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 **NORTON ROSE FULBRIGHT**

Doing Business in Asia Pacific

December 2016



Doing Business in Asia Pacific

A Norton Rose Fulbright guide

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Our thanks also go to all of the many others who assisted with the production of this publication.

The law in referred to in this publication is as at 1 May 2016 unless otherwise stated. Whilst every effort has been made to ensure the accuracy of this publication, it is for general guidance only and should not be treated as a substitute for specific advice. If you would like advice on any of the issues raised, please contact the relevant Norton Rose Fulbright office.

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Norton Rose Fulbright also wishes to extend its special thanks to the law firms below for their contribution to the production of the 2016 edition of Doing Business in Asia Pacific:

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<i>Indonesia</i>	TNB & Partners (associate office of Norton Rose Fulbright)
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<i>Malaysia</i>	Skrine
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<i>Vietnam</i>	Vision & Associates

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, establishing a new business, or developing a new project in any one of the jurisdictions here. One deal leads to another, relationships accumulate, and layer upon layer of knowledge and trust are developed over time.

Norton Rose Fulbright has been active across the Asia Pacific region for several decades now. This is the 11th edition of *Doing Business in Asia Pacific* we have produced at the behest of our clients, who have been very clear that this comprehensive guide to doing business in the region is something they value.

All of the facts are here in this publication. We cover visas and work permits, types of business entities, business environment, policy on foreign investment, government initiatives, government incentives, taxation, workplace relations and the means to forestall or resolve disputes.

This edition of *Doing Business in Asia Pacific* was published in 2016. It bundles up our local market knowledge, our emphasis on quality and our geographic reach to provide you with a key reference source. It is the distillation of the knowledge of dozens, if not hundreds, of our professionals across the region.

We wish you great success in all your business dealings in Asia Pacific, and would be pleased to provide additional information and advice about any of the issues discussed in this guide.

Regards

Michael Joyce

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Australia

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 territory; 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 Border Protection (**DIBP**).

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 Temporary Work (Short Stay Activity) visa (subclass 400) and the Business Visitor stream of the Visitor visa (subclass 600) allow business people to visit Australia for such purposes for up to three months for the Temporary Work (Short Stay Activity) visa and up to three, six or 12 months for the Business Visitor stream of the Visitor visa.

There is also an Electronic Travel Authority visa (**ETA**) (subclass 601) available to passport holders from certain countries, which allows the applicant to visit Australia as many times as they wish for up to a year and to stay in Australia for up to three months for each visit. The advantage of the ETA visa is faster processing times and ease of application. DIBP advises applicants to lodge an application at least two weeks before the proposed date of travel. Applications for the ETA visa can either be made online or through a travel agent.

Australia is one of the 21 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 (including China and Russia) 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 a temporary (provisional) business visa which provides a pathway to a permanent visa.

The temporary business visa, the Business Innovation and Investment (Provisional) visa (subclass 188), is available for people who want to own and manage a new or existing business in Australia or to invest in Australia. Applicants must be nominated by a state or territory government or Austrade. There are four streams of the Business Innovation and Investment (Provisional) visa:

- business innovation stream: for people with business skills who want to establish, develop or manage a new or existing business in Australia
- investor stream: for people who make a designated investment of at least A\$1.5 million in an Australian state or territory and maintain business and investment activity in Australia

- significant investor stream: for people who invest at least A\$ five million into complying significant investments in Australia and want to maintain business and investment activity in Australia
- premium investor stream: for people who invest at least A\$15 million into complying premium investments in Australia and want to maintain business and investment activity in Australia

The direct permanent residence visa, the Business Talent (Permanent) visa (subclass 132), is available for business people who are nominated by an Australian state or territory government agency and who hold a Business Innovation and Investment (Provisional) visa (subclass 188). There are two streams of the Business Talent (Permanent) visa:

- the Significant Business History stream: for high calibre business owners or part-owners who want to do business in Australia
- the Venture Capital Entrepreneur stream: for people who have sourced venture capital funding from a member of the Australian Venture Capital Association Limited

Temporary visas for skilled workers

The Temporary Work (Skilled) visa (subclass 457) allows employers to sponsor skilled workers to work in Australia on a temporary basis for up to four years. The employers can be either Australian businesses or overseas businesses.

Skilled workers permanent visas

The Employer Nomination Scheme visa (subclass 186) allows Australian employers to sponsor highly skilled employees for a permanent residence visa to work in Australia.

The Regional Sponsored Migration Scheme visa (subclass 187) 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.gov.au.

If you are using a migration agent outside Australia, DIBP 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 28.5 per cent for small business entities and 30 per cent for all other entities. 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 - see information under the subheading "foreign investment policy" 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. Certain limited partnerships are treated as companies for tax purposes and are taxed at the corporate tax 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 for larger business activities. 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\$ three 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

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 Organisation (**WTO**) Agreement on Trade Related Aspects of International Property Rights (**TRIPS**) (an agreement scheduled to the General Agreement on Tariffs and Trade 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 can include the following or any combination of the following: any letter, word, name, signature, numeral, device, brand, heading, label, ticket, aspect of packaging, shape, colour, sound or scent.

