court judgments.

Because punitive damages are not awarded in Japan, an award of punitive damages in a foreign court judgment will not be enforceable in Japan.

Service of foreign court documents on Japanese nationals or corporations

If a foreign company files a legal action in its home country against a Japanese national or corporation, one of the first issues the plaintiff will face is how to effect service of process on the defendant. If the defendant has business operations in the foreign country, the plaintiff will probably be able to serve the defendant at its place of business. In many countries, Japanese and other foreign companies must designate a local service agent when obtaining permission to conduct business in the country/local jurisdiction.

If the Japanese corporation does not have operations in the foreign country or if the defendant is a Japanese national residing in Japan, the plaintiff will probably need to serve the defendant under the Hague Convention on the Service Abroad of Judicial and Extra-Judicial Documents in Civil and Commercial Matters.

Service under the Hague Convention normally takes at least several months and requires the preparation of a Japanese translation of all documents to be served. The request for service is normally made by the Department of Foreign Affairs in the plaintiff's home country to the Ministry of Foreign Affairs in Japan. The Ministry of Foreign Affairs will then arrange for service through the Secretariat of the Supreme Court which will further pass on the task to the district court (trial court) having jurisdiction over the defendant. The actual service is performed by a postal worker, who will prepare a statement certifying completion of service and submit it to the relevant district court official. If the defendant refuses to accept service, the postal worker is authorised to leave the documents at the defendant's place of residence, and such

service will be considered effective, despite the defendant's refusal.

Plaintiffs who wish to avoid the delay and complications associated with service under the Hague Convention will sometimes attempt to serve the documents by airmail or international courier with proof of receipt, especially if service in such manner is authorised by the civil procedure rules of the foreign court. However, it is important to remember that compliance with the civil procedure rules of the foreign court will only be relevant if the plaintiff seeks to enforce the resulting judgment against the defendant's assets in the foreign country (such as the defendant's bank accounts or real estate). If the judgment will be enforced in Japan, compliance with the foreign court's rules concerning service of process will normally be irrelevant.

The Japanese government has issued certain vague statements concerning whether it considers service by mail to be valid, but its underlying intent appears to be that service by mail will not be considered valid. Thus, if the plaintiff intends to enforce the foreign judgment in Japan, it should serve process under the Hague Convention.

Similarly, if the plaintiff attempts to serve the defendant in Japan by hiring an attorney or private investigator to locate and personally serve the documents on the defendant, such service will not be considered valid under the Hague Convention.

It is also possible for service to be effected through a consular officer of the foreign government, if such service is authorised by the foreign court. However, service by consular officer is limited to voluntary service and will not be effective if the defendant refuses to accept service. Service by United States consular officers is prohibited under United States federal law.

Depositions in Japan by United States and other lawyers

The Japanese judicial system generally does not allow lawyers to examine witnesses outside the courtroom, so depositions of witnesses without the participation of judicial officers are not allowed. Thus, when United States lawyers seek to take depositions in Japan in connection with United States lawsuits, such depositions are subject to several conditions:

- The deposition must be presided over by a United States consular officer, who serves as a substitute for a Japan judicial officer, pursuant to the Consular Convention between the United States and Japan.
- The deposition must be conducted at the United States embassy in Tokyo or one of the United States consulates in other Japanese cities. Currently, only Tokyo and Osaka have rooms set aside for depositions, so depositions at other consulates are rare. The depositions cannot take place at a law office or hotel room, even if all parties agree. Reservations for the deposition rooms at the embassy/consulate should be made well in advance, especially for the embassy in Tokyo, as the deposition rooms there tend to be filled many months in advance.
- The United States court must issue a formal commission commissioning the United States consular officer to preside over the deposition of the witness.
- United States attorneys and other non-Japanese participants travelling to Japan must obtain a special deposition visa from their local Japanese consulate. The application for the visa should again be made well ahead of the scheduled deposition date.

Additionally, the witness must appear voluntarily at the deposition, as the Japanese courts will not issue subpoenas to compel attendance of the witness.

Japan is not a party to the Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters. Similar to the United States, the Consular Convention between the UK and Japan allows English consular officers to take voluntary depositions in Japan. Attorneys from other countries seeking to take depositions in Japan will need to investigate the consular convention between their home country and Japan.

International arbitrations

International arbitrations have become more common in Japan in recent years as arbitration clauses have become more common in international business contracts involving Japanese parties. Arbitration offers many advantages over court litigation:

- the parties can appoint neutral arbitrators of their choice, whereas court judges may be viewed as inherently sympathetic to the local party
- the foreign party does not have to learn the intricacies of an unfamiliar foreign court system
- English can be designated as the language of the arbitration, which will usually be convenient, because the contracts and communications between the parties will usually have been in English
- the proceedings can generally be kept confidential.

Arbitrations in Japan are governed by the Arbitration Act of 2003, which was adopted on the basis of the UNCITRAL Model Law on International Commercial Arbitration. Japan was the 45th nation to adopt the UNCITRAL Model Law albeit with some changes.

The arbitration clause will also usually designate an administering organisation, so that the relevant rules of the organisation will also apply. The main arbitration associations utilised in Japan are the Japan Commercial Arbitration Association, the International Court of Arbitration of the International Chamber of Commerce (headquarters in Paris), and the Tokyo Maritime Arbitration Commission of the Japan Shipping Exchange.

Enforcement of foreign arbitral awards

Japan is a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which governs the enforcement of foreign arbitral awards in Japan. Under the terms of the convention, Japan will enforce an arbitral award issued in any other member country, subject to certain narrow exceptions.

Malaysia

Contributed by Jeff Leong, Poon & Wong

Visas and work permits
Business entities
Business environment
Foreign investment policy
Government initiatives and incentives
Taxation
Workplace relations
Dispute resolution

Malaysia is a democratic country that practises parliamentary democracy. The country is headed by a constitutional monarch, His Majesty the Yang di-Pertuan Agong, as the Supreme Head of the country. The Yang di-Pertuan Agong is elected for a five-year term from among the nine hereditary Sultans of the Malay states; the other four states, which have titular Governors, do not participate in the selection.

Parliamentary democracy is the basis of the government administration in Malaysia and, in keeping with this concept, the Federal Constitution underlines the separation of governing powers among the executive, judicial and legislative branches.

The Parliament, which comprises the Yang di-Pertuan Agong, the Senate and the House of Representatives, has legislative authority to make laws. At the state level, power is vested in the respective state legislature, for which elections are held every five years. Among other laws and provisions made by the Parliament are the functions of the Cabinet ministers, foreign conventions, the raising of taxes and approval of expenditure. In exercising the legislative powers conferred on it by the Constitution, Parliament may make laws for the whole or any part of the Federation, and laws having effect outside as well as within the Federation. The state legislatures may make laws for the whole or any part of that state. If any state law is inconsistent with a federal law, the federal law shall prevail and the state law shall, to the extent of the inconsistency, be void.

Executive authority, or the authority to rule, is exercised by a Cabinet of Ministers headed by the Prime Minister under the name of the Yang di-Pertuan Agong. The Cabinet is directly responsible to the Yang di-Pertuan Agong. While every executive action is by the King's royal authority, in accordance with the principle of a democratic ruling system, the Prime Minister is the Chief Executive. Under the Prime Minister there are various cabinet ministers who represent different sectors, among which include ministers representing public welfare, economics and national security. These ministers are responsible for the execution and running of government policies in their respective sectors.

Malaysia continues to improve its regulatory framework to attract foreign investment. Foreign investment remains an important part of the Malaysian economy. Gross inflows of foreign direct investment, as released by the Department of Statistics, amounted to RM5.2 billion in the third quarter of 2011, channeled mainly into the manufacturing, oil and gas, and retail trade sectors. Meanwhile, portfolio investments reverted to net outflow of RM23.4 billion from net inflow of RM48.1 billion in the previous quarter.

Since 17 June 2003, 100 per cent foreign equity holding has been allowed, irrespective of sector and level of export, for all new manufacturing projects and investments for expansion/diversification by existing companies. Following the deregulation of the Foreign Investment Committee investment guidelines in June 2009, equity conditions are imposed only on certain sectors which are deemed strategic (such as information and communication technologies, oil and gas, mining, manufacturing etc) by the respective sector regulators.

Employment of expatriates in manufacturing or related services sectors has also been relaxed since 17 June 2003. The existing incentive schemes were further improved in 2003. Malaysia is positively ranked as the 21st most competitive economy in the World Economic Forum's Global Competitiveness Report 2011-12. Furthermore, in the World Competitiveness Yearbook 2011, published by the Switzerland International Institute for Management Development, Malaysia was ranked as the world's 16th most competitive economy. The Third Industrial Master Plan (IMP3)

2006–20 recognises the need for Malaysia to maintain and enhance its competitiveness in order for it to further progress along the value chain from assembly-based and low value-added activities towards higher value-added activities. IMP3 outlines the industrial strategies and policies which form part of the country's continuing efforts towards realising Malaysia's objective of becoming a fully developed nation by 2020, as stated in Vision 2020. The overriding objective of the IMP3 is to achieve global competitiveness through innovation and transformation of the manufacturing and service sector that contributes to the other development thrusts of the National Mission of the Ninth Malaysia Plan (RMK-9), 2006–10.

As the second largest contributor to intra-ASEAN trade, Malaysia promotes itself as a base for foreign investors to access the larger ASEAN market of half a billion people and combined GDP of US$750 billion through the ASEAN Free Trade Area that was realised on 1 January 2003. Based on the World Bank's report Doing Business 2011, Malaysia has also been ranked 21st among 183 countries for ease of doing business.

Visas and work permits

All persons entering Malaysia must possess valid national passports or other internationally recognised travel documents valid for travel to Malaysia. These documents must be valid for at least six months beyond the date of entry into Malaysia.

Citizens of the following countries:

- Do not require a visa to enter into Malaysia: Commonwealth countries (except Bangladesh, Cameroon, Ghana, Mozambique, Nigeria, Pakistan and Sri Lanka), and the United States (except for employment purposes).
- Do not require a visa for visits not exceeding two weeks: Iran, Iraq, Libya, Macao SAR (Travel Permit/Portugal CI), Palestine, Sierra Leone, Somalia, South Yemen and Syria.
- Do not require a visa for visits not exceeding one month: All ASEAN countries (except Myanmar), Armenia, Azerbaijan, Barbados, Belarus, Benin, Bolivia, Bulgaria, Cambodia, Cape Verde, Chad, Chile, Costa Rica, Ecuador, El Salvador, Estonia, Gabon, Georgia, Greece, Guatemala, Guinea Republic, Haiti, Honduras, Hong Kong SAR, Kazakhstan, Latvia, Lithuania, Macao SAR, Macedonia, Madagascar, Moldova, Mauritania, Mexico, Moldova, Monaco, Mongolia, Nicaragua, North Korea, North Yemen, Panama, Paraguay, Portugal, Russia, Sao Tome & Principe, Senegal, Slovenia, Sudan, Surinam, Tajikistan, Togo, Ukraine, Upper Volta, Uzbekistan, Vatican City, Venezuela, Zaire and Zimbabwe.
- Do not require a visa for visits not exceeding three months: Albania, Algeria, Argentina, Australia, Austria (Vienna), Bahrain, Belgium, Bosnia-Herzegovina, Brazil, Croatia, Cuba, Czech Republic, Denmark, Egypt, Finland, France, Germany, Hungary, Iceland, Ireland, Italy, Japan, Jordan, Kyrgyzstan, Kuwait, Kyrgyz Republic, Lebanon, Liechtenstein, Luxembourg, Morocco, Netherlands, Norway, Oman, Peru, Poland, Qatar, Romania, San Marino, Saudi Arabia, Slovakia, South Korea, Spain, Sweden, Switzerland, Tunisia, Turkey, Turkmenistan, United Arab Emirates, United Kingdom, Uruguay and Yemen.
- Require a visa to enter into Malaysia: Afghanistan, Angola, Bangladesh, Bhutan, Burkina Faso, Burundi, Cameroon, Central African Republic, China, Colombia, Comoros, Congo Democratic Republic, Congo Republic, Cote d'Ivoire, Djibouti, Equatorial Guinea, Eritrea, Ethiopia, Ghana, Guinea-Bissau, Hong Kong (Certificate of Identity or Document of Identity), India, Liberia, Mali, Mozambique, Myanmar (normal passport), Nepal, Niger, Nigeria, Pakistan, Rwanda, Serbia & Montenegro, Sri Lanka, Taiwan, United Nations (Laissez Passer) and Western Sahara.
- Require a visa, and permission must be granted by the Ministry of Home Affairs: Israel.

For countries other than those stated above, no visa is required for visits not exceeding one month. For ASEAN countries, a visa will be required for a stay exceeding one month (except for nationals of Brunei and Singapore).

Foreign nationals who wish to visit Malaysia have to obtain a pass at the point of entry in addition to a visa (where required), which allows them to stay temporarily. A pass is an endorsement in the passport constituting permission to stay for the approved duration. Applications for passes, other than applications for tourist, social or business visits, must be made before arrival in the country. All applications must have sponsorship in Malaysia. The sponsors must agree to be responsible for the maintenance and repatriation of the visitors from Malaysia if it should become necessary.

Business entities

General

The most common types of business organisation include sole proprietorships, partnerships and companies. Foreign companies may also operate through a branch in Malaysia.

Sole proprietorships and partnerships

Sole proprietorship is a type of business organisation owned by one person only and a partnership may be formed by two or more persons, up to 20 persons.

The sole proprietor and partners do not have a separate legal identity from the sole proprietors and partnerships. A sole proprietorship or partnership must be registered with the Companies Commission of Malaysia (CCM).

Companies

The most common company structure in Malaysia is a company limited by shares. Such limited companies may be either private or public companies. A private company is one which restricts the transfer of its shares and has no more than 50 shareholders. A private company may not offer its shares to the public.

There are two means of setting up a subsidiary in Malaysia: by incorporating a new company or buying a shelf company. Buying a shelf company may take less time than forming a new company, although if all relevant documents are duly submitted, incorporating a new company may take less than one month.

The secretary of a company must be a natural person of full age who has their principal or only place of residence in Malaysia. The person must be a member of a prescribed body or be licensed by the CCM. The company must also appoint an approved company auditor to be the company auditor in Malaysia.

In addition, the company shall have at least two directors who each has his or her principal or only place of residence within Malaysia.

Branch

A foreign company may set up a branch in Malaysia by registering itself as a “foreign company” with the CCM under the Companies Act 1965 (revised 1973). The foreign company must appoint one or more “agents” in Malaysia, who must be residents of Malaysia to accept, on the foreign company’s behalf, service of process and any notices required to be served on the foreign company.

Business environment

The Malaysia Plan

The Ninth Malaysia Plan

The Ninth Malaysia Plan, which covers the period 2006 to 2010 (RMK-9), represents the second phase in the implementation of the Third Outline Perspective Plan for the period 2001 to 2010, which will integrate strategies, programmes and projects towards achieving Vision 2020. The Plan will place an emphasis on maintaining the macroeconomic stability of the country to consolidate the economy on a sustainable growth path to achieve distributional goals and improve Malaysians’ quality of life. In order to enhance Malaysia’s competitive edge, special emphasis will be given to increasing productivity and efficiency through human resource development, encouraging research and development activities and utilising the latest technologies, particularly information and communications technology. The Malaysian economy is projected to grow by an average of six per cent annually during the Plan and 6.5 per cent annually during the period of 2011 to 2020. Under the Malaysia Budget 2010, Malaysia’s economy is expected to grow by 2–3 per cent in 2010.

The Tenth Malaysia Plan

The Tenth Malaysia Plan (RMK-10) was unveiled in Parliament on 10 June 2010 by Prime Minister Dato' Seri Najib Tun Razak to spearhead the Malaysian economy over a period of five years beginning 2011 to achieve developed-nation status by 2020. It is one of the four pillars of the national transformation program (the others being 1Malaysia, the Government Transformation Program (GTP), and the Economic Transformation Program (ETP)).

Under the RMK-10, the Malaysian economy is envisaged to grow at an average clip of 6.0 per cent per annum, led by the services and manufacturing sectors, revitalising the agricultural sector towards higher value added as well as the adoption of information and communication technologies, biotechnology and other relevant technologies. The key challenge is to stimulate private sector investments to grow at 12.8 per cent or RM115 billion per annum. A business growth fund with an initial allocation of RM150 million will be set up to bridge the financing gap between the early stage of commercialisation and venture capital financing for high technology products. The RMK-10 will focus on 12 national key economic areas as follows:

- oil and gas
- palm oil and related products
- financial services
- wholesale and retail
- tourism
- information and communications technology (ICT)
- education services
- electrical and electronics
- business services
- private healthcare
- agriculture
- greater Kuala Lumpur.

Personal Data Protection

The Personal Data Protection Act 2010 (PDPA) came into force on 10 June 2010, making Malaysia one of the first Asean countries to introduce such legislation. It seeks to regulate the processing of personal data in commercial transactions.

The PDPA applies to both local and foreign individuals or companies operating in this country, as long as personal data is being processed in Malaysia. Personal data, under the PDPA, means any information in respect of commercial transactions that can identify an individual, for example name, age, MyKad details, photo, passport number, video and images captured via closed-circuit television. The term "process" includes the act of collecting, recording, holding, storing, carrying out operations involving alteration, use, disclosure, correction and erasure of personal data.

Generally, the PDPA can be seen to affect the way businesses and other organisations (ie, the data users) store the personal data of their employees, customers or suppliers (ie, the data subjects).

First, the data users are required to inform the data subjects via written notice, inter alia, that their personal data will be processed, the purpose for which their personal data is being collected and processed, and that the data subjects have a right to request access and/or correction of the personal data. Subsequently, the data users are required to obtain consent from the data subjects to process the personal data, including the transfer of personal data to a place outside Malaysia. This consent granted by the data subjects may be withdrawn at any time via written notice to the data users.

Upon collection of personal data from the data subjects, the data users are responsible to protect the personal data from any loss, misuse, modification, unauthorised or accidental access, disclosure, alteration or destruction. The data users have a duty to also ensure that the personal data is accurate, complete, not misleading and kept up-to-date. In the event the purpose for processing such personal data has been fulfilled or the keeping of such personal data is no longer necessary, the data users are obliged to take reasonable steps to ensure that all such personal data is destroyed or permanently deleted.

It is noteworthy that even if the data users have collected and processed personal data before the PDPA comes into force, they are given a grace period of three months from the effective date of the PDPA to comply with the provisions thereof.

Whistleblower protection

Malaysia has taken significant steps in respect of whistleblower protections by enacting new legislation with the objective of providing a check against corruption. The relevant act is the Whistleblower Protection Act 2010 (WPA) which will come into force once officially published in the government gazette.

Pursuant to the WPA, a whistleblower means any person who makes a disclosure, either orally or in writing, of improper conduct to an enforcement agency based on his reasonable belief that any person has engaged, is engaging or is preparing to engage in improper conduct.

The WPA provides immunity to the whistleblower from civil and criminal action and all information disclosed will be treated as confidential. The WPA is considered to be of importance in the realm of employment and industrial relations, and specifically provides that:

- any provision(s) or term(s) in any contract of employment shall be void in so far as it purports to preclude the making of a disclosure of improper conduct

- no detrimental action shall be taken against a whistleblower or any person related to or associated with the whistleblower in reprisal for a disclosure of improper conduct

- no person acting or purporting to act on behalf of any public body or private body shall: (a) terminate a contract; (b) withhold a payment that is due and payable under a contract; or (c) refuse to enter into a subsequent contract, solely for the reason that a party to the contract or an employee or employer of a party to the contract has made a disclosure of improper conduct to any enforcement agency relating to the public body or private body.

Significantly for employers in the country, action taken against whistle blowing employees in reprisal could constitute an offence under the WPA. For whistle blowing employees who claims that detrimental action, in reprisal for a disclosure of improper conduct, has been taken against him is entitled to seek the following remedies from court:

- damages or compensation
- injunction
- any other relief as the court deems fit.

The WPA also provides that a whistleblower or any person related to or associated with the whistleblower who fears or has suffered detrimental action may request the enforcement agency to apply in writing, for and on their behalf, to the relevant public body or employer or other appropriate person in the private body for relocation of their place of employment. The public body or the employer or other appropriate person in the private body shall, as far as practicable, make arrangements for such request of relocation of the place of employment. Any whistleblower protection given to an employee, provided under law, under a collective agreement or employment contract, will continue to subsist and would not be affected by WPA so long as it does not contradict the new statute.

Competition and regulation

The Competition Act 2010, which will come into force on 1 January 2012, marks the first piece of legislation in this country to address competition in generic terms, apart from specific legislation with some provisions on antitrust governing the energy and multimedia communications sectors. It promotes a competitive environment and provides foreign investors with a stronger confidence in the country's business practices.

The Competition Act applies to any commercial activities within Malaysia. It applies equally to commercial activities outside Malaysia, which has an effect on the competition in any market in Malaysia.

In essence, there are two major prohibitions:

- anti-competitive agreements
- abuse of dominant positions.

Anti-competitive agreements include price fixing, import cartel, bid rigging, territorial allocation, limiting production and market sharing; whilst the abuse of dominant position covers predatory pricing, price discrimination, excessive pricing and denying market access.

The Competition Act also introduces a Competition Commission to monitor and investigate potential uncompetitive markets, and a Competition Appeal Tribunal which allows petition of a decision by the companies.

With the enactment of the Competition Act, there is now a promotion of efficient functioning of the markets. It benefits consumers with lower prices and better choices made available, provides safeguard against practices that could drive companies out of business, allows lower entry barriers to promote entrepreneurship and growth of small and medium enterprises, and controls international unfair competition and restrictive business practices such as international cartels.

Intellectual property rights

Legislation

Malaysia's intellectual property laws include:

- Copyright Act 1987
- Trade Marks Act 1976 and the Trade Marks Regulations 1997
- Patents Act 1983 and the Patents Regulations 1986
- Industrial Designs Act 1996 and the Industrial Design Regulations 1999
- Intellectual Property Corporation of Malaysia Act 2002
- Layout Designs and Integrated Circuit Act 2000
- Geographical Indications Act 2000.

Malaysia's intellectual property laws originate from English laws and are generally similar to the intellectual property laws in other countries. Malaysia is a member of numerous international conventions and has amended its laws in accordance with the terms of its accession to these conventions.

Copyright

The Copyright (Amendment) Act 1990 extended copyright protection to foreign works following Malaysia's accession to the Berne Convention of Literary Works 1886. The Copyright (Amendment) Act 1997 and the Copyright (Amendment) Act 2000 gave protection for performers rights pursuant to Malaysia's international obligations under the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS), an agreement scheduled to the General Agreement on Tariffs and Trade of the World Trade Organisation.

There is no requirement for registration in order to acquire copyright protection. Under the Copyright Act, the works eligible for copyright are:

- literary works
- musical works
- artistic works
- films
- sound recordings
- broadcasts
- derivative works
- published editions.

The duration of copyright in Malaysia is as follows:

- copyright in any literary, musical or artistic works subsist during the life of the author and 50 years after the author's death
- copyright in a sound recording subsists for a period of 50 years from the beginning of the calendar year following the year in which the recording was first published or, if the sound recording has not been published, from the beginning of the calendar year following the year of fixation
- copyright in a broadcast subsists for a period of 50 years computed from the beginning of the calendar year following the year in which the broadcast was first made
- copyright in a film subsists for a period of 50 years from the beginning of the calendar year following the year in which the film was first published or first made available to the public or made, whichever is the latest
- copyright of foreign work protected in Malaysia by reason only of the amendments made pursuant

to Malaysia's accession to the Berne Convention for the Protection of Copyright in Respect of Literary and Artistic Works ceases to subsist on the expiry of the duration of protection under the laws of the country of origin of the work or as provided in the Copyright (Application to Other Countries) Regulations 1990.

Copyright initially vests in the author. However, where a work is commissioned or where a work is made in the course of the author's employment, the copyright shall be deemed to vest in the person who commissioned the work or the author's employer, unless there is any agreement to the contrary. Copyright is transferable by assignment, testamentary disposition or by the operation of law, as movable property.

Trade marks

Malaysia is a member of the Paris Convention for the Protection of Industrial Property and is bound by TRIPS. As a member of the Paris Convention, Malaysia gives:

- a right of priority to applicants for trade mark protection in any Convention country, if the Malaysian application is filed within six months of the former application

- temporary protection to trade marks of goods and services that are the subject matter of an exhibition at an official or officially recognised international exhibition held in Malaysia or in any Convention country or a foreign country declared in the Gazette as affording Malaysia reciprocal protection of trade marks.

In accordance with the requirements of TRIPS:

- the Geographical Indications Act 2000 was passed and came into force on 25 August 2001. The Geographical Indications Act 2000 allows a producer in a specified geographical area to apply for the registration of an indication of the geographical origins of its goods

- the Trade Marks Act 1976 was amended to abolish the division of the Trade Marks Register into Part A and B and confers protection on well known marks regardless of whether the proprietor is carrying on business or has any goodwill in Malaysia. The import of counterfeit trade mark goods is prohibited and such goods may be seized by customs officers.

A trade mark may be registered for any goods or services. A proprietor may apply to register a trade mark used or proposed to be used by the proprietor. A trade mark is registrable if it contains or consists of at least one of the following particulars:

- the name of an individual, company or firm represented in a special or particular manner

- the signature of the applicant for registration or of some predecessor in his business

- an invented word or words

- a word having no direct reference to the character or quality of the goods or services not being, according to its ordinary meaning, a geographical name or surname

- any other distinctive mark.

The registration of a trade mark is for a period of ten years but may be renewed from time to time for a period of ten years from the date of expiry.

Patents

An invention is patentable if it is new, involves an inventive step and is capable of industrial application. An invention involves an inventive step if the inventive step would not have been obvious to a person having ordinary skill in the art.

Rights to a patent belong to the inventor. However, for a work commissioned or made in the course of the inventor's employment, the rights to a patent are deemed to vest, respectively, in the commissioner of the work or the employer. An employee-inventor is entitled to equitable remuneration to be fixed by a court in the absence of agreement between the parties if the invention has an economic value much greater than the parties could reasonably have foreseen at the time of concluding the contract of employment.

The owner of the patent shall have exclusive rights in relation to the patent to exploit the patented invention, to assign or transmit the patent and to conclude licence contracts.

A patent expires 20 years from the filing date of the application.

Priority may be claimed from:

- a domestic application for a patent
- an application for a patent in a member country of the European Patent Convention 1973, the Paris Convention and Patent Cooperation Treaty 1970.

If there is no declaration of priority, the priority date of an application for a patent is the filing date of the application.

No resident may file or cause to be filed outside Malaysia an application for a patent for an invention without the written authority of the Registrar of Patents unless:

- an application for a patent for the invention has been filed in the Patent Registration Office not less than two months before the application outside Malaysia
- either the Registrar of Patents has not issued any directions as to secrecy or has revoked all such directions.

None of the provisions described in the last paragraph are applicable to an application which has been filed outside Malaysia by a non-resident.

Industrial design

A design that is new and not contrary to public morality is eligible for protection.

The author of an industrial design is treated as the owner of the industrial design. However, where the industrial design is commissioned for money or money's worth, the commissioner will be treated as the original owner subject to contrary agreement between the parties. The employer, subject to contrary agreement between the parties, is treated as the original owner of an industrial design created by the employee in the course of employment. Industrial design is transferable by assignment, testamentary disposition or by operation of law. The assignment, transmission or operation of law must be recorded in the Register of Industrial Designs to be effective against third parties.

The registration of an industrial design will subsist for five years and is extendable for two further consecutive terms of five years each.

Malaysia is a member country of the international conventions which revised the Paris Convention and TRIPS. Malaysia adopts the Locarno Agreement Establishing an International Classification for Industrial Design 1968 (amended in 1979) for the classification of designs. Priority will be accorded for earlier national, regional or international applications filed by the applicant or his or her predecessors in title in or for any state which is a party to any international treaty or convention to which Malaysia is a party. To claim the priority, the application in Malaysia must be filed within six months of the earlier applications. In other cases, the priority date will be the "filing date" of the application.

Franchising

Franchising is an established business strategy amongst retailers and other service providers in Malaysia to expand their businesses. It involves the franchisor giving the franchisee the rights and conduct of a prescribed business format or system coupled with the rights to use their trade mark, trade secret, and confidential information or intellectual property of the franchisor. The Franchise Act 1998 applies to the sale of any franchise in Malaysia.

A local franchisor who intends to sell a franchise to a person who is not a Malaysian citizen is required to obtain the approval from the Registrar of Franchise. A foreign person who intends to sell a franchise in Malaysia or to any Malaysian citizen is also required to obtain the Registrar's approval. Further, a master franchisee is required to register with the Registrar.

In general, a franchisor is required to submit a copy of its franchise agreement and disclosure documents to a franchisee at least ten days before the franchisee signs the agreement with the franchisor. The franchisor is also required to submit annually a report to the Registrar in a prescribed form within 30 days from the anniversary date of the registration. If a franchisee is required to pay any franchise fee or royalty, the rate of franchise fee or royalty to a franchisor shall be at the rate as provided in the disclosure document.

A franchise agreement is required to be in writing and for a term of not less than five years. However, the franchise term may be terminated prior to the expiry of the minimum five-year term if the parties to the franchise agreement agree to terminate or where a court determines there are certain conditions in the franchise agreement which warrant early termination. At any time before the expiration of the franchise term, a franchisee is entitled to give written notice to the franchisor to extend the franchise term unless the franchisee has breached the terms of the agreement. A franchise agreement, if renewed, is required to be on conditions similar to or not less favourable than the conditions in the original agreement.

A franchisee is required to give a written guarantee to the franchisor that the franchisee and its employees will not disclose to any person any information contained in the operation manual for the franchise or obtained while undergoing training organised by the franchisor during the franchise term, and for a period of two years after the expiration or earlier termination of the franchise agreement. Further, a franchisee is required to give a written guarantee to a franchisor that the franchisee and its employees will not carry on any other business similar to the franchised business operated by the franchisee during the franchise term and for two years after the expiration or earlier termination of the franchise agreement.

A franchisor who requires a franchisee to make any payment for the purpose of the promotion of a franchise shall establish a promotion fund. Financial statements for the promotion fund, endorsed by a registered public accountant, must be submitted to the Registrar within 30 days after the conclusion of each financial year. A franchisor is required to have at least made an application to register his or her trade mark or service mark relevant to his franchise in accordance with the Trade Marks Act before applying for registration of the franchise.

Non-compliance with the Franchise Act is an offence punishable by imprisonment or fines, depending on the nature of the contravention. Non-compliance also renders the franchise agreement null and void.

Exchange controls

Malaysia has currency and capital controls governed by the Exchange Control Act 1953 (revised 1969). Since 1 April 2005, the foreign exchange administration rules have been liberalised and simplified.

Non-residents are free to open Malaysian ringgit accounts with licensed onshore banks in Malaysia (which are termed as “External Accounts”) and foreign currency accounts with licensed onshore banks and licensed International Islamic Banks. From the External Accounts, they are free to, inter alia, convert Malaysian ringgit into foreign currency with licensed onshore banks for repatriation abroad, pay to another non-resident’s External Account for settlement of Malaysian ringgit assets, and receive export proceeds in Malaysian ringgit (from monies earned from the export of goods and services to the resident). From the foreign currency accounts, non-residents are free to repatriate and pay a resident for any purpose including for settlement of goods and services.

Currency for the payment of import or export of goods and services by residents may be made in either Malaysian ringgit or foreign currency. Residents can settle their trade payments or receipt with non-residents in Malaysian ringgit arising from the import or export of goods and services. Payment in Malaysian ringgit by residents to non-residents must be made into the External Account of the non-resident, whilst receipt of Malaysian ringgit by residents from non-residents can be effected from the External Account of non-residents or an External Account of an appointed overseas branch within the same banking group of a licensed onshore bank.

Proceeds from the export of goods must be repatriated to Malaysia in full as per the sales contract and must not exceed six months from the date of export. Additionally, prior permission is required for residents to offset export proceeds against payables due to non-residents or receive the export proceeds exceeding six months from the date of exports. Residents are nevertheless free to retain the foreign currency export proceeds in foreign currency accounts maintained with licensed onshore banks (excluding licensed International Islamic Banks or non-resident banks where prior permission is required).

Resident companies and resident individuals with no domestic Malaysian ringgit borrowings are free to invest abroad.

Resident companies with domestic Malaysian ringgit borrowings can equally invest with no restriction on the amount if the investment is funded with their own foreign currency funds retained onshore or offshore, or funded from proceeds of listing through initial public offering on Bursa Malaysia Securities Berhad or any other foreign stock exchanges. However, they may only invest up to the equivalent of RM50 million in aggregate on a corporate group basis per calendar year if funded from conversion of ringgit, or up to the full amount of permitted foreign currency borrowing.

Similarly, resident individuals with domestic Malaysian ringgit borrowings can also invest with no restriction on the amount if the investment is funded with their own foreign currency funds retained onshore or offshore. However, they may only invest up to the equivalent of RM1 million in aggregate per calendar year if funded from conversion of ringgit, or up to the full amount of permitted foreign currency borrowing.

A resident individual is free to borrow in foreign currency up to the equivalent of RM10 million in aggregate from licensed onshore banks, licensed International Islamic Banks and non-residents. However, trade financing involving export must only be obtained from licensed onshore banks.

A resident company is free to borrow any amount in foreign currency from non-resident non-bank related companies, other resident companies within the same corporate group in Malaysia, licensed onshore banks and licensed International Islamic Banks. A resident company is also free to borrow in foreign currency up to the equivalent of RM100 million in aggregate on a corporate group basis if it borrows from non-residents (other than non-resident non-bank related companies) and through the issuance of foreign currency denominated bonds onshore and offshore.

In terms of foreign currency trade financing facilities, residents are free to obtain foreign currency trade financing facilities from licensed onshore banks and licensed International Islamic Banks (other than trade financing facilities involving export). Foreign currency trade financing facilities from offshore is allowed up to the equivalent of RM5 million in aggregate, and the trade financing facilities are part of the RM100 million limit on foreign currency borrowing from non-residents.

Non-residents are free to borrow any amount of foreign currency from licensed onshore banks and licensed International Islamic Banks. In addition, non-residents (other than stockbroking companies and banks) are free to obtain Malaysian ringgit borrowings from licensed onshore banks, resident non-bank companies and individuals to finance activities in the real sector in Malaysia and to finance or refinance the purchase of residential and commercial properties in Malaysia.

Both resident and non-resident travellers are allowed to import or export Malaysian ringgit notes up to an equivalent of US$10,000. For amounts exceeding the permitted limits, application can be made online using Form 13, or submitted via written application to Foreign Exchange Administration Department, Bank Negara Malaysia. There is no limit on the value of foreign currency notes or traveller's cheques that a resident or non-resident may bring in or take out from Malaysia.

Foreign investment policy

Malaysia welcomes foreign investments, especially those involving activities that support the policies identified in The Third Industrial Master Plan 2006–2020. Activities such as research and development, product design, distribution and marketing, or which promote productivity-generated growth such as those involving usage of high technology (automation/robotisation), emphasising knowledge and capital-intensive manufacturing, applying new technology, innovation, best management practices and more efficient usage of resources.

The Ministry of International Trade and Industry (MITI) is usually the first ministry encountered or approached by foreign investors. MITI and its agencies regularly organise seminars, roadshows or exhibitions in foreign countries to update investors on the government's current policies, incentives, facilities and support services available, as well as to highlight business opportunities available in Malaysia. MITI and its agencies have offices in many foreign countries.

Malaysia, however, does not have a centralised department dealing with all matters relating to the regulation of foreign investors or foreign investments. Foreign investments are subject to the supervision or approval by the regulatory and approving bodies or authorities that oversee the relevant industries, just as for local investments.

MITI and its agencies focus more on manufacturing activities. One of its agencies, the Malaysian Industrial Development Authority, as part of its regular functions, has been assigned the task of evaluating applications for incentives provided under the Promotion of Investments Act 1986 and application of manufacturing licences under the Industrial Coordination Act 1975.

Franchising businesses, for example, are subject to the supervision of the Ministry of Entrepreneur

Development while shipping, transport and logistic businesses are subject to the Ministry of Transport. For a business that is not subject to the scrutiny of any specific authority, the Foreign Investment Committee (FIC) will be the regulatory body. The FIC has issued various guidelines and circulars throughout the years which cover two main areas: the acquisition of interests, mergers and takeovers by local and foreign interests; and the acquisition of properties by local and foreign interests.

Foreign investments are generally subject to a cap on foreign shareholdings. The cap varies according to industries but generally it was 30 per cent, with a minimum of 30 per cent shareholding by Bumiputera or indigenous people and the rest by Malaysians.

On 30 June 2009, the Prime Minister announced a comprehensive rationalisation of the investment guidelines administered by the FIC. To allow Malaysia to strengthen its business and regulatory environment to attract greater investment, the government has decided to substantially deregulate FIC investment guidelines.

Accordingly, the government has implemented, inter alia, the following changes to the FIC guidelines with immediate effect:

- The FIC guidelines on the acquisition of interests, mergers and takeovers by local and foreign interests are repealed. The FIC will, therefore, no longer process such share transactions, nor impose equity conditions on such transactions. However, the equity conditions imposed by the respective sector regulators will continue to apply. For strategic sectors (such as information and communication technologies, oil and gas, mining, manufacturing etc), sector regulators are best placed to oversee their respective sectors and to tailor equity conditions according to the requirements and strategic nature of each sector. There will no longer be any equity conditions imposed on sectors not deemed strategic.

- The conditions imposed on fund-raising exercises by listed companies has also been significantly eased in the context of raising Malaysia's attractiveness as a listing destination.