The term of registration is 10 years, renewable for further periods of 10 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", as well as the Australian consumer laws that generally prevent corporations from engaging in misleading conduct, 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 available or 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 10 years after the calendar year in which the layout was first commercially exploited or, in any other case, 10 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 plant variety.

Trade secrets

Violation of trade secrets or confidential information is protected under common law. This is essentially a contractual right between the parties involved. Confidential information belonging to corporations receives also some protection under the Corporations Act 2001 (Cth) where directors, officers and employees of a corporation who have obtained information are prohibited from using that information to gain an advantage or to cause detriment to the corporation.

Privatisation

During the 1990s, both Commonwealth and state governments in Australia privatised a significant number 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 2012, there has been an increase in privatisation, particularly Australian ports. The Port of Melbourne Corporation, Port of Newcastle, Darwin Port Corporation, Port of Brisbane Q Port Holdings, Port Botany and Port Kembla have all been privatised. The NSW state government agreed to a long term lease of Transgrid, a "poles and wires" business that owns, operates and manages the NSW high voltage electricity network in NSW.

Although, in mid-2016 the Chair of the Australian Competition and Consumer Commission (ACCC) criticised privatisation for damaging economic reform and costing consumers.

Banking sector

The Australian banking sector is dominated by four main trading banks, being the National Australia Bank, Commonwealth Bank of Australia, 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 (APRA).

Competition policy

The Competition and Consumer Act 2010 (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.

The key prohibitions under the CCA are:

- agreements, arrangements or understandings that have the purpose, or have or are likely to have the effect, of substantially lessening competition
- exclusionary provisions (also known as a primary boycott)
- exclusive dealing
- cartel conduct including price fixing, sharing markets, bid rigging and restricting outputs
- misuse of market power

The CCA applies to corporations and is administered and enforced by the ACCC. The CCA also covers consumer protection and these laws, which apply to corporations, are mirrored at the state level by state competition regulation.

The principal sanction for corporations and individuals that breach the CCA is a civil penalty (similar to a fine). An individual who commits, or is knowingly involved in, criminal cartel conduct could face a fine of A\$360,000 and/or imprisonment for up to 10 years.

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 Code was repealed and replaced with a new Franchising Code of Conduct on 1 January 2015. The purpose of the Code is to regulate the franchise industry and to 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. Serious breaches of the Code incur civil penalties (fines).

The Code imposes an obligation for parties to act in good faith in their dealings with one another. 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.

Funds management

Regulatory bodies

The primary regulator of fund trustees, managers and custodians is ASIC.

The Australian Prudential Regulation Authority (**APRA**) regulates entities that are involved in the superannuation (pension fund) industry.

The Australian Transaction Reports & Analysis Centre (**AUSTRAC**) is Australia's financial intelligence unit with regulatory responsibility for anti-money laundering and counter-terrorism financing, including with respect to proper identification of investors.

The Office of the Australian Information Commissioner (**OAIC**) is the regulator responsible for managing the handling of personal information in accordance with privacy law.

Licensing of the fund operator

A person wishing to carry on a financial services business in Australia will generally require an Australian Financial Services Licence (**AFS Licence**) issued by ASIC. An AFS Licence may be sought with respect to the following types of financial services activities:

- financial product advice and product marketing
- dealing (including arranging or issuing) financial products
- acting as trustee or responsible entity of an investment fund
- providing investment management services in respect of financial products
- custodial or depository services
- market making activities
- margin lending facilities

Registration of the fund

An investment fund that is offered to Australian retail client investors will generally need to be registered as a registered managed investment scheme with the ASIC. The scheme will need to have a constitution and compliance plan prepared in accordance with the Corporations Act 2001 (Cth). Depending on the make-up of the board of directors of the fund operator, the operator of the scheme will need to establish a compliance committee with respect to the scheme and a majority of the members of the Committee must be independent external members.

Registration of the fund operator

The scheme (made available to retail client investors in Australia) must be an Australian incorporated (unlisted) public company. The company must have at least three directors, at least two of whom must be persons ordinarily resident in Australia.

A foreign company carrying on business in Australia must seek registration with ASIC. This will require appointment of a local agent.

Fund disclosure document

The offer of interests in a fund to retail client investors in Australia will need to be offered by way of a regulated product disclosure statement (**PDS**). The content of a PDS must comply with legislative content requirements. An issuer is required to notify ASIC of the use of a PDS in the market. A copy of the PDS must be lodged with ASIC if the interests in the fund are to be quoted on the Australian Securities Exchange.

Operator compliance obligations

A fund operator must put in place adequate arrangements for the management of conflicts of interest, for example, conflicts between its duty to investors in a scheme and its duty to shareholders of the funds management company.

The operator of a registered scheme (made available to retail client investors in Australia) and any provider of financial product advice to retail clients are required to maintain professional indemnity and other insurance arrangements.

The operator of a registered scheme must comply with financial regulatory capital requirements notified by ASIC, including the requirement to hold a minimum net tangible asset amount (**NTA**) equal to the greater of \$150,000 and 0.5 per cent of the gross value of assets within the schemes operated by it. A \$10 million NTA requirement will apply unless the operator appoints a licensed custodian which in turn meets the \$10 million NTA requirement.

Other ongoing requirements include reporting obligations such as in relation to significant breaches, notification of material adverse changes to the financial position of the company and lodgement of audited financial statements.

Market misconduct rules

Persons carrying on business in Australia must comply with various market misconduct related legislation, including with respect to misleading or deceptive representations or other conduct, insider trading, market manipulation and hawking.

Passport arrangements for foreign licensed firms

Foreign firms that wish to provide financial services only to "wholesale clients" in Australia may still need to obtain an AFS Licence, unless they are able to rely on a statutory exemption.

One exemption involves entry into certain appointment or delegation arrangements involving an AFS licenced entity.

Firms that are regulated under equivalent foreign regulatory regimes may also apply to the ASIC to access certain 'regulatory-lite' arrangements. For example, certain limited "passport" arrangements may be available with respect to certain firms regulated in the United States, Hong Kong, Germany and the United Kingdom. The passport

would permit the foreign firm to provide various financial services to wholesale clients in Australia.

Fuel regulation

Importation

In Australia, aside from various military-grade oils, there are no licencing requirements in relation to the importation of oil. Instead, the bulk of regulatory regimes are centred on the storage and transportation and sale of oil.

Storage and transportation of oil

Petroleum developments in Australia, including associated infrastructure, such as pipelines and storage facilities, are often privately owned. They are regulated by the applicable Commonwealth, State or Territory legislation and require the grant of licences or permits to construct and operate.

The governmental authorisations (including any applicable environmental authorisations) that are required to construct and operate oil and natural gas transportation pipelines and associated infrastructure typically includes a separate pipeline licence or permit, together with consents to construct.

In the offshore Commonwealth area, a pipeline licence is granted under Part 2.6 of the Offshore Petroleum and Greenhouse Gas Storage Act 2006. Each state or territory generally has its own pipeline or transport infrastructure legislation and regulations.

Environmental regulations

Any petroleum pipeline specific environmental approvals are complemented by the general environmental approval regimes under state and territory legislation and the Environment Protection and Biodiversity Conservation Act.

Land access regulations

The legislative procedures for land access, easement acquisitions and approval for construction and operation of pipelines varies across the different states and territories.

However, onshore pipelines and associated infrastructure generally require land access rights or tenure. To secure the necessary land rights often requires approval or consent from other parties with an interest in the relevant land.

Access to private land for the purpose of constructing and operating a pipeline will typically require the private land owner to grant, generally for a negotiated fee, an "easement" or other suitable right over the pipeline route.

Subject to payment of proper compensation and to restrictions on proximity to improvements, private landowners can be compelled under the pipelines legislation to grant pipeline easements.

Where the pipeline traverses Government land, a Government authority, licence, permit or form of tenure such as an easement under the applicable land legislation would generally need to be obtained. Consents may need to be obtained from other interested parties, including native title parties,

heritage stakeholders, local Government, pastoral lessees, and mining titleholders. Generally, Government authorities have powers of compulsory acquisition to facilitate land access.

Offshore pipelines or infrastructure generally do not require separate land access rights. A pipeline or infrastructure licence, which are titles under offshore legislation, is generally all that is required.

Transport

With regards to pipelines, domestic oil and gas transportation is effectively split into two geographical areas: the eastern side of Australia; and the western side of Australia. There is no interconnection of these two systems. Co-operation within each system is generally commercially negotiated between the respective owners of each part of each system.

With regards to road transportation, each state has its own legislation. However, if licencing is required, a current dangerous goods driver licence issued by any state or territory is recognised throughout Australia. For example, in New South Wales, the Road and Rail Transport (Dangerous Goods) Act 1997 stipulates that particular amounts of crude oil constitutes "dangerous goods" and that a licence is required when transporting any receptacle with a capacity of more than 500 litres or which contains more than 500 kilograms of dangerous goods.

Wholesaling and retailing

The downstream oil sector is regulated by the Competition and Consumer (Industry Codes-Oilcode) Regulation 2006 (the **Oilcode**). The Oilcode is a mandatory industry code under section 51AE of the CCA and therefore applies to all downstream oil industry participants.

The purpose of the Oilcode is to regulate the conduct of the suppliers, distributors and retailers in the petroleum marketing industry. It was introduced to remove restrictions on competition, promote industry certainty, promote cultural change and improve industry sustainability, giving all industry players the freedom to respond to changing conditions in the petroleum market.

Broadly, the Oilcode is intended to regulate the conduct of participants in the downstream petroleum retail industry by providing for:

- minimum standards for fuel re-selling agreements between suppliers and retailers
- a nationally consistent approach to terminal gate pricing arrangements
- an inexpensive and efficient mechanism for resolving disputes between participants in the industry

As the Oilcode was introduced as a mandatory code under the Trade Practices Act 1974 (Cth), the ACCC is responsible for monitoring compliance with, and enforcement of, the provisions on the Oilcode and will have greater involvement in the retail fuel industry.

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. At the end of 2014 total of foreign investment in Australia was almost A\$2.8 trillion, with A\$690 billion comprised of foreign direct investment.

Foreign persons require prior approval to acquire certain interests in Australian businesses, real estate and land. 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 reviews and evaluates foreign investment proposals on a case by case basis. 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. A number of legislative reforms to strengthen the foreign investment framework came into effect on 1 December 2015.