- Pursuant to the revised FIC guidelines on the acquisition of properties by local and foreign interests effective from 1 January 2010, FIC will only process transactions involving the following:

- Direct acquisition of property valued at RM20 million and above, resulting in the dilution in the ownership of property held by Bumiputera interest and/or government agency.
- Indirect acquisition of property by other than Bumiputera interest through acquisition of shares, resulting in a change of control of the company owned by Bumiputera interest and/or government agency, having property more than 50 per cent of its total assets, and the said property is valued more than RM20 million.

Government initiatives and incentives

Tax incentives, both direct and indirect, are provided for in the Promotion of Investments Act 1986, Income Tax Act 1967 (revised 1971), Customs Act 1967 (revised 1980), Sales Tax Act 1972, Excise Act 1976 and Free Zone Act 1990. These Acts cover investments in the manufacturing, agriculture, tourism (including hotel) and approved services sectors as well as research and development, training and environmental protection activities. The direct tax incentives grant partial or total relief from income tax payment for a specified period, while indirect tax incentives come in the form of exemptions from import duty, sales tax and excise duty. Some of the main incentives are summarised below.

Incentives for manufacturing companies

The major tax incentive for companies investing in the manufacturing sector is the pioneer status or investment tax allowance (ITA). Eligibility for pioneer status or ITA is based on certain priorities, including the level of value-added, technology used and industrial linkages. Eligible activities and products are termed “promoted activities” or “promoted products”. The package of incentives may vary according to the products manufactured.

Pioneer status

A company granted pioneer status enjoys a five-year partial exemption from the payment of income tax. It pays tax on 30 per cent of its statutory income. Companies located in the promoted areas, namely the states of Perlis, Sabah and Sarawak and the designated “Eastern Corridor” (covering the states of Kelantan, Terengganu and Pahang, and the district of Mersing in the State of Johor) of Peninsular Malaysia will enjoy 100 per cent tax exemption of their statutory income during the five-year exemption period. All project applications received by 31 December 2010 are eligible for this incentive.

Investment tax allowance

As an alternative to pioneer status, a company may apply for an ITA. A company granted ITA gets an allowance of 60 per cent on its qualifying capital expenditure (such as factory, plant, machinery or other equipment used for the approved project) incurred within five years from the date on which the first qualifying capital expenditure is incurred. The company can offset this allowance against 70 per cent of its statutory income for each year of assessment. Any unutilised allowance can be carried forward to subsequent years until fully utilised. The remaining 30 per cent of its statutory income will be taxed at the prevailing company tax rate.

Companies located in the promoted areas, namely the states of Perlis, Sabah and Sarawak and the designated “Eastern Corridor” of Peninsular Malaysia enjoy an allowance of 100 per cent on the qualifying capital expenditure incurred within a period of five years. The allowance can be utilised to offset against 100 per cent of their statutory income for each year of assessment. All applications received by 31 December 2010 are eligible for this incentive.

Incentives for relocating manufacturing activities to promoted areas

Existing companies who relocate their manufacturing activities to the promoted areas are eligible for a second round of the following incentives:

- pioneer status with tax exemption of 100 per cent of statutory income for a period of five years. Accumulated losses and unabsorbed capital allowances incurred during the pioneer period can be carried forward and deducted against post-pioneer income of the company.
- ITA of 100 per cent on the qualifying capital expenditure incurred within a period of five years. The allowance can be utilised to offset against

100 per cent of the statutory income for each year of assessment. Any unutilised allowance can be carried forward to subsequent years until fully utilised.

Incentives for high technology companies

A high-technology company that fulfils certain criteria qualifies for pioneer status with a tax exemption of 100 per cent of its statutory income for a period of five years. Unabsorbed capital allowances as well as accumulated losses incurred during the pioneer period can be carried forward and deducted against post-pioneer income of the company. Additionally, a high-technology company qualifies for an ITA of 60 per cent (100 per cent for promoted areas) on the qualifying capital expenditure incurred within five years from the date the first qualifying capital expenditure is incurred. Any unutilised allowance can be carried forward to subsequent years until the whole amount has been fully utilised. The allowance can be utilised to offset against 100 per cent of its statutory income for each year of assessment.

Incentives for strategic projects

Strategic projects involve products or activities of national importance. They generally involve heavy capital investments with long gestation periods, have high levels of technology and are integrated, generate extensive linkages, and have significant impact on the economy. Such projects qualify for:

- pioneer status with income tax exemption of 100 per cent of statutory income for a period
- of ten years. Unabsorbed capital allowance as well as accumulated losses incurred during the pioneer period can be carried forward and deducted from the post-pioneer income of the company
- ITA of 100 per cent on qualifying capital expenditure incurred within five years from the date on which the first qualifying capital expenditure is incurred. This allowance can be offset against 100 per cent of statutory income for each year of assessment. Any unutilised allowance can be carried forward to subsequent years until fully utilised.

Incentives for small and medium-scale companies

Effective from the year of assessment 2009, for small and medium-sized companies with paid-up ordinary share capital not exceeding RM2.5 million to the extent of that portion of their chargeable income of up to RM500,000, the corporate tax rate is reduced to 20 per cent. The tax rate on the remaining chargeable income is maintained at 26 per cent. Small-scale manufacturing companies incorporated in Malaysia with shareholders' funds not exceeding RM500,000 and having at least 60 per cent Malaysian equity can obtain, under the Promotion of Investments Act 1986, pioneer status with an income tax exemption of 100 per cent of the statutory income for a period of five years. Unabsorbed capital allowance as well as accumulated losses incurred during the pioneer period can be carried forward and deducted from the post-pioneer income of the companies. Additionally, they are eligible for an ITA of 60 per cent (100 per cent for promoted areas) on the qualifying capital expenditure incurred within five years from the date the first qualifying capital expenditure is incurred. This allowance can be offset against 100 per cent of statutory income for each year of assessment. Any unutilised allowance can be carried forward to subsequent years until the whole amount has been fully utilised.

A sole proprietorship or partnership is eligible to apply for this incentive provided a new private limited/limited company is formed to take over existing production/activities. The applicant company must not be a subsidiary of another company with shareholders' funds of more than RM500,000. To qualify for the incentive, the small-scale company must have either achieved at least 15 per cent value-added, or the activities of the company contribute towards the socio-economic development of the rural population.

Incentives for the Multimedia Super Corridor

The Multimedia Super Corridor (MSC), a 15km x 50km zone extending south from Malaysia's capital city and business hub, Kuala Lumpur, is designed to be the environmment for companies wanting to create, distribute and employ multimedia products and services.

MSC status is the recognition granted by the Malaysian government through the Multimedia Development Corporation (MDeC) to companies that participate and undertake information and communication technology activities in the MSC. Companies with MSC status enjoy a set of incentives and benefits that is backed by the Malaysian government's Bill of Guarantees.

Generally, MSC status multimedia companies as well as multimedia faculties located in institutions of higher learning outside the cybercities are eligible for the following incentives/facilities:

- pioneer status with income tax exemption of 100 per cent of the statutory income for a period of ten years or ITA of 100 per cent on the qualifying capital expenditure incurred within a period of five years to be offset against 100 per cent of statutory income for each year of assessment

- eligibility for R&D grants (for majority Malaysian-owned MSC status companies).

In addition, there are other benefits such as duty-free import of multimedia equipment, and import duty, excise duty and sales tax exemption on machinery, equipment and materials.

Business incentive and support package developed by the Iskandar Regional Development Authority

The Iskandar Malaysia project is a development corridor in Johor, Malaysia. It aims to become Southern Peninsular Malaysia's most developed region where living, entertainment, environment and business seamlessly converge within a bustling and vibrant metropolis. The five economic/flagship zones in the Iskandar Malaysia Region, namely Johor Bahru City Centre, Nusajaya, Western Gate Development, Eastern Gate Development and Senai-Skudai, are proposed as key focal points for developments in Iskandar Malaysia.

The Iskandar Regional Development Authority (IRDA), a federal statutory body formed under the IRDA Act 2007, is the single authority entrusted with the responsibility of planning, promoting, processing, stimulating, facilitating and undertaking development in Iskandar Malaysia.

IRDA has developed a comprehensive business incentive and support package (ISP). The ISP, which was announced initially on 22 March 2007, is designed to encourage and kick-start early investment into Iskandar Malaysia. It focuses on the following six targeted services-based sectors at designated nodes:

- creative industries and related services
- educational services
- financial advisory and consulting services
- healthcare and related services
- logistics services
- tourism-related activities.

The ISP includes fiscal and non-fiscal incentives as follows:

- corporate tax exemption for ten years provided operations commence on or before 31 December 2015

- exemption from withholding tax provisions on payments for services and royalties to non-residents for a period of ten years from the date of commencement of operations

- exemption from the FIC's rulings

- permission to source capital globally

- permission to employ foreign knowledge workers without restriction.

The company must be an IRDA-status company to qualify for the above incentives. Essentially, an IRDA-status company must fulfil the following two general criteria:

- involving in one of the six targeted services-based sectors mentioned above

- be situated in the designated IRDA-approved zones.

The incentive package, which was announced by IRDA on 9 October 2007, complements the initial announcement. The ISP is not only intended for Iskandar Malaysia-status companies and foreign knowledge workers, but is now extended to include approved developers and approved development managers.

Taxation

Taxes
All income of companies and individuals accrued in, derived from or remitted to Malaysia are liable to tax. However, income derived from outside Malaysia and remitted to Malaysia by resident companies (except those involved in the banking, insurance, air and sea transportation business), non-resident companies and non-resident individuals is exempt from tax. Apart from income tax, there are other direct taxes such as stamp duty and real property gains tax, and indirect taxes such as sales tax, service tax, excise duty, import duty and export duty.

The following sources of income are liable to tax:

- gains and profits from a trade, profession and business
- gains or profits from an employment (salaries, remunerations, etc)
- dividends, interests or discounts
- rents, royalties or premiums
- pensions, annuities or other periodic payments
- other gains or profits of an income nature.

A company, whether resident or not, is assessed on income accrued in or derived from Malaysia. Income derived from sources outside Malaysia and remitted by a resident company is exempt from tax, except in the case of the banking and insurance business, and sea and air transport undertakings. A company is considered a resident of Malaysia if the control and management of its affairs are exercised in Malaysia.

To promote greater private sector investment and to enhance the nation's competitiveness, the corporate tax rate from the year of assessment 2009 onwards was reduced to 25 per cent for companies (including small and medium-scale companies) resident in Malaysia with paid-up ordinary share capital not exceeding RM2.5 million, to the extent of that portion of their chargeable income in excess of RM500,000.

Tax on individuals
All individuals are liable to tax on income accrued in, derived from or remitted to Malaysia. However, a non-resident individual will only be taxed on income earned in Malaysia. Generally, an individual residing in Malaysia for more than 182 days in a year has resident status. Effective from the year of assessment 2004, income remitted to Malaysia by a resident individual is exempt from tax. Resident individuals are taxed on their chargeable income at a graduated rate from 0 per cent to 26 per cent after deducting personal tax relief effective from the year of assessment 2010. Non-resident individuals are liable to tax at the rate of 26 per cent without any personal relief. However, the non-resident can claim rebates in respect of levies paid to the government for the issuance of an employment work permit. Non-residents are also subject to withholding tax between three per cent and 15 per cent depending on the nature of the income.

Workplace relations

Employment conditions
The terms of an individual's employment are governed by their employment contract (which may include terms implied through dealings between the employer and the employee, terms incorporated from other documents such as employee manuals and collected agreements), statutes and statutory instruments.

For an employee whose monthly salary does not exceed RM1,500 or an employee engaging in work such as manual labour or domestic servant irrespective of his wage, the minimum protection given by the Employment Act 1955 (revised 1981) will apply to the employment contract.

Under the Employment Act:

- The contract of employment must be in writing and state the notice period required to terminate it.
- Wages must be paid by the seventh day after the last day of any wage period. A pay slip must be given to the employee, detailing the wages and deductions made.

- Normal hours of work must not exceed eight hours per day, 48 hours per week, more than five consecutive hours a period of leisure of not less than 30 minutes' duration and in excess of a spread over period of ten hours in one day.
- Employees are entitled to paid holidays on at least ten gazetted public holidays in any one calendar year and on any day declared as a public holiday under section 8 of the Holiday Act 1951 (revised 1989).
- Employees must be given eight days' paid annual leave if having less than two years of service, 12 days' paid annual leave if having two years but less than five years of service, and 16 days' paid annual leave if having five or more years of service.
- Employees are entitled to 14 days' paid sick leave if having less than two years of service, 18 days' paid sick leave if having two but less than five years of service and 22 days' paid sick leave if having over five years of service per calendar year, and where hospitalisation is necessary, up to a maximum of 60 days' paid sick leave per calendar year.
- Female employees are entitled to not less than 60 days' consecutive paid maternity leave for up to five surviving children.
- Overtime work must be paid at a minimum of one and a half times the hourly rate of pay on normal working days, twice the hourly rate on rest days and triple the hourly rate on public holidays.
- An employer may not terminate the services of a local employee in favour of a foreign employee and, if retrenchment is necessary, to first terminate the services of all foreign employees before the locals.

Employees' Provident Fund

The Employees' Provident Fund Act 1991 requires all employers and employees to pay monthly contributions to the Employees' Provident Fund at minimum rates of 13 per cent and 11 per cent of an employee's monthly wages respectively. Both employers and employees are encouraged to contribute at a rate higher than this mandatory contribution.

Effective from 1 February 2008, employers are required to continue contributing to the Employees' Provident Fund for employees who continue working past age 55 years until they have attained the age of 75 years.

The rate of contribution by the employees (Malaysian citizens, permanent residents or non- Malaysian citizens who have elected to contribute before 1 August 1998) who have attained the age of fifty-five years, is 5.5 per cent of the employees monthly wage, and the rate of contribution by the employer is six per cent of the employees monthly wage.

All foreign workers and expatriates and their employers are exempted from compulsory contributions. They can, however, choose to contribute at the rate of RM5 per employee per month by the employer and 11 per cent of the monthly wages by the employee.

The rate of contribution by foreign workers and expatriates (non-Malaysian citizens who elect to contribute on or after 1 August 1998) who have attained the age of fifty-five years is 5.5 per cent and the rate of contribution by the employer is RM5.00.

Employment injury insurance scheme and invalidity pension scheme

These schemes are administered by the Social Security Organisation under the Employees' Social Security Act 1969. The schemes cover only Malaysian workers and permanent residents. All employers of workers earning wages not exceeding RM3,000 per month must insure their workers under the schemes.

The Employment Injury Insurance Scheme provides employees with coverage of cash benefits and medical care for any disablement or death due to employment injury.

The Invalidity Pension Scheme provides 24-hour coverage to employees against invalidity and death due to any cause not connected with their employment before the age of 55. The principal

employer must make a monthly contribution for each eligible employee according to the rates specified under the Act. The employee's share of 0.5 per cent of wages should be paid for coverage under the Invalidity Pension Scheme while the employer pays 1.75 per cent for the Employment Injury Insurance Scheme and the Invalidity Pension Scheme. Contributions should be made from the first month the employee is employed.

Over the past decade, various public interest groups have lobbied to increase the normal retirement age to address the increased life expectancy in Malaysia. The introduction of the Pension (Amendment) Act 2008 has extended the compulsory age of retirement from 55 years to 58 years; and this is applicable to all government officers who are appointed on or after 1 July 2008. Government officers who were appointed prior to this date have a choice of opting to retire at 55 years or to work until they reach 58 years. The Pension (Amendment) Act 2008 is only applicable to those in the public sector. However, it is best for those in the private sector to conform with this Act, as it is used as a baseline generally.

Workmen's compensation

Under the Workmen's Compensation Act 1952 (revised 1982), an employer must pay compensation for expenses incurred in the treatment and rehabilitation of a workman for personal injuries caused by employment-related accidents.

Generally, a "workman" under the Workmen's Compensation Act refers to private sector employees who earn less than RM500 a month and all manual workers irrespective of their wages. The Act fixes the amounts of compensation under different circumstances to the workman or, if death resulted from the injury, to the dependants.

Malaysians and permanent residents who are covered by the schemes administered by the Social Security Organisation are not covered by the Workmen's Compensation Act. This Act applies to all foreign workers whether the compensation relates to employment or non-employment injury.

Employees' safety and health

The Factories and Machinery Act 1967 (revised 1974) requires occupiers of factories to provide certain minimum standards (for example, the factory buildings are structurally sound, proper storage of goods and dangerous substances, fire protection, cleanliness, ventilation) of safety and welfare for employees working within the factories. The occupiers must report in writing to the inspector appointed under the Act of any accidents involving death or serious injury or serious damage to properties.

The Occupational Safety and Health Act 1994 requires an employer to ensure the health and safety of its employees by properly maintaining safe plant and systems in areas of storage, transport, etc of substances, and by providing adequate training, supervision etc to employees. An employer must inform the nearest occupational safety and health office of any accident, dangerous occurrence, occupational poisoning or disease which has occurred or is likely to occur. The Act also requires an employer to ensure its employee's activities do not affect the health of non-employees.

Industrial relations

In Malaysia, employee and employer are free to establish a trade union as based on:

- 10(1) (c) Article Constitution Of Malaysia
- ILO No.98 Convention
- Trade Unions Act 1959 (revised 1982).

Trade unions are regulated by the Trade Unions Act and the Trade Unions Regulations 1959 (revised 1982), which require:

- Membership of a trade union be confined to employees within any particular establishment, trade, occupation or industry.
- Registration of all trade unions.
- A trade union to obtain prior consent by secret ballot of at least two-thirds of total members before organising a strike.
- All unions to be inspected regularly to ensure compliance with the laws.

Relations between employers and workmen and their trade unions, including the prevention and settlement of trade disputes, are regulated by the Industrial Relations Act 1967 (revised 1976), which covers:

- The protection of the legitimate rights of employers, workmen and their trade unions.
- The procedure for submission of claims for recognition and the scope of representation of trade unions and collective bargaining.
- Matters not allowed to be included in the proposals for collective bargaining, such as those relating to promotion, transfer, recruitment, retrenchment, dismissal, reinstatement, allocation of duties, and prohibition of strikes and lockouts over any of these issues.
- The prohibition of strikes and lockouts once a trade dispute has been referred to the Industrial Court and on any matter covered by a collective agreement or by an award of the Industrial Court.
- The protection of pioneer industries during the initial years of their establishment against any unreasonable demands from a trade union. Collective agreements cannot contain more favourable terms of employment than those stipulated under the Employment Act unless approved by the Minister of Human Resources.

The Industrial Relations Act emphasises direct negotiation between employers, workmen and their trade unions to settle any differences. Where this fails, the Act provides for speedy and just settlement of trade disputes by conciliation. The Minister of Human Resources may intervene and, at any time, refer a trade dispute to the Industrial Court for arbitration.

Employment of expatriates

Where there is a shortage of trained Malaysians, foreign companies are allowed to bring in expatriate personnel.

Expatriate personnel are foreigners who are qualified to fulfil the following positions:

Key posts
These are high level managerial posts in foreign-owned private companies and firms operating in Malaysia. Key posts are posts essential for companies to safeguard their interest and investments. The expatriates are responsible for determining the company's policies in achieving its goal and objectives.

Time posts

- Executive posts
  These are intermediate level of managerial and professional posts. The post requires professional qualifications, practical experience, skills and expertise related to the respective jobs. The expatriates are responsible for implementing the company's policies and supervision of staff.
- Non-executive posts
  These are posts for the performance of technical jobs that require specific technical or practical skills and experience.

Before an expatriate applies for the employment pass at the Immigration Department, the company must first apply for and obtain an approval for an expatriate post or position from the relevant agencies. There are six authorised bodies or agencies that can approve the expatriate application based on the core business of the company. These agencies are namely the Malaysian Industrial Development Authority (MIDA); Multimedia Development Corporation Expatriate Committee (EC); Public Service Department (PSD); Central Bank of Malaysia (BNM); Securities Commission (SC) and Expatriate Committee (EC). Upon approval of the expatriate posts by one of the authorised bodies, the foreign company must submit an application to the Immigration Department for endorsement of the employment pass.

Effective from 17 June 2003, the new guidelines on the employment of expatriates are as follows:

- For manufacturing companies with foreign paid-up capital of US$2 million and above, automatic approval is given for up to ten expatriate posts, including five key posts.

- Expatriates may be employed for up to a maximum of ten years for executive posts and five years for non-executive posts.
- For manufacturing companies with foreign paid-up capital of more than US$200,000 but less than US$2 million, automatic approval is given for up to five expatriate posts, including at least one key post. Expatriates may be employed for up to a maximum of ten years for executive posts and five years for non-executive posts.
- For manufacturing companies with foreign paid-up capital of less than US$200,000, applications may be considered on a case-by-case basis for both key posts and time posts. Applications for key posts may be considered where the foreign paid-up capital is at least RM500,000. Time posts can be considered for up to ten years for executive posts that require professional qualifications and practical experience and five years for non-executive posts that require technical skills and experience. Malaysians must be trained to eventually take over these time posts.

Employment passes for key post holders are generally issued on a five-year renewable basis. All employment passes for non-key post holders are valid for the period approved for the post. Employment pass holders will be issued with multiple entry visas valid for the duration of the relevant employment passes.

Dispute resolution

Courts

The court system comprises Magistrates Courts, Sessions Courts, the High Court, the Court of Appeal and the Federal Court. The judiciary operates on the same principle fundamental to the common law system, namely the principle of the independence of the judiciary from the executive and legislative branches of the government.

Magistrates Courts have jurisdiction to determine cases where the amount of the claim does not exceed RM25,000, while the limit of the Sessions Court is RM250,000.

There is no monetary limit in terms of the amount of a claim before a High Court and the High Court has original, revisionary and appellate jurisdiction. No appeal from a decision of a High Court can be brought to the Court of Appeal where the amount of the claim is less than RM250,000, except with leave of the Court of Appeal.

The Court of Appeal is the final appellate court on matters decided by the High Court in its appellate or revisionary jurisdiction, except in rare cases where special leave may be obtained for a further appeal to the Federal Court.

The supreme court in Malaysia, with advisory and appellate jurisdiction, is the Federal Court. All appeals to the Federal Court are subject to leave being obtained.

A judgment obtained within Malaysian jurisdiction by a foreign company is enforceable as if the judgment had been obtained by a local company or citizen. The enforcement modes available for enforcement of money judgments or orders are, amongst others, a writ of seizure and sale, garnishee proceedings, charging orders, the appointment of a receiver by equitable execution, an order of committal or winding-up and bankruptcy proceedings.

The enforcement of foreign judgements in Malaysia is governed by the Reciprocal Enforcement of Judgments Act 1958 (revised 1972), which is modelled on the UK Foreign Judgments (Reciprocal Enforcement) Act 1933.

Arbitration

The principal law-governing arbitration in Malaysia is the Arbitration Act 2005. Established in 1978, the Regional Centre for Arbitration at Kuala Lumpur (KLRCA) adopts the guidelines of the United Nations Commission on International Trade Law Arbitration Rules and the UNCITRAL Model Law on International Commercial Arbitration.

In relation to enforcement, the Arbitration Act has also sought to streamline the process and various legislations that previously applied. Section 38 of the Arbitration Act sets out the formal requirements that a party needs to comply with when seeking an

arbitration award to be recognised as binding and enforceable by entry as a judgment in terms of the award. Further to this, Section 39 of the Arbitration Act sets forth the grounds for refusing recognition or enforcement, which are similar to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Given that the Arbitration Act now contains the relevant provision for the enforcement of awards from Convention states, this has resulted in the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Act 1985 (revised 1972) being repealed.

Singapore

Contributed by Norton Rose

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Business entities
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Singapore markets itself as a "dynamic, global city" and is consistently ranked as one of the world's easiest places to do business (Doing Business 2012 Report) with its global connectivity, multicultural and cosmopolitan environment. Like other countries in the region, the economy of Singapore has not been spared the effect of the Eurozone debt crisis, the slow recovery of the US economy and the natural disasters in Japan and Thailand. Nonetheless, in Q3 of 2011 the Singapore economy expanded by 6.1 per cent on a year-on-year basis. GDP in 2012 is expected to be between one per cent to three per cent.[1]

Despite the negative global outlook, Singapore's economy is well placed to weather the current uncertainty. Singapore has built on its advantageous geographical location to transform itself into one of the world's top transportation centres for air and sea cargo, Changi International Airport offering links to 182 cities in 57 countries and Singapore's ports offering 200 shipping lines with links to more than 600 ports in 123 countries.

In the World Economic Forum's latest Global Competitiveness Report 2011-2012, Singapore climbed one position to second place overall, behind only Switzerland in top spot, and ranked first for lack of corruption, government efficiency, goods market efficiency and financial market development and second for labour market efficiency[2]. Singapore has a per capita GDP of approximately US$41,109, comparable to the UK, France, Germany and Italy and enjoys a relatively low unemployment rate of approximately two per cent (as at December 2011)[3].

A leading provider of international banking, trade finance, maritime finance, insurance, treasury operations and asset and wealth management within Asia, Singapore is the fourth-largest foreign exchange trading centre in the world and the second largest over-the-counter derivatives trading centre in Asia[4]. Foreign investors in Singapore can tap into the country's network of over 50 comprehensive double taxation agreements, free trade agreements (including with major economies such as the United States, Japan, Australia, members of the European Free Trade Association, China and India) and investment guarantee agreements as well as benefiting from Singapore's excellent business infrastructure, rule of law and protection of free trade policies and intellectual property. The Political and Economic Risk Consultancy consistently ranks Singapore as one of the least corrupt countries in the world to do business.

Tax rates are highly competitive and the Singapore government has developed numerous pro-investment initiatives aimed at promoting Singapore as a regional and global hub for both inbound and outbound investment activities. An open immigration policy, assisted by an efficient immigration pass system, allows companies based in Singapore to attract talent from anywhere in the world. Of the estimated five million residents in Singapore, approximately 27 per cent are foreign nationals[5].

With its British colonial roots, Singapore is a republic with a parliamentary system of government based on the Westminster model comprising the executive, the cabinet and the judiciary. Members of Parliament are elected by general election every five years. At the last election in 2011, the People's Action Party (which has governed Singapore since its independence in 1965) secured 81 seats, with the Worker's Party winning six seats and the remaining opposition parties failing to win any[6].

1 http://www.mas.gov.sg/resource/eco_research/eco_dev_ana/Recent_Economic_Developments.pdf.
2 http://www3.weforum.org/docs/WEF_GCR_Report_2011-12.pdf.
3 http://www.mas.gov.sg/resource/eco_research/eco_dev_ana/Recent_Economic_Developments.pdf.
4 http://www.mas.gov.sg/fin_development/Singapore_International_Financial_Centre.html.
5 http://www.singstat.gov.sg/stats/themes/people/popinbrief2011.pdf.
6 http://online.wsj.com/article/SB10001424052748703859304576309273466042038.html.

Visas and work permits

Visas

The Singapore government controls all immigration matters through the Immigration and Checkpoints Authority (ICA). The ICA monitors and controls the passing of people and goods over Singapore's borders and is responsible for various immigration and registration functions including the issue of immigration passes and permits to foreign nationals as well as the issue of travel documents and identity cards to Singapore citizens.

Under Singapore's immigration policy, a visa is required by foreign nationals from countries such as the Commonwealth of Independent States, the Middle East states, China and some north African countries. Apart from India and Bangladesh, residents of the Commonwealth, Europe, the United States, Canada and South America generally do not require visas to enter Singapore.

Visitors are generally granted either a 14-day or 30-day social visit pass on arrival, provided they hold passports with a validity of at least six months, sufficient funds to cover their stay in Singapore, confirmed onward/return tickets and entry documentation for any onward destination. A social visit pass permits short stays, enabling attendance at job interviews, short business negotiations, discussions or meetings. For longer stays, see below.

Any person wishing to be employed or to work under a contract of service or employment (or any similar agreement) for a prolonged period in Singapore must obtain an employment pass.

Business visitor

A person visiting Singapore for business negotiations or discussions and who needs to stay longer than the 14 or 30 days permitted under a social visit pass may apply for an extension of their pass. The company with whom the business visitor is dealing is required to sponsor the application for the extension, provide details of the applicant's business visit and guarantee the business visitor's maintenance and repatriation. If an application is successful, the social visit pass may be extended for up to a further 30 days. All applications are processed by the Visitors' Services Centre at the ICA, usually within two days.

The Singapore government strongly supports new investors/entrepreneurs in establishing business activities in the country. Through the Singapore Economic Development Board (EDB), foreigners are allowed to enter and stay in Singapore through the following means:

- Global Investor Programme (GIP)[7]
- multiple journey visa (MJV)
- EntrePass.

The GIP makes it easier to establish and run a business in Singapore by enabling investors to apply for Permanent Residence status. In order to be eligible, an investor must have a substantial business track record, an entrepreneurial background and, in some cases, a business proposal or investment plan. Under the programme, the applicant is required to invest at least S$2.5 million in a new or existing business or in a GIP-approved fund.

An MJV (which is issued for periods of one, two or five years) is normally granted to a foreign individual who frequently travels into Singapore for the purpose of exploring business opportunities or to attend to business and investment matters. An MJV allows the foreign individual to stay in Singapore for up to 30 days per visit and can be renewed. A letter of introduction is required from a Singapore-registered company in support of a MJV application.

An EntrePass, with an initial validity period of up to two years, is targeted at foreign entrepreneurs who:

- are ready to start a new business/company in Singapore and who will be actively involved in the operation of the business/company

- own a business which must have been registered with the Accounting and Corporate Regulatory Authority (ACRA) for a maximum of six months at the time of submission of the EntrePass application.

7 http://www.edb.gov.sg/edb/sg/en_uk/index/why_singapore/Guide_to_Investing_in_Singapore/entering_singapore.html; http://www.ica.gov.sg/services_centre_overview.aspx?pageid=376&secid=171

All new EntrePass applicants must register their companies as private limited companies with at least S$50,000 paid-up share capital and hold at least a 30 per cent shareholding in the company. The Ministry of Manpower (MOM) and the Standards, Productivity and Innovation Board are responsible for processing applications for EntrePasses.

Employment pass

Employment pass holders are allowed to live and work in Singapore for periods of up to three years at a time. The employer is required to sponsor the application for the pass made by the applicant and applications are usually processed within two weeks by the MOM. The following types of employment passes are available to foreigners seeking professional, managerial or executive and specialist jobs:

- P1 pass: for foreigners earning a fixed monthly salary of more than S$8,000[8]
- P2 pass: for foreigners earning a fixed monthly salary of more than S$4,500 and up to S$8,000 and who possess recognised qualifications[9]
- Q1 pass: foreigners who are young graduates from good institutions earning a fixed monthly salary of more than S$3,000 and who possess recognised qualifications. Older applicants have to command a higher salary commensurate with their work experience and quality[10].

The S pass is available for mid-level skilled foreigners earning a minimum fixed monthly salary of S$2,000[11] who possess recognised qualifications.

Apart from obtaining an employment pass, foreigners can also apply for dependant's passes and/or LTVPs for their immediate family members.

8 http://www.mom.gov.sg/newsroom/Pages/PressReleasesDetail.aspx?listid=377.
9 http://www.mom.gov.sg/newsroom/Pages/PressReleasesDetail.aspx?listid=377.
10 http://www.mom.gov.sg/newsroom/Pages/PressReleasesDetail.aspx?listid=377.
11 http://www.mom.gov.sg/foreign-manpower/passes-visas/s-pass/before-you-apply/Pages/default.aspx.

The personalised employment pass (PEP) is available for employment pass holders who have worked in Singapore for some time or overseas foreign professionals whose last drawn fixed monthly salary overseas was at least S$8,000[12]. The PEP allows the holder to remain in Singapore for up to six months between jobs to evaluate new employment opportunities and its validity is not conditional upon the PEP holder keeping his job with the same employer, unlike an employment pass.

Permanent residence

There are a number of schemes under which permanent residency can be granted, depending on an applicant's skills and qualifications. These include the Professional, Technical Personnel and Skilled Workers Scheme,[13] Approval-in-Principle for Permanent Residence Scheme (for Hong Kong applicants), the Foreign Artistic Talent Scheme, the Financial Investor Scheme[14] and the Global Investor Programme.

Permanent residence applications can be lodged either in Singapore with the ICA or, if the applicant is currently residing overseas, an application can be submitted to the Singapore mission in the resident country. Processing usually takes three months.

Business entities

General

Foreign investors have a wide range of business structures to choose from when doing business in Singapore.

The most common business entities used by non-residents in Singapore are:

- representative offices
- branches of parent companies
- Singapore subsidiaries
- partnerships
- joint ventures
- trusts.

12 http://www.mom.gov.sg/foreign-manpower/passes-visas/personalised-employment/before-you-apply/Pages/default.aspx.
13 http://www.workpermit.com/singapore/immigration-to-singapore.htm.
14 http://www.rikvin.com/immigration-work-visas/singapore-permanent-residence-singapore-business-guide/overview-singapore-permanent-residence-schemes/; http://www.financialinvestorscheme.com/.

The regulatory framework for foreign entities is under review by the Ministry of Finance. One of the proposed changes involves the introduction of standalone legislation that will deal with the registration and regulation of foreign entities (leaving the Companies Act to regulate companies incorporated in Singapore).

Representative office

When a foreign corporation wishes to explore the Singaporean market to analyse the suitability of the market for its goods and/or services, it may elect to open a representative office.

A representative office is permitted and licensed to carry out limited activities including market research, auxiliary or support services (such as the dissemination of market information) and promotional and liaison work for the foreign corporation it represents. It can also engage in customer service to the extent of answering queries on behalf of the foreign corporation.

A representative office cannot conduct any business activities of a profit-yielding nature, carry out any trading activities or enter into any contracts in Singapore (other than for the purpose of carrying out any permitted activities), nor is it allowed to open any letters of credit directly or indirectly on behalf of its head office. As a representative office is not revenue producing, it is a cost centre to the foreign corporation.

The government authority responsible for registering representative offices for most industries (including manufacturing, business services and commerce) is International Enterprise Singapore (the IES). Representative offices of banking, finance and insurance businesses have to be registered with the Monetary Authority of Singapore (MAS).

A representative office must be staffed by a representative from the foreign corporation's head office and it can engage Singaporean support staff. Liabilities of a representative office are borne by the foreign corporation.

A representative office would not normally be regarded as a taxable entity in Singapore as it does not generate income. However, unless protected under a tax treaty, in some circumstances, the Inland Revenue Authority of Singapore (IRAS) may take the view that there is some profit element which should be subject to tax (for example, where the representative office regularly secures orders for acceptance by the overseas head office of the foreign corporation). In such circumstances, the IRAS may impose taxes based on a notional profit of five per cent of the operating overheads and expenses incurred by the representative office in Singapore. In this case, tax would be levied at the normal corporate rate on the notional profit amount. This is because the IRAS may regard the activities rendered by the representative office to the head office of the foreign corporation as sufficient to amount to a taxable presence in Singapore.

Branch office

If a foreign company wishes to conduct business in Singapore but does not wish to establish a separate legal entity, it may register a branch. A branch is a registered legal entity although unlike a subsidiary, a branch is treated as an extension of the foreign company. The name of the foreign company's Singapore branch must be the same as that of the head office.

A branch must have a registered office address in Singapore and two local agents for acceptance of service of process and notices. Note that the liabilities of the branch are the liabilities of the foreign company which established it.

A branch will not be subject to limitations on the scope of its activities. However, just as with any other business or company operating in Singapore, certain types of business activities will require governmental approvals and licences. The registered foreign company will then be able to carry on business in Singapore through its branch.

From a taxation point of view, a branch is considered a non-resident entity (because control and management are exercised outside Singapore) and, therefore, is not eligible for tax exemptions and incentives available to local companies in Singapore. The IRAS will impose income tax on the income of the branch accrued in or derived from Singapore. The current applicable corporate tax rate (for the 2012 year of assessment onwards) is 17 per

cent on all chargeable income accrued in or derived from Singapore.

Singapore subsidiary

Singapore allows 100 per cent foreign ownership in companies. Therefore, a foreign company may incorporate a limited liability company in Singapore and own 100 per cent of its shareholding. One advantage of a subsidiary arrangement is that it "ring fences" the liability of the parent company from operations carried on by the Singapore subsidiary.

A company must be incorporated with a minimum of one member and have at least one director who is ordinarily resident in Singapore. A Singapore citizen, permanent resident or an employment pass holder will typically satisfy this requirement. Subject to compliance with these residency requirements, the sole shareholder and director can be the same person. Every Singapore-incorporated company must maintain a registered office in Singapore and have at least one company secretary who is ordinarily resident in Singapore.

A subsidiary may be either a private or a public company. Professional assistance should be sought to ensure that the most suitable corporate structure is chosen. The majority of companies in Singapore are private companies. Private companies are limited to a maximum of 50 non-employee shareholders. Although it is possible to incorporate a company with unlimited liability, there may be few commercial or other benefits in doing so. In a limited liability company, the liability of the members to contribute to the debts of the company is limited to the amount they each agreed to contribute as capital. Private companies are also subject to fund-raising restrictions and must not offer their shares to the public or engage in any activity that would require the lodgement of a disclosure document (for example, a prospectus). A private limited company's name in Singapore normally ends with "Private Limited" or "Pte Ltd".

Public companies are usually listed on a stock exchange and have well-established medium-to-large businesses with a large number of shareholders. Public companies are subject to more stringent rules and regulations as they have the ability to raise funds from the public. A public company's name in Singapore ends with "Limited" or "Ltd".

A corporate tax rate of 17 per cent for the 2012 year of assessment applies to Singapore incorporated and registered companies.

Partnership

General partnerships are comparatively inexpensive to establish and can be formed quickly. The agreement creating the partnership does not need to be registered. However, if the partnership trades under a business name, that name must be registered.

Each partner is personally liable (on a joint and several basis) with the other partners for the debts and obligations of the partnership incurred while the relevant person is a partner. Each partner can be held responsible for the actions of another partner. Subject to an exception for certain types of professional partnerships, partnerships may not generally have more than 20 members.