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
- a corporation in which an individual who is not ordinarily a resident in Australia, a foreign corporation or a foreign government holds at least 20 per cent interest in the entity
- a corporation in which two individuals who are not ordinarily residents in Australia, a foreign corporation or a foreign government together hold at least 40 per cent interest in the entity
- the trustee of a trust in which an individual who is not ordinarily a resident of Australia, a foreign corporation or a foreign government holds a beneficial interest in at least 20 per cent of the income or property of the trust
- the trustee of a trust in which two individuals who are not ordinarily residents of Australia, a foreign corporation or a foreign government holds a beneficial interest in at least 40 per cent of the income or property of the trust

- a foreign government (what constitutes a foreign government is considered further below)

The FATA categorises transactions which are subject to Australia's foreign investment framework into two broad groups; significant actions and notifiable actions.

Significant actions

Significant actions are transactions which trigger the power of the Federal Treasurer to make certain orders under the FATA. Notification to the Treasurer of significant actions is voluntary (except where the action is also a notifiable action). Significant actions include:

- the acquisition of interests in Australian entities or businesses, or their assets
- the acquisition of interests in Australian land
- the acquisition of a direct interest (10 per cent but in some circumstances less) in an Australian agribusiness
- entering into certain agreements relating to the affairs of an entity or altering the constituent documents of an entity, which gives one or more foreign persons certain abilities to control senior officers of the entity
- entering into or terminating significant agreements with an Australian business

Notifiable actions

The categories of notifiable actions overlap extensively with the concept of 'significant actions'. A foreign person who proposes to enter into an agreement to take a notifiable action must notify the Treasurer before entering the agreement. Notifiable actions include:

- the acquisition of a direct interest in agribusiness
- the acquisition of a substantial interest in an Australian entity (substantial interest is defined below)
- the acquisition of an interest in Australian land
- a foreign government investor starting a business in Australia or taking any direct interest in an Australian entity or business, and
- a foreign government investor taking any interest in a tenement or a 10 per cent or more interest in a mining, production or exploration entity (tenement is defined below)

A substantial interest for an entity exists where a person holds an interest of at least 20 per cent in the entity. A substantial interest for a trust exists where the person, together with any one or more associates, holds a beneficial interest in at least 20 per cent of the income or property of the trust.

Two or more persons hold an aggregate substantial interest in an entity or trust if:

- for an entity—the persons hold an aggregate interest of at least 40 per cent in the entity
- for a trust (including a unit trust)—the persons, together with any one or more associates of any of them hold, in the aggregate, beneficial

interests in at least 40 per cent of the income or property of the trust

A mining or production tenement is defined as:

- a right under a law of the Commonwealth, a state or territory to recover minerals, oil or gas in Australia or from the seabed or subsoil of the offshore area
- a right preserving a right as defined above
- a lease under which the lessee has a right mentioned above
- an interest in a right or lease mentioned above

An exploration tenement means a right under a law of the Commonwealth, a state or territory to recover minerals, oil or gas in Australia or from the seabed or subsoil of the offshore area for the purposes of prospecting or exploring for minerals, oil or gas. It also includes a right or an interest in such a right or an interest under such a lease.

Acquisition of an interest in Australian land

Australian land means agricultural land, commercial land, residential land or a mining or production tenement.

An interest in Australian land is broadly defined and includes:

- a legal or equitable interest in Australian land (subject to certain exceptions)
- an interest in certain types of securities of the entity that owns the land which entitles the holder to occupy a dwelling
- an interest as lessee or licensee in a lease that exceeds five years
- a profit-à-prendre, if the term of the agreements exceeds five years
- an interest in a share in an Australian land corporation or agricultural land corporation
- an interest in a unit in an Australian land trust or agricultural land trust, or an interest in the shares of the trustee of such a trust

Threshold test

Generally the action is only a significant action or a notifiable action if the entity, business or land meets the threshold test. Although agricultural land is an exception as the test is cumulative.

The monetary screening thresholds for foreign private investors are as follows in the table over:

Investment	Area/Type	Private investor nationality	Threshold (A\$million)
Australian business	Non sensitive sectors	Chile, China, Japan, NZ, South Korea, US	\$1,094
		All others	\$252
	Sensitive sectors	All	\$252
	Media	All	\$0
Agriculture	Land	US, NZ, Chile	\$1,094
		Singapore, Thailand	\$50
		All others	\$15 (cumulative)
	Agribusiness	US, NZ, Chile	\$1,094
		All others	\$55
Non-agricultural land	Residential	All	\$0
	Vacant commercial land	All	\$0
	Non-vacant commercial land	Chile, China, Japan, NZ, South Korea, US	\$1,094
		All others	\$252
	Sensitive land (e.g., airport, port)	Chile, China, Japan, NZ, South Korea, US	\$1,094
		All others	\$55
	Mining and production tenements	US, NZ, Chile	\$1,094
		All others	\$0
Interest in land to be held by Australian land corporation and trust	All	\$0	

- contravenes an order made by the Treasurer which prohibits a proposed significant action, is related to a prohibition order, is an interim order or is a disposal order
- contravenes a condition in a no objection notification imposing conditions or an exemption certificate

The maximum penalty for an individual is imprisonment for three years and/or a fine of 750 penalty units (A\$135,000). The maximum fine for a corporation is a fine of 2,500 penalty units (A\$450,000).