A partnership must lodge an income tax return (Form P) as if it were an ordinary taxpayer but is not itself assessed for income tax on its taxable income. Instead, the individual partners are assessed on their share of the taxable income of the partnership together with any other personal income they may have. The partners may claim a deduction for any losses that the partnership incurs.

Limited liability partnerships

A limited liability partnership (LLP) is a hybrid between a company and a general partnership and was introduced in 2005 through the enactment of the Limited Liability Partnership Act (Cap 163A).

An LLP partner can be an individual or a business entity and retains the desired flexibility of a partnership to the extent that it has less onerous reporting requirements than companies. Further, an LLP partner's liability is limited (that is, a partner is not liable for liabilities of the other partner(s)).

An LLP must have at least two partners at all times and one manager who is ordinarily resident in Singapore. The manager may be held personally

liable for the failure of the LLP to submit an annual declaration of solvency statement.

For income tax purposes, an LLP is tax-transparent (that is, each LLP partner will bear the liability of paying taxes according to its own tax circumstances, which would include its share of profits from the LLP). For treaty purposes, the Singapore tax authorities may not issue a tax residency certificate for the LLP as it is a tax-transparent entity, but may consider issuing the certificate to the LLP's partners who are individuals or companies resident in Singapore for tax purposes.

Limited partnerships

Limited partnerships were introduced in 2009 through the enactment of the Limited Partnership Act (Cap 163B) (LP Act) and have become a popular vehicle for private equity and investment funds in Singapore. A limited partnership must consist of one or more general partners and one or more limited partners. There is no prescribed upper limit on the total number of partners. A limited partnership is essentially a general partnership with passive investors participating as limited partners.

A limited partner's liability is capped at his agreed investment in the limited partnership provided that the limited partner does not participate in management of the limited partnership. If the limited partner does participate in management of the limited partnership, he risks losing his limited liability status for the period of such participation in management. The LP Act helpfully sets out a non-exhaustive list of "safe harbour" activities which do not constitute participating in management of a limited partnership.

General partners typically manage the limited partnership and have unlimited personal liability for all debts and obligations of the limited partnership incurred while they are general partners. In consequence, it is common for the general partner to be set up as a special purpose limited liability company.

Like a general partnership, a limited partnership has no separate legal personality and, therefore, cannot own assets in its own name.

A limited partnership is tax-transparent; all partners are taxed on their share of the limited partnership's income and gains according to their personal income tax rates.

Unincorporated joint ventures and co-ventures

This type of business arrangement should be distinguished from a partnership. A joint venture is an association of persons created when two or more parties agree to work towards a common goal. This arrangement is often structured so that it is not a partnership, as the parties to the joint venture do not share the profit of the venture and do not wish to be legally liable for each other's acts and liabilities. However, notwithstanding the intentions of the parties, Singapore law may, under certain circumstances, regard that business arrangement as a partnership, and legal advice should be sought if the arrangement is not intended to be regarded as such.

Careful legal planning is required to achieve the most favourable tax treatment and to avoid any undesired classification as a partnership.

Joint venture company

This takes the form of a company incorporated to carry on the joint venture on behalf of its shareholders. The company is a separate legal entity distinct from its shareholders and is used where a number of parties wish to carry on business together. The component parties' liability is limited to their share of capital investment in the joint venture company.

Trusts

While not commonly used in Singapore, a trust can be utilised as a business vehicle or as an investment vehicle whereby a trustee conducts the trust's business on behalf of its "members" (legally known as "beneficiaries" of the trust). The trustee may be a company (usually proprietary) created for this purpose. The income generated will belong to the beneficiaries of the trust and the rights and duties of the trustees are set out in the trust deed.

A trust is not an independent legal entity. The trustee can assume obligations on behalf of the trust and is allowed to use trust assets to satisfy trust debts as provided for in the trust deed.

Business trusts

For trusts which are registered under the Business Trusts Act (Cap 21A), the tax treatment applicable to normal trusts does not apply. A registered business trust will instead be subject to tax like a company under the one-tier system and income will continue to be taxable at the trustee level. The unit holders will, however, not be taxed on their share of the statutory income of the trust to which they are entitled and no credit will be allowed to the unit holders for the tax paid by the trustee.

Shelf companies

Shelf companies are "ready-made" companies available for immediate use. Shelf companies, therefore, offer a solution to an urgent requirement for a company as it usually takes an average of a week to incorporate a company in Singapore. Shelf companies have all the powers of a company under the Companies Act (Cap 50) to carry out any nature of business.

Singapore Exchange

Investors may wish to consider raising local equity by listing on the Singapore Exchange (SGX). This avenue is also available to companies incorporated outside Singapore. The SGX serves a wide array of international and domestic investors and end users, including many of the world's largest financial institutions. Potential investors should ask their legal advisers for a thorough outline of the current listing rules.

Business environment

General

Over the last four decades, Singapore has achieved enviable economic progress. Today, the city-state is a reputable financial centre, a key regional trading centre, one of the world's busiest ports and a top location for investment.

Singapore offers a pro-business environment, advanced infrastructure, world-class connectivity, highly trained people and a young working and consumer population.

Leading surveys have consistently ranked Singapore as one of the most competitive nations and best places for business in the world. In the World Bank-IFC Doing Business 2012 Report, Singapore was ranked as the world's easiest place to do business and is the second most open economy in the world (according to the 2012 Index of Economic Freedom). Singapore has also consistently been ranked as one of the five least corrupt countries in the world and the least corrupt nation in Asia by Transparency International.

Singapore has entered into landmark free trade agreements (FTAs) with ASEAN, the United States, Australia, the European Free Trade Association (Switzerland, Liechtenstein, Norway and Iceland), New Zealand, India, China, South Korea, Japan, Peru, Costa Rica, the Trans-Pacific SEP (Brunei, New Zealand and Chile), the Hashemite Kingdom of Jordan, Panama and the Cooperation Council for the Arab States of the Gulf (Kuwait, Oman, Qatar, Saudi Arabia, Bahrain and the United Arab Emirates). It is currently negotiating FTAs with Canada, Mexico, Pakistan and Ukraine.

Startups

Venture capital industry

A significant amount of venture capital funding has been attracted into Singapore and is managed by a host of fund management companies and firms.

Government-linked schemes and incentives

To further foster entrepreneurship and innovation in Singapore, the EDB has a range of schemes and incentives designed to help new ventures over initial funding hurdles, obtain government co-funding, enjoy tax breaks for investors and support for entrepreneurs seeking investors. These include:

- the Business Angel Fund
- the i.MATCH Programme
- the SPRING Startup Enterprise Development Scheme
- Early-Stage Venture Funding Scheme[15].

15 http://www.enterpriseone.gov.sg/Government%20Assistance/Equity%20Financing/Startups.aspx; http://www.enterpriseone.gov.sg/Resources/Links/Venture%20Capitalists%20and%20Investors/Setting%20Up%20Venture%20Capital%20Firms/rl_vc_VCFirms_pgm.aspx.

Research and development

The Singapore government committed S$13.55 billion (approximately US$10 billion) on R&D activities in the period 2006–10 (a more than 200 per cent increase from the previous five-year period). In the 2011 Budget the government re-affirmed its commitment to investments in R&D[16]. The government has also established several research institutions, with competence in areas such as biotechnology, microelectronics, manufacturing technologies, materials and chemical sciences.

Intellectual property rights

The Singapore government attaches great importance to the protection of intellectual property rights (IPR), a high standard of IPR protection being necessary to protect and encourage the growth of high-value-added, high content industries. To protect these vital industries, the government has put in place a comprehensive regime as listed below for IPR protection.

Legal and policy – compliance with the TRIPS Agreement

Singapore has achieved full compliance with the World Trade Organization's (WTO) Agreement on Trade Related Aspects of International Property Rights (TRIPS). TRIPS is, to date, the most comprehensive multilateral agreement on trade and intellectual property. It sets out a high standard of compliance for the protection, enforcement and dispute settlement of trade-related IPR matters for WTO members to adhere to.

In implementing the legal initiatives necessary to be TRIPS-compliant, Singapore has strengthened its IP legal framework and made it more attractive for foreign investors to invest in Singapore's developing knowledge-based economy.

Singapore's membership of IPR Conventions

Singapore has been a member of the World Intellectual Property Organisation since December 1990. Singapore has also acceded to several international IP treaties including the Berne Convention, the Budapest Treaty on the International Recognition of the Deposit of Micro-organisms for the Purpose of Patent Procedure, the Nice Agreement for the International Classification of Goods and Services to which Trade Marks Apply and Revisions (Nice Agreement)[17] and the Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks (Madrid Protocol). In addition, Singapore is a party to the Paris Convention for the Protection of Industrial Property, WIPO Copyright Treaty, WIPO Performances and Phonograms Treaty, International Convention for the Protection of New Varieties of Plants (UPOV Convention), the Geneva Act (1999) of the Hague Agreement for the International Registration of Industrial Design, Singapore Treaty on the Law of Trademarks[18] and the Patent Cooperation Treaty (PCT).

Enforcement

Sustained enforcement actions are constantly undertaken by various authorities, including the Singapore Police Force, Films and Publications Department and Customs and Excise Department (now the ICA). Backing the enforcement actions is the continued imposition of stiff penalties for copyright and trade mark offences by the Singapore courts. Persons guilty of trade mark and copyright offences may be given jail terms of up to five years and/or fines of up to S$100,000.

Substantial statutory damages may be awarded by courts for trademark and copyright infringements in civil actions. Under the Trade Marks Act (Cap 332), for example, infringements involving counterfeit trade marks may attract statutory damages in excess of S$1 million.

International recognition

The Political & Economic Risk Consultancy, the International Institute for Management Development and the World Economic Forum (WEF) have consistently ranked Singapore top in Asia for IP protection.

16 http://www.mof.gov.sg/budget_2011/speech_toc/download/FY2011_Budget_Statement.pdf.

17 http://www.ipos.gov.sg/topNav/abo.

18 http://www.ipos.gov.sg/topNav/abo.

Cooperative approach with industry
While Singapore's efforts to protect IPR have been successful, the government is constantly reviewing its protection programmes to ensure that not only are existing measures relevant, effective and adequate but that they also adapt to technological advances or changing circumstances through consultations with industry.

IPR-related legislation
Singapore has completed its review and amendment to its IPR-related legislation to comply with the obligations under the TRIPS Agreement.

Copyright
The Copyright Act (Cap 63) governs copyright and related rights in Singapore. The duration of copyright protection varies according to the type of work concerned:

Literary, dramatic, musical, artistic works

Literary, dramatic, musical and artistic works	70 years from the end of the year in which the author died. If the work is published after the death of the author, it lasts for 70 years, from the end of the year in which the work was first published.
Published editions of literary, dramatic, musical or artistic works (layout)	25 years from the end of the year in which the edition was first published.
Sound recordings and films	70 years from the end of the year in which the sound recording or film was first published.
Broadcasts and cable programmes	50 years from the end of the year of making the broadcast or cable programme.
Performances	70 years from the end of the year of the performance.

Source: http//:www.ipos.gov.sg

Copyright material sent over the internet or stored in webservers is treated in the same manner as copyright material in other media. The civil remedies for copyright infringement include injunctions, damages and account of profits. In addition, there is criminal liability attached to distribution of infringing materials, as well as wilful infringement of copyright.

Trade marks
The registration and protection of trade marks in Singapore is governed by the Trade Marks Act, which was revised in 2007. Singapore is a contracting country under the Madrid Protocol and may be designated as a target jurisdiction under an international trade mark application. The registration of a trade mark is for an indefinite period so long as the renewal fees are paid every tenth year. Singapore adopts the International Classification of Goods and Services under the Nice Agreement. Some of the salient features of the Trade Marks Act include:

- a more streamlined test of registrability which is that of capacity to distinguish
- simplifying and expediting the examination process
- the protection of "shape" and "colour" marks
- the protection of "well-known marks".

In general, protection of trade marks under the Trade Marks Act is conditional on the registration of the trade mark with the Intellectual Property Office of Singapore (IPOS). There is one exception – marks which qualify as "well-known marks" are protected under the Trade Marks Act despite not being registered in Singapore.

In 2009, the Singapore Court of Appeal, Singapore's highest court, released its first decision concerning "well-known marks" in the case of *Novelty Pte Ltd v Amanresorts Ltd & Anor* (Civil Appeal No. 56 of 2007/Z) [2009] SGCA 13. In this landmark case, the Singapore Court of Appeal discussed the definition of a "well-known mark" under Singapore's laws and the application of section 55 of the Trade Marks Act, which grants protection to "well-known marks" which have not been registered in Singapore. This

decision was subsequently affirmed by the Court of Appeal in *City Chain Stores (S) Pte Ltd v Louis Vuitton Malletier* [2010] 1 SLR 382; [2009] SGCA 53[19].

Patents

The law governing patent protection in Singapore is the Patents Act (Cap 221). Patent protection lasts 20 years from the date of filing the application. Singapore is a party to the PCT and may be designated as a country under an international patent application. Software and business methods patents are recognised in Singapore.

Plant varieties

Under the Plant Varieties Protection Act 2004 (Cap 232A), which conforms with the 1991 revision to the International Convention for the Protection of New Varieties of Plants, breeders may file for new plant variety protection. The term of protection is 25 years from the date of grant.

Designs

The Registered Designs Act (Cap 266) came into force on 13 November 2000. The Registered Designs Act repealed the United Kingdom Designs (Protection) Act (Cap 339), which previously conferred protection in Singapore on designs registered in the UK. The Registry of Designs was established with applications for registration of designs being lodged in Singapore instead of the UK.

Geographical indications

Singapore has the Geographical Indications Act (Cap 117B), to protect geographical indications. The Geographical Indications Act seeks to prevent the use of misleading geographical indications, the registration of misleading geographical indications as trade marks and the use of geographical indications that would constitute an act of unfair competition. Protection afforded to geographical indications is automatic. Where geographical indications qualify as a trade mark, certification mark or collective mark, it is also possible to register geographical indications under Singapore's trade mark legislation.

19 LawNet

Layout designs of integrated circuits

The original layout design of integrated circuits is protected under the Layout-Designs of Integrated Circuits Act (Cap 159A)[20]. Protection is automatic and the duration of protection is either ten years after the first commercial exploitation (if the exploitation takes place within five years after the year it is created) or 15 years after the year it is created.

Consumer Protection (Trade Descriptions and Safety Requirements) Act

The Consumer Protection (Trade Descriptions and Safety Requirements) Act (Cap 53) (CPTDSRA) was enacted to protect consumers against false trade descriptions such as deceptive statements concerning the composition or nature of goods. The CPTDSRA makes it an offence for any trader to apply a false trade description to any goods or to supply goods to which false trade descriptions are applied. Trade marks which contain or comprise false trade descriptions are also prohibited, unless they fall within the exemption criteria stipulated under the CPTDSRA. Offences under the CPTDSRA are punishable with a fine of up to S$10,000 and/or imprisonment of up to two years.

Consumer Protection (Fair Trading) Act

Singapore has enacted the Consumer Protection (Fair Trading) Act (Cap 52A) (CPFTA). The CPFTA came into force on 1 March 2004 (and was amended on 15 April 2009, with further proposed amendments currently under review[21]) and protects consumers against unfair practices by suppliers in Singapore in relation to consumer transactions. Unfair practices are defined in the CPFTA and include circumstances where suppliers make false claims or misleading or deceptive representations. Certain transactions are excluded from the CPFTA, such as employment contracts and the acquisition of an interest in real estate. The CPFTA prescribes civil remedies against businesses or traders who engage in unfair trade practices (as defined by the CPFTA). The CPFTA further prescribes a maximum amount that can be claimed by way of damages for its breach (S$30,000) as well as a limitation period within which all claims must be filed.

20 http://www.ipos.gov.sg/leftNav/Layout+Designs+of+Integrated+Circuits.htm.
21 http://app.mti.gov.sg/default.asp?id=84.

Franchising in Singapore

In 2011[22], there were over 500 franchising systems and 3,000 franchisees in Singapore. However, Singapore does not have a specific franchise law, regulation or code of practice. Distribution and franchise agreements are governed by general contract and common law principles applying to commercial contracts in Singapore. There is no requirement to register a franchise or distribution agreement, or any related disclosure document, in Singapore. The Franchising and Licensing Association of Singapore (FLA) was established to nurture and develop Singapore's franchising industry. Membership of the FLA is discretionary and all members must comply with the FLA's code of ethics.

Competition laws

According to the Global Competitiveness Report 2011–2012 by the WEF, Singapore is ranked the second most competitive economy in the world[23]. In 2004, Singapore enacted the Competition Act (Cap 50B). Modelled largely on the UK Competition Act 1998, Singapore's Competition Act is administered and enforced by the Competition Commission of Singapore and prohibits three main types of anti-competitive behaviour, namely:

- anti-competitive agreements, decisions and practices
- abuses of market power
- mergers and acquisitions that have the effect of substantially lessening competition. A voluntary merger notification system applies under the Competition Act.

Foreign investment policy

Foreign capital plays a key role in the development of Singapore's industries and resources. In the Global Enabling Trade Report 2010[24] by the WEF, Singapore was ranked the most open economy in the world of international trade and investment. With very few barriers to foreign investments and a large number of investment incentives available, foreign investors, both in partnership with local companies or on their own account, are strongly encouraged to pursue opportunities in Singapore.

Those foreign investment restrictions that do exist in Singapore are primarily in the broadcasting and domestic news media sectors, legal and other professional services, multi-level marketing, property ownership and retail banking industries.

Government initiatives and incentives

General

In order to promote economic and industrial development in Singapore, the government has introduced various tax concessions, incentives and development schemes. However, certain conditions may need to be satisfied for these incentives to be available.

Incentives

The available tax incentives are found mainly in the following legislation:

- Economic Expansion Incentives (Relief from Income Tax) Act (Cap 86)
- Income Tax Act (Cap 134).

Broadly speaking, there are two types of tax incentives – incentives to attract specific investments and incentives to promote overseas investment. Most of the tax incentives are administered by the EDB, the MAS or the IES.

These incentives extend to a wide range of business sectors. Some of the financial and tax incentives available are listed below. It is important to note that, this is not an exhaustive list and the incentives available may vary from time to time.

22 http://www.spring.gov.sg/NewsEvents/ITN/Pages/Ins-and-outs-of-franchising-20110823.aspx.
23 http://www3.weforum.org/docs/WEF_GCR_Report_2011-12.pdf.
24 http://www3.weforum.org/docs/WEF_GlobalEnablingTrade_Report_2010.pdf

Financial incentives

Scheme	Benefits	Suitable for
Research Incentive Scheme for Companies (RISC)	Co-funding to support the set-up of R&D centres and/or the development of in-house R&D capabilities in strategic areas of technology Supportable project costs include expenditure in the following: • Manpower • Equipment and Materials • Professional Services • Intellectual Property Rights	Singapore-registered business entities undertaking R&D activities
Initiatives in New Technology (INTECH)	Co-funding to support manpower development in the application of new technologies, industrial R&D and professional know-how	Singapore-registered business entities introducing or developing new capabilities

Tax incentives

Scheme	Benefits	Suitable for
Pioneer (Manufacturing)	Tax exemption on income from qualifying activities	Manufacturing
Pioneer (Services) (also available for IHQ Award)	Tax exemption on income from qualifying activities	Services GHQ
Development and Expansion Incentive (also available for IHQ Award)	Reduced tax 5% or 10% on incremental income from qualifying activities	Manufacturing Services RHQ/IHQ IP Hub
Investment Allowance	Allowance of 30% or 50% of approved fixed capital expenditure on top of normal 100% capital allowance	Manufacturing
Finance & Treasury Centre Tax Incentive	Reduced tax 5% or 10% on fees, interest, dividends and gains from qualifying services/activities WHT exemption on interest payments on loans from banks and network companies for FTC activities	FTC
Approved Royalties Incentive	Reduced WHT 0% or 5% on royalty payments to access advanced technology and know-how	Manufacturing
Approved Foreign Loan	Reduced WHT 0%, 5% or 10% on interest payments on loans taken to purchase productive equipment	Manufacturing
S19B writing-down allowances for IP acquisition	Automatic 5-year write-down if legal and econ IPR are acquired EDB's approval is required if only econ IPR is acquired	Manufacturing IP Hub
S19C writing-down allowances for R&D cost-sharing	1-year write-down for R&D cost-sharing payments	Manufacturing IP Hub

Source: http://www.edb.gov.sg

Taxation

Corporate tax

Singapore's tax laws tax the income of a company that is actually or deemed to be derived from a source within Singapore or is actually or deemed to be received in Singapore from outside Singapore. There is no precise definition of "source" in the Income Tax Act (Cap 134) and consequently, each income-generating commercial activity has to be carefully examined to determine its source. Income is considered received in Singapore from outside Singapore if the income:

- is remitted or transmitted to, or brought into, Singapore
- is applied in or towards the satisfaction of any debt incurred in respect of a trade or business carried on in Singapore
- is applied towards the purchase of any movable property which is brought into Singapore.

In Singapore, income is assessed to tax on a preceding year basis. Essentially, this means that income earned by a company in a financial year will be taxed in the following tax year, referred to as the year of assessment. For example, income for the financial year ended in 2012 will be assessed in the year of assessment 2013. The Singapore fiscal year is the calendar year. Singapore incorporated companies and Singapore branches of foreign companies are both taxed at the same corporate tax rate, which is currently 17 per cent.

Sale of shares

Singapore laws do not impose tax on capital gains, but do impose tax on income gains.

Accordingly, gains arising from a sale of shares are only subject to tax where the gains are of an income nature and are derived from Singapore or are received in Singapore.

The gains are usually deemed to be of an income nature where the seller engages in or is deemed to be engaging in a business of dealing in or trading of shares and securities. The gains are generally considered to be of a capital nature where the seller is a long-term investor. Whether the sale of shares amounts to income gains or capital gains is dependent on the facts of each case. In determining whether the gains constitute taxable income gains, the factors that the tax authority takes into consideration include:

- the length of the holding period of the shares in question
- the frequency of share sale transactions carried out by the seller
- the reasons for which the shares were acquired
- the circumstances under which the disposal of the shares was made
- the nature of business or trade carried on by the seller.

Dividends

Dividends distributed by a company resident in Singapore are considered sourced from Singapore. A company is considered as resident in Singapore if the control and management of its business is exercised in Singapore.

Singapore has a one-tier corporate tax system where the tax paid by a company on its chargeable income would constitute a final tax. Also, dividends paid out of "after-tax profit" by Singapore resident companies will be exempt from tax in the hands of shareholders (exempt one-tier dividends). All dividends paid by any company resident in Singapore are not subject to further tax in Singapore.

Under the one-tier system, companies need not maintain a record of corporate tax paid for the purposes of paying dividends. Further, when the company pays an exempt one-tier dividend, it is not required to deduct tax from the dividend paid.

The one-tier system does not alter the tax treatment of foreign dividends remitted to Singapore. Such foreign dividends remain taxable in the hands of the shareholders unless exempted from tax. Expenses incurred by the shareholders to earn the foreign dividends are attributed to and allowed as set-off

against such dividends only. The applicable foreign tax credit continues to be granted.

Currently, for Singapore tax-resident companies, foreign dividends remitted to or received in Singapore will be tax exempt provided the following conditions are met:

- In the year the foreign dividend is received in Singapore, the headline tax rate of the foreign jurisdiction from which the dividend is received is at least 15 per cent.

- The foreign dividend has been subjected to tax in the foreign jurisdiction from which they were received. This condition may be regarded as fulfilled if no taxes are paid in the foreign jurisdiction due to a tax holiday, or where specific remission is granted for a "look through" treatment – where an operating subsidiary at the end of a holding chain satisfies this requirement.

Withholding tax

Withholding tax is a tax-collection mechanism enacted primarily to ensure and facilitate the collection of taxes due on specified categories of income sourced or deemed to be sourced in Singapore where such payments are made by a person in Singapore to a non-resident.

Generally, withholding tax applies to the following categories of income or payment:

- interest, commission, fees in connection with any loan or indebtedness

- royalties and other payments for the use of, or right to use, movable property

- know-how payments for the use of scientific, technical, industrial or commercial knowledge/information

- technical assistance or service fees

- management fees

- rent or other payments for use of movable property

- directors' remuneration

- professional service fees

- proceeds from sale of real property by a real property trader.

The rate of withholding tax applicable to a payment made to a non-resident is either the prevailing corporate tax rate (17 per cent), or the reduced rate of 15 per cent or ten per cent, depending on the nature of the payment. These rates may be reduced under Singapore's tax treaties with other countries in respect of payments made to residents of such treaty countries. There are also exemptions from withholding tax for specified payments under certain conditions.

Goods and services tax

Goods and services tax (GST) is a broad based consumption tax which aims to tax the final consumer. GST is charged on all taxable supplies of goods and services made in Singapore by a taxable person in the course or furtherance of his business. GST is also payable on the importation of goods into Singapore.

A "taxable supply" is a supply of goods or services that is subject to GST at either the prevailing standard rate of seven per cent GST (also known as standard rated supplies) or zero per cent GST (also known as zero-rated supplies), other than an exempt supply. A "supply" refers to any form of supply made for a consideration. An "exempt supply" generally relates to certain financial services, leases and sales of residential properties.

The place of supply rules determines whether a company is making supplies in Singapore for GST purposes. The rules governing the place of supply of goods are different from the rules governing the place of supply of services.

If a supply of goods involves "their removal" to Singapore (that is, they are imported), these goods are treated as supplied outside Singapore. On the other hand, if the supply of goods involves "their removal" from Singapore, the goods are treated as supplied in Singapore. If the supply of goods does not involve their removal from or to Singapore, the

supply is made in Singapore if the goods are "in" Singapore at the time of the supply. If the goods are not in Singapore at the time of the supply, the supply is not made in Singapore.

In the case of services, a supply of services is treated as made in Singapore if the supplier "belongs" in Singapore. A supplier of services will be treated as belonging in Singapore if they:

- have a business establishment or some other fixed establishment in Singapore and no such establishment elsewhere
- have no such establishment in any country but their usual place of residence is in Singapore
- have such establishments in Singapore and elsewhere and their establishment in Singapore is the one that is most directly concerned with the supply.

A "taxable person" is a person who is, or is required to be, registered under the Goods and Services Tax Act (Cap 117A). At present, a person is required to be registered as a taxable person if they make taxable supplies and the value of their taxable supply exceeds S$1 million in a 12 month period. The 12 month period refers to the current and past three calendar quarters or the next 12 month period.

Only a GST-registered person can charge and collect GST on all taxable supplies they make (output tax). The person is also entitled to recover the GST (input tax) that they incur on their expenses, subject to satisfying the conditions governing the input tax claims. The amount of GST payable by the GST-registered supplier to the IRAS is the difference between the output tax and the input tax. Where the input tax exceeds the output tax, the IRAS will refund the difference to the GST registered person.

If a person's taxable supply is below the S$1 million threshold, they are not required to be registered as a taxable person. However, they may consider voluntary GST registration in order to claim credits or refunds of the GST incurred on their expenses, subject to satisfying the conditions governing the input tax claims. The approval for voluntary GST registration is granted at the discretion of the Comptroller. Once a person is registered under the voluntary registration, the person must remain GST-registered for at least two years.

GST is charged at a prevailing standard rate of seven per cent. However, there are certain specified goods and services which are termed zero-rated supplies and are subject to GST at zero per cent. Generally, the export of goods and international services qualify as zero-rated supplies.

Examples of zero-rated international services include:

- international transportation
- hiring of transport for use outside Singapore
- services supplied directly in connection with property located outside Singapore
- services supplied directly in connection with goods located outside Singapore
- cultural, artistic and sporting services performed wholly outside Singapore
- prescribed international telecommunication services.

A GST-registered supplier is generally allowed to recover the GST incurred on the expenses that are attributable to the making of zero-rated supplies, subject to other conditions governing the input tax claims. This is unlike the case of an exempt supply, where a corresponding input credit is generally not allowed.

There are conditions governing when a supply can be zero-rated.

A GST registered person is required to furnish a GST return to the Comptroller not later than one month after the end of each prescribed accounting period, unless the Comptroller otherwise allows. A prescribed accounting period is generally three months, though there is also monthly or six-monthly prescribed accounting period.

A person furnishing his or her GST return must pay the Comptroller the GST due (that is, the difference between the output tax and input tax for the relevant period) for the prescribed accounting period to which the return relates. Payment must be made no later than one month after the end of the prescribed accounting period unless the payment is made by way of Giro (automatic bank withdrawal), in which case the payment will be deducted from his or her bank account on the 15th day of the month after the due date for submission of the GST form.

Tax on individuals

Income tax

The imposition of Singapore tax on the income of an individual depends on the source of the income and the tax-resident status of the individual. Generally, an individual who is a Singapore resident is subject to Singapore income tax on their income derived from a source in Singapore. Foreign-sourced income that is received in Singapore is not subject to Singapore income tax, so long as it is not received via a partnership in Singapore. A non-resident individual, on the other hand, need only pay Singapore income tax on their Singapore-sourced income and is exempt from Singapore income tax on income arising abroad even when such income is received in Singapore.

As a general rule, a person is considered resident in Singapore if they are physically present in Singapore or exercise employment in Singapore (other than as a director of a company) for 183 days or more during the year preceding the year of assessment.

Singapore income tax on individuals is imposed on a marginal basis. For the year of assessment 2012, the maximum marginal tax rate is 20 per cent.

Central Provident Fund (CPF) contributions

Unlike most countries, there are no compulsory contributions to any pension scheme or social security insurance scheme in Singapore. Singapore instead has the CPF Scheme, which is a form of long-term savings scheme. Compulsory contributions to the CPF account of an employee are required for an employee who is a Singapore citizen or permanent resident.

For such an employee, the employer must deduct and pay to the CPF Board a specified percentage of the employee's salary (employee's contribution) for deposit into the employee's CPF account. The employer must also itself contribute to the employee's CPF account, which contribution is also a specified percentage of the employee's salary. Currently, the employee's rate of contribution is 20 per cent and the employer's rate of contribution is 16 per cent for Singapore citizens and permanent residents (from their third year of obtaining permanent residency status). These rates will be different for employees who are above 50 years old or permanent residents who are in the first and second year of obtaining the permanent residency status.

Other forms of tax

Stamp duty

Under the Stamp Duties Act (Cap 312), stamp duty is levied on instruments and agreements which relate to stocks and shares and immovable property situated in Singapore. Stamp duty is payable at ad valorem rates or at fixed rates, depending on the document concerned. Where the document is executed in Singapore, stamp duty is payable within 14 days after the document has been executed. Where the document is executed outside Singapore and received in Singapore, stamp duty is payable within 30 days after the document has been received in Singapore.

In the case of corporate reorganisation involving transfer of shares or the business of a company or transfer of beneficial interests in assets between associated companies, exemption of stamp duty may apply if certain conditions are met.

Property tax

Property tax is levied on immovable properties in Singapore based on the annual value of the property at the progressive rates of zero per cent, four per cent and six per cent for owner-occupied residential properties and ten per cent for other properties. Certain buildings may, however, qualify for exemptions or concessions. The annual value is the estimated annual market rent that the property can reasonably be expected to fetch if it were let from year to year.

Customs duty
Customs duty is levied on tobacco, liquor, motor vehicles and petroleum-related products.

Workplace relations

General
Singapore offers a highly educated and skilled workforce and competitive wage rates. Singaporeans have always been and continue to be committed to making their industries internationally competitive. As Singapore progresses to a knowledge-based economy, the nature of work, workplaces and workplace practices are being aligned to the new demands of the economy.

The government authority tasked with employment matters is the Ministry of Manpower (MOM) within which the Labour Relations and Workplaces Division (LRWD) promotes and maintains industrial peace and stability in Singapore by balancing the interests of employers and employees and providing a legal framework to achieve this balance. The LRWD also formulates policies on industrial relations and reviews labour and employment laws regularly to ensure their continued relevance to both employers and employees. The four main types of services provided by the LRWD are as follows:

- advisory services on terms and conditions of employment
- investigation into claims and complaints regarding employment terms
- conciliation of employment/trade disputes
- adjudication of employment disputes.

Employment conditions
Employment conditions are usually provided for in contracts of service entered into between employers and employees and/or in the collective agreement entered into between employers and the trade unions representing these employees. For employees who fall within the ambit of the Employment Act (Cap 91), the provisions of the Employment Act must be observed to the extent that it sets out certain basic employment conditions that apply on a mandatory basis.

Depending on the particular industry/employer, there may be trade unions that negotiate workplace agreements between employers and employees.

Aside from the Employment Act, other statutes that may apply to an employment relationship include the Retirement and Re-employment Act (Cap 274A), the Workplace Safety and Health Act (Cap 354A), the Work Injury Compensation Act (Cap 354), the Central Provident Fund Act (Cap 36), the Children Development Co-Savings Act (Cap 38A), the Employment of Foreign Manpower Act (Cap 91A), the Industrial Relations Act (Cap 136), the Trade Unions Act (Cap 333), the Trade Disputes Act (Cap 331), and the Skills Development Levy Act (Cap 306). Other more specific legislation may also apply, for example, depending on the industry sector of the employer.

Substantive amendments were recently made to the Employment Act, with the changes coming into effect on 1 January 2009. These amendments sought to keep pace with changes in the workforce profile and to update employment standards and benefits, especially for vulnerable workers.

More recently, on 1 January 2012, re-employment legislation was introduced in Singapore to enable more people to continue working beyond the current statutory retirement age of 62. The re-employment laws were incorporated into the Retirement Age Act, which has been re-renamed the Retirement and Re-employment Act with effect from 1 January 2012.

Employment Act
It is important to note that the Employment Act does not extend to all employees. An "employee" under the Employment Act is defined as "a person who has entered into or works under a contract of service with an employer and includes a workman and any officer or employee of the government included in a category, class or description of such officers or employees declared by the President to be employees for the purposes of this Act or any provision of it; but does not include any seaman, domestic worker or, subject to subsection (2), any person employed in a managerial or executive position or any person belonging to any other class of persons whom the Minister may, from time to

time by notification in the Gazette, declare not to be employees for the purposes of this Act." Persons employed in managerial or executive positions but who earn a basic monthly salary of S$4,500 and below enjoy statutory protection against non-payment of salary and may access the MOM Labour Court for salary claims.

It is also worth noting that the Employment Act prescribes certain minimum conditions for workmen who are in receipt of a salary not exceeding S$4,500 a month and employees who are in receipt of a salary not exceeding S$2,000 a month (this ceiling applies as of 1 January 2009).

For employees falling within the Employment Act, the employer may stipulate conditions of employment which are more favourable than those set out in the Employment Act. Conversely, a contract of employment or service which provides for conditions which are less favourable than those prescribed in the Employment Act are illegal and are null and void to the extent that they are less favourable.

Employees not covered by the Employment Act are usually governed by their employment contracts with the employer and any other reasonable and lawful rules, regulations and policies as may from time to time be implemented by the employer (whether in the form of an employment handbook or otherwise).

Wages and bonuses

The salary to be paid to an employee is subject to negotiation between an employer and an employee (or the trade union). Singapore has no minimum wage law. Wages are determined by market forces.

Although not legally required, many companies in Singapore reward their employees with bonuses that range (generally) from one to three months' salary depending on the employer's and employee's performance.

Apart from variable bonuses which hinge on the company's and the individual's performance, some companies also provide an annual wage supplement (AWS). Commonly known as the 13th month salary payment, the AWS represents a single annual payment (up to a maximum of three months' salary) to employees which supplements the total amount of annual wages earned by the employee. The payment of AWS is not mandated by law and is payable only if required under the terms of the employment contract or a collective agreement.

Leave entitlements

Sick leave

All employees falling within the ambit of the Employment Act who have at least three months of continuous service with an employer are entitled to paid sick leave under the Employment Act. The number of days of paid sick leave an employee is entitled to will depend on his service period:

Service period completed	Paid Outpatient non-hospitalisation leave (days per year)	Paid hospitalisation leave (days per year)
3 months	5	15
4 months	8	30
5 months	11	45
6 months and thereafter	14	60

The amount of paid outpatient and hospitalisation sick leave that an employee can take is aggregated and counted towards his sick leave entitlement. For example, if an employee has already taken 14 days of outpatient sick leave in a year, the number of days of hospitalisation sick leave that he can take would be 46 days (60 – 14 = 46).

Other than the above, an employee's entitlement to sick leave will vary from contract to contract although it is common practice to provide employees with at least 14 days of sick leave per year.

Annual leave

Part IV of the Employment Act (which only applies to employees who are in receipt of a salary not exceeding S$2,000 a month and workmen who are in receipt of a salary not exceeding S$4,500 per month) provides that an employee who has at least three months of continuous service with an employer will be entitled to a minimum of

seven days paid annual leave in the first year of service and an additional day's leave for each year worked thereafter up to a maximum of 14 days. For employees who are not covered by the Employment Act, their entitlement to annual leave will depend on their contract of employment. Most employees are commonly given 14 to 21 days' paid annual leave (depending on length of service).

Bereavement or compassionate leave
It is common for employers to provide two or three days' leave without loss of pay for employees who suffer the death of a close relative.

Maternity leave

The Employment Act and the Children Development Co-Savings Act (CDCSA) provide maternity protection and benefits for female employees. The protection and benefits provided differ between the two statutes.

The CDCSA applies to all female employees working in Singapore (including those employees who fall within the ambit of the Employment Act) provided they fulfill certain qualifying criteria, as follows:

- The employee's child is a citizen of Singapore at the time of birth.
- The employee was lawfully married to the child's natural father at the time of conception or before the child's birth.
- The employee has been employed by the employer for at least 90 days before the birth of the child.

Prior to 31 October 2008, employees who qualified for maternity leave under the CDCSA were entitled to paid maternity leave of 12 weeks. This has been enhanced to 16 weeks with effect from 31 October 2008 regardless of the birth order of the child.

For the first two births, the first eight weeks of maternity leave will be employer-paid. The last eight weeks will be funded by the government (capped at S$20,000 per birth, including CPF contributions). For the third and subsequent births, the full 16 weeks will be funded by the government (capped at S$40,000 per birth, including CPF contributions).