Foreign government investors

The definition of what constitutes a foreign government investor includes:

- a foreign government or separate government entity
- a corporation or trustee of a trust or general partner of a limited partnership in which:
 - a foreign government or separate government entity, alone or together with one or more associates, holds an interest of at least 20 per cent, or
 - foreign governments or separate government entities of more than one foreign country (or parts of more than one foreign country), together with any one or more associates, hold an aggregate interest of 40 per cent or more

Under FATA, a 'foreign person' includes a 'foreign government investor'. Therefore, foreign government investors are subject to the same requirements as foreign persons under FATA (unless an exemption in the regulations applies).

All foreign government investors require prior approval before acquiring a direct interest in Australia (generally at least 10 per cent, or the ability to influence, participate in or control), starting a new business or acquiring an interest in Australian land regardless of the value of the investment. Foreign government investors also require approval to acquire a legal or equitable interest in a tenement or a 10 per cent or more interest in a mining, production or exploration entity.

Where a proposal involves a foreign government investor, 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 and 10 days after the expiry of this period (i.e., a total of 40 days) 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.

Free trade agreement country investors

Australia currently has free trade agreements with Chile, China, Japan, Korea, Malaysia, New Zealand, Singapore, Thailand, the United States and the 10 Association of Southeast Asian Nations (**ASEAN**) member states. Accordingly, higher monetary screening thresholds apply to certain investors from these countries in accordance with the free trade agreements.

Foreign persons proposing to enter into transactions that meet or exceed these monetary thresholds or which are otherwise mandatorily notifiable will need to apply to FIRB for prior approval. Application fees have recently been introduced and range from A\$5,000 to A\$100,000 (or A\$10,000 per A\$1 million of the proposed acquisition) per application.

Penalties

The FATA provides for civil penalties and offences. Some examples of when a person may be liable are if the person:

- fails to notify the Treasurer before taking a notifiable action
- gives notice to the Treasurer stating that a significant action is proposed to be taken and takes the action before the end of the applicable time limit

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.

The Treasurer 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. Alternately, the Treasurer can make an order prohibiting the significant action if he or she is satisfied that the significant action is contrary to the national interest.

Offshore takeovers

The acquisition of an interest in a corporation that is already foreign-owned or controlled (an offshore takeover) is a significant action under FATA if:

- the foreign corporation holds relevant Australian assets (legal or equitable interests in Australian land or securities in an Australian entity) and carries on an Australian business or is a holding entity of such a foreign corporation
- the Australian assets or business of the target company are valued at more than A\$252 million (or A\$1,094 million for foreign investors from Chile, China, Japan, NZ, South Korea or the US)
- there would be a change in control in the foreign corporation as a result of the acquisition

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 and territory 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

Major aspects of the tax system in Australia

Australian taxes levied by the federal government and by the state and territory governments and local councils. The major taxes levied in Australia are summarised below. There are other taxes related to specific 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 taxable income which in many ways is determined on the same basis as accounting profits, but there are certain differences.

Australian residents are generally liable to pay tax in respect of their world-wide assessable income, whereas non-residents only pay tax on that part of their income that is derived from sources in Australia. However, this principle may be subject to the application of a double taxation agreement between Australia and the non-resident's country of residence. Double tax agreements have been entered into by Australia with a large number of countries, including virtually all of the OECD countries and most of Australia's major trading partners in Asia.

The income tax rates applicable to individuals for the 2016/17 financial year (that is, 1 July 2016 to 30 June 2017) are as follows.

Resident Individuals		
Taxable Income (A\$)	Resident tax rate (%)	Non-resident tax rate (%)
0 - 18,200	0	32.5
18,201 - 37,000	19	32.5
37,001 - 80,000	32.5	32.5
80,001 - 180,000	37	37
180,001 and over	45	45

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

For the 2014-15, 2015-16 and 2016-17 income years, both residents and non-residents whose income exceeds A\$180,000 per year are required to pay an additional tax, known as the Temporary Budget Repair Levy, which is 2 per cent of their taxable income over A\$180,000.

Currently, the general company tax rate is 30 per cent and the rate for businesses with a group turnover of less than A\$2 million is 28.5 per cent. However, the government has announced (but not yet enacted) a reduction in the small business tax rate to 27.5 per cent for the 2016-17 income year, and an intention that the company tax rate will be gradually decrease over the following years until it is

25 per cent for all companies by the 2026-27 income year.

Capital gains tax

Tax is also imposed on capital gains (which in most cases are realised when an asset is disposed of). The capital gains tax (**CGT**) regime provides that a taxpayer's net capital gains are included in taxable income.

CGT applies to a wide range of assets held by Australian residents both tangible and intangible. It Non-Australian residents are only liable for CGT on gains relating to assets that are 'taxable Australian property'. The main categories of taxable Australian property are, broadly:

- land in Australia or a mining, quarrying or prospecting right if the minerals, petroleum or quarry materials are situated in Australia;
- shares in a company or units in a unit trust which derive more than half of their value from land or mining, quarrying or prospecting rights as described above; and
- any asset that has been used by the non-resident in carrying on a business through a permanent establishment in Australia.