Female employees who do not satisfy either of the first two criteria set out above but who fall within the ambit of the Employment Act and satisfy the third criterion (ie, they have been employed by their employer for at least 90 days before the birth of the child) will be entitled to 12 weeks of maternity leave under the Employment Act. Where the employee has fewer than two children of her own at the time of delivery, she is entitled to be paid her usual salary for the first eight weeks of maternity leave. In the case of multiple births (eg, twins, triplets, etc) during the first pregnancy, the employer is still required to pay eight weeks of maternity leave for the next pregnancy.

It should be noted that a female employee who qualifies for maternity leave under the CDCSA will not be entitled to claim the same benefits under the Employment Act.

Childcare Leave
The CDCSA and the Employment Act both provide for childcare leave entitlement. Under the CDCSA, an employee is entitled to a total of six days of paid childcare leave per year (regardless of the number of children) if:

- The employee's child is a Singapore citizen.
- The employee is legally married to the other parent, or was married to the other parent at the time of, or at any time after, conception (where the child is not an adopted child); or where the child is an adopted child, the employee was married, widowed, or divorced when the employee adopted the child.
- The employee's child (including any legally adopted or step-child) is below seven years of age at the time the application for childcare leave is made or celebrated or will be celebrating his or her seventh birthday during the calendar year (ie, 1 January to 31 December) in which the application for childcare leave is made.
- The employee has worked for the employer for at least three months.

Where the employee has been employed for at least three months but for less than 12 months, the six days' paid childcare leave may be pro-rated by the employer, subject to a minimum of two days.

The employee will be entitled to be paid at his/her gross rate of pay for every day of childcare leave that is taken, however where an employee has already taken three days of paid childcare leave, the amount of payment the employee is entitled to receive from his/her employer for each subsequent day of childcare leave that is taken is capped at S$500.

If the employee does not meet either of the first two criteria set out above but is covered under the Employment Act and fulfils the third and fourth criterion set out above, he/she will be entitled to a total of two days of paid childcare leave per year (regardless of the number of children) under the Employment Act. Where the employee qualifies for paid childcare leave under the Employment Act, the employee will be entitled to be paid at his/her gross rate of pay for every day of such childcare leave that is taken.

It should be noted that for so long as an employee is entitled to paid childcare leave under the CDCSA, he/she will not be entitled to paid childcare leave under the Employment Act.

Military leave

Under section 23 of the Enlistment Act (Cap 93), an employer must grant leave of absence to any employee required to report for national service, mobilised service under section 73 of the Police Force Act (Cap 235), or voluntary service in the division of the Singapore Armed Forces known as the People's Defence Force under the Singapore Armed Forces Act (Cap 295) or in the Special Constabulary under the Police Force Act (Cap 235).

Public holidays

There are generally 11 public holidays each year in Singapore (with minor fluctuations when holidays fall at weekends) and an employee who falls within the ambit of the Employment Act is entitled to a paid holiday for each of them.

National Wages Council

The National Wages Council (NWC) is usually convened when there is a need to review wage guidelines. Following its review, the NWC makes recommendations that apply to all employees (management, executives and rank-and-file employees), unionised and non-unionised companies and in both the public and private sectors. However, implementation of these recommendations is not mandatory and employers in the private sector have the discretion to elect whether or not to adopt them.

Termination of employment

Employees who have been terminated "unlawfully" may seek appropriate redress under the Employment Act or common law.

Under the Employment Act, an employee who considers that he or she has been dismissed without just cause or excuse may, within one month of dismissal, make representations in writing to MOM to be reinstated in his or her former employment. Upon satisfaction on the part of the Minister that the employee has been dismissed without just cause or excuse, the Minister may direct the employer to reinstate the employee in the former employment (although this is rare) and to pay the employee an amount that is equivalent to the wages that the employee would have earned had he or she not been dismissed. The Minister may alternatively direct the employer to pay the employee such amount of wages as compensation as may be determined by the Minister but not to reinstate his or her employment. Disputes which cannot be resolved amicably through the above means will be referred to the Labour Court for adjudication.

Alternatively, if the manner of dismissal contravenes the terms of the employment contract, the employee can make a claim for breach of contract against the employer. For an employee falling outside the ambit of the Employment Act, the employee can also seek redress in the form of damages for breach of contract.

There are no statutory requirements for the employer or employee to furnish reasons for termination of an employment contract.

Termination of employment at retirement

The Retirement and Re-employment Act states that it is unlawful for an employer to dismiss any employee who is aged below 62 years because of his or her age. This Act, however, applies only to employees who are Singapore citizens or Permanent Residents.

Certain categories of employees are exempted from the ambit of the Act including, but not limited to, persons employed to work on a specific project for a fixed term.

The Retirement and Re-employment Act states that it is unlawful for an employer to dismiss on the ground of age any employee who is below 62 years of age or the prescribed minimum retirement age. Furthermore, pursuant to the amendments which came into effect on 1 January 2012, an employee is eligible for re-employment by the employer up to the age of 65 if the employee:

- attains the specified age (defined as the minimum statutory retirement age of 62, or the contractual retirement age if it is higher) on or after 1 January 2012
- is assessed by his employer to have at least satisfactory work performance
- is medically fit to continue working.

An employee shall be presumed to be medically fit to continue working, unless his employer proves, on a balance of probabilities, that the employee is not medically fit.

The Retirement and Re-employment Act requires employers to give reasonable notice to those employees who are not eligible and similarly places an obligation on employees to give reasonable prior notice to their employers if they do not wish to work beyond retirement. Furthermore, if an employer is not able to find suitable job vacancies for employees who are eligible for re-employment, the employer will be required to offer a one-off Employment Assistance Payment (EAP) to such employees. The legislation does not prescribe the amount of the EAP to be paid but does require the employer to take into account the Tripartite Guidelines on the Re-Employment of Older Employees (Tripartite Guidelines) in determining the amount to be paid.

The Tripartite Guidelines were introduced by the Tripartite Implementation Workgroup in March 2010 to better prepare employees in anticipation of the introduction of the re-employment legislation. Employers were urged to implement the Tripartite Guidelines even before the new legislation came into effect. They served as the basis for drafting the re-employment legislation and identified good re-employment practices that employers should consider adopting in the following areas:

- planning and preparing employees for re-employment
- the re-employment contract
- recognising the contributions of re-employed employees
- providing assistance to eligible employees whom employers are unable to re-employ.

Trade unions

Unions represent the industrial interests of certain categories of employees who are entitled to become its members. Typical trade union activity is to negotiate collective agreements with employers on behalf of its members.

The MOM maintains a Registry of Trade Unions, the primary function of which is to regulate the following:

- formation and dissolution of trade unions
- safe custody and lawful utilisation of union funds
- impartial and proper election of union officers.

All trade unions have to be registered under the Registry of Trade Unions otherwise they are illegal. The Registry also provides advisory services to trade union officers and members on matters relating to the laws and regulations on trade unions.

Occupational health and safety

Increasing emphasis is being placed on the importance of occupational health and safety in Singapore which is reflected in legislation such as:

- The Workplace Safety and Health Act, which sets out a framework for the promotion of safe practices in all factories and workplaces of various risk levels and industries and
- The Work Injury Compensation Act (which replaced the Workmen's Compensation Act with effect from 1 April 2008) which covers all employees except self-employed persons, independent contractors, domestic workers, members of the Singapore Armed Forces and officers of the Singapore Police Force, the Singapore Civil Defence Force, the Central Narcotics Bureau and the Singapore Prison Service.

The Work Injury Compensation Act requires employers to maintain insurance for employees who are involved in manual work or non-manual work (where the employee's total earnings do not exceed S$1,600 per month). It is not mandatory for employers to buy insurance for employees who are involved in non-manual work and have monthly earnings of above S$1,600. Nonetheless, employers will be required to pay compensation in the event of a valid claim, even if they do not buy insurance for this group of employees.

The MOM also requires employers to purchase and maintain insurance for medical expenses of foreign workers. This requirement applies to all foreign workers on work permits (including foreign domestic workers) or S passes. For medical insurance policies taken up or renewed on/or after 1 January 2010, the insurance coverage must be at least S$15,000 per year for each worker's inpatient care and day surgery during his/her stay in Singapore.

Dispute resolution

Courts

The courts in Singapore hear a full range of civil and criminal matters, and are empowered to make orders in respect of damages, specific performance and injunctions. The courts are divided into the Subordinate Courts and the Supreme Court, and cases are filed before these courts according to the monetary amounts involved.

The Subordinate Courts comprise of the District and Magistrate Courts, both of which oversee civil and criminal matters, as well as specialised family, juvenile, coroner's courts and the Small Claims Tribunal, which handles civil claims for amounts below S$10,000. The Supreme Court is made up of the High Court and the Court of Appeal and hears both civil and criminal matters. The Court of Appeal hears appeals against decisions of the High Court in both civil and criminal matters and has been Singapore's final court of appeal since 8 April 1994, when appeals to the Judicial Committee of the Privy Council were abolished.

Singapore's court system is transparent and efficient. In recent years, far-reaching changes have been made within the Supreme Court and the Subordinate Courts to rationalise and standardise court rules into a single uniform set of rules to ensure uniformity of practice and consistency. The courts have also been increasingly vigilant in ensuring that orders of court are complied with and parties do not prolong the process of litigation unnecessarily. These measures have been relatively far-reaching and have resulted in a drastic reduction in case backlog.

Arbitration

Singapore as a nation is committed to promoting international arbitration as a means of resolving commercial disputes within the region. Foreign lawyers may represent parties in arbitration in Singapore. This is in addition to the Qualifying Foreign Law Firm scheme, which grants foreign law firms a licence to practise Singapore law in designated practice areas through Singapore-qualified lawyers employed by the firms.

Singapore has world-class facilities for arbitration and a full range of qualified arbitrators registered with the Singapore International Arbitration Centre, which has fairly comprehensive arbitration rules which can be adopted by parties involved in a dispute. Singapore is now home to the world's first integrated dispute resolution centre for international arbitration cases, namely the Maxwell Chambers.

Arbitration generally affords more privacy to the parties in dispute as compared to litigation. The other key feature of international arbitration is that there are better prospects of enforcing an international arbitration award in other countries within the region than enforcing a foreign court judgment. This is often perceived as a useful risk-management tool for parties doing business in Asia.

Amendments to the International Arbitration Act (Cap 143A) means the Singapore High Court is now empowered to provide interim relief in aid of arbitrations seated in countries other than Singapore. Before this amendment, the High Court had interpreted the power to provide interim relief conferred by the International Arbitration Act as excluding foreign arbitrations. Parties considering making an application to the Singapore High Court for interim relief will have now greater flexibility to do so.

South Korea

Contributed by Barun Law

Visas and work permits
Business entities
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Dispute resolution

South Korea is located in north-east Asia, in the southern half of the Korean Peninsula. To the north lies the Democratic People's Republic of Korea (North Korea), to the west the Yellow Sea and China, to the east the East Sea (Sea of Japan) and Japan, and the Jeju Strait, Korea Strait, and the Philippines to the south. Since the Second World War, the Korean Peninsula has been divided at the 38th parallel, with South Korea forming a republic. After two military coups and several decades of authoritarian rule, today Korea is a fully functioning modern democracy. Korea comprises nine provinces (do) and seven metropolitan cities (*gwangyoksi*). It is primarily a single ethnic community that speaks one language, the Korean language.

Throughout its history, South Korea has had no less than nine constitutions when entire redrafts and amendments are taken into account. Korea's latest constitution, the Constitution of 1987, creates a government structure, in which a President is directly elected and serves a single five-year term. The President in turn appoints a Prime Minister and a Cabinet. South Korea's government also has a National Assembly, or unicameral Parliament, in which its Members are elected for four-year terms.

Korea welcomes and encourages foreign investment, particularly direct investment which will foster export-orientated, internationally competitive industries. Especially welcome are joint ventures and new enterprises which will diversify the Korean economy. Foreign capital plays a fundamental role in the development of Korea's industries and resources. Foreign investors, both in partnerships with local companies or on their own account, are readily able to pursue opportunities in Korea.

Visas and work permits

Visitors who wish to stay in South Korea for over 90 days or who wish to enter for remunerative activities must obtain a visa before entering the country. Visas may be obtained through South Korean consulates. In general, obtaining a South Korean visa is a fairly simple and expedient process, provided that the appropriate application documents are supplied. The appropriate visa must be acquired prior to entering South Korea. Most non-resident visas are for a short-term stay, up to a maximum of 90 days; a special long-term visa is required to stay longer than 90 days. A valid passport is required for all visa applications.

No visa entry (B-2)

Most foreigners who want to visit South Korea just for the purpose of tourism or transit may enter South Korea without a visa (in accordance the principles of reciprocity or priority of national interests) and will be granted either a 30-day or three-month tourist/transit B-2 visa status. Note that "special status" (comprising a visa with an extended time period) is awarded to Canadians (up to six months) and Australians, Japanese, Slovenians and citizens of Hong Kong and the United States (up to 90 days). South Korea has also entered into "visa waiver" agreements with a number of countries, including most members of the European Union. Citizens of countries that are party to a visa waiver agreement may enter South Korea without a visa for a set period (usually 90 days or three months). As the visa-free or visa waiver period varies from country to country, it is important to check prior to travelling.

Diplomats (A-1), Official Duty (A-2) and Agreement (A-3)

For a Diplomat (A-1) visa, a temporary duty order, statement of employment or official letter from a Foreign Minister is required as proof of diplomatic status. The requirements are the same for an Official Duty (A-2) visa and an Agreement (A-3) visa, although for an A-2 visa the letter must specify that the individual is on official duty.

Temporary News Coverage (C-1), Short-Term Business (C-2), Short-term Visitors (C-3) and Short-term Employment (C-4)

Temporary News Coverage (C-1) visas require a letter of assignment, a statement of employment from the employer company, or a certificate proving the individual is a foreign news reporter. A document detailing the purpose of the entry and the planned activities is also required. Short-Term Business (C-2) visas require a document that proves that the purpose of the individual's visit is for business.

No documents are required for Short-term Visitors (C-3) visas. Short-term Employment (C-4) visas require a letter of employment contract and a recommendation of employment issued by the relevant Minister (the Ministry of Culture issues permissions for performances).

Culture/Art (D-1), Students (D-2), Technical Trainees (D-3), General Trainees (D-4), Residence Reporters (D-5) and Religious Workers (D-6)

Culture/Art (D-1) visas require a letter of invitation, documents that prove that the "sponsor" organisation is a culture and art organisation (with a certificate of the expert's career required if the individual requires instruction), a curriculum vitae or certificate of career and documents that prove the individual's ability to cover their expenses during their stay.

Students (D-2) require proof of admission/ certificate of registration; researchers require documentation of the research and a certificate from the last school attended as well as a personal (notarised) reference letter.

Technical trainees (D-3) require a training schedule prepared by the research organisation, a notarised personal reference letter, a copy of a pay slip and proof of recommendation from a foreign industrial/ technical research institute or its equivalent.

General trainees (D-4) require a certificate of training or proof of admission to an educational institute, related documents to prove the existence of the educational/training institution, and proof that the individual can cover his/her expenses during his/her stay.

Resident reporters (D-5) require a temporary duty order or statement of employment and related documents that prove the existence of a branch office in South Korea.

Religious workers (D-6) require a temporary mission order, a copy of a certificate from the religious/ social welfare organisation and documents that prove that the "sponsor" organisation will pay the applicant's travel costs.

Business Investor (D-8)

A Business Investor (D-8) visa can be issued for specialists involved in the management, production or technological sections of a company involved in foreign direct investment pursuant to the Foreign Investment Promotion Act 1998. Specialists include:

- Executives who are primarily responsible for the organisation and management of the company. Executives must be involved in the decision-making processes of the company and generally will only be responsible to the Board of Directors and shareholders.

- Senior managers who are responsible for setting the objectives and policies of the company, involved in planning company strategy, hiring and firing employees, and supervising the work of other professional employees and managers. This category does not include people who manage front-line staff or those directly involved with the provision of a service.

- Employees with professional and proprietary experience and knowledge essential to the research, design and technological functions of the company and the management of the services provided.

Staff engaged in ordinary administrative services, engineers already available in South Korea and staff who provide direct services are not regarded as "specialists".

Professors (E-1), Teaching Foreign Languages (E-2), Research (E-3), Special Technology Instruction (E-4), Speciality Occupation (E-5), Art and Entertainment (E-6), Particular Occupation (E-7)

Professors (E-1) visas require a professional certification and an employment contract or documentation of expected employment. Teaching Foreign Languages (E-2) visas require a certificate of academic degree or a graduation diploma, an employment contract, documentation on the school/organisation and a notarised personal reference letter.

Research (E-3) visas require documentation on the "sponsor" organisation, a certificate of academic degree and career and an employment contract.

Special Technology Instruction (E-4) visas require a temporary duty order or statement of employment, a copy of the approved technology-import contract, an import contract (or certificate of service transactions) or certificate of designated military defence industry and documentation on the "sponsor" organisation.

Speciality Occupation (E-5) visas require a certificate of academic degree and qualifications, an employment recommendation letter from the head of the central government agency or documents proving the necessity of employment, and an employment contract.

Art and Entertainment (E-6) visas are divided into two classes: 1) those entertainers in tourist hotels and other entertainment venues; and 2) others. Those individuals in 1) require a performance recommendation letter from the Image Stuff Classification committee Performance Project, proof of an HIV test, and a notarised personal reference letter. Those individuals that fall into 2) require an employment recommendation letter from the head of the relevant central government agency or documents that prove the necessity of employment, a qualification or career certification, and a notarised personal reference letter.

Particular Occupation (E-7) visas require academic or qualification certification, an employment contract, an employment recommendation letter from the head of the relevant central government agency stating the necessity of employment, documentation of the "sponsor" organisation and a notarised personal letter of reference.

Long term Visiting & Joining Family (F-1) and Accompanying (F-3)

Long term Visiting & Joining Family (F-1) visas fall into three classes:

- Class 1: individuals visiting family or relatives living in South Korea.
- Class 2: domestic helpers of diplomats in South Korea.
- Class 3: foreign students enrolled in elementary/junior/high school.

Individuals in:

- Class 1 require proof of family relations (certificate of marriage and register book or certificate of birth) and a notarised personal reference letter. Note that individuals adopted abroad require a confirmation certificate or a statement from the adopting parents.
- Class 2 require an official letter issued by the foreign embassy or consulate, an employment contract, and a copy of the employer diplomat's identification.
- Class 3 require proof of school enrolment and, if adopted, the certificate of the adopted person's annual tax payment. Accompanying (F-3) visas require proof of family relationship (certificate of marriage and register book or certificate of birth), statement of employment, and certificate of annual tax payment.

Business entities

General

A foreign investor has a range of business structures to choose from when doing business in South Korea. The type of entity the investor chooses will depend on what best suits the particular needs of the investor and optimal financial and tax considerations.

The most common business entities used by non-residents in South Korea include:

- joint stock company/corporation (*Chusik Hoesa*)
- limited company (*Yuhan Hoesa*)
- unlimited partnership (*Hapmyung Hoesa*)
- limited partnership (*Hapja Hoesa*)
- domestic branch of foreign parent company.

Two new forms of business entity, the limited liability company (*Yuhanchaegim Hoesa*) and the limited liability partnership (*Hapja Johap*) have been introduced by amendments made to the Commercial Act in 2011. These amendments took effect on 15 April 2012.

Joint stock company/corporation (Chusik Hoesa)

This is the entity most often used by foreign companies. This entity is legally distinct from the party or the parties that comprise it and is used to carry on projects on behalf of its shareholders. A joint stock company is appropriate where a number of parties wish to carry on business together, or for large businesses that require large amounts of fixed capital along with an ongoing procurement of funds. Shareholders of the company have limited liability up to their share of capital investment subscription.

Incorporation is effective upon completion of the following:

- preparation of the articles of incorporation
- election of directors and auditor(s)
- determination of the shareholders
- fulfilment of contribution
- completion of the registration of incorporated status.

Limited company (*Yuhan Hoesa*)

Like a joint stock company, the liability of all members is limited to their respective contribution to the company. However, unlike a joint stock company, when a limited company is formed, the individual character of each member is evaluated, the transfer of equity is limited, and the company is not open to the public. As a result of these differences, a limited company may be more appropriate for small to medium-sized enterprises (SMEs) in which ownership is limited to a small number of members. Membership was previously limited to a maximum of 50 members. However, the provision that limited the total number of members was deleted by the recent amendments to the Commercial Act that took effect on 15 April 2012. To establish a limited company, promoters are not separately required. However, all members must jointly prepare the articles, to which all members attach their signatures and seals. Together all members act as promoters at the time of incorporation. Directors must be elected and capital contributions made. Unlike joint stock companies (Chusik Hoesa), the appointment of an auditor is optional for limited liability companies. The company's incorporation becomes effective upon registration.

Unlimited partnership (*Hapmyung Hoesa*)

An unlimited partnership is a business entity in which the members bear direct, joint and unlimited liability with respect to the entity's creditors. All members in principle bear the rights, duties and obligations with respect to all partnership activities and its representation. An unlimited partnership is appropriate for a small enterprise in which the members have a close, personal and trusting relationship with one another.

Owing to the unlimited liability, members need not pay in capital prior to the partnership formation; contribution in the form of credit or labour is allowed, and no inspection procedure by the South Korean courts is available. Further, all members are responsible for the execution of partnership affairs and thus the formation of an executive organ prior to the formation of the partnership is not required.

To establish an unlimited partnership, a minimum of two members must jointly prepare the establishment document, with all members to add their signatures and seals to the document. The partnership is officially formed upon its registration.

Limited partnership (*Hapja Hoesa*)

A limited partnership consists of some members bearing direct, joint and unlimited liability and

other members bearing limited liability. The former members partake of partnership affairs and represent the partnership, while the latter members participate in the business entity only through their capital contributions and have no right in relation to partnership affairs and representation. Thus, this business entity is much like an unlimited partnership, with the addition of a limited liability capital contribution component.

To establish a limited partnership in South Korea, at least one member with unlimited liability and at least one member with limited liability together prepare the establishment document. Registration comes into effect upon the preparation of this document, complete with all members' signatures and seals.

Limited liability company (*Yuhanchaegim Hoesa*)

The new limited liability company structure created by the 2011 amendments to the Commercial Act is based on the limited liability company structure used in the United States of America. A limited liability company is a mixture of multiple corporate structures and combines elements of an unlimited partnership with elements of a joint stock company. Capital contributions are made by members of the limited liability company. Credit or services cannot constitute contributions. Members are liable for debts incurred by the limited liability company to the extent of the amount of their contributions. A member or non-member can be appointed as the General Partner, who has management control of the limited liability company through the articles of incorporation. The appointment of directors or an auditor is unnecessary, as members who are not the General Partner will have auditing rights.

In principle, members of a limited liability company cannot assign shares to others without the consent of all other members (provided however, that members who have no management control can assign shares by obtaining the consent of the General Partner).

A limited liability company can make distributions to its members to the extent of the amount of paid-in capital, deducted from the amount of net assets of the limited liability company is a surplus. Provision for such distributions as well as for profit allocation should be provided for in the Articles of Incorporation.

Establishing a limited liability company requires preparation of Articles of Incorporation and the making of the required capital contributions by the members. A limited liability company is officially formed upon registration of the required documents.

Limited Liability Partnership (*Hapja Johap*)

The limited partnership is the second new business structure introduced by the 2011 amendments to the Commercial Act. The limited partnership is based on limited liability partnerships in the United States of America, where all members of the partnership have limited liability. A limited liability partnership consists of one or more managing partners and one or more limited partners. The managing partner of a partnership bears unlimited liability in respect of the debts incurred by the partnership, while the limited partner or partners are liable to the extent of their investment in the partnership. The limited liability partnership is the joint enterprise formed by mutual investments made by the managing partner and the limited partner.

The limited partnership agreement should include all matters required by law to ensure registration. Credit or services form the basis of investment or contribution made by the limited partners if allowed by the limited partnership agreement. Profit and loss ratio can be determined freely by the parties through the limited partnership agreement. A managing partner can assign shares only by obtaining the consent of all other members of the partnership, whereas a limited partner can assign shares in accordance with the provisions of the limited partnership agreement.

Domestic branch office

A domestic branch office is a South Korean branch office of a non-resident foreign corporation. In order to establish such an office, a report must be issued to either the designated foreign exchange bank or the Minister of Finance and Economy. For the purpose of foreign exchange transactions in South Korea, the branch, office or other premises of a non-resident in South Korea is considered as a resident branch whether or not it is recognised as such under South Korean law.

A domestic branch may be:

- A "regular" branch that conducts profit-generating activities in South Korea.
- A "liaison office" which does not carry on profit-generating activities but rather non-profit-making functions such as business affairs liaison work, market research and general research and development. A foreign exchange bank may be designated by a party to a transaction for administrative and foreign transactions.

Generally, the establishment of a domestic branch office by a non-resident requires a report to a designated foreign exchange bank. However, a declaration should be filed with the Minister of Strategy and Finance in the following cases:

- For finance-related activities other than banking business.
- For securities and insurance-related activities.
- For any activities not permitted according to the provisions of any other South Korean laws and regulations, including the Foreign Investment Promotion Act 1998 (such as activities that would threaten public order or national safety, harm public health, environment, morals or customs of South Korea). Specific reporting requirements also exist in the case of the alteration of reported matters, the transfer of operating funds in the nature of capital or operation and maintenance, the overseas remittance of settled net profits, and the closure of a domestic branch office.

Recent Amendments to the Commercial Act

The legislative provisions governing companies in Korea have been substantially altered by the recent amendments to the Commercial Act. The amendments were passed on 14 April 2011 and came into force on 15 April 2012. Some of the important changes are set out below:

- Introduction of a no-par value stock system, meaning it is no longer necessary to indicate par value on the stock certificate.
- Treasury shares being allowed up to the extent of profit available for dividends.
- Introduction of various different classes of shares.
- Set-off allowed for payment of share prices and conversion of bonds allowed with the consent of the company.
- Overhaul of accounting regulations.
- Improvement of the dividend system, with the board of directors given the right to decide on the profit and commodity dividends allowed.
- Improvement of the corporate bond system – corporate bonds can now be issued upon the decision of the representative director, whereas previously, issuing corporate bonds required the resolution of board of directors and the restriction on the total amount of corporate bonds set that was previously at four times of the amount of net assets has been repealed.
- Improvements to the merger system, including provisions for cash or other forms of assets to be used other than shares and for triangular mergers to be allowed.
- Introduction of minority shareholder squeeze-out provisions.
- Introduction of electronic registration of shares and corporate bonds.
- Introduction of a managing director system.

- Approval for self-dealing by directors to be given in a broader range of situations.
- Prohibition introduced on usurping corporate opportunities, with directors and other officers prohibited from exploiting corporate opportunities from which a company could obtain stable earnings.
- Stronger minority shareholder rights.

Business environment

General

South Korea has a mixed economy in which both the government and the private sector are active. Improving the nation's competitiveness was a key campaign pledge of the current President Lee Myung-Bak. President Lee has consistently advocated a "business-oriented" social mindset and he has urged pragmatism as his foremost governing philosophy. Accordingly it is widely believed that Lee's administration has been pragmatic, global, and business-friendly. President Lee's term expires this year and new elections for both the Presidency and National Assembly are due in December 2012.

President Lee's administration also introduced a significant new environmental policy, the 10 Policy Directions for Green Growth, which focuses on encouraging investment in green and renewable technologies and promoting green and environmentally friendly planning, development and technology. The Lee administration has actively investigated and pursued Free Trade Agreements with a wide range of trading partners. In 2011, major free trade agreements (FTAs) were ratified with the European Union and United States of America, with the European Union FTA coming into force on 1 July 2011 and the FTA with the United States of America coming into force on 15 March 2012.

Intellectual property protection

South Korean law recognises intellectual property (IP) rights and, in general, South Korean legislation protecting intellectual property is consistent with international practice. South Korea is a member of the following IP-related international organisations and treaties:

- World Trade Organization (WTO) Agreement on Trade Related Aspects of International Property Rights (TRIPS)
- World Intellectual Property Organization (WIPO)
- Patent Cooperation Treaty (PCT)
- Berne Convention for the Protection of Literary and Artistic Works
- WIPO Copyright Treaty
- Paris Convention for the Protection of Industrial Property
- Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms
- Trademark Law Treaty
- Budapest Treaty on the International Recognition of the Deposit of Microorganisms for the Purpose of Patent Procedure
- Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks
- Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks
- Strasbourg Agreement Concerning the International Patent Classification
- Vienna Agreement Establishing an International Classification of the Figurative Elements of Marks (2011)
- Locarno Agreement Establishing an International Classification for Industrial Designs (2011).

Further protection is available for a range of intellectual property rights through domestic South Korean legislation.

The Patent Act 1990
The Patent Act provides for the grant of a patent for an "invention". To be an "invention" under the Patent Act, it must satisfy the basic criteria of industrial applicability, novelty and inventiveness. The invention must be "a high level creation of a technical idea utilising the law of nature". The holder of a patent registration has the right to take legal action against anyone else who may reproduce the same patent. The term of patent registration is good for 20 years, with a possible extension of another five years under certain circumstances.

The Utility Model Act 1961
The Utility Model Act protects registered utility models. This law protects the functional aspect of a product that may not meet the stricter requirements of novelty and inventiveness under patent law and thus encourages innovations and artisan entrepreneurship. The shape, structure or assembly of an article is protected under this law. To qualify for registration and subsequent protection, the device must also satisfy the criteria of an "invention" as defined under the Patent Act. The holder of a registered utility model has the right to take legal action against anyone else who may reproduce the same utility model. The duration of the utility model right is ten years.

The Design Protection Act 1961
The Design Protection Act encourages the creation of industrial designs through their protection and subsequent utilisation for the purpose of industrial development. Under this Act, "design" is the shape, pattern, colour of a combination thereof "in an article that produces an aesthetic impression in the sense of sight". A person who creates the design (or his or her successor) is entitled to design right registration. Where two or more people create a design, registration is joint-owned. The holder of a design right registration has the right to take legal action against anyone else who may reproduce the same industrial design. A person who wishes to register a design right as a secret may request to do so for a period of three years, renewable for an additional three-year period. The standard term of design right registration is 15 years.

The Trademark Act 1949
The Trademark Act protects trademarks in South Korea to protect the business reputations of persons who use trademarks, which in turn protects industrial development and consumer interests. Under this Act, a "trademark" is a "mark" that is associated with goods that are produced, processed, certified, and/or sold with the business of a given person. A "mark" is a sign, character, figure, or three-dimensional shape (or any combination thereof) with any colour combination. Services are also protected under "service marks" and legal entities with memberships can register "collective marks" for use by all the members.

A trademark registration may be obtained with a few exceptions. The holder of a trademark registration has the right to take legal action against anyone else who reproduces the same trademark. The term of registration is ten years, and is renewable for an additional ten-year term.

The Unfair Competition Prevention and Trade Secret Protection Act 1961
The goal of the Unfair Competition Prevention and Trade Secret Protection Act is "to maintain orderly trade" through the prevention of any acts of unfair competition, such as the improper use of domestically well-known trademarks and trade names and the infringement of trade secrets. Under this Act, a "trade secret" is information such as production methods, sale methods, or useful technical or business information for a business activity that is not publicly known, in which great efforts are made to maintain its secrecy and that has independent economic value. A person whose business has been injured by unfair competition has the right to take legal action against the person who engages in unfair competition. Likewise, a person who possesses trade secrets may seek legal action against a person who infringes or is likely to infringe trade secrets and thus cause damage. The statute of limitations for the infringement of trade secrets is three years from the date of actual knowledge or ten years from the beginning of the infringement.

Semiconductor Integrated Circuits Layout Design Act 1992

This law protects the rights of a person who creates a layout design for semiconductor integrated circuits and permits fair use so as to promote technology industries. Layout designs may be assigned and jointly owned by two or more creators (equally or otherwise if specifically stated). The holder of a layout design right may take legal action against a person who infringes or is likely to infringe upon that right. The registration term for a layout design right is normally ten years. The registration term may not exceed ten years after its initial commercial use or 15 years after its date of creation.

Copyright Act 1957

The Copyright Act protects the rights of the works of authors. The term "works" is defined as the creative production of original literary, scientific, or artistic works. Registration of copyright is not required in South Korea; copyright commences upon the completion of a work but registration provides increased protection. Under the Copyright Act, the author's (inalienable) moral rights are:

- the right to make public
- the right to indicate the author's name
- the right to preserve the integrity of the work.

The works of foreigners are protected in accordance with the treaties to which South Korea is a party on a reciprocal basis. Protection of works by foreigners under the Copyright Act 1957 takes place in the following situations, although these situations are still subject to reciprocity with those respective foreign nations:

- if such foreigners are permanent residents of South Korea (or foreign legal entities with a principal office in South Korea)

- if works of foreigners are first published in South Korea or published within 30 days of publication in a foreign country. The holder of a copyright may take legal action against a person who infringes or is likely to infringe upon that right

- the copyright law was revised on 30 June 2011 following the signing of the Korea-European Union Free Trade Agreement. The protection period for intellectual property rights was extended from 50 to 70 years from the copyright holder's death. This revision will take effect on 1 June 2013.

In addition to the Acts listed above, the Civil Procedure Act and Criminal Procedure Act govern procedural matters related to the enforcement of IP rights.

Seed Industry Act 1995

The Seed Industry Act protects the rights of a "breeder's right, management of variety performance of major crops, seed production, certification, marketing, etc" and applies to the agriculture, forestry and fisheries industries. "Seed industry" is defined as the business of breeding, propagation, production, assignment, processing, leasing, import, export, or display of seeds. Foreigners may enjoy variety protection rights provided reciprocity with the nation of the foreigner exists. Protection by registration of a variety protection right takes place by making an application to the Ministry of Food, Agriculture, Forestry and Fisheries.

Administrative and judicial challenge procedures exist as well as legal actions for infringement or the likelihood of infringement.

Privatisation

From the 1960s to the 1990s, the government-sponsored family-run conglomerates, or *chaebols*, dominated the private corporate sector. However, since the Asian financial crisis of 1997, South Korea has undergone extensive changes and liberalisation of the structure of its economy, so as to promote both foreign and domestic private industrial development.

Banking sector

The banking sector comprises two types of bank – commercialised banks and specialised banks. Commercialised banks, such as national banks, regional banks and foreign bank branches, are regulated by the Banking Act 1950. Specialised banks raise capital for the special needs of industries. There are currently 18 banks operating in South Korea – seven nationwide commercial banks, six regional commercial banks, and five specialised banks.

Competition policy
The Monopoly Regulation and Fair Trade Act 1980 is designed to prevent unfair trade practices and anti-competitive behaviour. Although historically a law for the enforcement of domestic business activities, this law is now applied to foreign business activities that affect the domestic market. It is one of the principal merger control laws in South Korea, and is enforced by the Korean Fair Trade Commission (KFTC). The KFTC has recently increased its monitoring of the activities of multinational companies in South Korea.

Environmental laws
As a result of South Korea's rapid economic expansion over the last half-decade, protection of the environment is now a very high priority in South Korea. Many statutes exist that govern environmental concerns. They include (but are not limited to) air quality, water quality, soil and natural environment conservation, regulation of noise, vibration, toxic chemicals, waste and recycling.

The government has also recently released the 10 Policy Directions for Green Growth, which focuses on encouraging environmentally sustainable economic growth and development, while reducing effects on the environment and lowering greenhouse gas emissions. The new policies include provision for significant new government investment in renewable energy and climate change mitigation technology, providing financial support for investment in green industries, technology and research and development, a focus on developing green knowledge-based industries and encouraging the construction of green buildings and transport solutions. The Green Growth Policy aims to establish South Korea as a world leader in both its response to international environmental issues (such as climate change) and its capability to provide the necessary products and technology (such as climate change mitigation technology, hybrid cars and renewable energy solutions) to other countries to assist those countries in responding to difficult environmental issues.

Franchising
Franchising is a well-established and credible business method in South Korea. Franchises are regulated by law under the Fair Franchise Transactions Act 2002. The purpose of this Act is to create a fair and rational environment for the franchise industry and ensure a balanced franchiser/franchisee relationship.

Capital market consolidation
On 3 July 2007, the South Korean National Assembly passed the Capital Market Consolidation Act (CMCA) which became effective in February 2009. The renamed Financial Investment Services and Capital Markets Act, which became effective in February 2009, represents the consolidation of regulation for various types of financial companies, including securities companies, asset management companies, merchant banks, futures dealers and trust companies. The introduction of investment banks and private equity funds through the Act is expected to facilitate growth and specialization of Korea's financial sector as well as bring about a broader range of underlying assets, all of which are intended to help Korea become a financial hub of Asia.

Foreign investment policy

General
South Korea is rapidly liberalising its economy and is generally a foreigner-friendly environment when it comes to investment, with a continual relaxation and liberalisation of its foreign direct investment (FDI) regulations and restrictions.

Foreign investment, foreigner and national
South Korea's main foreign investment law is the Foreign Investment Promotion Act 1998 (FIPA). FIPA allows for the creation of foreign investment zones in local areas for the purpose of industrial site creation. Under FIPA, a "foreigner" is "any one of the following:

- an individual of a foreign nationality
- a corporation established under foreign laws, also called a "foreign corporation"

- an international economic cooperative organisation identified by Presidential decree.

Under FIPA, "foreign investment" is the purchase of stocks or shares of a South Korean corporation (already existing or in the process of being established) or a company run by a South Korean national by a foreigner, with the purpose of participating in the ongoing management of such a corporation or company. In this context, the term "purchase of stocks or interest in a South Korean corporation or company" means:

- A minimum foreign investment amount of KRW100 million resulting in the possession of ten per cent or more of the total voting stocks or total invested capital of a South Korean corporation or company.