Important categories of assets not included in 'taxable Australian property' are shares in Australian companies, units in Australian unit trusts and interests in Australian resident trust estates (unless their value is principally derived from land or rights as described above).

Certain resident taxpayers, such as individuals and complying superannuation funds, will be entitled to a discount on a capital gain if the asset disposed of has been held for 12 months or more. In the case of a resident 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.

Withholding taxes

Withholding tax is imposed on dividends, interest and royalties paid by an Australian resident to a non-resident. It is also imposed on payments of interest and royalties from a resident to a non-Australian permanent establishment of a resident and from an Australian permanent establishment of a non-resident to another non-resident.

The rates of withholding tax are 10 per cent on interest and 30 per cent on dividends and royalties.

Although Australia has a number of double tax agreements, most do not affect the interest withholding tax rate.

Australia has adopted a dividend imputation system by which shareholders are given credit for income tax paid by a company, and this can reduce or eliminate the applicable dividend withholding tax.

From 1 July 2016, purchasers of certain types of property are obliged to withhold and pay to the

Australian Taxation Office (**ATO**) 10 per cent of the purchase price unless the seller is able to establish that it is an Australian resident. The types of asset caught by the withholding are broadly, taxable Australian property as described above under the heading 'CGT' (excluding assets used in a permanent establishment) as the withholding is intended to assist in the collection of foreign residents' Australian tax liabilities.

Foreign resident sellers affected by the withholding may apply for a variation of the withholding rate.

There are other withholding obligations which apply in more specific situations.

Goods and services tax

Goods and services tax (**GST**) is a broad-based consumption tax levied on most goods and services in Australia and on goods imported into Australia. It is largely modelled on European-style VAT regimes. GST is levied at the rate of 10 per cent.

GST is paid at each stage of the supply chain, except to the extent that the supply is input-taxed (exempt without credit) or GST-free (exempt with credit). 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.

Fringe benefits tax

Fringe benefits tax (**FBT**) is a separate tax payable by employers (rather than the employees) on the fringe benefits which they provide to their employees. Benefits subject to FBT include motor vehicles, free or low-interest loans, some car parking allowances, payment of private expenses, free or subsidised housing, living-away-from-home allowances, and concessional fares for air transport. Certain specific benefits are FBT exempt, and these are generally a tax-efficient way to remunerate employees.

The FBT year runs from 1 April to 31 March in the following year. FBT is calculated on the taxable value of the fringe benefits provided by the employer at the current rate of 49 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.

Superannuation guarantee scheme

Employers are required to provide a prescribed minimum level of superannuation support for each of their employees in Australia. Currently the amount is 9.5 per cent of the amount each employee earns for their ordinary hours of work.

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).

Payroll tax

Payroll tax is a tax on total wages levied by each state government. The requirements and rates of tax vary from state to state. Payments to certain independent contractors are also liable to payroll

tax. 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.

Stamp duties

Stamp duties are additional transaction type taxes imposed by each of the states and territories. The stamp duty legislation of each state and territory specifies the transactions on which duty is chargeable and the relevant rates. The amount of duty is sometimes fixed, but in most cases an *ad valorem* rate of duty is imposed, that is, calculated by reference to the 'dutable value' of the transaction. In most cases, the 'dutable value' will be the greater of the consideration paid for the transaction and its market value.

All states and territories impose duty on transfers of Australian land and on certain transfers of interests in companies and trusts that hold Australian land.

Other transactions that often attract duty include purchases of business assets, insurances and declarations of trust. Victoria, New South Wales and Queensland have in recent times introduced higher rates of stamp duty for buyers which are foreign or substantially foreign-owned.

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.

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 and territory 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 10 minimum standards:

Ordinary working hours

Full time employees may not be required to work in excess of 38 hours per week unless the additional hours are considered reasonable. An employee may refuse to work unreasonable additional hours.

Annual leave

The minimum condition is four weeks' 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. Employees have the right to payment of unused annual leave if their employment is terminated.

Personal/carer's leave and compassionate leave

The NES provide for 10 days paid personal/carer's leave per year and two days paid compassionate leave for each relevant occasion, casual workers are excepted. Personal/carer's leave accrues progressively during a year of service and accumulates from year to year. 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 12 months' unpaid parental leave. They also have the right to request an extension of a further 12 months of unpaid parental leave. Employers can only refuse a request for an extension on reasonable business grounds. Employees who have taken parental leave have rights to return to work at the end of the leave.

Right to request flexible working hours

Employees who have completed at least 12 months' continuous service, and who:

- care for a child that is school age or younger
- are a carer
- have a disability
- are aged 55 years or older
- are experiencing violence from a member of the employee's family
- provide care or support to a family or household member who is experiencing violence

have the right to request flexible hours arrangements. 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 commencement of the NES, which in many cases will vary from employer to employer. For most employees however, long service leave will still arise under state and territory legislation rather than the NES. The precise long service leave entitlement varies between the various states and territories but as a rule of thumb it will be approximately two months' paid long service leave after 10 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 between the various states and territories.