- A minimum foreign investment amount of KRW100 million resulting in the possession of less than ten per cent of the total voting stocks or total invested capital of the South Korean corporation or company, provided that the foreigner enters into an agreement whereby they are given the authority/responsibility for the election or dispatch of corporate or company officers, for the purchase or delivery of the raw materials or products for one year or longer or for the supply or importation of technology or for joint research and development.

FIPA further extends to foreign investment in South Korea when a loan with a maturity of five years or more is extended to a foreign capital-invested company by an overseas holding company or a company in a relationship with such a holding company.

Limited restrictions to foreign investment

South Korea has few restrictions regarding the types of foreign investment, with three exceptions. These are investments that:

- threaten public order or national security

- harm the public health, environment, morals or customs of South Korea

- violate any other relevant South Korean Act.

Other foreign investment laws

Other South Korean laws pertaining to foreign investment include, without limitation, the Foreigner's Land Acquisition Act 1994, the Act on Designation and Management of Free Economic Zones 2002, the Private Infrastructure Investment Act 1994 and the Industrial Cluster Promotion and Factory Construction Act 1990.

Government initiatives and incentives

Both the South Korean national government and its individual provinces may establish various programmes to encourage foreign investment. Examples of possible incentives are:

- foreign investment zones/industrial complexes

- free economic zones in port cities

- tax incentives, such as reductions and benefits

- administrative support for applications for R&D centres and plants

- employment subsidies

- training subsidies

- issuing credit card to foreigners

- English-language housing rent contracts

- international schools

- exclusive immigration line for foreign investors

- Invest Korea Plaza, a business incubation complex for foreign investors

- investment consultation

- orientation seminars on South Korean business culture

- cash grants for land development

- rent fee reduction

- financial (loan) assistance and support
- relaxation of certain regulations
- corporate transparency and anti-corruption
- increase in channels for foreign broadcasting.

Potential investors should seek professional advice to determine the best possible incentives available for their given investment proposals so that they can determine the most advantageous location and structure for their investment. Note that the incentives offered by the government will vary from year to year and from industry to industry.

Taxation

Taxation policy

South Korea has both local and national taxes. South Korea currently has over 60 bilateral income tax treaties currently in force. These treaties are ratified by the South Korean National Assembly and have the same effect as domestic law, with new laws and specific laws having an overriding effect over old laws and general laws respectively.

To boost corporate investment, the South Korean government has lowered rates of various corporate-related taxes, including, but not limited to, reduction of corporate tax rates to a range of ten per cent to 20 per cent.

The foreign investor should work closely with a professional South Korean legal advisor to ensure compliance with all relevant regulations.

Major aspects of the tax system in South Korea

Foreign investors must pay taxes in South Korea. The major taxes levied are summarised below. There are other taxes related to special types of investments and transactions.

Income tax

A person who has resided in South Korea for one year or more is subject to income tax on income from all sources within or extending to South Korea. A non-resident is subject to income tax on income derived from South Korean sources. Individuals use the calendar year as the tax year (1 January to 31 December). There are three categories of taxable income: composite income (including wages, interest/dividends and rental income), retirement income and transfer income (including income from the sale of interests in real estate or shares). Personal tax rates were most recently altered on 31 December 2011, with the introduction of a new 38 per cent rate for taxable income above KRW300 million.

Corporate income tax

The corporate tax rate is ten per cent up to a maximum of KRW200 million of taxable income. For taxable income earned between KRW200 million and KRW20 billion the rate is 20 per cent, while taxable income exceeding KRW200 million is taxed at 22 per cent. A resident surtax of ten per cent is levied on the corporate tax. Corporate tax returns are filed annually, along with the tax payment, within three months of the end of each fiscal year. Semi-annual returns should be filed within two months of the end of the fiscal half year.

Value-added tax

Value-added tax (VAT) is applied to all imports to South Korea and all goods and services supplied within South Korea at a flat rate of ten per cent. Exemptions to this VAT exist, such as:

- the export of goods
- the supply of services to a non-resident without a South Korean domestic place of business for which compensation is received in foreign currency through a foreign exchange bank
- educational services
- passenger transport services
- insurance and banking services
- land
- admission to cultural institutions and events.

VAT refunds are available if the input VAT paid exceeds the output VAT collected.

Securities transaction tax

A securities transaction tax applies to the transfer of shares in a South Korean company (stocks listed on foreign or South Korean stock markets are subject to various reductions or exemptions).

Composite real estate tax

The Composite Real Estate Tax Act was introduced in 2005. The Act was intended to increase taxes for large real estate owners, discourage property speculation and reorganise the local tax system. Property taxes are collected on land and building within a district by the relevant local government authority. The National Tax Service also analyses properties owned by people outside their district of residence and may levy additional taxes in relation to these properties.

From 2006, taxes have been levied on houses with a value of over KRW600 million and land with a value of over KRW500 million. Taxes are levied after calculating the total number of properties owned by an individual household.

Local tax

There are a number of local taxes in South Korea. Local taxes include:

- acquisition tax, which applies to transfers of land, buildings, vehicles etc
- registration tax, which applies to the transfer of ownership of land and buildings.

Branch profit tax

Registration tax and surtaxes in the combined amount of 1.44 per cent of the paid-in capital are levied upon the incorporation of a subsidiary (reduced to 0.48 per cent if its head office is located outside the Seoul Metropolitan Area). The subsidiary is also required to use 0.1 per cent of its initial paid-in capital to purchase public bonds. Important taxation differences exist between a branch and a subsidiary:

- a subsidiary is taxed based on its entire global income, while a branch is taxed based on its South Korean income
- dividends from a subsidiary are subject to a 25 per cent withholding tax (in which a ten per cent surtax also applies, for an effective tax rate of 27.5 per cent, which may be reduced under a tax treaty), while the profit distributions from branches are generally not subject to further taxes; for although branch profit tax rates of 25 per cent (in which a ten per cent surtax also applies, for an effective tax rate of 27.5 per cent, which may be reduced under a tax treaty) exist, it is only imposed if the tax treaty with a given country allows it. Only a few tax treaties allow this, such as Australia (15 per cent), Canada (15 per cent plus a ten per cent inhabitant surtax), and France (5 per cent). Note that branches are governed under South Korean law and are not viewed as residents of the country in which they are located for treaty tax purposes. Special rules exist for the taxation of a branch's South Korean-source income.

Cross-border payments and foreign investment tax incentives

A withholding tax (WHT) exists in South Korea. This includes a 25 per cent tax on royalties (as well as interest) paid by a domestic company to a non-resident (where a ten per cent surtax also applies, making an effective tax rate of 27.5 per cent, which can be minimised or eliminated via tax treaties). The rules of this WHT also apply to dividends paid by a South Korean company to a non-resident. South Korea has "thin capitalisation" rules that apply to both corporations and permanently established foreign corporations. The International Taxes Adjustment Act (Law for the Coordination of International Tax Affairs) 1995 applies to all types of transactions (including transfer pricing rules) between residents and non-residents. The Corporate Tax Act 1949 applies to resident transactions. The Summary of Special Taxation For Foreign Investment in Restriction of Referential Taxation Act 2001 outlines South Korea's system for tax reduction or exemption in the cases of foreign investment.

Tariffs

Tariffs are payable on a range of goods imported into South Korea based on the dutiable value of the goods. Tariff reduction is available in certain circumstances. Tariff reduction involves the full or partial exemption of goods from tariff obligations, either conditionally or unconditionally, where the reduction or exemption benefits South Korea. Tariff

reduction can provide either an unconditional reduction or exemption, or a conditional reduction or exemption available only where goods are used for a certain purpose. The Customs Act provides for tariff reduction, although tariffs may also be reduced in accordance with the FIPA, Tax Exemptions and Exceptions Act, Offshore Minerals Development Act or as a result of intergovernmental or bilateral agreements. Tariff rebates may also be available when imported raw materials are used as part of the production or manufacturing of goods within South Korea for export. Tariffs may be rebated when the manufactured goods are subsequently exported from South Korea.

South Korea has been actively engaged in FTA negotiations with over 50 countries since 2003. FTAs have been completed with Chile, Singapore, EFTA (Iceland, Norway, Liechtenstein and Switzerland), the ASEAN countries, India and Peru. The FTA with the European Union recently came into force on 1 July 2011. The FTA with the United States which was initially signed in April 2007 was finally ratified by both countries in 2011 and will come into force on 15 March 2012.

South Korea is currently negotiating FTAs with the Gulf Cooperation Council, Peru, Australia, New Zealand, Canada, Mexico, and Columbia. South Korea also launched FTA negotiations with Turkey in 2010 and is conducting preparatory talks or joint research projects with a number of prospective FTA partners including China, Japan, MERCOSUR, Russia, Israel, the South African Customs Union, Vietnam, Mongolia, Malaysia, Indonesia and a group of Central American countries. South Korea, China and Japan have also agreed to start a joint study on a trilateral FTA between the three countries.

Capital gains tax

No special rules exist regarding capital gains tax in South Korea. Capital gains from transfers of capital assets are included in a corporation's income and are thus taxed at normal corporate tax rates. No participation exemptions or relief for reinvestment exist.

Labour, employment, and industrial relations

General

South Korea has a number of laws in relation to employment, with three types of labour laws under the Constitution:

- the guarantee of employment
- the protection of the workplace
- social insurance.

The Labour Standards Act 1997 prescribes the minimum working conditions standards in South Korea, and the Employment Insurance Act 1993 prescribes the employment insurance system. Part-time employees are defined as those workers whose hourly working weeks are shorter when compared to those of full-time workers. The working conditions of part-time workers are guaranteed proportionate to the working hours of full-time workers. Industrial disputes between labour and management are typically settled by the Labour Relations Commission, or through private mediation.

Employment conditions

Minimum employment conditions for most employees are set out in the various employment and labour laws.

Minimum wage

The Minimum Wage Act 1986 sets a minimum wage in the workplace. Since 24 November 2000, the minimum wage applies to all workplaces. The government sets and announces the minimum wage annually, no later than 5 August of each year. The set minimum wage applies from 1 September through to 31 August. Late payment or a failure to pay wages is an actionable offence. In 2011, the minimum wage was set at KRW4,580 per hour and KRW36,640 per day.

Ordinary working hours

For all business places with five or more full-time employees, the statutory working hours are eight hours a day and 40 hours a week, excluding lunch and/or any rest period (standby time under employer's supervision will also included in working hours under the amended Labor Standards Act, which will take effect on 12 August 2012). Under

the flexible working hours system, working hours can be extended up to 12 hours a day or 52 hours a week if agreed in writing by both the employer and the workers concerned and the extension does not exceed a period of three months.

Leave entitlements

Personal/carers' leave

There is no specific provision under Korean law requiring employees to be provided with personal/ carer leave (including sick leave), however, a set number of days for such leave is often granted by companies to their employees as a general practice.

Annual leave

As of 1 July 2008, 15 to 25 days annual leave will be granted – 15 days annual leave for those persons who have worked continuously for one year, with the total days of annual leave increasing by one day every two years. Those who have worked continuously for less than one year are granted one day of annual leave for each month of service. The use of leave is encouraged.

Leave as overtime compensation

South Korean labour and management plan to introduce a system of using leave as compensation for overtime work, etc.

Childcare leave and maternity leave

One parent of a newborn child (up to six years old and prior to entering elementary school) who has been working for over one year is entitled to childcare leave. The maximum leave period is 12 months. Maternity leave is available for up to 90 days with 60 paid days (45 days must be given after delivery). Total costs can be borne by social insurance (phased in between 2006 and 2008). A 30–90-day leave period for women who miscarry is available (after 16 weeks of pregnancy, with the amount of leave to depend on the time of miscarriage). Fraternal leave is also available for three paid days within 30 days from the date of birth of the father's child.

Menstruation leave

Female employees are entitled to menstruation leave without pay.

Maximum overtime hours and remuneration

Employers and employees may agree to extend working hours up to 12 hours a week. An employer shall, in addition to the ordinary wages, pay 50 per cent or more thereof for overtime work pursuant to relevant restrictions under the Labour Standards Act, for hours worked between 10pm and 6am the next day, or for hours worked during holidays. If the employee works normal overtime, at night or during a holiday, an employer must pay cumulatively the overtime allowance of 50 per cent or more of the ordinary wage for each type of work.

Public holidays

There are 13 to 15 public holidays. Typically, during a public holiday employees are entitled to leave from work without loss of pay.

Termination of employment

Generally, employers can only dismiss employees if they have justifiable cause, which is a very high standard to meet. If an employee is dismissed without justifiable cause, an employee can appeal the dismissal to the Labour Relations Commission or file legal action.

An employer who wants to dismiss their employees for managerial reasons will need to meet very strict conditions (very narrow exceptions to the general just cause rule). An employer has to give a written notification of the reason for dismissal and the date upon which the dismissal becomes effective and the employee is dismissed. The law requires prior notice of 30 days when an employee is dismissed. The employer must pay 30 days or more of ordinary wages to the employee being dismissed if the termination notice is given to the employee less than 30 days from the date of dismissal. In addition, when dismissing employees for managerial reasons, the employer must inform and consult in good faith with the employee representative in relation to the criteria for dismissal 50 days prior to the intended date of dismissal.

Labour union activities during working hours

As of 1 July 2010, when provided for in any collective agreement or agreement with the employer, labour union leaders may engage in labour union related tasks for improving the

employer/employee relationship and performing certain duties prescribed under law, such as consulting and/or discussing with the employer, handling complaints and engaging in industry safety functions, during his or her paid working hours up to the number of hours determined in accordance with set procedures for the business and the number of employees at the place of business.

Wages, severance pay and pensions

Severance pay

Employers shall provide their employees with a retirement benefit plan or a retirement pension plan in accordance with the Employee Retirement Benefit Security Act 2005. Under the retirement benefit payment plan, an employer shall pay the amount equivalent to wages of 30 days for each year an employee has worked for the employer. Those who have worked for the employer for no less than one year are eligible for the plan. Under the retirement pension plan, which was initiated in December 2005, an employer shall deposit a fixed amount in an account with a financial institution that carries on retirement pension operations, until their employees retire. The retirement pension plan promises the participant an annual or monthly benefit or a lump-sum payment at retirement. There are two types of retirement pension plan: a defined benefit plan and a defined contribution plan.

National pension

Another pension scheme is a national pension plan. This plan, which has been governed by the National Pension Act 1986, is aimed at securing the livelihood of the public against lost earning power from retirement, an unexpected accident or death on duty. Under the plan, both an employer and an employee shall deposit about 4.5 per cent of the basic monthly payment to the National Pension Management Corporation on a monthly basis.

Employment insurance (EI) and industrial accident compensation insurance (IACI)

These types of insurance form part of South Korea's social insurance system and protect against impoverishment due to job loss or occupational accidents or diseases (the latter under the Industrial Accident Compensation Insurance Act 1994).

Industrial relations

Industrial relations have evolved rapidly over the last 20 years. Under the Constitution, there are three basic labour rights of:

- the right to organise (that is, form labour unions)
- the right to bargain collectively (that is, an employee's right to negotiate with employers regarding working conditions)
- the right to strike (an employee's right to take action collectively so as to further the negotiation process).

Any efforts of management to hinder these three basic labour rights are deemed to be unfair labour practices. Workers are free to form or join trade unions.

Anti-discrimination law and equal employment opportunity

The Equal Employment Act 1987 promotes the equal opportunity and treatment of women and men and includes protections for women taking maternity leave.

Industrial safety and health and the labour inspection system

The goal of the Industrial Safety and Health Act 1994 is to prevent industrial accidents and diseases. The labour inspection system ensures that the country's workplaces adhere to South Korea's legal standards of working conditions and, if violations are found, provides for the enforcement of the labour standards law. Labour inspectors carry out various duties to protect employee working conditions. Specific procedures also exist for the management of health and safety within the construction industry.

Dispute resolution

Courts

The legal system is influenced by a combination of elements from European civil law systems, the Anglo-American common law system, and classical Chinese philosophies. As a result, the legal system is based on a quasi-civil code system that is heavily influenced by the common law system components of court precedent and the principle of the independence of the judiciary from the executive and legislative branches of government.

South Korea has a three-tier judicial court system, with eight different types of court. The highest judicial court is the Supreme Court, under which are five intermediate appellate courts. The District Courts, the High Courts (of which there are 15) and the Supreme Court form the basic three-tier system. In addition to these three-tier courts are the specialised courts with particular functions – the Patent Court, the Family Court, and the Administrative Court. The Patent Court is on a par with the High Courts, while the Family Court and Administrative Court are on a par with the District Courts. Both the District Court and the Family Court may establish Branch Courts and/or Municipal Courts (of which there are 103), and Registration Offices to assist in their workload. Branch Courts of both the District Court and the Family Court may be established and exist within the same court. In addition to these six courts, since 1988 South Korea has had a Constitutional Court, which hears constitutional issues. The country also has military courts.

The President, with the permission of the National Assembly, appoints the Chief Justice and the other 13 Justices of the Supreme Court. The President also appoints the Justices of the Constitutional Court. The Chief Justice, in consultation with the other court justices, appoints the lower court justices.

The Constitution upholds such procedural due process principles as:

- a presumption of innocence
- protection from self-incrimination
- the right to a trial within a reasonable amount of time
- protection from double jeopardy
- establishes an independent judiciary.

Trial by jury made its debut in South Korea in February 2008 under the civil participation system (CPS), which took effect that year as part of the judiciary reform. The CPS is still in its early stages. Under the CPS, criminal trial by jury is held only if several conditions are satisfied. The type of case must be identified as a felony such as rape, burglary or murder and the accused has to request the participation of a jury. The court decides whether a jury is necessary for the case. Jurors take part in trials by giving advisory comments to judges. They give a verdict as to whether a defendant is guilty or not by a majority vote. If the accused is found guilty by the judge, they debate on sentencing. Taking note of the jurors' opinions, the judge makes the final decision on the judgment and sentence.

Arbitration

Arbitration is often a more cost-effective, less adversarial method of alternative dispute resolution, which, unlike litigation in the courts, allows the parties and the arbitrator to set the degree of formality. Arbitration in South Korea has increased steadily, particularly for international commercial disputes after the 1997 Asian financial crisis.

South Korea's first arbitration law was the Arbitration Act 1966. In 1970, the Korean Commercial Arbitration Board (KCAB) was created to handle both foreign and domestic arbitrations. Three years later, South Korea ratified the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (New York Convention). In 1999, the Arbitration Act 1999 was enacted to replace the then-outdated Arbitration Act 1966. The new law was heavily influenced by the UNCITRAL Model Law on International Commercial Arbitration of 1985.

The KCAB and its corresponding rules respectively oversee and make up the basic procedures for commercial arbitration in South Korea. Three differences distinguish the KCAB from other international arbitral organisations:

- the default method of arbitrator selection is the "list method" (unless the parties agree otherwise)
- the fees charged by the KCAB for administrative and arbitral work are relatively low
- the KCAB is known for holding a series of short hearings at regular intervals, with the result that arbitrations are spread out over a longer period of time, rather than held in intensive hearings over a very short period of time (although technically the KCAB rules leave the number and content of both hearings and submissions to the discretion of the arbitral tribunal).

In addition to its domestic arbitral procedures through the KCAB, parties also seek arbitration through such international arbitral organisations as the International Chamber of Commerce, the Singapore International Arbitration Centre and others. Ad hoc arbitration tribunals also exist, particularly for maritime disputes.

Enforcement of arbitral awards depends on whether the arbitration award is a domestic or a foreign award, and, if a foreign award, whether or not the country in which the arbitration took place has ratified the New York Convention. Grounds to refuse arbitration award enforcement are limited and are narrowly interpreted by the South Korean Supreme Court.

Arbitration clauses are generally upheld by South Korean courts only if both parties consent to the clause and admit that such an arbitration agreement exists. Specific deadlines exist for:

- objections to the validity of an arbitration agreement
- a challenge to the selection of arbitrators.

An arbitration that is dismissed by the arbitration tribunal for failing to fall within the given arbitration agreement should be taken to the courts for a lawsuit on the merits of the dispute only, and not for a lawsuit for the cancellation of the arbitral award itself. In its efforts to ensure the stability of international business transactions, South Korea considers the international public policy of the New York Convention when it enforces foreign arbitral awards.

Other forms of alternative dispute resolution

Other forms of alternative dispute resolution in South Korea include compromise and mediation. Compromise is a process regulated under the Civil Code 1948, where the parties to a dispute voluntarily contract to terminate the dispute through mutual concession. The compromise is contractual if the court does not intervene. If the court does intervene, a judicial compromise takes place. Unlike an arbitrator, a conciliator has an active role where they may suggest terms of settlement and provide advice to assist in reaching an agreement.

Mediation is a process different from compromise, in which the mediator is an independent third party outside the formal South Korean judicial system. A mediator assists the parties to a dispute to reach a mutually beneficial agreement.

Taiwan

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As evidenced by its accession to the World Trade Organization in 2002, the ongoing liberalisation of its trade and foreign investment regimes, and the opening up of various sectors within its economy to foreign investors through tax incentives and the lifting of investment restrictions, Taiwan welcomes and encourages foreign investment. Direct investment through new enterprises and joint ventures is especially welcome in Taiwan. Set forth below is an introduction to issues that may be of interest to those looking to invest and do business in Taiwan.

Formerly a one-party state, the government structure of Taiwan has evolved into a multi-party representative democracy. The two levels of government in Taiwan consist of a central government and municipal governments. The central government has five branches, namely, the Executive Yuan, the Legislative Yuan, the Judicial Yuan, the Control Yuan and the Examination Yuan.

Taiwan's head of state is its President, who is directly elected by Taiwanese citizens for a term of four years and for a maximum of two terms. Members of the Legislative Yuan are also directly elected by Taiwanese citizens.

Visas and work permits

Save for passport holders of certain countries who are entitled to visa-exempt entry into Taiwan (currently there are 42 countries, for stays of 30 or 90 days), foreigners are required to apply for either a visitor's visa or a resident visa in order to enter Taiwan.

Visitor's visa

A foreign national who holds an ordinary passport or another legal travel document issued by a foreign country and who intends to stay in Taiwan for less than six months for the purpose of transit, tourism, visiting relatives, attending a training course, receiving medical treatment or engaging in business or other permissible activities, can apply for a visitor's visa at an appropriate Taiwanese representative office.

To apply for a visitor's visa, the applicant must submit the following documents:

- an original passport valid for at least six months at the time of application
- a duly completed application form with two passport size photographs
- an original outbound airline ticket from Taiwan or verifiable proof of purchase of a steamship ticket from Taiwan
- documents verifying the purpose of the visit
- any other relevant documents.

Resident visa

A foreign national who holds an ordinary passport or another legal travel document issued by a foreign country and who intends to stay in Taiwan for more than six months for the purpose of reuniting with family, study, employment, investment, missionary work, or engaging in other permissible activities can apply for a resident visa at an appropriate Taiwan representative office.

In order to apply for a resident visa, the applicant must submit the following documents:

- an original passport valid for at least six months at the time of application
- a duly completed application form with two passport size photographs
- supporting documents or official letters of approval from a competent Taiwanese authority

- a health certificate, if applicable
- any other relevant documents.

Work permit
Generally speaking, if a foreign national intends to work in Taiwan, their employer must apply for a work permit on behalf of the foreign national. The foreign national and the employer must meet certain requirements based on the work that the foreign national will perform in Taiwan. Once the work permit is approved, the foreign national is entitled to apply for a resident visa in Taiwan.

Change of visa status and visa extension
A foreign national who has lawfully entered Taiwan can change the status of his or her visa to that of a resident visa. To change the status of a visa, the visa holder must submit a written statement explaining the purpose of the change to the Bureau of Consular Affairs or its branch offices. The applicant must also prepare and submit certain required documents. However, the following persons are not allowed to change the status of their visas or extend their visas:

- visitors who have stayed beyond the term of their visas
- visitors who have already changed the status of their visas.

Furthermore, visas which are valid for less than 60 days and which bear the stamp “No extension will be granted” cannot be extended.

Alien resident certificate
A foreign national who has a resident visa is required to apply for an alien resident certificate (ARC) at the local office of the National Immigration Agency within 15 days of his or her arrival. A foreign national who has entered Taiwan on another visa and has filed an application for a resident visa should also apply for an ARC within 15 days of his or her resident visa being issued. The ARC is typically issued two weeks after the application is filed, so if the foreign national will travel in and out of Taiwan during such two week period, a re-entry permit can be applied for at the same time the ARC application is filed. The re-entry permit allows the foreign national travel in and out of Taiwan during the validity date of the re-entry visa, provided that it is a multiple re-entry permit.

Business entities

General
A foreign investor has a wide range of business structures to choose from when doing business in Taiwan. The type of entity the investor chooses will depend on what best suits the particular needs of the investor as well as the investor’s financial and tax considerations.

The most common business entities used by foreign investors in Taiwan include:

- a liaison office
- a branch office of the foreign parent company
- a subsidiary of the foreign parent company
- a joint venture.

Liaison office
A foreign company intending to designate a representative to conduct liaison work in Taiwan may register a liaison office with the Ministry of Economic Affairs pursuant to Article 386 of the Company Law. By law, a liaison office may only conduct liaison work, such as locating manufacturers or customers, following up on production schedules or delivery schedules, and coordinating shipping schedules and related details. A liaison office may not conduct any business activities, such as importing goods for sale or other activities that will generate or will be deemed to have generated business income for the account of the liaison office. Unlike a branch office, a subsidiary or a joint venture, a liaison office is not subject to income tax in Taiwan.

Branch office
If the foreign company wishes to carry on business in Taiwan and operate through a branch office, it must register the business pursuant to the Company Law. The establishment of a branch office means:

- the Taiwan government recognises the existence of the head office as a foreign corporate entity

- the branch office is granted permission to do business in Taiwan.

The branch office must have a branch manager and an agent for litigious and non litigious matters. In practice, these two positions are usually served by one individual simultaneously. If the branch manager or the agent is a foreigner, they are entitled to apply for a work permit, resident visa and an alien resident certificate. Although there is no minimum working capital requirement (except in the case where the branch office employs a foreigner (other than the branch manager), in which case a minimum working capital of NT$5 million is required), the initial working capital should be an amount sufficient to cover the expenditures of the branch office before it generates any revenue.

A branch office of a foreign parent company is not a separate legal entity but a part of the parent company. As such, the parent company will be liable for any activities conducted by the branch office. In other words, when a branch office is involved in litigation, tax disputes, or other liabilities, the liabilities will attach to the total assets of the parent company as a whole, rather than the assets of the branch office in Taiwan.

Subsidiary

A foreign company may wish to incorporate a wholly-owned subsidiary in Taiwan. One advantage of a subsidiary arrangement is that it limits the liability of the parent company in relation to the operations carried on by the Taiwan subsidiary. The subsidiary may be either a limited company or a company limited by shares. Either type of subsidiary has unique advantages. Professional assistance should be sought to ensure that the most suitable corporate form is chosen. Under Taiwan's current laws and regulations, foreign investors, if intending to establish a subsidiary, are required to file a foreign investment application (FIA) pursuant to the Statute for Investment by Foreign Nationals.

A company limited by shares must have at least two promoters (initial shareholders), but only one promoter is acceptable if the sole promoter is the government or a company. The shares held by promoters cannot be transferred within one year from the date of incorporation. In addition, a company limited by shares must organise a board of directors comprised of at least three directors, while a limited company may appoint one to three directors. One of the directors of a company limited by shares must be elected as chairman of the board. A company limited by shares must also appoint at least one supervisor (statutory auditor). All the directors and the supervisor can be foreign nationals if the foreign investor(s) obtains FIA approval.

The minimum amount of capital for a subsidiary may be regulated by order of the competent authorities, taking into consideration the nature of the business and the economic circumstances. Currently, there is no minimum capital requirement (except in the case where the subsidiary employs a foreigner (other than its general manager), in which case a minimum capital of NT$5 million is required). However, the initial capital should be an amount sufficient to cover the expenditures of the subsidiary before it generates any revenue.

Joint venture

A joint venture is normally used to carry on joint venture business activities on behalf of its shareholders. A joint venture typically takes on the form of a company incorporated in Taiwan which is legally distinct from the parties which comprise it. It is used where a number of parties wish to carry on business together. The component parties' respective liabilities are limited to their respective shares of capital investment in the joint venture company. The formalities for establishment of a joint venture company are similar to those for a subsidiary company.

The Taiwan Stock Exchange

Investors may wish to consider raising local equity by listing on The Taiwan Stock Exchange (Exchange). The Exchange serves a wide array of international and domestic investors and end users. Potential investors should ask their legal adviser for a thorough outline of the current listing rules.

Business environment

General

Taiwan has over the years maintained its position as one of the leading places in the world to invest and do business. With a huge consumer population of approximately 23 million people occupying an area of 36,000 square kilometres, Taiwan is an island country, consisting of the main island of Taiwan together with the islands of Penghu. Taiwan was once a recipient of foreign aid in the 1950's with an economy primarily based on agriculture. However, in the past 60 years, through aggressive policies aimed at self-sufficiency and modernising the economy, Taiwan has transformed itself into one of the world's leading manufacturers of electronic equipment, electrical equipment, chemical exports, plastics, steel, and pharmaceuticals. More recently, Taiwan has placed increasing emphasis on developing its information and high technology industries. As a result of these efforts, Taiwan is a creditor economy and a world leader in the supply of high technology products such as semi-conductor equipment, computers, and computer monitors. In 2011, Taiwan was ranked the 13th most competitive country in the world out of 142 economies according to the World Economic Forum's Global Competitiveness Report 2011-2012. Moreover, Taiwan was ranked 6th out of 59 economies in the International Institute for Management Development's World Competitivenes Yearbook 2011.

Taiwan's geographic location is particularly conducive to foreign trade. Average travel distance from Taiwan to other major ports in the Asia Pacific region is the shortest among all Asia Pacific ports. As such, Taiwan's ports are among the busiest ports in the world and foreign trade has very much been the engine behind Taiwan's economic growth since the 1950s. Air travel from Taiwan to other major cities in Asia is convenient and cost effective. As such, government policies are aimed at developing Taiwan into a global logistics centre for foreign businesses wishing to do business in Asia.

Located 160 kilometres off the southeast coast of the People's Republic of China and separated from the People's Republic of China only by the Taiwan Strait, Taiwan has emphasised the strengthening of existing economic ties with the People's Republic of China as a key component of Taiwan's long-term economic policy. Significant progress has been made recently as a result of the promulgation of the Economic Cooperation Framework Agreement on 12 September 2010. Furthermore, China overtook the U.S. to become Taiwan's largest export market, with the U.S. and Japan rounding out Taiwan's three largest trading partners.

Given the export-oriented nature of Taiwan's economy, Taiwan was given a further boost when Taiwan became a member of the World Trade Organization (WTO) in January 2002. As a member of the WTO, Taiwan has committed to working towards the ongoing lifting or relaxation of foreign trade barriers and foreign investment restrictions over the last ten years, which have liberalised and facilitated foreign trade and investment.

The official language in Taiwan is Mandarin Chinese. A large percentage of the population also speak Taiwanese, Hakka and other Chinese dialects. The most frequently spoken foreign languages in Taiwan are English and Japanese.

Intellectual property protection regime

A comprehensive and sophisticated regime for the protection of intellectual property rights has been established in Taiwan.

Trademarks

In Taiwan the protection of trademarks is governed by the Trademark Law, which provides for the registration of trademarks for goods as well as for services. Once a trademark is duly registered with the Trademark Office, the owner of such mark enjoys the exclusive right to use such registered mark in Taiwan for ten years, at the expiry of which an extension of the exclusive right may be obtained by application. In order to register a trademark, the applicant must prove that the trademark is distinctive and not confusingly similar to another mark used for similar goods or services. It is not necessary that a trademark has a history of use in Taiwan before it is registered. However, a registered trademark may be subject to cancellation in the event that it has not been used in Taiwan for three years after registration.

Copyright
Copyright protection in Taiwan is governed by the Copyright Law, which provides for copyright protection in all original literary, musical, dramatic, artistic, sound and cinematic works. In Taiwan, copyright protection does not require that the copyright or the work which is subject to the copyright first be registered. Provided that the work is sufficiently original when reduced to a permanent medium, copyright in such work shall be deemed to exist. The Copyright Law recognises moral rights and economic rights in respect of a copyrightable work. Generally speaking, economic rights in connection with a copyrighted work enjoy protection for 50 years after the death of the author, whereas moral rights in connection with a copyrighted work are protected as long as the copyrighted work exists.

Patents
Protection of patents in Taiwan is governed by the Patent Law, which provides that in order to obtain a patent in respect of an invention, such invention must be new, innovative and useful. By obtaining a patent, the creator enjoys the exclusive manufacturing and selling rights in respect of the patented invention, and can license the right to manufacture and sell the invention to a third party.

Trade secrets
Trade secret protection in Taiwan is governed by the Trade Secret Law. Generally speaking, a trade secret can be afforded protection if the trade secret is not known to persons who are generally involved in information of the same or similar nature, the trade secret has economic value, and the owner of the secret has taken reasonable measures to maintain its secrecy.

Integrated circuits
Protection of integrated circuits in Taiwan is governed by the Integrated Circuit Layout Protection Act. In order to protect an integrated circuit, the creator of such circuit must apply to register such circuit. Upon due registration, no one other than the owner of the registered integrated circuit may without authorisation copy, import or distribute the integrated circuit layout. If registered pursuant to the Integrated Circuit Layout Protection Act, the integrated circuit shall be protected for ten years commencing from the earlier of the day that the application to register the integrated circuit layout was filed and the day that the integrated circuit layout was used commercially for the first time.

Financial institutions
As a result of major revisions to the Banking Law in the early 1990s, government controls over financial institutions in Taiwan have been relaxed significantly and many financial institutions in Taiwan have been privatised and consolidated. Two main government bodies now regulate Taiwan's financial institutions, namely, the Central Bank of China and the Financial Supervisory Commission. The Central Bank of China regulates the financial conditions of Taiwan, oversees market credit management and represents Taiwan in international financial matters. The Financial Supervisory Commission supervises the financial administration of all banks in Taiwan. It also oversees the operations of local branches of foreign banks in Taiwan.

Consumer protection
Taiwan's Consumer Protection Law (CPL) is aimed at protecting consumer welfare, public safety and improving the overall quality of living of people in Taiwan. The CPL mandates that businesses be held accountable for product defects and disclose complete and accurate information to consumers about the goods and services they provide. The CPL also introduces the concepts of equality and reciprocity into standard consumer contracts, such that when the terms of a standard consumer contract are ambiguous, such terms shall be interpreted in favour of the consumer. Moreover, if a term of a standard consumer contract is deemed by the Consumer Protection Commission as being unconscionable or offending the principle of good faith, such term may be invalidated under the CPL. In order to further protect the public, regulations have been put in place to regulate transactions offered through mail, radio, television broadcasts, telephone, facsimile, catalogs, newspaper, magazine, the internet or other similar mechanisms, and home visit sales. For example, consumers may rescind the purchase contract in writing or return the goods within seven days after receipt of the goods or services without giving any reason or paying any expenses or penalty. Under the CPL, the Consumer Protection Commission and its sub-

agencies are empowered to conduct investigations and tests on various products and services in the market. A business that has violated the CPL may be required to pay an administrative fine, recall its products, cease production or refrain from further business activities if the authorities have evidence to suggest that the health and safety of consumers is in jeopardy. A dispute resolution mechanism is also provided under the CPL.

Anti-Trust and Competition Laws

Taiwan's Fair Trade Law (FTL) contains anti-trust laws and laws against unfair competition. The FTL addresses a number of market practices including monopolies, oligopolies, combinations, mergers, discriminatory treatment of competitors, concerted actions, vertical restraint measures, and pyramid sales schemes. In addition, the FTL contains prohibitions against trademark infringement, passing off, intentional mis-labelling, trade libel, misappropriation of trade secrets, and other deceptive and unfair market practices. A business that is in violation of the FTL will be subject to criminal, civil and administrative penalties.

Franchising

So as to ensure fair competition and to prevent franchisors from concealing important information when recruiting franchisees, Taiwan's Fair Trade Commission has enacted regulations which impose certain disclosure obligations upon franchisors. For example, at least ten days prior to the signing of a franchise contract, a franchisor must disclose to a prospective franchisee information on a range of issues, including information on the responsible persons and managers of the franchisor, terms respecting the payment of royalties by the franchisee, and intellectual property rights, among a number of other issues. Moreover, a reasonable period of no less than five days shall be given to the prospective franchisee to review such information. If a franchisor fails to comply with such obligations, the franchisor may be deemed to have violated Taiwan's FTL.

Foreign investment policy

General

According to Taiwan's Investment Commission, approximately 95 per cent of all foreign investment has been deregulated, allowing foreigners to invest in all sectors except in those sectors where certain prohibitions or conditional restrictions still apply. Those restrictions or prohibitions are summarised in the Investment Commission's "Negative List for Investment by Overseas Chinese and Foreign Nationals" (Negative List). Generally speaking, under the Negative List, foreigners are restricted or prohibited from investing in sectors which, from the government's perspective, have special implications on Taiwan's national security, public harmony, social behaviour, public health or which are otherwise prohibited due to international agreements with other countries. For example, the Negative List prohibits foreign investors from investing in the manufacture of firearms, ammunition, toxic chemicals and certain basic industrial chemicals such as nitroglycerin (used in gunpowder) to the extent that nitroglycerin may be deemed to harm public safety, and restricts foreign investment in the manufacture and repair of military equipment, gas supply, electricity supply, water supply, civil air transportation, ocean transportation, class A telecommunication services, radio and television. All other sectors not described in the Negative List are free from foreign investment restrictions and prohibitions.

Foreign investment application

Among the various laws governing foreign investment in Taiwan, the most important ones are the Statute for Investment by Foreign Nationals and the Statute for Industrial Innovation. Under the Statute for Investment by Foreign Nationals, a foreign investor whose investment project is not restricted or prohibited by the Negative List may file a foreign investment application (FIA) with the Investment Commission of the Ministry of Economic Affairs.