Employers can request an employee to work on a public holiday and the employee must agree unless it would be "reasonable" for the employee to refuse the request. An employee required to work on a public holiday is often entitled to additional pay and/or a day off 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' pay in the case of a redundancy termination. 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. Jury service is an eligible community service activity. Paid jury service leave entitlements vary between the various states and territories and according to whether the employee is full time, part time or casual. Jury service leave entitlements range from no paid leave entitlement to paid leave entitlements for the duration of the jury service.

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, including NES entitlements.

Modern awards

Modern awards build on the NES and include additional minimum conditions of employment for employees employed in certain industries or occupations. Created by the Fair Work Commission (FWC), modern awards prescribe industry or occupation 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 the FWC 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 the FWC before it comes into operation. The FWC 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 the FWC is satisfied that each employee covered by a modern award would be better off overall if the enterprise agreement applied to the employee rather than the applicable modern award.

Minimum rates of pay

The Minimum Wage Panel of the FWC is responsible for setting and adjusting the Federal Minimum Wage (FMW), minimum award classification rates of pay (including apprentices) and casual loadings. The FMW is set each year with effect from 1 July. From 1 July 2015 the FMW is A\$17.29 per hour or A\$656.90 per week and the casual loading is 25 per cent. However, most employees will be entitled to a greater minimum wage or casual loading under a modern award or enterprise 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 9.5 per cent of their ordinary time earnings) to a complying superannuation fund.

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. Employees cannot be treated less favourably because they are, or are not, a union member.

Termination of employment

With certain exceptions, employees who are covered by a modern award or enterprise agreement or who earn less than the unfair dismissal threshold (\$136,700 from 1 July 2015 to 1 July 2016) 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, and trainees 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 a modern award or enterprise agreement, or a workplace law.

Anti-discrimination law and equal employment opportunity

There is federal, state and territory 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

A significant emphasis is placed on the importance of workplace health and safety in Australia. All states and territories (except Western Australia and Victoria) have implemented the model workplace health and safety laws.

These laws place significant duties on persons conducting a business or undertaking (PCBU) to ensure the health and safety of workers (including employees, contractors and volunteers) and that the health and safety of other persons is not put at risk. This includes ensuring that workplaces are safe and without risk to health and safety. The laws also

place duties on officers of the PCBU, workers and other persons at the workplace. Heavy penalties apply for breaches of such legislation.

Workers' compensation insurance

It is compulsory under state and territory based legislation 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, the level of risk associated with that industry, and the employer's own safety and claims record.

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 between the states and territories.

Fair Work Commission and the Fair Work Ombudsman

The FWC 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 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 Circuit 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 Australian Human Rights Commission, the Fair Work Commission, the Australian Competition and Consumer Commission 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 all Australian states and territories, 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

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Contributed by Norton Rose Fulbright

China

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 first obtained an employment licence to employ a foreign national, 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 and possibly a statement outlining the reasons for employment and the terms of the employment contract.

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 (**M**), which can be for single, double, or multiple entries. The M visa is normally valid for stays of up to 30 days and may be renewed in China. A formal invitation letter from an authorised Chinese entity is required to apply for an M 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.

If an investor can meet various guidelines as to the number and size of its Chinese subsidiaries, a holding company with 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 LLCs 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 generally no longer required since March 2014 (except in limited circumstances, e.g., a company engaging in regulated business). Contributions can be made either in cash or in kind (machinery, buildings, etc). Careful consideration should be made to how much cash/assets need to be injected for the business to operate successfully and will be subject to review by the authorities. 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 five 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 five 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 in the real estate sector.

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.

	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 per cent 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 broadly 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 the 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 open-ended establishment term as long as the foreign enterprise continues to exist.

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.