Note that although PRC investors are not eligible to file a FIA, they are permitted to invest in Taiwan subject to certain limitations. Such investment must also be reviewed and approved by the Investment Commission, but such review and approval is independent from the FIA process.

A foreign investor whose FIA is approved by the Investment Commission is entitled to, among other things, the following rights pursuant to the Statute for Investment by Foreign Nationals:

- repatriation in foreign currency of net profits or interest accrued from the investment
- where the shares of the invested company are transferred or sold one year after the commencement of the company's business operations or the dissolution of the company, repatriation in foreign currency of the invested capital as well as the capital gain resulting from such transfer or sale
- exemption from the residency/nationality requirement for the chairman, directors and supervisor of the invested company
- exemption from having to list the shares of the invested company on a stock exchange in Taiwan
- exemption from having to offer ten per cent to 15 per cent of the invested company's newly issued shares to employees of the company if the foreign investor holds 45 per cent or more of the total capital of the company.

The Statute for Industrial Innovation provides various other incentives to entities in Taiwan from which a foreign investor can benefit as a shareholder or head office of a Taiwan subsidiary or branch, respectively. For more information on the Statute for Industrial Innovation, see Section 6 (Government Initiative and Incentives).

FIA documents

In applying for the FIA approval, a foreign investor must submit the following documents to the Investment Commission:

- completed application form
- documentary proof of the foreign investor's identity
- a photocopy of the foreign investor's registration certificate or an official document describing the scope of activities that the foreign investor (if a corporate entity) is registered to carry on or its registration certificate
- a corporate organisation chart of the foreign investor's group of companies up to the level of its ultimate individual shareholder(s). If at any point in the corporate chain a company is a publicly listed company, then the corporate organisation chart needs to only show up to such company and documentation must be provided which evidences such company's publicly listed status. The purpose of this requirement is so that the Investment Commission can confirm that the foreign investor's investment does not exceed the PRC investment threshold requiring a PRC investment approval instead of a FIA approval
- an original letter appointing the foreign investor's local representative and a photocopy of such representative's identity card.

FIA review period

The amount of time required to process and review an FIA depends on the nature of the investment at issue. If the proposed investment is valued at less than NT$500 million and is not included on the Negative List, the review period will usually be between two to four business days. If the proposed investment is valued between NT$500 million and NT$1.5 billion and is not included on the Negative List, the review period will be between seven to ten business days. If the proposed investment is valued at an amount in excess of NT$1.5 billion and is not included on the Negative List, the review period will be between ten to 20 business days.

Remitting investment capital into Taiwan

After FIA approval has been obtained, the foreign investor must open a preparatory bank account in Taiwan and remit the investment funds (in a foreign currency) into such account. After the remittance is complete, the investor must submit original copies of the remittance notice and the foreign exchange receipt and apply to have the invested capital amount confirmed by the Investment Commission. In addition, after FIA approval has been obtained, the foreign investor must register the investment with the competent authority.

In most cases, a foreign investor will remit investment funds into Taiwan in cash. In some cases, it is possible to capitalise an investment in Taiwan by contributing machinery, equipment, raw materials, intellectual property rights or other property as approved by the competent authority. However, the process for doing so is more time-consuming and complicated than an equity investment.

Article 9 of the Statute for Investment by Foreign Nationals requires the foreign investor to remit the entire approved investment amount into Taiwan within the required period, which is usually one to three years after receiving the FIA approval. If the foreign investor is unable to remit the investment amount, in whole or in part, within the required time period, the FIA approval will be revoked unless prior to the expiration of the time period the foreign investor can show good cause for its failure to remit the investment amount in time, in which case it can apply to the authority for a time extension. Each time period extension is usually six months.

Government initiatives and incentives

Of the various incentives and initiatives made available in Taiwan, the most significant are found in Taiwan's Statute for Industrial Innovation (SII). Set out below is a summary of the major incentives and initiatives provided in the SII.

The SII

The SII provides some incentives to foreign and domestic investors. For example:

- for facilitating the promotion of an industrial innovation, a company may credit up to 15 per cent of the company's total expenditure on R&D against its profit-seeking enterprise income tax payable for that year; provided, that this credit shall not exceed 30 per cent of the profit-seeking enterprise income tax payable by the company in that year
- land acquisition for the development of industrial parks within a certain size will not have to be passed through multiple layers of agencies for approval but will be submitted directly to the central government authority in charge of the relevant municipal, county, or city governments. Such establishment of industrial parks is not limited to manufacturing enterprises but will be open to service, telecommunications, environmental protection, and cultural and creative enterprises as well
- instead of providing various tax exemption policies, the SII encourages an amendment to the Income Tax Act be made to reduce the income tax rate for the enterprise from 20 per cent to 17 per cent, which gives a competitive advantage to Taiwan since the income tax rate of Korea, Singapore, mainland China, Japan, Holland, Finland, Canada and America are 22 per cent, 17 per cent, 25 per cent, 30 per cent, 25.5 per cent, 26 per cent, 21 per cent and 35 per cent, respectively (For other relevant information about the Profit-Seeking Enterprise Income Tax, see 7.2(1))
- to encourage Taiwan companies to utilise global resources and internationalise their operations, such company may apply to establish within Taiwan an operational headquarter of a certain size, which will receive significant economic advantages as prescribed by the competent authorities.

Taxation

Taxation policy

To encourage investment in Taiwan, a competitive range of tax concessions and incentives are available to investors in Taiwan. Such concessions and incentives provide a very supportive framework for investment in Taiwan and compare favorably with other industrialised economies. A foreign investor should work closely with a professional Taiwanese legal advisor to ensure compliance with all relevant regulations.

Taxation in Taiwan includes income tax, mining lot tax, estate and gift tax, land tax, house tax, deed tax, customs duty, securities transaction tax, business tax, stamp tax, amusement tax, tobacco and wine tax, vehicle license tax and commodity tax. Foreign investors in Taiwan must pay taxes

levied by the Taiwanese government and by the county and municipal governments. The major taxes levied in Taiwan are summarised below.

Income tax

Generally speaking, there are two main types of income tax assessable under Taiwanese law, namely, profit-seeking enterprise income tax and individual consolidated income tax.

Profit-seeking enterprise income tax

A profit-seeking enterprise is any enterprise which has a business title or a place of business with profit-making as its purpose and which is organised as a sole proprietorship, a partnership, a company (including a subsidiary of a foreign company), a branch office of a foreign company, or any other form of organisation which is not otherwise exempt under Taiwanese law. Profit-seeking enterprise income tax is assessable on the income of any profit-seeking enterprise operating in Taiwan, unless such income falls within any of the exemptions provided under Taiwanese law. A profit-seeking enterprise, other than a branch office of a foreign company, is taxed on its worldwide income. If the profit-seeking enterprise pays income tax on its foreign income, such income tax can be credited against income tax payable by the profit-seeking enterprise on its Taiwan-sourced income. A foreign company's branch office in Taiwan or a foreign company with a fixed place of business in Taiwan (such as an administrative office, business office, factory, workshop, warehouse, mining field, and construction site, but excepting a warehouse or storage site used exclusively for the purchase of goods and maintenance shops not used for processing or manufacturing products) is subject to income tax only on its income from Taiwan sources. However, court rulings suggest that under very limited circumstances, a foreign company itself will be subject to Taiwan income tax. Specifically, if a foreign company engages in any value added activities to its products or services in Taiwan, the resulting incremental amount of such products or services is subject to Taiwan income tax.

In general, Taiwan-sourced dividends, other profit distributions, payments for services, interest income, rental income, and royalties earned by foreign companies are subject to withholding tax at a rate of 20 per cent. A foreign enterprise carrying on certain designated businesses such as machine or equipment leasing, international transportation, construction or technical services may apply to the Ministry of Finance for an approval to treat ten per cent (in the case of an enterprise engaged in international transportation) or 15 per cent (in the case of enterprises engaged in any other designated business) of its total Taiwan-sourced income as its taxable income. If the Ministry of Finance approves its application, the income tax payable by the foreign enterprise would be only two per cent or three per cent, respectively, of its total Taiwan-sourced income. Furthermore, the existence of tax treaties entered into between Taiwan and other jurisdictions reduce the withholding rates for particular type of payments into such jurisdictions. The reduced withholding rates listed by jurisdiction are as follows:

Countries Income Items	Dividends	Interest	Royalties
Non-treaty Countries	20	15,20	20
Australia	10,15	10	12.5
Denmark	10	10	10
France	10	10	10
Gambia	10	10	10
Hungary	10	10	10
India	12.5	10	10
Indonesia	10	10	10
Israel	10	7,10	10

Countries Income Items	Dividends	Interest	Royalties
Macedonia	10	10	10
Malaysia	12.5	10	10
New Zealand	15	10	10
Netherlands	10	10	10
Paraguay	5	10	10
Senegal	10	15	12.5
Singapore	The tax shall not exceed an amount which together with the corporate income tax payable on the profits of the company paying the dividends constitutes 40% of that part of the taxable income out of which the dividends are declared	No agreement	15
Slovakia	10	10	5,10
South Africa	5,15	10	10
Swaziland	10	10	10
Sweden	10	10	10
Switzerland	10,15	10	10
UK	10	10	10
Vietnam	15	10	15

Profit-seeking enterprise income tax is calculated against the net income of the profit-seeking enterprise (ie, gross income less cost of sales or services, deductible expenses and losses).

To avoid double taxation, Taiwan applies a tax imputation system for dividends. Under this system, individual shareholders residing in Taiwan who receive dividends from a company are entitled to an imputed tax credit on income tax paid by the company.

In the case of corporate shareholders, dividends received are not deemed to be taxable income. However, any tax credits otherwise received by a corporate shareholder will be imputed to its own shareholders in respect of future dividend distributions to avoid double taxation. Imputed tax credits are not available to non-resident shareholders.

If a company earns after-tax profits in a year but does not distribute the profits by 31 December of the following year, such profits will be subject to a ten per cent advance tax. Payment of the ten per cent advance tax can be claimed as a tax credit against the final tax liability of shareholders.

Individual income tax

An individual who receives income from Taiwanese sources must report and pay income tax unless such income is otherwise exempt under Taiwanese law. Taiwan's individual income tax system recognises two types of individual taxpayers: resident taxpayers and non-resident taxpayers. For the purposes of Taiwanese taxation law, "resident" means a person who maintains a domicile in Taiwan and who resides regularly in Taiwan or, alternatively, one who stays in Taiwan for a total of at least 183 days in a taxable year. Non-residents are persons who do not satisfy the above criterion. While both resident individuals and non-resident individuals are liable to report and pay individual income tax on their Taiwan-sourced income, non-resident individuals who generate Taiwan-sourced income typically pay the applicable income tax by at source withholding.

Taiwan imposes an Income Basic Tax (IBT) on resident taxpayers. The IBT Act sets a standard as to how much an individual's income is subject to tax liability. A resident taxpayer's IBT is determined by adding the resident taxpayer's net income as calculated according to the Income Tax Act to various items specified under the IBT Act. This can include any income derived from sources outside of Taiwan. However, if the aggregate amount of two of the items under the IBT Act is less than NT$1,000,000, then such amount may be excluded from the calculation of the IBT.

Taiwanese taxation laws require that the income of a taxpayer, the taxpayer's spouse, and the taxpayer's dependents all be consolidated into one income tax return.

In Taiwan, a resident individual's income tax will be assessed on the resident's gross consolidated income for a particular calendar year after deducting personal exemptions and deductions.

If an individual who is a resident in Taiwan receives a salary paid by their foreign employer, by a local Taiwanese subsidiary, by a Taiwanese branch office, or by any other local entity for services rendered in Taiwan, such salary is subject to income tax. An exception to this is that if the expatriate stayed in Taiwan for not more than 90 days during a calendar year, the salaries received by the expatriate from their foreign employer are not subject to Taiwanese income tax.

If a non-resident individual stays in Taiwan for more than 90 days but less than 183 days within a calendar year, the income received by such non-resident individual in Taiwan or paid by the individual's foreign employer for services rendered in Taiwan is consolidated, reported, and levied at a withholding rate prescribed by the tax authority. Non-residents who stay in Taiwan for 183 days or longer in any calendar year will be treated as residents for the purpose of Taiwanese income tax.

Some remuneration paid by employers to expatriates in Taiwan may be non-taxable, such as housing subsidies or car allowances.

An alternative minimum tax (AMT), which came into effect on 1 January 2006, operates as a "substitute tax system." If the AMT applies, the taxpayer must add back certain "preferred items" (eg, income attributable to tax holidays or capital gains attributable to the sale of Taiwan securities) to taxable income calculated under the general tax rules, thus increasing taxable income. The AMT rate for individuals is 20 per cent. There is a NT$6,000,000 deduction per household unit from the minimum income to arrive at the minimum taxable income subject to the AMT. Under the AMT scheme, individual taxpayers calculate both the tax under the general income tax rules and the AMT rules, and pay the higher of the two amounts. If foreign source income is included in the calculation of the AMT, any foreign tax paid on those amounts may be offset from the AMT. The AMT Law applies to both profit-seeking enterprises and individuals.

Business tax (VAT and Non-VAT)

Generally speaking, imported goods and services sold in Taiwan are subject to business tax, also known as VAT and Non-VAT. Whereas VAT is levied based on the value added to each sale, Non-VAT is levied on the gross business receipts of financial institutions and small-scale enterprises.

Persons required to pay VAT include:

- a person that sells goods or services
- a person that receives or holds imported goods
- a person that buys services rendered by a foreign enterprise, institution, or organisation without a permanent place of business in Taiwan
- a business agent of a foreign enterprise engaged in international transportation without a permanent place of business in Taiwan.

VAT in Taiwan is taxed at a rate of five per cent and applies to persons doing business in any industry in Taiwan, provided that a zero tax rate applies in the case of export sales and export-related services.

In contrast, only banks, insurance companies, trust and investment companies, securities firms, futures firms, bills finance companies, and pawnshops are

subject to Non-VAT, which is taxed at a rate of two per cent (except in the case of reinsurance companies, in which case the Non-VAT rate is one per cent).

VAT assessed on imported goods is collected by the Customs Bureau at the time of importation. VAT on local purchases of goods and services are collected by the seller of the goods or services if the seller is a VAT payer.

A business entity that is subject to the VAT system must file VAT returns every two months. On each VAT return the business entity will specify any VAT paid on local purchases (also known as input VAT) and VAT collected from sales (also known as output VAT). VAT will be payable to the extent that output VAT exceeds input VAT. If input VAT exceeds output VAT, a credit equal to the difference can be carried forward to offset future VAT payable. Certain items are exempt from VAT under Taiwan's Business Tax Law.

If a business sells goods or services which are subject to Taiwanese business tax, the business must register with the appropriate tax authority in Taiwan. If a foreign business engages in taxable transactions in Taiwan, the foreign business is entitled to register for VAT. If the foreign business operates under a service contract with a Taiwan client pursuant to whom the foreign business is to provide job site supervision, start-up and technical services, the foreign business may apply to the tax office for exemption from VAT registration.

Securities transaction tax

The purchase and sale of bonds (other than government bonds), share certificates, shares or corporate debentures issued by companies or any other securities available for subscription after being approved by the government are subject to securities transaction tax. Securities transaction tax is borne by the seller of the securities, but paid by the purchaser withholding the amount of the securities transaction tax from the purchase price and remitting such amount to the tax authority.

For shares and share certificates, the securities transaction tax rate is 0.3 per cent of the transaction price. For corporate bonds or any securities offered to the public and approved by the authority, the securities transaction tax rate is 0.1 per cent of the transaction price.

Customs duty

Customs duty is payable on imported goods based on the duty-paying value of the imported goods. The duty-paying value of an imported good is deemed to be the true transaction price of the imported good. Where the price of an imported good as indicated on the relevant invoice is considered to be incorrect, untrue or obviously too low, or in the case of a related party transaction, Customs may determine or estimate an appropriate duty-paying value for such imported good by referring to:

- the most recent true transaction prices used on past occasions where the same goods were imported
- the domestic selling price of the same or similar goods
- the production cost and expense of such goods.

If none of the aforementioned prices are available, Customs may assess such goods, provided that the assessment is reasonable and based on information acquired through proper investigation. The taxpayer shall be identified as the consignee of the imported goods, the bearer of the bill of lading, or the holder of the imported goods.

Commodity tax

Commodity tax is levied on specific commodities locally produced or imported into Taiwan. For a locally produced commodity, commodity tax is levied at source and is payable on the removal of the commodity from the factory. For an imported commodity, commodity tax is levied when the import duty is paid.

Land value tax and building tax

Land is subject to land value tax and buildings are subject to building tax on an annual basis payable by the landowner or building owner (as the case may be). Land value tax is assessed in November of each year in respect of the fiscal year beginning on 1 January and ending on 31 December. Building tax is assessed in May of each year for the fiscal year beginning on 1 July and ending on 30 June.

Assessment of the building tax is based on a government assessed value (after depreciation) of the building. Land value tax is assessed based on the reported land price. In this regard, the government will adjust the published land prices on 1 July every three years, and 80 per cent of the published land price is treated as the reported land price unless the owner reports a higher land price.

Land value increment tax

Gains realised from the disposition of land are exempted from income tax and business tax. Instead, such gains will be subject to land value increment tax (LVIT). Generally speaking, LVIT is calculated as on the difference between the published government assessment price for the land at the time of acquisition and the published government assessment price for the land at the time of disposition.

Deed tax

Deed tax is levied on the transfer of title to real estate through a sale, exchange, donation, partition, or occupancy, but excluding any transfer of title where LVIT is assessable. Deed tax is calculated based on the relevant deed price prescribed by the local government.

Stamp tax

The following documents, if executed in Taiwan, are subject to stamp tax:

- receipts of monetary payment
- deeds for the sale of movable property
- agreements for undertaking construction or other contractors' works
- deeds or contracts for sale, gratuitous transfer, partitions or exchanges of real estate.

If a document is subject to stamp tax, the person who signs the document is also the person liable to pay the stamp tax. If each party to a document that is subject to stamp tax keeps an originally signed document, each original would be subject to stamp tax.

Luxury tax

The Specifically Selected Goods and Services Tax Act was promulgated on 1 June 2011 with a view to narrowing the widening gap in wealth and curbing real estate speculation. The Act imposes a ten per cent tax on purchases of luxury items such as cars, yachts and private jets valued at more than NT$3 million; fur and leather products and designer furniture valued at more than NT$500,000; and business and golf club memberships valued at more than NT$500,000. It also targets speculative property transactions, imposing a tax of ten per cent or 15 per cent on the actual sales price of real estate (including land and non-primary residences) sold within one or two years of purchase.

Work relations

General

Generally speaking, employee-employer relationships in Taiwan are governed by Taiwan's Labour Standards Law (LSL), the Gender Equality in Employment Act, and the Labour Pension Act. The purpose of these laws are to establish basic standards for labour conditions, to protect the rights and interests of employees, to strengthen relationships between employers and employees, and to promote social prosperity and economic development in Taiwan.

The following is a general overview of the major provisions of these laws.

Labour agreements

The LSL recognises two kinds of labour agreements. The first type of labour agreement is a fixed-term agreement, usually in the case of jobs which are temporary, short term, or seasonal in nature. The second type of labour agreement is a non-fixed term agreement, used in the case of jobs which are of an ongoing nature.

Payment of wages

Unless the employer and the employee otherwise agree, wages must be paid twice a month on a regular basis. The LSL also provides for mandatory overtime pay where an employer extends the working hours of an employee by over two hours.

Regular work hours and mandatory maximum work hours
The regular work hours of all employees shall not exceed eight hours a day and 84 hours every two weeks.

Extension of work hours
The LSL prescribes that regular work hours may be extended in any one of the following circumstances:

- where an employer requires such extension of work hours and has obtained the consent of a labour union or the approval of a labour-management conference
- for special businesses or certain types of employees designated by the central authority-in-charge
- due to an act of God, accident or any other unpredictable event
- except for business in the manufacturing or mining industry, where for the convenience of the public or for other particular reasons, the local authority-in-charge, after consulting the industrial authority-in-charge of the relevant industries and the labour union, makes necessary adjustments to the work hours through an administrative order.

Holidays and special vacations
According to the LSL, every seven days, an employee shall have at least one day off as a weekly holiday. All commemorative days, labour days and other holidays designated by the central authority-in-charge shall be holidays for all employees.

In addition, an employee is entitled to the following days of leave each year:

- a seven days for an employee who has worked for one year or more but less than three years
- a ten days for an employee who has worked for three years or more but less than five years
- a 14 days for an employee who has worked for five years or more but less than ten years
- an extra day off for every additional year for an employee who has worked ten years or more, up to a maximum vacation of 30 days each year.

Employees are also entitled to various other types of leave such as sick leave, parental leave, maternity leave, and family leave.

No-pay leave
According to an announcement of the Council of Labour Affairs, employers may negotiate an agreement with employees to take “no-pay leave” for no longer than three months. Such type of leave is an effective way for an employer to limit costs during an economic downturn, and quickly increase production when the economy improves.

Retirement
Since 1 July 2005, retirement benefits have been regulated by both the LSL and the Labour Pension Act. Employees who were hired before 1 July 2005 were entitled on 1 July 2005, or within five years thereafter, to choose whether their pension entitlements will be handled pursuant to the LSL or the Labour Pension Act. Employees who are hired after 1 July 2005 will have no choice but to be subject to the pension entitlement scheme under the Labour Pension Act. However, an employee cannot choose to have their pension entitlements handled pursuant to the LSL and their severance pay handled pursuant to the Labour Pension Act, or vice versa, ie,an employee’s pension entitlements and severance pay must be governed by the same act. For more information on how pension entitlements are determined, the assistance of a Taiwanese legal advisor should be sought.

Generally speaking, under the LSL, employers shall reserve a certain sum of money each month (which is equal to between two per cent to 15 per cent of an employee’s total wages) to be deposited in a special account as a pension entitlement fund, and such fund must not be subject to assignment, attachment, offset or used as security. Such fund is not portable with the employee.

Under the Labour Pension Act an employer must contribute six per cent of an employee’s wages on a monthly basis into the employee’s personal pension fund account held at the Bureau of Labour Insurance. Such fund is portable with the employee.

According to Article 23 of the Labour Pension Act, an employee who is 60 years old or above and has at least 15 years of seniority, is entitled to monthly pension payments. An employee who has less than 15 years of seniority is entitled to a lump sum pension payment.

Articles 5 and 33 of the Labour Pension Act provide respectively that the collection, payment, and custody of the labour pension fund, the imposition of delay penalties and fines, and the compulsory execution thereof will be supervised by the Bureau of Labour Insurance and that the labour pension fund will only be used for the payment of employees' pensions and investment, and must not be attached, pledged, or used for other purposes.

Work rules

An employer who employs 30 or more employees must establish work rules according to the nature of the employer's business and, after reporting them to the authority-in-charge and obtaining approval from that authority, must cause the rules to be publicly posted.

The work rules must address a number of issues including, for example, work hours, holidays, wage standards, allowances and bonuses, rules governing conduct, discharge, severance, resignation and retirement, compensation for accident, injury, illness and death of employees, and communication between the employer and employees.

The work rules shall be invalid and unenforceable if they are in violation of the mandatory or prohibitive provisions of laws and regulations or are in violation of any provision of a collective agreement applicable to the relevant industry.

Termination of a labour agreement

A labour agreement may only be terminated immediately without notice and without severance pay under special circumstances, such as, among others:

- where an employee misrepresents any fact at the time of signing the labour agreement in a manner which might mislead the employer and cause the employer to sustain damage
- where an employee is in serious breach of the labour agreement or in serious violation of the employer's work rules.

Termination of a labour agreement with advance notice to the employee may also be permissible, depending on the reason for termination. Usually termination with advanced notice is allowed only in special circumstances such as, among others, where the business ceases to operate or has been transferred, or the employee is clearly unable to perform their duties satisfactorily.

If the reason for termination allows the employer to terminate with advanced notice, the employer must pay severance and also give advance notice of termination in accordance with the following:

- ten days advanced notice where an employee has continuously worked for the employer more than three months but less than one year
- 20 days advanced notice where an employee has continuously worked for the employer more than one year but less than three years
- 30 days advanced notice where an employee has continuously worked for the employer more than three years.

Severance pay after termination

Currently in Taiwan, severance payments are regulated by the LSL and the Labour Pension Act, effective 1 July 2005, which introduces, among other things, a new concurrent system for both severance payments and pension entitlements. As a result, since 1 July 2005, there are two statutory severance payment schemes effective in Taiwan. Employees who were hired before 1 July 2005, and for five years thereafter, possessed the right to choose whether their severance payments will be handled pursuant to the LSL or the Labour Pension Act within five years after 1 July 2005. Any employees hired after 1 July 2005 have no choice but to be subject to the severance payments scheme under the Labour Pension Act. However, an employee cannot choose to have their severance payments pursuant to the LSL and their pension entitlements handled pursuant to the Labour Pension Act, or vice versa. That is to say, an employee's pension entitlements and severance payments must be handled pursuant to the same act.

Dispute resolution

Courts

Taiwan recognises three levels of court, namely, the District Court, High Court and Supreme Court. Most criminal and civil cases are first heard at the District Court level before a single judge. If a District Court level decision is appealed the appeal will be heard by the High Court before a three-judge panel. The final court of appeal is the Supreme Court. In addition, Taiwan operates administrative courts to hear claims in respect of potentially illegal administrative actions by government agencies.

Arbitration

Arbitration is a commonly used mechanism for alternative dispute resolution. Taiwan has enacted the Arbitration Act to allow parties to resolve disputes through arbitration regarding civil matters (other than matters involving issues of family law, criminal law or succession law). Parties to an arbitration proceeding in Taiwan may decide the language in which the proceeding shall be conducted, the arbitrator(s) (who can be local or foreign) who will hear the case, and the laws and procedural rules that will apply in the proceeding. Once a decision in an arbitration proceeding is reached, such decision is deemed to be final, carrying the same legal force and effect as a decision by a court of law. However, except in cases where the arbitral award involves payment of a specified monetary amount or the delivery of specific moveable property, arbitral awards are usually executed and enforced by obtaining a court order.

Thailand

Contributed by Norton Rose

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The economy

According to statistics maintained by the Board of Investment, Japan has been the largest source of foreign direct investments into Thailand, followed by the Netherlands and the Cayman Islands. Thailand's largest export markets in December 2011 were ASEAN nations (23.73 per cent), the European Union (10.55 per cent), Japan (10.52 per cent), and the United States (9.55 per cent).

The government

Thailand is a constitutional monarchy with the King as head of state and the Prime Minister as the head of the government. Under the constitution, the Prime Minister is required to be a Member of Parliament. The legislative branch comprises the bicameral Thai legislature called the National Assembly (commonly known as the Parliament). The Thai Parliament consists of an elected House of Representatives with 500 seats and a Senate with 150 seats, with a mix of elected and appointed members. Members of the House of Representatives serve four-year terms, while Senators serve six-year terms.

The people

According to statistics maintained by the National Statistical Office, as at September 2010, Thailand's population was approximately 66 million. As of 2010, an overwhelming majority of Thai people (93.4 per cent) were Buddhists with a small percentage of Muslims and Christians. English is not widely spoken outside of the international business community and the tourism sector.

The legal system
Thailand has a codified system of law which shares a number of characteristics of a civil system, but also has elements which are similar to common law systems. The main codes or statutes are the:

- Civil and Commercial Code (which governs, among other matters, private companies, civil rights and obligations, and most general commercial contracts)
- Penal Code (which governs, among other matters, general criminal offences and offences relating to trade, reputation and property)
- Civil Procedure Code (which governs court procedures for civil proceedings)
- Criminal Procedure Code (which governs court procedures for criminal proceedings)
- Revenue Code (which governs the collection of income tax, value-added tax, specific business tax and stamp duty)
- Land Code (which governs ownership of land).

These codes are principally drawn from civil jurisdictions, but with influences from common law jurisdictions as well as Thai customary law. In recent times, Thailand has looked to both the United States and the UK as models for sector-specific laws, such as the securities and exchange law, arbitration law, trade competition law and intellectual property law. In line with the civil law tradition, the codified laws are brief statements of general principles leaving some room for different interpretations. Owing to a lack of case law reports (only Supreme Court cases are reported) the regulatory authorities tasked with enforcing a particular law are usually consulted on a no-name basis on their policies, practices, interpretation and attitude to enforcement. Occasionally, regulators will seek the opinion of the Council of State (which is the body established under the State Council Commission Act B.E. 2522 (1979)) on interpretation issues. Although the opinions of the Council of

State are not binding and do not have the force of law, they are generally followed by regulators and are highly persuasive to the courts. The Supreme Court will generally follow previous rulings of the Supreme Court and Supreme Court cases are highly persuasive on the lower courts.

Visas and work permits

Visa and work permit requirements

With very limited exceptions (including for diplomatic or governmental work), foreign nationals require both a work permit and a long-stay visa before commencing work in Thailand. Although the work permit and the visa are issued by different authorities, the two are, in practice, inter-related and are usually valid for the same periods.

Generally, a foreigner applying for a work permit must already have a non-immigrant visa (not a tourist visa) issued by a Thai embassy outside Thailand. There is a distinction between a visa which is issued from outside Thailand and which allows a foreigner to enter Thailand, and a permit to stay, which is issued once the foreigner enters Thailand. The period of the permit will depend on the type of visa used to enter Thailand. A foreigner obtaining a visa on arrival is generally given a 30-day permit to stay whereas a foreigner entering Thailand on a non-immigrant visa is generally given a longer permit to stay depending on the type of visa obtained. Once a work permit is granted, the non-immigrant visa supports a long-stay visa which should track the period of the work permit (usually one year). Lastly, the permit to stay will be automatically cancelled if the foreigner leaves Thailand without first obtaining either a single or a multiple re-entry permit. Typically, an expatriate worker will hold a work permit, a long-stay visa and a multiple re-entry permit, which are all renewable annually.

Applications for work permits can be made by the employer before the foreign worker enters Thailand, but the work permit will be issued only after he or she enters Thailand. The foreign worker must not commence work until the work permit has been issued. In general, there will be minimum requirements as to the wage of the foreign worker, the registered capital of the employer and the ratio of foreign workers to Thai workers at the employer's workplace.

Short-term work permits (of up to 15 days) are also available for work which is "urgent and essential". These types of work permits can be obtained within a day by an applicant who holds a valid visa, but need not be a non-immigrant visa. What is considered "urgent and essential" is not defined in the relevant legislation and, as such, it is at the discretion of the Director General of the Department of Employment.

Companies granted investment privileges by the Board of Investment or the Industrial Estate Authority of Thailand may also receive specific privileges relating to visas and work permits for their foreign workers, including applying different criteria (see below for more details).

One-stop service centre

Since 1997, the One-Stop Service Centre has been established to expedite and facilitate the issue and renewal of visas and work permits. The centre is staffed with representatives from the Board of Investment, the Department of Employment and the Immigration Bureau and processes both visa and work permit applications from a single location. The centre is only available to expatriates who satisfy certain conditions.

Recently, changes to the Alien Employment Act B.E. 2551 (2008) extended the maximum period for work permits to two years under certain circumstances. However, the maximum period for long-stay visas is still one year.

In addition to the laws and regulations, there are internal rules, practices and requirements of both the Department of Employment and the Immigration Bureau, all of which change regularly and specific advice should be sought in each case.

Types of business entities

General

The most common form of business entity in Thailand is a private limited liability company. Other forms of business entities include public limited liability companies and various forms of registered and unregistered partnerships. Foreign companies can also choose to have a direct presence by way of a registered branch office.

Although there is no general Thai law requirement to adopt any specific type of business entity in Thailand, through licensing and minimum registered capital requirements, participation in certain business activities requires a form of incorporated entity. The choice of business entity for foreign investors will, generally, be driven by requirements on foreign ownership and also by tax considerations. Specific advice should be sought in each case.

Limited liability companies

Thai incorporated limited liability companies have similar features to those of western jurisdictions. Limited liability companies can be either private or public. Private limited liability companies are governed by the Thai Civil and Commercial Code (CCC) and public limited liability companies are governed by the Public Limited Companies Act B.E. 2535 (1992) (PLCA). Liabilities of the shareholders are limited to the unpaid capital held by the shareholder. Thai private limited liability companies and public (unlisted) limited liability companies are required to have at least three shareholders and 15 shareholders, respectively.

The duties and liabilities of a director of a private company and a public company are primarily contained in the CCC and the PLCA, respectively.

The prescribed directors' duties are both specific and general. No director of a private or public company may operate a business or act as a director of a company which is of the same nature and competes with the business of the company without shareholders' consent. There are restrictions on a director's use of company funds for his own purposes and personal liability to third parties if a director exceeds the scope of his authority. Directors are jointly responsible for certain duties such as fulfilling a number of filing obligations with the Department of Business Development of the Ministry of Commerce (DBD) and convening shareholders' meetings within fixed periods and ensuring minutes are recorded of such meetings and retained at the company's registered office.

There is personal liability for directors in the case of specified forms of wrongdoing and also joint liability for certain actions. Directors of a private company may be sued by the company for any breach of their duties, or if the company fails to bring an action, any shareholder or creditor (to the extent that their claims against the company remain unsatisfied) can bring a claim against the directors. Shareholders holding a minimum of five per cent of the shares of a public company may bring an action on behalf of the company seeking damages and the removal of such directors from office.

Partnerships

Thai partnerships have similar features to partnership in western jurisdictions. Generally, partnerships are not a separate legal entity from the partners and the partners (other than the limited liability partners of a limited partnership) do not enjoy limited liability. Under the CCC, there are three types of partnerships:

- unregistered ordinary partnerships
- registered ordinary partnerships
- limited partnerships.

Registered partnerships are separate legal entities. However, partners in both an unregistered partnership and a registered partnership are liable jointly for the debts of the partnership. Creditors of a registered partnership must first look to the assets of the partnership to satisfy his or her debt before making any claim against individual partners. Creditors of an unregistered partnership can claim against the individual partners without first claiming against the partnership assets. Limited partnerships have two classes of partners: limited partners, whose liability is limited to their contributions to the partnership, and general partners, who are jointly liable for all the debts of the partnership. Limited partnerships are required by law to have at least one general partner.

Other structures

Pursuant to Thai law, a foreign corporation can also establish a presence in Thailand by way of:

- a representative office
- a regional office
- a branch office.

Representative office

A representative office is similar to a branch office but is restricted to "non-trading" activities.

In particular, functions of the representative office must be limited to liaison with the head office and a representative office is only permitted to conduct the following activities:

- to procure sources of goods or services in Thailand for its head office
- to monitor and control quality and quantity of goods its head office buys or contract manufactures in Thailand
- to advise its head office in relation to distributors or customers
- to distribute any information relating to new goods and services of its head office
- to report on the business in Thailand to its head office.

The representative office is subject to the following requirements:

- it must not generate income from its activities
- it must not receive purchase orders, offer to sell products or negotiate transactions with any individual or business entity in Thailand
- its operational expenditures must be funded by its head office.

As the representative office must not generate income, it is not subject to corporate income tax under the Thai Revenue Code.

Regional office

A multinational corporation may have a regional office in Thailand to liaise with its branches and affiliates in the Asia region. The regional office need not be incorporated as a juristic person in Thailand. The regional office's functions are to provide its head office's branches and affiliated companies with the following services:

- coordination and supervision of the operation of the head office's branches or affiliates in the Asia region on behalf of the head office
- advisory and management services
- training and personnel development services
- financial management services
- marketing and sales promotion services
- product development
- research and development services.

The regional office is subject to the following requirements:

- the head office must have branch offices or affiliates in the Asia region
- it must not generate income from its activities
- it must not receive purchase orders, offer to sell products or negotiate transactions with any individual or business entity in Thailand
- its operational expenditures must be funded by its head office.

The regional office is not subject to corporate income tax under the Thai Revenue Code.

Branch office

A foreign company incorporated overseas may establish a branch office to conduct business in Thailand. The branch office is regarded as the same legal entity as its head office and the actions of the branch office will be viewed as the actions of the head office.

There is no specific law requiring a branch office of such foreign company to be registered under Thai law in order to do business in Thailand. However, if a branch office operates certain types of "commercial business" (eg, banking business, transportation business) as defined in the Commercial Registration Act B.E. 2499 and relevant notifications, that branch must be registered in Thailand by submitting a set of its constitutional documents and a power of attorney (appointing a branch manager to act for it in Thailand) to the relevant district office or the municipal office. In addition, activities of the branch office are subject to the Foreign Business Act B.E. 2542 (1999) (FBA) and laws relating to foreign investment in Thailand. The branch office may be required to seek approval or licence to carry on certain types of business or may be prohibited from carrying on certain types of business. Where the activity of the branch office is not subject to an approval or a licence under the FBA, the branch office will be required to receive funds from abroad for its operation in Thailand of at least THB2 million. However, if an approval or a licence under the FBA is required from the DBD, at least THB three million will be required from abroad.

The income derived by the branch office will be subject to corporate income tax under the Thai Revenue Code.

Business environment

Intellectual property

Thai law recognises the common categories of intellectual property rights, including copyrights, trademarks and patents and trade secrets. The Central Intellectual Property and International Trade Court was established in 1997 with jurisdiction over both civil and criminal cases relating to intellectual property rights and international trade issues. The Department of Intellectual Property of the Ministry of Commerce (DIP) is responsible for the administration of the various laws enacted for the protection of intellectual property rights.

Copyright

Under the Copyright Act B.E. 2537 (1994) (Copyright Act), an author gains automatic protection over his or her copyright work. The Copyright Act has a wide definition of "works" that are protected, including literary works, dramatic works, visual and graphic arts, musical works, audio-visual works, cinematic works, sound recordings and broadcasts. Thailand, as member of the Berne Convention, is obliged to protect copyright works of other member states. Although not required to receive protection under the Copyright Act, copyright works can be registered with the DIP for evidentiary purposes.

The Copyright Act protects copyright works against infringement by unauthorised reproduction, adaptation, publication and use. Generally, protection under the Copyright Act lasts during the lifetime of the author and for 50 years after the death of the author.

Trademarks

The owner of a registered trademark receives protection under the Trademark Act B.E. 2534 (1991) (Trademark Act). The Trademark Act defines a "trademark" as a symbol used (or proposed to be used) in respect of a good, to distinguish that good from goods under another trademark. In order to receive protection under the Trademark Act, a trademark must be registered with the Trademark Registrar within the DIP. Any licensing and/or assignment of a registered trademark must also be registered with the DIP in order to receive protection under the Trademark Act.

The Trademark Act protects registered trademarks against infringement by counterfeits and imitations. Generally, protection under the Trademark Act lasts for ten years after the date of the application and can be renewed for additional ten-year periods by submission of an application within the prescribed period.

Patents

The owner of a registered patent receives protection under the Patent Act B.E. 2522 (1979) (Patent Act). The Patent Act protects three categories of patents: invention patents, design patents and petty patents. In order to receive protection under the Patent Act, a patent must be registered with the Patent Registrar within the DIP. Any licensing and/or assignment of a registered patent must also be registered with the DIP in order to receive protection under the Patent Act.

The Patent Act protects registered patents against infringement by making, using, selling, keeping for sale or importing the patented products or the products produced using the patented process. Generally, protection of inventions and designs lasts for 20 years and ten years, respectively, from the date of filing and neither can be renewed. Protection of petty patents lasts for six years, but can be renewed twice for periods of two years for each renewal.

Trade secrets
The owner of a "trade secret" receives protection under the Trade Secret Act B.E. 2545 (2002) (Trade Secret Act). The Trade Secret Act defines "trade secret" to include the method or process of manufacturing, price lists and customer database. A trade secret need not be registered to receive protection.

The Trade Secret Act protects the trade secret owner from infringement by disclosure, deprivation or usage of trade secret without the consent of the owner. Generally, protection of trade secret lasts so long as it remains a trade secret under the Trade Secret Act.

Environmental issues
The principal Thai environmental law is the Enhancement and Conservation of National Environmental Quality Act B.E. 2535 (1992) (NEQ Act). The NEQ Act provides the framework for pollution control and other environmental protection measures by, among other matters, setting the standards to measure noise, air and water pollution, requiring projects which meet certain specified criteria to prepare an environmental impact assessment report (EIA Report) in respect of the project. Certain projects which may have severe environmental effect on the community (as specified in the relevant notification) will also require preparation of another report – an environmental health impact assessment report (EHIA Report).

In addition, where a licence is required from any regulatory authority (for instance, under the Factory Act B.E. 2535 (1992) or the Building Control Act B.E. 2522 (1979)), the NEQ Act requires the EIA Report and the EHIA Report (if any) to be submitted to those authorities and the Office of Natural Resources and Environmental Policy and Planning (ONEP), and the grant of the relevant licence will be subject to ONEP's approval of the EIA Report and the EHIA Report (if any).

Banking law
All financial institutions in Thailand are governed by the Financial Institutions Act B.E. 2551 (2008) (FIA). The FIA consolidated various acts which had, separately, governed commercial banks, finance companies and other types of financial institutions. Commercial banks are licensed under the FIA, which also prescribes a 25 per cent limit on the aggregate foreign shareholding, a 25 per cent limit on foreign directors and a ten per cent limit on any single shareholding. These limits can be waived by the Bank of Thailand (BoT) or the Minister of Finance, depending on the nature and extent of the waiver required. Thai banks (and other financial institutions) are primarily under the supervision of the BoT.

Securities law
The Securities and Exchange Act B.E. 2535 (1992) (SEC Act) governs securities business in Thailand. The SEC Act established both the Securities and Exchange Commission (SEC) and the Stock Exchange of Thailand (SET). Generally, securities business and/or securities-related activities in Thailand require the approval of the SEC. The SET is the only institution authorised to operate a securities exchange in Thailand. Public companies wishing to offer their shares to the public and list their shares for trading on the SET require the approval of the SEC and the SET, respectively.

The SEC also administers the laws and regulations applicable to the acquisition of securities in companies listed on the SET (Takeover Code). Under the Takeover Code, any acquisition of shares in a listed company (Target) by an acquirer which will result in the total voting rights held by the acquirer, its "concert parties", including "related persons" of both the acquirer and its "concert parties", reaching or exceeding 25 per cent, 50 per cent or 75 per cent of the total voting rights of the Target (each a Trigger Point) will trigger a mandatory obligation on the acquirer to make a tender offer for all of the shares and equity linked securities of the Target. For the

purposes of determining whether a Trigger Point has been reached or exceeded, the "chain principle" aggregates the direct shareholding of the acquirer with those of all intermediate companies over which the acquirer has a "significant degree of control". This includes holding 50 per cent or more of the total voting rights or having the ability to control the management or operation of an entity.

There are no specific Thai law requirements to disclose the proposed acquisition of shares in listed companies. However, any acquisition of shares which results in the acquirer's shareholding (including shareholding of its "concert parties" and "related persons" of both the acquirer and its "concert parties") in a listed company hitting or passing a five per cent threshold (being each multiple of five per cent of the total issued shares) will require it to make a notification to the SEC within three business days.

The SEC Act imposes various disclosure obligations on companies listed on the SET, including an obligation to disclose all material information concerning its affairs and an obligation to issue public statements in response to any rumour or report which is likely to impact on the trading of its shares.

Competition law

The Trade Competition Act B.E. 2542 (1999) (TCA) prohibits agreements between business operators which reduce or restrict competition in a market for particular goods or services. The TCA also prohibits the abuse of market power by businesses in a dominant position. The TCA subjects mergers "which may result in monopoly or unfair competition" to the prior approval of the Thai Competition Commission. However, at present the regulations to implement this particular provision have yet to be introduced.

Consumer protection law

Specific protections for consumers are found in various acts, including the Consumer Protection Act B.E. 2522 (1979) (CPA) and the Unfair Contract Terms Act B.E. 2540 (1997) (UCTA), and more recently the Liability for Damages Caused by Unsafe Goods Act B.E. 2551 (2008) (PLA) and the Consumer Case Procedure Act B.E. 2551 (2008) (CCPA).

The CPA governs advertising and labelling of products and the terms of certain specified types of agreements, including hire purchase and condominium purchase agreements.

The UCTA empowers the court to amend specific categories of contracts made on terms which the court regards as excessively advantageous to the business operator. The court is able to consider various factors (including, good faith of the parties, bargaining power, economic status and past practice) in enforcing the relevant contract to the extent that it is fair and reasonable. The specific categories of contracts covered under the UCTA include consumer contracts, hire purchase contracts and standard term contracts.

The PLA allows any person who suffers damage from an unsafe product to file a claim against the manufacturer, importer or seller of the product. It also shifts the burden of proof from the consumer and allows the consumer to claim for emotional distress.

The CCPA sets out the procedures to be followed in "consumer claims", aimed at making it easier for consumers to bring an action to the court, including shortening the timeframe. The definition of "consumer claims" under the CCPA is very wide and includes claims under the PLA and other categories of claims between a consumer and business operators.

In addition, the TCA also protects consumers against various restrictive trade practices, including anti-competitive behaviour and abuses of dominant position (see above).

Exchange control

Foreign exchange regulations in Thailand are contained in the Exchange Control Act B.E. 2485 (1942) and related regulations. Generally, the Thai baht is freely convertible and both local and (subject to certain conditions) foreign currency accounts can be kept in Thailand. There are, however, restrictions on the transfer of funds (in local or foreign currency) out of Thailand.

The BoT has, under the notice of the Exchange Control officer, authorised commercial banks to approve certain transactions on its behalf.

Generally, the inward remittance of foreign currency into Thailand does not require prior approval, but the foreign currency must, in effect, be exchanged into local currency by authorised agents (that is, banks) or deposited into a foreign currency account with an authorised agent within a specified period. Repatriation of profits and repayment of overseas borrowings in foreign currencies can be generally remitted upon submission of supporting evidence of the profit and repayment obligation, respectively. Repatriation of initial capital investment is allowed in the event of a reduction of capital or liquidation upon submission of supporting evidence of the reduction or liquidation process, respectively. Please note that these requirements change from time to time and up-to-date advice should be sought in each case.

Foreign investment law

General

There are no generally applicable limitations on the level of foreign ownership of shares in companies incorporated in Thailand. However, there are wide-ranging limitations on activities conducted by non-Thais including by foreign individuals and companies where, in effect, more than half of the shares are held by non-Thais.

Foreign Business Act

The majority of the restrictions on activities being undertaken by non-Thais are contained in the FBA. The FBA prescribes a wide range of business activities as restricted businesses which are reserved for Thai nationals and therefore cannot be carried out by “foreigners” (as defined in the FBA) at all or cannot be carried out by “foreigners” without an appropriate licence or exemption. These restricted businesses are further categorised into three Schedules attached to the FBA, depending on the level of protection accorded to the relevant business:

- Schedule 1 lists the businesses reserved for Thai nationals for “special reasons” and there is a total prohibition on “foreigners” engaging in those businesses
- Schedule 2 lists the businesses reserved for Thai nationals because they affect national security or arts, culture, tradition, local handicrafts or natural resources and the environment. Foreigners are prohibited from engaging in those restricted businesses, except with a licence from the Minister of Commerce and approval from the Cabinet
- Schedule 3 lists the businesses reserved for Thai nationals because Thai nationals are not yet prepared to compete with foreigners. Foreigners are prohibited from engaging in those restricted businesses, except with a licence from the Director General of the Commercial Registration Department of the Ministry of Commerce and an approval from the Foreign Business Committee.

The Committee reviews applications under the FBA and makes its recommendations to either the Minister of Commerce or the Director General, whichever is applicable. In addition to the FBA, certain other acts contain industry-specific restrictions. There is no clear and uniform definition of a “foreign” company under Thai law. Each act adopts a slightly different definition.

Land code

The Land Code generally prohibits a foreign national (individuals or companies) from owning land in Thailand. There are some exceptions to this general prohibition. Foreign individuals can own units in a condominium building, provided the total foreign ownership in the relevant building does not exceed 49 per cent of the total floor space. Foreign companies can be granted the privilege to own land in certain circumstances, such as:

- for the purposes of carrying on a business “promoted” by the Board of Investment (see below)
- pursuant to the Petroleum Act B.E. 2514 (1971), which allows an oil concessionaire to own land to carry on its business
- pursuant to the industrial Estate Authority of Thailand Act B.E. 2522 (1979), which allows foreign business operator to own land in certain industrial zones (see below)

- where the Minister of interior, under specific conditions, waives the prohibition on foreign land ownership.

Industry-specific restrictions
Both the Life insurance Act B.E. 2535 (1992) and Non-Life insurance Act B.E. 2535 (1992) set foreign ownership limits for companies carrying on insurance business at 25 per cent less one share – in other words, Thais must hold more than 75 per cent of the total issued shares. In addition, no fewer than three quarters of the directors of insurance companies must be Thai nationals. The insurance regulator (the Office of insurance Commission (OiC)), the Thai insurance regulator, has the discretion to increase the foreign shareholding limit in a particular case to 49 per cent of the total issued voting shares and increase the limit on foreign directors to not more than half. in addition, the Minister of Finance, upon recommendation from the OiC, has the discretion in a particular case to increase the foreign shareholding limit beyond 49 per cent of the total issued voting shares, and increase the limit on foreign directors to more than half, if the operation of the insurance company may have an adverse effect on the insured or the public.

Government initiatives and incentives

General
The Board of investment (Boi) and the industrial Estate Authority of Thailand (iEAT) are the principal agencies responsible for administering government incentives to promote investments, both domestic and foreign, in Thailand.

Board of investment
The Boi administers the Board of investment Act B.E. 2520 (1977) (Boi Act) and is empowered under the Boi Act to grant a wide range of investment incentives and concessions for relevant qualifying business activities (Promoted Activities), including:

- limited period exemptions from or reductions in corporate income tax in respect of income derived from the Promoted Activities
- exemption from or reduction of import duties on imports of raw material, components and machinery used in the Promoted Activities
- the right for foreigners to own land used in the Promoted Activities
- permission to bring in foreign skilled workers
- exemption from tax for dividends derived from Promoted Activities
- permission to remit foreign currency abroad.

To attract investments to particular provinces, the Boi has divided Thailand into investment zones, and projects located in a particular zone will receive the special privileges granted to that particular zone.

In addition, the Boi Act itself provides for specified protections in respect of the Promoted Activities, including:

- a guarantee against nationalisation
- protection from competition from the government
- protection against government price control.

Industrial Estate Authority of Thailand
The iEAT administers the industrial Estate Authority of Thailand Act B.E. 2522 (1979) (iEAT Act) and operates (either on its own or jointly with the private sector) various industrial estates in Thailand. There are two types of industrial estate: general industrial estates which house manufacturing operations for export and/or domestic consumption, or service business operations, and free zones which house manufacturing or commercial operations which benefit the economy, national security, public welfare, environmental management or have any other prescribed benefits. In addition to access to the established infrastructure (including water, electricity, waste management, workers' accommodation and security) and proximity to the complementary goods and services, industrial operations located within an industrial estate may be eligible for various investment privileges, including:

- the right for foreigners to own land used in the industrial operation

- permission to bring in foreign skilled workers
- the operations located within a free zone may receive exemptions from import/export duties, VAT and excise tax on imports of raw material, components and machinery and exports of goods manufactured.

There are privately owned and managed industrial estates in respect of which the owner may receive special promotion from the Boi. However, the individuals who operate their business in this private industrial estate will not be entitled to Boi or iEAT incentives.

Taxation

General

The principal Thai taxation law is the Revenue Code, which regulates the collection of income tax (both personal and corporate), value added tax, specific business tax and stamp duties. There are other acts which govern the collection of other taxes, such as the Customs Act (which governs the collection of customs duties) and the Excise Act (which governs the collection of excise duties), the Land and Housing Tax Act and the Land Development Act (which govern the collection of housing and land tax), the Signboard Tax Act (which governs the collection of tax on signboards) and the Petroleum Tax Act (which governs the collection of tax on petroleum products).

The Revenue Department of the Ministry of Finance administers the collection of taxes under the Revenue Code. Generally, Thailand applies a self-assessment system.

Thailand is a party to double taxation treaties with various countries, which will affect taxation payable in Thailand by nationals of the relevant countries and taxation payable by Thai nationals in the relevant countries.

Corporate income tax

Domestic corporations are taxed on their worldwide income, while foreign corporations are taxed on income generated in Thailand. The income tax rate is, generally, 30 per cent and the same rate applies to both domestic and foreign corporations (which have a permanent establishment in Thailand). However, the corporate income tax rate was reduced to 23 per cent from 1 January 2012 and will be reduced to 20 per cent from 1 January 2013. Generally, taxable income includes business income, dividends, interests, royalties and service fees. Capital gains are treated as ordinary income and are subject to the same corporate income tax rate.

There may be specific tax concessions which are applicable to corporations with privileges from the Boi, iEAT, corporations listed on the SET or the Market for Alternative investment, and corporations with regional operating headquarters privileges.

In addition, withholding tax applies to specific categories of income paid to corporations, including dividends, interest, royalties, capital gains and certain service/professional fees.

Value-added tax

Thailand's consumption tax is value-added tax (VAT), collected on the sale of goods and provision of services. The standard rate of VAT under the Revenue Code is ten per cent. However, as at 31 December 2011, a concession rate of seven per cent still applied.

Personal income tax

Individuals resident in Thailand are taxed on their income derived in Thailand and income derived from outside Thailand and brought into Thailand in the same year in which the income is earned, while non-resident individuals are taxed only on income derived from sources in Thailand. Personal income tax rates are progressive, ranging from five per cent to 37 per cent, with a tax-free threshold of THB150,000 per year. Employers are required to withhold tax on payments of salary based on the projected tax payable for the year and remit them to the Revenue Department on a monthly basis.

Stamp duty

Stamp duties are collected on instruments specified in the stamp duty schedule of the Revenue Code at the applicable rates, which are also specified in the schedule. Generally, transfers of shares (in private and public companies) are subject to stamp duty at a rate of 0.1 per cent of the par value of the shares or the transfer price of the relevant shares (whichever is greater). Where the Thailand Securities Depository Co. Ltd is appointed as the registrar of the transferred shares (which is the case with all companies listed on the SET), the transfer will be exempt from stamp duty.

Workplace relations

General

The principal Thai labour protection laws are the Labour Relations Act B.E. 2518 (1975), which sets, among other matters, the framework for formation, operation of labour unions and collective bargaining agreement, and the Labour Protection Act B.E. 2541 (1998), which sets out various statutory minimum benefits and welfare for employees.

Currently provident funds are voluntary. All employers must contribute to the Social Security Fund and the Compensation Fund. The rate of contribution to the Social Security Fund is five per cent of the total salary of each employee with a cap of THB750 per employee per month. Due to the 2012 flood, the rate will be reduced to three per cent for the first half of 2012 (with a cap of THB450), and four per cent for the second half of 2012 (with a cap of THB600). Employees can draw on the Social Security Fund for specific and limited benefits, including non-work-related injuries, sickness or death, old age pension and unemployment. The rate of contribution to the Compensation Fund varies depending on the type of business and the nature of the work, ranging from 0.2 per cent to 1.0 per cent of the total wages paid to employees per annum. For the purposes of calculating the Compensation Fund contributions, the annual wage for any single employee is capped at 240,000. The rate of contribution is subject to change, depending on the claim history. Employees can draw on the Compensation Fund for work-related injury, sickness or death.

Terms of employment

In addition to the statutory minimum welfare and benefits and the individual employment contracts, the terms of employment are also found in the company's work rules. Every company with at least ten employees must file a set of work rules with the Director General of the Department of Labour Protection and Welfare.

Termination of employment

Under Thai labour laws, termination of employment may trigger one or more of the following:

- payment in lieu of notice
- severance pay
- unfair termination compensation.

The analysis below is not intended to apply to fixed-term contracts and is subject to the terms of any individual employment contract, the work rules of the company and the terms of any collective bargaining agreement.

Payment in lieu under the Civil and Commercial Code

Under Section 582 of the CCC, termination of employment by either the employer or the employee (subject to limited exceptions) requires appropriate advance notice or payment in lieu of such notice.

Notice must be at least equal to one pay period and the termination must be effective on the next pay day. For example, if an employee is paid on a monthly basis at the end of the month and notice of termination is given in the middle of January, the earliest that termination can be effected is the end of February.

Severance Pay under the Labour Protection Act

Under the Labour Protection Act B.E. 2541 (1998) (LPA), an employer who has terminated the employment of an employee (other on one of the grounds prescribed in the LPA) must pay severance. The statutory minimum severance rates are:

- for an employee who has worked for at least 120 consecutive days, but less than one year, the minimum severance amount is equal to 30 days' pay

- for an employee who has worked consecutively for at least one year, but less than three years, the minimum severance amount is equal to 90 days' pay
- for an employee who has worked consecutively for at least three years, but less than six years, the minimum severance amount is equal to 180 days' pay
- for an employee who has worked consecutively for at least six years, but less than ten years, the minimum severance amount is equal to 240 days' pay
- for an employee who has worked consecutively for more than ten years, the minimum severance amount is equal to 300 days' pay.

Unfair termination compensation
Under the Act Establishing the Labour Court and Labour Case Procedure B.E. 2522 (1979) (ALC), if the employee brings an action for unfair dismissal in the Labour Court and the Labour Court is of a view that the termination of employment was unfair, the Labour Court may order the employer to reinstate the employee; or if the Labour Court is of the view that reinstatement is not practicable, the Labour Court will determine an amount of compensation to be paid, taking into account:

- the employee's age
- his employment period
- any adverse effect of the termination on the employee
- the grounds for termination
- the amount of severance payable.

Directors' liabilities
Under some circumstances a director may incur personal liability for violation by the company of Thai labour laws.

Dispute resolution

Courts
The Thai judicial system comprises the Court of Justice, which hears most of the general civil and criminal cases, and specialist courts (such as the Administrative Court, the Constitutional Court, the Intellectual Property and International Trade Court, the Labour Court, the Juvenile and Family Court, the Tax Court and the Military Court). The Court of Justice is organised into three tiers, with the lowest court being the Court of First Instance, whose decisions are appealable to the Court of Appeals and ultimately to the Supreme Court.

Cases from some of the specialist courts (other than the Administrative Court, the Constitutional Court and the Military Court) may be appealed to the Court of Appeals and ultimately the Supreme Court or directly to the Supreme Court with special leave of the Court of Appeals.

The Administrative Court has jurisdiction over disputes among government agencies, state enterprises and public servants and their employers as well as disputes between the state and the public. The administrative Court comprises the Administrative Court of First Instance, whose decisions are appealable to the Supreme Administrative Court. The Administrative Court has exclusive jurisdiction over disputes involving "administrative contracts" between the state and the private sector. "Administrative contracts" are principally concessions and other contracts to provide public services or utilities.

Arbitration
Generally, arbitration agreement/clause and arbitration awards (both domestic and foreign) are enforceable in Thailand. Thailand is a party to the Convention on the Recognition and Enforcement of Foreign Arbitration Awards 1958 (commonly known as the New York Convention) and has enacted the Arbitration Act B.E. 2542 (2002) (Arbitration Act). Arbitration proceedings in Thailand and enforcement of foreign arbitration awards in Thailand are governed by the Arbitration Act. Pursuant to the Arbitration Act, arbitration awards both domestic and foreign are generally enforceable in Thailand through the Thai courts with competent

jurisdiction, subject to limited exceptions, which include where the award deals with a dispute which cannot, by law, be settled by arbitration; or where the recognition or enforcement of the award is contrary to "public order or the good morals of the Thai people".

Foreign arbitration awards will, generally, be enforced by Thai courts only if such arbitration awards are rendered in accordance with an international convention, treaty or agreement to which Thailand is a party and only to the extent that Thailand has agreed to be bound by such international convention, treaty or agreement. For instance, an arbitration award rendered in Singapore in accordance with the New York Convention will, generally, be recognised and enforceable in Thailand pursuant to the Arbitration Act because both Thailand and Singapore (the country in which the award was rendered) are the parties to the New York Convention.

Vietnam

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Visas and work permits
Business entities
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Vietnam is a socialist republic. Until 1986, Vietnam had a centrally planned economy; however, in 1986, the country introduced a regime of economic reform, known as "doi moi". The Government refers to this as a socialist-oriented market economy. Business in Vietnam changed in January 2007 when Vietnam acceded to the WTO, at which time, there were major changes in legislation in order for Vietnam to qualify for accession. Most commercial legislation in Vietnam is no more than six years old, and at the time it was introduced, it was considered a legislative revolution.

The National Assembly is the national legislature. It meets at least twice a year, comprises delegates from throughout the country (with various backgrounds and ethnicity) and is the only body with the power to promulgate laws.

The President (appointed by the National Assembly) is the head of the State and the representative of Vietnam in respect of internal and external issues. The President has a wide role and broad powers (although in practice many of those powers are formal) including being the head of the armed forces, and the ability to appoint and dismiss the Prime Minister and other senior appointments.

The Prime Minister is the head of the Government, which is the executive organ of the National Assembly and the highest State administrative organ in Vietnam. Currently, the Government comprises of 18 ministries and six equivalent authorities, including the State Bank of Vietnam.

Ministries and the Prime Minister regularly issue decrees providing regulations for the implementation of the laws.

Vietnam comprises 58 provinces and five centrally-run cities – Hanoi, Ho Chi Minh City, Haiphong, Danang and Can Tho. Each of these are administered by its provincial or city people's committee, which are effectively a form of provincial or city government. Each province and city is divided into districts, each of which has its own people's committee (analogous to local government).

The people's committees in the various provinces administer most laws (including most foreign investment applications), however, there is often inconsistency between the application by the 63 provinces and cities.

The People's Court including the Supreme Court, Provincial People's Courts and People's Courts at district level are judicial bodies.

Visas and work permits

Visas

A Vietnamese entry visa is required for all foreigners wishing to visit Vietnam, except for citizens of countries having bilateral visa exemption agreements with Vietnam.

There are two ways of obtaining an entry visa to Vietnam as follows:

- visas issued by a Vietnam consular office outside Vietnam – foreigners may apply and collect the entry visa at a Vietnam consular office in the country in which the foreigner resides

- visas on arrival – foreigners may collect the entry visa upon arrival at an international airport in Vietnam. A letter issued by the Vietnam Immigration Department is required to be produced for obtaining a visa on arrival.

The practice for issuing visas and renewals changed in 2009, although there was no change in the law. At the time of writing, visas are not being issued for more than three months and renewals will only be issued for one month. It is necessary to leave Vietnam to get a new visa.

People with work permits or who are exempt (considered below) can obtain temporary residency cards (TRC) for up to three years. Applications for TRCs are relatively straightforward.

Work permits

Virtually all foreigners working in Vietnam for three months or more are required to obtain a work permit. Exceptions exist, including for foreigners:

- entering Vietnam to work for a period of less than three months
- who are members of limited liability companies with two or more members
- who are the owners of one member limited liability companies
- who are members of the Board of Management of joint stock companies established in Vietnam
- entering Vietnam to offer services
- entering Vietnam to deal with issues arising from urgent situations with a work duration of less than three months, but if for more than three months then after working for three months in Vietnam the foreigner must carry out procedures to register for issuance of a work permit
- who are lawyers licensed by the Ministry of Justice to practise as such in Vietnam
- who are heads of representative offices, project offices, and foreigners assigned to represent all activities in Vietnam by foreign non-government organizations
- transferred internally within an enterprise and within the List of Commitments on Services of Vietnam as specified in the WTO Schedule, comprising the following services: business services; information services; construction services; distribution services; education services; environmental services; financial services; health services; tourism services; services of entertainment culture; and transportation services
- going to Vietnam to supply expert and technical consulting services including research, formulation, evaluation monitoring and assessment, management and implementation of a program of project using official development aid (ODA) in accordance with provisions or agreements in international treaty on ODA signed by a competent authority of Vietnam and of the foreign country
- licensed to operate in the information and newspaper sector in Vietnam by the Ministry of Foreign Affairs
- in other certain circumstances which are in accordance with the Prime Minister's regulations.

Work permits are issued with the same duration as the term of the labour contracts or contracts between the Vietnamese party and the foreign party but will not exceed three years. Work permits may be renewed. Obtaining work permits is a time consuming process and employers are recommended to commence the application preparation as early as possible.

Business entities

The principal law regulating companies is the Enterprise Law 2005 (EL). The EL governs all domestic and foreign-invested companies.

Types of enterprises

The EL provides for three types of enterprise, being:

- limited liability companies
- partnerships
- private enterprises.

Limited liability companies

For foreign investment purposes, the main types of investment vehicles are the following:

- one member limited liability company. These are commonly known as "One Member LLCs"
- two members or more limited liability company. The number of members must not exceed fifty. These are commonly known as "Two Member LLCs"

- shareholding company. These are known as "Joint Stock Companies", or "JSCs". The minimum number of shareholders is three and there are no restrictions on the maximum number of shareholders. Shareholding companies may issue securities to the public to attract capital in accordance with Vietnam's legislation on securities.

In general, the first two types of limited liability companies are more common for foreign investors, although companies that are considering listing on the stock exchange will want to be a JSC as only JSCs can be listed. JSCs also provide more flexibility for transferring equity.

One major difference between an LLC and a JSC is that although shares are issued in a JSC, shares are not issued in an LLC. Equity is subscribed, and although it can be assigned, it is subject to pre-emptive rights in favour of the other shareholders.

Partnerships
A partnership is an enterprise in which there must be at least two unlimited liability partners who jointly own the partnership. In addition to these, there may be limited liability partners. Unlimited liability partners are liable for the liabilities and obligations of the partnership to the extent of all their assets, while limited liability partners are only liable for the debts of the partnership to the extent of the amount of capital they have contributed to the partnership.

Private enterprises
A private enterprise is an enterprise owned by one individual who is liable for all activities of the enterprise to the extent of all their assets. An individual is entitled to establish one private enterprise only.

Lines of business
When registering a company in Vietnam, the applicant must state the scope of business. If the Vietnamese company wants to undertake business outside the stated scope, it must apply for approval. The application must state precisely the proposed scope.

Investment Law 2005 (IL)
The IL governs the investment activities in Vietnam of foreign and local individuals and legal entities. The WTO Schedule (considered below) is also important for foreign investment. Under the IL, investors can invest directly or indirectly in all types of business that are not specifically prohibited or restricted. The IL provides for the following types of direct investment:

Establishment of a company
Investors can establish companies in accordance with the EL. These may be wholly owned or jointly owned subject to any WTO restrictions. In some industries, investors must also comply with the conditions laid down in the relevant laws (such as Law on Credit Institutions for banking and financial services, Law on Petroleum for petroleum businesses, Law on Civil Aviation of Vietnam for aviation business, Law on Education for schools, Law on Securities for securities business, and Law on Insurance Business for insurance business).

Investment under contracts
Investors are permitted to sign contracts in the forms of business cooperation contracts (BCC), build, operate, transfer (BOT), build, transfer, operate (BTO) and build, transfer (BT) for cooperation in production, sharing profits and sharing products and other forms of cooperation.

Investment for business expansion
Investors are permitted to invest in the expansion of existing businesses through the:

- expansion of the scale of business or increase of production capacity

- renovation of technology, increase of product quality or measures for reduction of environmental pollution.

Purchase of shares or contribution of capital
Investors are permitted to purchase shares or contribute capital to an economic entity operating in Vietnam at the rates stipulated by the Government.

Merger and acquisition

Investors are permitted to carry out mergers or acquisitions of a company operating in Vietnam, subject to any restrictions on foreign ownership. In addition, investors are permitted to invest indirectly by way of the purchase of bonds, investment fund certificates and other securities, and by way of the establishment of investment funds.

Conditional investment

Sectors in which investment is conditional include:

- radio and television broadcasting
- production, publishing and distribution of cultural products
- exploration and mining of minerals
- establishment of infrastructure for telecommunication networks, transmission and the provision of internet and telecommunication services
- establishment of a public postal network and provision of postal services and express services
- construction and operation of river ports, sea ports, terminals and airports
- transportation of goods and passengers by railway, roadway and sea and inland waterways
- fisheries
- production of tobacco
- real estate business
- import, export and distribution business
- education and training
- hospitals and clinics
- other investment sectors related to international treaties to which Vietnam is a member and which restrict the opening of the market to foreign investors.

Prohibited projects

The following projects are prohibited to foreign investment:

- projects which are prejudicial to national security, defence or the public interest
- projects which are detrimental to historical and cultural relics or the customs and traditions of Vietnam
- projects that may adversely affect people's health, spoil resources or destroy the environment
- projects which deal with the provision of harmful waste into Vietnam, projects for the production of toxic chemicals or which utilise toxic agents prohibited under an international treaty
- other investment projects prohibited in accordance with the provision of laws.

Recognised forms of doing business in Vietnam

The most common business structures used by foreign investors in Vietnam include:

- wholly owned subsidiaries
- joint venture companies
- business co-operation contracts
- foreign contractors.

Alternatively, foreign investors may also operate by establishing:

- representative offices
- branches.

Foreign investors may also invest indirectly in Vietnam, in the following ways:

- purchase of shareholding, shares, bonds and other valuable papers
- by way of securities investment funds
- by way of other intermediary financial institutions.

However there are restrictions on the level of foreign ownership of shares in Vietnamese companies in various sectors including the following:

- listed shares
- banking
- petroleum
- aviation
- general insurance
- publishing
- education
- media
- telecommunications
- mining.

WTO Schedule

The WTO Schedule sets out the timing for when foreign investors may invest in a wide range of services as well as the percentage ownership that may be held. Since 2007, many restrictions have been lifted.

Although many restrictions on foreign investment were lifted on 1 January 2009, in practice major problems remain (and can be noted in the retail, wholesale and franchising sectors). Applications for approval are dealt with extremely slowly and are subject to extremely detailed analysis. As an example of these restrictions in practice, Vietnam is one of the few countries in which there are no McDonalds or Starbucks stores.

Even if a foreign investor is allowed to open one retail outlet, any other outlet will be subject to an economic needs test which gives the authorities very wide scope to reject any application.

Establishment of an entity

Foreign investors are permitted to establish enterprises in accordance with the EL through the following types of entities:

- limited liability enterprises
- joint stock enterprises
- partnership enterprises
- private enterprises.

Foreign investors directly investing in Vietnam must have an approved investment project and are not permitted to simply establish a company. Approval is given for investment in a project, and the company is merely the vehicle for the project. Typically, approval is obtained from the Department of Planning and Investment of the local provincial or city People's Committee. If the application is successful, the People's Committee issues an investment certificate for the project. The investment certificate also serves as the Business Registration Certificate. Domestic companies with no foreign investment are issued with a Business Registration Certificate.

Business Co-operation Contract (BCC)

A Business Co-operation Contract is a contract signed by two or more parties to carry out investment without establishing a legal entity. A BCC operates on the basis of mutual allocation of responsibilities and sharing of profits, production and losses. As defined under the IL, a BCC does not create a separate legal entity under Vietnamese law but the parties to the BCC are issued with an investment licence. To the extent that a BCC is not a legal entity distinct from its constituent partners, it is similar to a partnership. It is often known as a joint operating company (JOC), and is a structure that is commonly used in the petroleum industry.

The IL does not stipulate in detail the rights and obligations of the parties to a BCC. It is important that the rights and responsibilities of the parties be comprehensively set out in the BCC.

Foreign contractors

There are certain businesses, especially in the service sector, where foreign investors may do business in Vietnam as foreign contractors without engaging in any form of investment prescribed under the IL. The following types of activities undertaken by a foreign entity are recognised and subject to tax on income that they generate in Vietnam (foreign contractor's tax):

- commerce, including distribution or supply of goods, material, machinery and equipment

- services

- construction and installation, other production and transportation

- lending
- licensing.

Foreign contractors in the fields of investment and construction, provision of material, equipment and technology together with technical services in respect of construction and the provision of construction services are required to be licensed by the Ministry of Construction or the Department of Construction of the provincial People's Committee, depending on the value of the project concerned. This licensing regime is project specific.

Representative offices

If a foreign company wishes to have a presence in Vietnam before actually investing, it may set up a representative office. The company must have operated for at least one year in its country of establishment.

A foreign representative office is not permitted to carry on any production or sales activities, nor is it permitted to earn income in Vietnam. Its main functions are to coordinate trade and transactions between the head office of the foreign company and Vietnamese businesses, to study the feasibility of investment in Vietnam and to undertake business development activities. A licence for the establishment of a representative office of a foreign business entity in Vietnam has a duration of five years.

Branches of foreign companies

A licence for establishment of a branch of a foreign business entity in Vietnam conducting the purchase and sale of goods, and activities directly related to the purchase and sale of goods, has a duration of five years. In some specific areas, including banking, branches are permitted under the relevant law.

Investment in Vietnamese companies

With limited exceptions (eg, the banking and insurance sectors), foreign individuals and organisations are allowed to purchase up to a maximum of 49 per cent of the issued shares of a listed Vietnamese enterprise. Further, with certain exceptions, foreign investors may invest in or acquire the whole or a part of the equity interest in unlisted Vietnamese companies, subject to the business scope of the Vietnamese company concerned.

Business environment

Business environment

Vietnam promulgated its first Law on Foreign Investment in 1987. In 1994, diplomatic relations with the United States resumed. In 1995, Vietnam was admitted into the Association of Southeast Asian Nations and was accorded favoured-nation trading status by the European Union. In 2001 a Bilateral Trade Agreement with the United States took effect. Vietnam became a permanent member of the WTO on 7 January 2007.

There are almost over 14,000 active foreign investment projects licensed in Vietnam, and despite the global financial crisis, its GDP has grown in recent years. Growth in 2010 was 6.78 per cent and 6.3 per cent for 2011. Over the past decade, Vietnam has averaged GDP growth of 7.5 per cent a year.

Vietnam is an attractive investment destination to foreign companies for many reasons. It has a substantial population (over 87 million people), with the majority below the age of 30, presenting a tremendous domestic market for goods and services. The country also enjoys a very high literacy rate of over 90 per cent.

In addition, the Vietnamese Government provides investment incentives to foreign investors in certain industries and where investment is undertaken in low socio-economic regions. The industries include certain areas of technology, biotechnology, education, infrastructure, and agriculture. Incentives are also available for investment in industrial zones, high tech zones, export processing zones, and economic zones. Incentives can include long term low tax rates, import tax, VAT, corporate income tax (CIT) and personal income tax (PIT) concessions, and concessions for land use fees and rent.

Currency

The Vietnamese Dong (VND) is the national currency of Vietnam. The Dong is not freely convertible in the international money market. The exchange rate between Dong and United States Dollars is set daily by the State Bank of Vietnam (SBV), the Vietnam central bank, and has been devalued four times since 2009.

United States Dollars are still widely used in the economy, despite the SBV's regulations on the circumstances in which they may be used in trade and business. It is common for those dealing in foreign exchange to offer better rates for buying US dollars than the maximum authorised rate.

Competition

Monopolies exist in certain sectors, such as electricity supply and the supply of aviation fuel. In other sectors such as oil distribution, SOEs dominate the market. Monopolies and market domination are not prohibited in Vietnam. Competition is increasing although there are occasions when the need to protect SOEs or Vietnamese companies leads to obstacles arising when foreign investors try to introduce competition.

The Competition Law 2004 (Competition Law) deals with the restraint of competition, abuse of dominant market position, economic concentration and other "unhealthy" anti-competitive practices. It also sets out procedures for the resolution of anti-competition cases and measures for dealing with breaches of the Competition Law.

The Competition Law applies to organisations and individuals conducting business in Vietnam, including enterprises engaged in the production or supply of public utility products or services, State monopolies and industry associations.

Price control

Rates for utilities (for example, electricity, water and fuel) are set by the Vietnamese authorities. Prices of certain key commodities are regulated by the Vietnamese Government.

Re-organisation of State-owned enterprises (SOEs)

The Government has pursued a policy of selling interests in SOEs through a process known as equitisation. This normally involves the allotment of parcels of shares to long-term strategic investors and to employees. A minority of shares may be issued on the stock exchange, although the Government maintains a majority shareholding.

Under the EL, SOEs were obliged to be equitised by 1 July 2010. While many small SOEs have now been equitised, most of them (more that 1,300) have not been.

Rules governing equitisation include that:

- the sale of shares to strategic investors (up to three) and other investors must not be less than 25 per cent of the charter capital of the relevant enterprise

- the sale of shares to other investors must not be less than 50 per cent of the 25 per cent referred to

- with respect to enterprises on a large scale with State owned capital above 500 billion VND or conducting business in specialised sectors and industries (insurance, banking, posts and telecommunications, aviation, rare mineral exploitation), the ratio of shares auctioned to investors must be considered and specifically decided upon by the Prime Minister or competent authority authorised by the Prime Minister.

Intellectual property

Vietnam promulgated the Intellectual Property Law 2005 on 12 December 2005. This Law is consistent with international practice. Accordingly, protection is available for the following types of intellectual property:

- copyright and copyright related rights

- inventions

- industrial designs

- layout-designs of semi-conductor integrated circuits
- business secrets
- trademarks
- trade names
- geographical indications
- rights to plant varieties.

Copyright
Vietnam is a party to the Berne Convention for the Protection of Copyright in Respect of Literary and Artistic Works under Decision No.332/QD-CTN dated 7 June 2004 of the President of Vietnam. In addition, the Law on Intellectual Property 2005 also protects copyright with respect to certain scientific works, irrespective of form, language and quality. Copyright in Vietnam may be protected without any legal recognition.

Trade marks
Vietnam is a signatory to the Paris Convention for the Protection of Intellectual Property (Paris Convention) and Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks. Priority registration may be claimed in respect of marks registered in other countries within the previous six months. Protection is granted for a period of ten years from the date of filing or the priority date and can be renewed for successive ten year periods.

The specification of the goods will determine the ambit of protection for the mark. The classes for registration of trade marks in Vietnam are based on the International Classification of Goods and Services under the Nice Agreement.

Patents, inventions and utility solutions
Vietnam is a signatory to the Paris Convention and Patent Cooperation Treaty (PCT). Priority registration may be claimed in respect of inventions registered in other countries within the previous twelve months for registration under Paris Convention, twenty one months for registration under Chapter I of PCT, and thirty one months for registration under Chapter II of PCT from the priority date, respectively.
Protection for an invention is granted for twenty years from the filing date or the priority date.
For “utility solutions” (or technical solution/ technological development), protection is granted for ten years from the filing date or the priority date.

Industrial designs
Where protection of inventions and utility solutions relates to technical aspects of a product, protection of industrial designs relates to the outer appearance of a product manifested by means of contours, three-dimensional forms or colours, or a combination of such elements, which is new in character throughout the world and may be used as a model for manufacturing handicrafts or industrial products.

The duration of protection is five years and renewable for two further five year periods.

Semiconductor integrated circuit layout designs
Semiconductor integrated circuit layout designs are defined as a three-dimensional description of circuit elements and their interconnections in semiconductor integrated circuits. Under the laws of Vietnam, protection of a layout design is valid for the following periods, whichever ends earlier:

- ten years from the date of grant of a certificate of protection
- ten years from the date of filing by an authorised person or the date that person permits commercial exploitation of the design anywhere in the world
- 15 years from the date of producing the design.

Trade secrets
Vietnam law states that a trade secret is protected if it is:

- not common knowledge
- applicable in business activities whereupon its holder is given advantages in comparison with others

- protected by the owner with necessary measures to avoid disclosure and access.

Further, a geographical indication is a sign used to indicate a product originating from a specific area, locality, region or country. Vietnamese law allows a geographical indication to be eligible for protection if it meets the following conditions:

- the product having the geographical indication originates from the area, locality, territory or country corresponding to such geographical indication
- the product having the geographical indication has a reputation, quality or characteristics essentially attributable to the geographical conditions of the area, locality, territory or country corresponding to such geographical indication.

A certificate of registered geographical indication shall have indefinite validity starting from the grant date.

Trade name
A trade name is a designation of an organisation or individual used in business to distinguish the business entity bearing such designation from other business entities acting in the same field and area of business. The area of business shall be the geographical area where a business entity has business partners, clients or reputation. Protection will be afforded to trade names only where the trade name is used in connection with an on-going business.

Rights to plant varieties
A plant variety is a plant grouping within a single botanical tax on of the lowest known rank, uniform of morphological, stability in the propagation circle, which can be distinguished by the phenotype expressed by a genotype or the combination of genotypes and distinguished from other plant grouping in at least one genetic phenotype. Rights to new plant varieties shall be established on the basis of the competent state authority's decision on the grant of Plant Variety Protection Title.

Franchising Law

The franchising industry in Vietnam has been gradually developing over the past few years with the products and services of a number of well-known local and foreign brand names achieving higher market profile. However, this development has taken place in the absence of any regulations directly governing franchising activities. The franchising industry in Vietnam had relied on regulations on related issues, such as those relating to the licensing of intellectual property rights and technology transfer, coupled with regulations relating to general contractual obligations.

In June 2005, the National Assembly of Vietnam passed the new Commercial Law 2005 (Commercial Law) (and effective from 1 January 2006), which includes eight articles dealing with franchising activities (Articles 284 – 291). The Government also issued Decree No.35/2006/ND-CP (Decree) guiding the implementation of the Commercial Law with respect to franchising activities on 31 March 2006, which was followed by Circular No.09/2006/TT-BTM dated 25 May 2006 of the Ministry of Trade on registration of franchising activities.

In practice there are restrictions under the application of the WTO Schedule as described above.

Franchisors
Under the Decree, a franchisor must satisfy the following conditions:

- the business system to be franchised has been operating for at least one year. In a case where a foreign franchisor grants a franchise to a primary franchisee being a Vietnamese business entity, such Vietnamese business entity must operate the franchise business for at least one year in Vietnam before sub-franchising
- the business entity has registered the franchising activity with the competent authority
- the goods and services of the franchise are not on the list of goods and services in which business is prohibited.

Franchisees

A franchisee must have a licence to carry out the franchised business. Under the Decree, only goods and services which are not subject to any transactional prohibitions may be franchised. Further, for franchise of goods and services which are subject to certain conditions, franchising can only be carried out if these conditions are satisfied.

Registration of franchising agreements

Under the Decree, all franchising agreements must be registered. The Ministry of Industry and Trade is the authority for registration of:

- franchising activities from overseas into Vietnam including those from export processing zones, non-tariff zones and other separate customs areas into Vietnamese territory
- franchising activities from Vietnam to overseas, including those from Vietnamese territory into export processing zones, non-tariff zones or separate customs areas.

The Department of Industry and Trade where the proposed franchisor registers its operations will carry out registration of domestic franchising activities, except those transferred across the borders of export processing zones, non-tariff zones or separate customs areas in accordance with the laws of Vietnam.

Foreign investment policy

Land and housing

Land

One of the principal matters that an investor must decide at the outset is the location of its investment project. The investor must, therefore, understand how it may acquire the right to use land in Vietnam.

General outline of Vietnamese land law

Under the Vietnamese Constitution, all land in Vietnam belongs to the Vietnamese people and its use is administered on their behalf by the State. Private ownership is not possible, although the right to use land can be allocated by the State. Accordingly, under the Vietnamese legal system, "land is the property of the entire people" but buildings erected on the land can be privately owned.

The individual title over the land upon which a building has been erected is acknowledged by law as the "Right of Land Use". A certificate known as the Certificate of Land Use Right, Ownership of Residential Housing and other Property attaches to the Land (Certificate), and defines the rights related to the use of the land.

Land use is governed by the Land Law 2003 and related regulations. Unfortunately, these regulations do not provide a clear system of land use and related issues.

Organisations being holders of land use rights may contribute the land use rights to form the capital of a joint venture (JV). This means that for a foreign investor entering into a joint venture arrangement with a Vietnamese partner, the Vietnamese partner can contribute its share of capital by way of land. This can be a major benefit due to the general inability of foreigners to obtain land use rights. If an investor requires the use of existing premises, it may rent such premises from entities and individuals that have the right to lease premises.

Certificate of Land Use Right, Ownership of Residential Housing and other Property attached to the Land.

The fundamental document evidencing the right to use land is the Certificate. After the State has allocated or leased land to a user, the land user must apply to the People's Committee of the District in which the land is situated for the Certificate if the land user is an individual, family household, community of citizens or an overseas Vietnamese who purchases a residential house. In other cases, the provincial People's Committee is responsible for the issue of the Certificate. The Certificate is valid only for the time for which the State allocates the land as set out in the Certificate. Moreover, the grantee of the Certificate may only use the land for the purpose stated in the Certificate and is required to pay land use fees or land rent to the State (usually on an annual or semi-annual basis).

Land lease by JVs and 100 per cent Foreign Owned Enterprises (FOEs)
Under the prevailing legislation on land, JVs and 100 per cent FOEs can lease land in Vietnam from the State under a lease contract for, amongst other things, the purpose of construction on the land according to the investment certificate granted to them and to own the buildings they construct on the land during the term of the lease.

JVs and 100 per cent FOEs may lease land from the State for the term set out in the lease contract, which is usually also for the term set out in their investment certificate. Upon expiry of the term of the lease, if extension of the lease contract is not approved by the relevant Vietnamese authority, the land use right terminates and reverts to the State and the foreign investor must then dispose of its interest in the building (if any). As such rights are relatively new, it is not clear what attitude the authorities will take upon the expiry of a lease if a foreign owned company wants to renew the lease.

Foreign companies (as distinct from JVs and 100 per cent FOEs) are not permitted to lease land from the State. They may, however, lease premises from landlords who are licensed to conduct leasing activities, provided that the office of the foreign company in Vietnam is duly licensed by the competent authority of Vietnam. This usually means that they have established a representative office.

Housing and construction works
On 23 June 2010, Decree No. 71/2010/ND-CP, on implementation of the Law on Residential Housing 2005, was issued. Under this decree, local individuals and organisations, overseas Vietnamese and foreign individuals and organisations who are entitled under Vietnamese law to own construction works will be issued with the ownership certificate of construction works (depending on the purpose of use of such property).

Under the Law on Residential Housing 2005 dated 29 November 2005, Vietnamese persons residing overseas, who return to Vietnam to make long-term investments and whose work has contributed to the country, cultural activists and scientists with a requirement to return to Vietnam for regular activity aimed at serving the cause of national development, persons permitted to live stably in Vietnam and other persons stipulated by the Standing Committee of the National Assembly, are entitled to own a residential house in Vietnam. Even if a non-resident Vietnamese does not satisfy any of the above conditions but returns to reside in Vietnam for a permitted duration of six months or more they are entitled to own one individual residential house or one apartment.

The newly adopted Resolution No. 19/2008/ND-QH12 permits foreign organisations and individuals to buy and own apartments on a pilot basis for a term of five years commencing on 1 January 2009. Subject to this Resolution 19, there are five groups of foreigners eligible to purchase apartments, including:

- foreigners who invest directly in Vietnam under the IL or are employed by enterprises doing business activities in Vietnam under EL, including domestic enterprises and foreign invested companies
- foreigners who have made contributions to Vietnam and have received medals awarded by the President of Vietnam, or foreigners who have made great contributions to Vietnam and as decided by the Prime Minister
- foreigners who are working in eco-social fields and hold bachelor degrees or higher degrees and foreigners who have special knowledge or skill that meet Vietnam's requirements
- foreigners who are married to Vietnamese nationals
- foreign invested enterprises doing business in Vietnam under the IL which are not operating in the real estate business, who have the need to purchase apartments for housing their employees.

Foreign organisations and individuals investing in the construction of residential properties for lease in Vietnam are issued with Certificate of Land Use Right, Ownership of Residential Housing and other Property attached to the Land with respect to such houses by the competent State body. The duration

of ownership of the residential house is the duration specified in the investment certificate. The duration of ownership is recorded in the Certificate. Foreign organisations and individuals investing in the construction of residential houses for sale, after completion of the construction pursuant to a project, are entitled to sell such residential houses to purchasers permitted to own residential houses in Vietnam. Purchasers of residential houses are issued with Certificate of Land Use Right, Ownership of Residential Housing and other Property attached to the Land.

The Law on Real Estate Business 2006 was passed on 29 June 2006 and came into force as of 1 January 2007. Based on this Law, foreign organisations and individuals, and Vietnamese persons residing overseas are permitted to conduct real estate business and real estate business services within the following scopes:

- investment in the creation of houses and buildings for sale, lease out or grant of hire purchase
- investment in upgrading land and to invest in infrastructure works on the leased land in order to lease out land with completed infrastructure
- provision of real estate business services, such as real estate:
  - brokerage services
  - valuation services
  - trading floor services
  - consultancy services
  - auctioning services
  - advertising services
  - management services.

Government initiatives and incentives

Investment incentives

Investment incentives largely take the form of exemptions from or reduction of corporate income tax (CIT), land rent and import duty. Particulars of the import duty and corporate income tax concessions are set out below.

Investment projects which satisfy one of the following conditions are entitled to corporate income tax incentives:

- investment in an industry and/or sector which is on the list of investment incentive sectors promulgated by the Government in accordance with the IL
- investment in an industry and/or sector which is on the list of special investment incentive sectors promulgated by the Government in accordance with the IL
- investment in a region which is on the list of regions with difficult socio-economic conditions as promulgated by the Government in accordance with the IL
- investment in a region which is on the list of regions with specially difficult socio-economic conditions as promulgated by the Government in accordance with the IL.

Land rental

Preferential treatment given to foreign enterprises in respect of land rental, includes:

- (i) Investment projects in areas where investment is especially encouraged, and which are carried out in geographical areas facing exceptional socio-economic difficulties; and (ii) projects involving the use of land for construction of condominiums for industrial park workers under projects approved by competent authorities, covering the house-selling prices or house-leasing prices which do not include land rent expenses; (iii) projects involving the use of land for construction of students' dormitories with State budget money, for which the units assigned to manage such dormitories may only calculate charges sufficient to cover expenses for services, electricity and water supply, for management and other relevant expenses and must not calculate land rent expenses and depreciate the houses; (iv) projects involving the use of land for construction of public facilities for business purposes in the fields of education, health, physical training, sport, science and technology.

- A three-year exemption for projects on the list of domains where investment is encouraged; and new production or business establishments of economic organisations which are relocated pursuant to State planning or due to environmental pollution.
- A seven-year exemption for projects in geographical areas facing socio-economic difficulties.
- An 11-year exemption for projects in geographical areas facing exceptional socio-economic difficulties, projects on the list of areas where investment is especially encouraged, and projects on the list of areas where investment is encouraged which are carried out in geographical areas facing socio-economic difficulties.
- A 15-year exemption for projects on the list of areas where investment is encouraged which are executed in geographical areas facing exceptional socio-economic difficulties, and projects on the list of areas where investment is especially encouraged and which are carried out in geographical areas facing socio-economic difficulties.

Further, for cases where annual land rent is payable, the annual land rental rate is 1.5 per cent of the land price based on the use purpose of the rented land. For land rental to be paid in a lump sum for the whole rent duration, the payable land rental amount is equal to the payable land use levy amount for land allocation with a land use levy payment for the same use purpose and land use duration.

The land rental rate applicable to each project was to be kept unchanged for five years. At the end of this period, if the land price prescribed by the provincial-level People's Committee increases by less than 20 per cent from the land price for calculating the land rental rate at the time of determining the land rental rate applicable to the preceding period, the land price bracket prescribed by the provincial-level People's Committee at the time of adjustment of the land rental rate will apply for calculating the land rental rate applicable to the subsequent five year period which must not be lower than the land rent rate applicable to the preceding stabilization period.

If the land price prescribed by the provincial-level People's Committee increases 20 per cent or more from the land price for calculating the land rental rate at the time of determining the land rental rate applicable to the preceding period, the provincial-level Finance Department has prime responsibility for determining the land price adjustment co-efficient and propose it to the provincial-level People's Committee for decision. This co-efficient serves as a basis for the provincial Department of Finance to adjust the land rental rate applicable to the subsequent five year period. At the end of the five year period, if the land rental rate has not been adjusted due to objective reasons, the land rental rate applicable to the preceding five year period will apply for temporary payment of land rentals for the subsequent period. When a competent authority adjusts the land rental rate for each adjustment, the policy on and the land price for collection of the land rental corresponding to such adjustment will apply and the payable land rental deficit amount (if any) shall be retrospectively collected.

Taxation

Vietnam has a relatively onerous tax regime with various heads of taxes levied on foreign investors and their investment projects. The common types of taxes are outlined below.

Import/export duty

Import

Import duty rates are classified into three categories subject to the origin of the imported goods:

- ordinary rates
- preferential rates
- special preferential rates.

Preferential rates are applicable to imported goods from countries that have a "Most Favoured Nation" (now known as Normal Trade Relations) status with Vietnam. Special preferential rates are applicable to imported goods from countries that have special preferential agreements with Vietnam and ordinary

rates are applicable to goods from countries without special preferential agreements with Vietnam.

To be eligible for preferential or special preferential rates, the imported goods must be accompanied with an appropriate Certificate of Origin (C/O). Without a C/O or when goods are sourced from non-preferential treatment countries, the ordinary Rate (being the preferential rate with a 150 per cent surcharge) is imposed.

The dutiable value of imported goods is based on the commercial contract. However, a list of product prices is introduced and updated by the General Department of Customs for reference. Generally, dutiable price for imported goods will be determined by using one of the following six methods:

- determined by transaction price
- price of the same goods
- price of similar goods
- deductible price
- valuation calculation
- the reasoning method.

There are 18 categories of import duty exemption, which include goods temporarily imported for export, materials for processing and export, and goods and materials used to create the fixed assets of investment projects.

Export

At present, the Vietnamese Government particularly encourages the production and exportation of labour-intensive products, including agricultural produce, seafood, textiles and garments, leather goods and footwear, and handicrafts. Most of the country's export goods now enjoy an export duty rate of zero per cent.

Value Added Tax (VAT)

VAT applies to goods and services used for production, trading and consumption in Vietnam (including goods and services purchased from abroad). In each case businesses must charge VAT on the value of goods or services supplied. In addition, VAT applies on the duty paid value of imported goods. The importer must pay VAT to customs at the same time they pay import duties.

The standard VAT rate is ten per cent. Exports are subject to 0 per cent VAT, while essential goods and services are subject to five per cent VAT (eg, fertilisers, medicine).

Corporate income tax (CIT)

Recently, the Vietnamese government adopted a new taxation system for all economic sectors.

The standard CIT rate is 25 per cent. There is an exception for companies involved in the exploration and mining of petroleum and gas and other important natural resources. The CIT rates applicable to these sectors vary between 32 per cent to 50 per cent.

There are CIT incentives for investments in certain specified fields and/or locations. There are also incentives for investments which employ a large workforce or a certain number of minority ethnic people. Preferential rates of 20 per cent and ten per cent are available where certain criteria are met. These incentive rates are available for a period of ten years and 15 years respectively, starting from the first year in which the enterprise has turnover. Certain exemptions and reductions are also available together with these preferential rates.

Enterprises undertaking large scale and high-tech projects particularly in areas which need to attract investment may enjoy preferential tax rates for a duration of up to 15 years. There are incentives for enterprises engaged in production, construction or transportation which employ a certain number of female employees or ethnic minorities.

An existing foreign invested enterprise (FIE) which establishes a new production line, expanding its business scale, renewing its technology, improving ecological environment or enhancing its production capacity will also be entitled to certain CIT incentives for that part of its increased profit resulting from such additional investment.

Business establishments are entitled to exemption from CIT payable on a portion of income in the following circumstances:

- Income earned from products of cultivation, husbandry and aquaculture by organizations

established pursuant to the Law on Co-operatives.

- Income earned from performance of technical services directly serving agricultural production.
- Income earned from performance of contracts for scientific research and technological development, from products during the period of trial production, and from products made from new technology applied for the first time in Vietnam.
- Income earned from activities of production and/or business in goods and services by enterprises specially reserved for employees being disabled persons, reformed addicts and people infected with HIV.
- Income earned from occupational training activities specially reserved for ethnic minority people, disabled persons, children living in particularly difficult conditions and reformed offenders.
- Income distributed from activities being capital contribution, joint venture and/or association with a domestic enterprise after payment of corporate income tax in accordance with the law.
- Aid funds receivable for use in educational, scientific research, cultural, artistic, charitable, humanitarian and other social activities in Vietnam.

Foreign contractor's tax

Vietnamese tax regulations divide the tax obligations of foreign contractors into two groups. The first group comprises foreign contractors that do not comply with the Vietnamese accounting system. The second group comprises foreign contractors that do comply with the Vietnamese accounting system. The distinction is relevant to the way taxes are calculated.

In most cases, foreign contractors fall into the first group. This group of contractors is liable to pay VAT and corporate income tax calculated as follows:

VAT: calculated based on the value added by the foreign contractor.

The amount of VAT payable = added value x VAT tax rate.

The added value in respect of each business activity is determined as a certain percentage of the taxable turnover as follows:

Types of activities	Income as % of turnover
Commercial (including distribution or supply of goods, material, machinery and equipment)	10
Services, machinery and equipment leasing business, and insurance	50
Construction and assembly and installation without supply of materials and/or machines and equipment in the construction work	50
Construction and assembly and installation with supply of materials and/or machines and equipment in the construction work	30
Transportation and other business and production	25

Corporate income tax

The amount of CIT payable is determined by reference to a certain percentage of the taxable turnover of each business activity, specifically:

Types of activities	Income as % of turnover
Commercial (including distribution or supply of goods, raw materials, supplies, machinery and equipment associated with services in Vietnam)	1
Services, leasing of machinery and equipment, Insurance	5
Construction, other production or business activities and transportation (including sea and air transportation), lease of aircraft, aircraft engines, aircraft spare parts and sea going vessels, and reinsurance	2
Assignment/transfer of securities	0.1
Loan interests, income from royalties	10

The amount of taxable turnover is calculated in accordance with the following formula:

Taxable turnover = turnover actually received/1 – (added value as a % of turnover x VAT rate + income as a % of turnover)

For the second group (which complies with the Vietnamese accounting system), the taxation obligation is calculated similar to those applied to local enterprises, or may be calculated according to a hybrid method: VAT payment according to the credit method and CIT payment according to a percentage of taxable turnover.

Capital gains tax from disposal of interest in FIEs

If a foreign party makes a profit from the disposal of its interest in an FIE, the foreign party is required to pay a capital gains tax (CIT at the rate of 25 per cent for organisations or PIT at the rate of 20 per cent for individuals) of the profits derived. The taxable gain is determined as the excess of the sales proceeds less the cost (or the initial value of contributed legal capital for the first transfer) less transfer expenses. The purchaser is required to withhold the tax due from the payment to the vendor, and account for this to the competent tax authority.

The transfer of a foreign investor's capital in a local enterprise is not subject to VAT.

Personal income tax (PIT).

The Law on Personal Income Tax 2007 (PIT Law) imposes a progressive tax regime set out in the schedule below for income from businesses, wages and salaries of individuals. A deduction of VND1.6 million is allowed for each dependent.

Tax bracket	Yearly taxable income (million VND)	Monthly taxable income (million VND)	Tax rate (%)
1	Up to 60	Up to 5	5
2	Over 60 to 120	Over 5 to 10	10
3	Over 120 to 216	Over 10 to 18	15
4	Over 216 to 384	Over 18 to 32	20
5	Over 384 to 624	Over 32 to 52	25
6	Over 624 to 960	Over 52 to 80	30
7	Over 960	Over 80	35

All individuals with taxable incomes must apply for individual tax codes.

Income tax is deducted by employers before paying wages. Individual tax payers must lodge their tax returns directly with the tax authorities by 31 March each year.

Business registration tax

Foreign invested enterprises must pay business registration tax based on their registered capital as follows:

Level	Registered capital	Registration tax rate
1	Over VND10 billion	VND3,000,000
2	VND5 billion to 10 billion	VND2,000,000
3	VND2 billion to less than 5 billion	VND1,500,000
4	Less than VND2 billion	VND1,000,000

Workplace relations

Legislation
The Labour Code applies to all employees, including foreign workers, working in Vietnam and generally sets out the rights and obligations of both employers and employees.

Issues relating to workplace relations are highly regulated in Vietnam, including the form of employment contract, term, probationary period, minimum salary, working hours, rest breaks, overtime, annual and other statutory leave entitlements, special benefits for female employees, social and health insurance contributions, internal labour regulations, collective labour agreements, and safety and hygiene.

Employment relations
The Code requires that all employment relationships (with a few exceptions) must be evidenced by labour contracts in the Vietnamese language entered into between employers and employees, including foreign employees, in duplicate and contain prescribed contents. Labour contracts for foreign employees must be registered.

Collective agreements
FIEs established in Vietnam and foreign and international organisations permitted to operate in Vietnam which have a trade union or temporary executive committee of the trade union are required to enter into collective labour agreements with their Vietnamese employees, in addition to the individual labour contracts between the employer and each employee.

The principal provisions of a collective labour agreement include undertakings of the parties in respect of employment and guarantees of employment, working hours and rest breaks, salaries, bonuses, allowances, labour protection, occupational safety and social insurance for employees.

The terms of a collective labour agreement must be accepted by more than 50 per cent of the employees and registered with the local labour department.

Internal labour regulations
Enterprises employing ten or more workers are required to adopt internal labour regulations in writing and register the internal labour regulations with the local labour department. Internal labour regulations stipulate the work hours, rest time, order in the enterprise, labour safety, hygiene, protection of assets and technology secrets of the enterprise. Specific forms of disciplinary measures must be included in the internal labour regulations.

Recruitment
FIEs are entitled to recruit Vietnamese employees directly or through labour supply agencies. Foreign organisations and agencies which are licensed to operate in Vietnam must employ Vietnamese employees through labour supply agencies. If the labour supply agency is not able to identify a suitable candidate within 15 days, the foreign organisation or individual is entitled to recruit directly. In practice, certain provinces and cities have abolished this requirement with respect to representative offices of foreign companies and such offices are permitted to employ Vietnamese employees directly.

Dismissal
It is very difficult to dismiss employees in Vietnam, even for serious breaches.

The Code provides for limited term contracts for 12 months and up to three years. It is important to ensure that wherever possible all employees are on limited term contracts so that the employer has the option of not renewing the contract upon maturity. It is very difficult to dismiss an employee who is employed on an indefinite term contract.

Definite term contracts automatically convert into indefinite term contracts if the parties do not sign a new definite term contract within 30 days following the expiry of the contract.

Sickness and disability pension and life assurance

Social insurance

Vietnamese employees on employment contracts of a duration of three months or more or for an indefinite term are subject to the compulsory social insurance scheme. Employers must contribute 17 per cent of the salary and the employee must contribute seven per cent. Both amounts will increase to 18 per cent and eight per cent respectively as from 1 January 2014.

There is also a compulsory contribution to an unemployment fund. Employees must contribute one per cent of monthly salary, and employers must contribute one per cent of monthly payroll, to the unemployment fund every month.

Employees are entitled to social insurance benefits and allowances in the event of illness, work-related accidents and occupational diseases, pregnancy, retirement, unemployment and death.

Medical insurance

Medical insurance is compulsory and is applicable to Vietnamese and foreign employees employed by and working for foreign invested enterprises, export processing zones and industrial parks and foreign and international organisations operating in Vietnam, except otherwise stipulated by international treaties executed or entered into by the Socialist Republic of Vietnam amongst others.

Premiums paid to the medical insurance fund for such Vietnamese and foreign employees are equal to 4.5 per cent of their monthly wages and salaries and allowances (if any) as specified in the labour contract, of which the employer is required to contribute three per cent and the employee 1.5 per cent. For foreign workers the contribution is usually insignificant as it is capped at 20 times the minimum wage.

Industrial relations

Trade unions

The establishment of a trade union in the workplace is to be carried out by the employees themselves or by the trade union at provincial level. Although employers are not required to set up trade unions, they are required to provide support for the establishment and operation of the trade unions. Trade unions are established and regulated pursuant to the Law on Trade Unions 1990 issued by the National Assembly, dated 7 July 1990. The trade union of an enterprise is set up to protect the rights and benefits of employees during the employment and represents employees in negotiation with the employer.

The Vietnam General Federation of Labour and trade unions in general are charged principally with the responsibility of discussing and resolving issues related to labour relations.

Settlement and mediation proceedings

The Labour Code 1994 provides for the resolution of labour disputes in the case of an individual labour dispute and also in the case of a collective labour dispute. A collective labour dispute can be classified as a collective labour dispute about rights and a collective labour dispute about benefits.

A party to an individual dispute may request the local labour conciliation council or, if there is none, a local labour conciliator to resolve the dispute. For certain individual disputes, either party may bring the dispute directly to the Labour Court. If an individual dispute cannot be resolved satisfactorily by the local labour conciliation council or the conciliator (as the case may be), either party may refer the dispute to the Labour Court.

In the case of a collective dispute, either party has the right to request the labour conciliation council or a local labour conciliator as selected by both parties to resolve the dispute. If no satisfactory solution is found, either party may refer the dispute to the Chairman of the relevant People's Committee of a district, town or provincial city regarding a collective labour dispute about rights, or the labour provincial arbitration council regarding a collective labour dispute about benefits for further settlement. If a collective labour dispute about rights is not resolved by the Chairman of the People's Committee of district, town or provincial city, either party may refer the dispute to a Labour Court for final resolution or the Labour Collective may go on strike in accordance with the procedure set down in the relevant regulations. While if a collective dispute about benefits is not resolved by

the labour provincial arbitration council, the dispute may not be further referred to the court, the Labour Collective however may go on strike in accordance with the procedure set down in the relevant regulations.

Dispute resolution

Under Vietnamese laws, there are two dispute resolution methods, namely courts and arbitration procedures.

Courts

Court procedures have two stages, first instance and appeal.

First instance procedures

In principle, the People's Court which has jurisdiction to settle civil cases is the court having jurisdiction over the locality in which the defendant's head office is located. Parties to a contract are, however, able to agree in the contract to submit any disputes for settlement to the People's Court of the locality in which the plaintiff's head office is located, but this must be expressly provided for in the relevant contract or in other written agreements between the parties.

Legal proceedings are commenced by a petition submitted to the competent court within the limitation period. The limitation period is generally two years from the date the benefits and interest of the plaintiff are breached, unless otherwise provided to by specific laws.

The first instance procedures typically last four months (or six months in complicated cases). However, in practice, this usually takes longer. During this time, the court investigates the case by requiring evidence from the parties. Prior to trial, the parties are required to attempt conciliation to reach an amicable resolution of the dispute. Conciliation meetings will be organised by the court which require the participation of the parties. If conciliation is successful, the mutual written agreement of the parties will be recognised under a decision of the court as final and binding on the parties. If conciliation fails, the parties will proceed to court trial.

The first instance trial is chaired by a judgment committee consisting of one judge and two jurors that will adjudicate on the dispute based on the principle of majority vote. A secretary of the court is in charge of preparing the minutes of the trial.

At the court hearing, in addition to the parties involved in the dispute, there may be other attendees including the prosecutor, interpreters, witnesses and experts. On conclusion of the court hearing, the court will issue its first instance judgment on the dispute. The court may also issue other decisions in respect of particular issues arising from the trial.

Appeal procedures

Appeals may be lodged with the court higher than the first instance court within 15 days from the date of the lower court's judgement.

An appeal trial is conducted on a similar basis to a first-instance trial except that the panel consists of three judges. The appeal court will reconsider the case.

Special procedures following the first-instance trial and appeal

After the judgement of the first instance court or any appeal court becomes effective, the judgment may still be subject to appeal by the administration authority of the People's Courts or the People's Procuracies at the provincial level or higher under the special procedures for supervision and review as prescribed by law. However, the parties to the proceedings have no right to initiate such appeal procedures.

Court fees

The plaintiff must deposit 50 per cent of the prescribed court fees when submitting its claims, except in some special cases. The losing party is responsible for payment of these fees at the time the judgment is issued.

Foreign court judgements are unenforceable in Vietnam in the absence of a bi-lateral agreement for mutual recognition. Vietnam has entered into bi-lateral agreements with countries including Russia, the Czech Republic, Slovakia, Cuba, Hungary, Bulgaria, Poland, Laos, China, France,

Ukraine, Mongolia, Belarus and the People's Democratic Republic of Korea. However, Vietnam has not made any agreement on the reciprocal recognition of judgments with the United States, Australia, any other Asian country or any western European country.

Arbitration procedures

The law provides for arbitration in Vietnam. However, it is very seldom used in Vietnam, partly because of the inexperience of the arbitrators in complicated commercial disputes. A dispute will be resolved by arbitration if the parties have entered into an arbitration agreement before or after the occurrence of the relevant disputes. A dispute between the parties can be resolved by an arbitration tribunal established by an arbitration centre or by an ad-hoc arbitration tribunal established by the parties.

An arbitration tribunal consists of three arbitrators or of a sole arbitrator as agreed by the parties. In Vietnam, there are only seven arbitration centres, and it is generally considered that the most reputable arbitration centre is the Vietnam International Arbitration Centre.

In order to commence proceedings, the parties must enter into an arbitration agreement. An arbitration agreement can be an arbitration clause in a contract or a separate agreement. An arbitration agreement or clause is independent from the underlying contract. Any modification, extension, termination or invalidity of a contract does not affect the validity of the arbitration clause. The arbitration clause should include provisions on how to establish an arbitration tribunal, how to appoint arbitrators, arbitration rules for settlement of dispute, venue of the arbitration, applicable laws and the language used in the procedures. Each party shall bear its own legal costs and disbursements relating to any dispute or arbitration, unless otherwise agreed between the parties.

Vietnam is a party to the United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards but only a very limited number of foreign arbitral awards have been recognised and enforced in Vietnam to date.

Contacts

Australia

Brisbane
Norton Rose Australia
Level 17, 175 Eagle Street
Brisbane QLD 4000
Australia

Tel +617 3414 2888
Fax +617 3414 2999

Canberra
Norton Rose Australia
Level 6, 60 Marcus Clarke Street
Canberra ACT 2601
Australia

Tel +612 6159 4400
Fax +612 6159 4425

Melbourne
Norton Rose Australia
Level 15, RACV Tower
485 Bourke Street
Melbourne VIC 3000
Australia

Tel +613 8686 6000
Fax +613 8686 6505

Perth
Norton Rose Australia
Level 39, BankWest Tower
108 St Georges Terrace
Perth WA 6000
Australia

Tel +618 6212 3222
Fax +618 6212 3444

Sydney
Norton Rose Australia
Level 18, Grosvenor Place
225 George Street
Sydney NSW 2000
Australia

Tel +612 9330 8000
Fax +612 9330 8111

China

Beijing
Norton Rose LLP
19/F, China World Tower
No.1 Jianguomenwai Ave
Beijing 100004
People's Republic of China

Tel +86 10 6535 3100
Fax + 86 10 8535 1089

Shanghai
Norton Rose LLP
27F, Plaza 66 II
1266 Nanjing Road West
Jing An District
Shanghai 200040
People's Republic of China

Tel +86 21 6137 7000
Fax +86 21 6137 7088

Hong Kong

Norton Rose Hong Kong
38/F Jardine House
1 Connaught Place
Central
Hong Kong SAR

Tel +852 3405 2300
Fax +852 2523 6399

Indonesia

Susandarini & Partners*
(in association with Norton Rose Australia)
Level 33, Equity Tower
Sudirman Central Business District
Jalan Jend. Sudirman Kav. 52-53
Jakarta 12190
Indonesia

Tel +62 21 2924 5000
Fax +62 21 2924 5099

Japan

Norton Rose Gaikokuho Jimu Bengoshi Jimusho
Norton Rose (Asia) LLP
Otemachi First Square
East Tower 18th Floor
1-5-1 Otemachi, Chiyoda-ku
Tokyo 100-0004
Japan

Tel +81 3 5218 6800
Fax +81 3 5218 6801

Singapore

Norton Rose (Asia) LLP
One Raffles Quay
34-02 North Tower
Singapore 048583

Tel +65 6223 7311
Fax +65 6224 5758

Thailand

Norton Rose (Thailand) Limited
Sindhorn Building
Tower 2, Floor 14
130-132 Wireless Road
Bangkok 10330
Thailand

Tel +662 205 8500
Fax +662 256 6703/5

Vietnam

Vision & Associates Legal*
(in association with Norton Rose Australia)
Unit 1801, 18th Floor
Saigon Trade Centre
37 Ton Duc Thang Street
District 1
Ho Chi Minh City
Vietnam

Tel +84 8 3823 6495
Fax +84 8 3823 6496

*associate office

Contributing law firms

India

J. Sagar Associates
2 Frontline Grandeur
14 Walton Road
Bangalore 560 001
India

Tel +91 80 4350 3600
Fax +91 80 4350 3617

Japan

Kashiwagi Sogo Law Offices
Atago Toyo Building
3-4 Atago 1-chome
Minato-ku, Tokyo
Japan

Tel +81 3 5472 5050
Fax +81 3 5472 5077

Malaysia

Jeff Leong, Poon & Wong
B-11-8, Level 11, Megan Avenue II
Jalan Yap Kwan Seng
50450 Kuala Lumpur
Malaysia

Tel +603 2166 3225
Fax +603 2166 3227

South Korea

Barun Law
Barun Law Building,
92 gil 7, Teheran-ro,
Daechi-dong, Gangnam-gu,
Seoul 135-846
Korea

Tel +82 2 3479 7518
Fax +82 2 3476 5995

Taiwan

Alliance International Law Offices
7th Floor, 54 Zhongshan N. Rd., Sec. 3
Taipei 10452, Taiwan
Republic of China

Tel +886 2 2597 4521
Fax +886 2 2592 6601

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