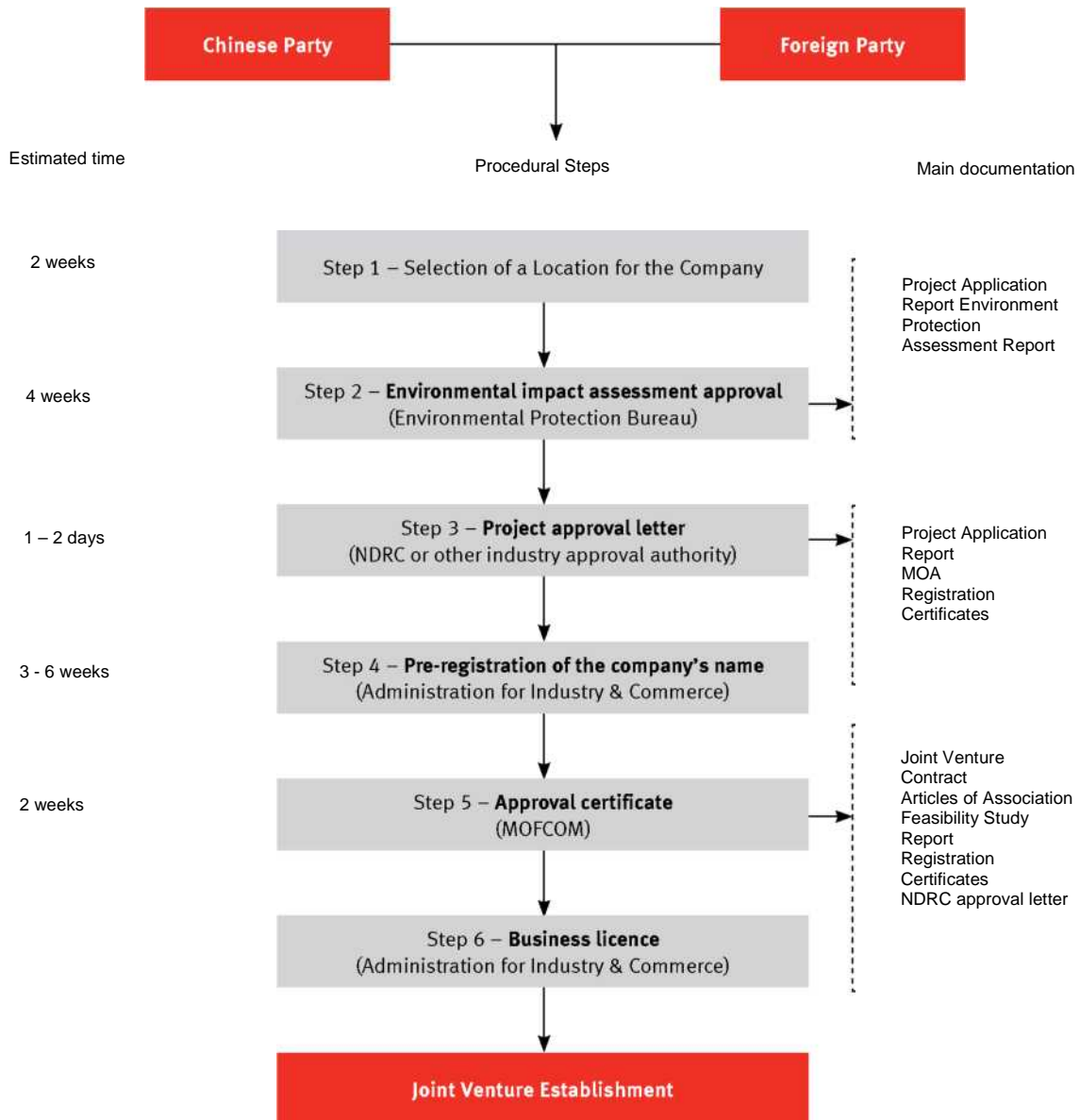
The most important approval required is that of the Ministry of Commerce (**MOFCOM**). MOFCOM is responsible for approving the establishment of the FIE and the terms of the articles of association and shareholders’ agreements.

MOFCOM is split into various levels of authority—municipal, provincial and central. 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 central 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.

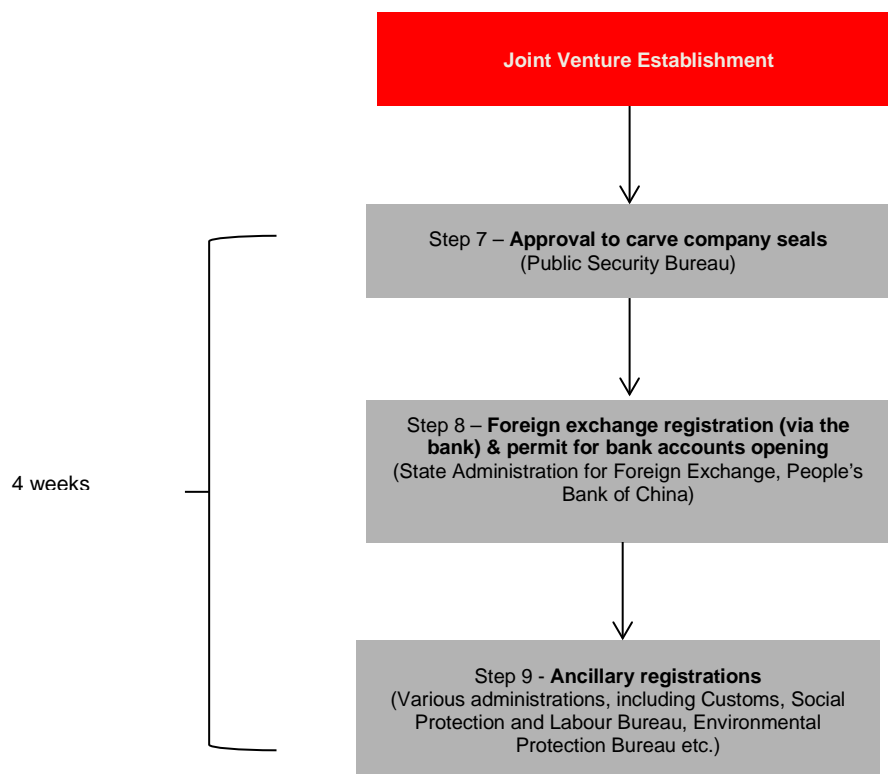
It is worth noting that a lighter legal regime applies in the pilot free trade zones, where a MOFCOM filing would generally suffice in lieu of an approval, which simplifies the procedures and expedites the timeline, as long as foreign investment in the relevant sector is not listed in the “negative list” (further discussed in the “Foreign investment policy” section below).

FIE pre-establishment procedure



The following diagram describes the steps to be followed after establishment of the joint venture.

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 publications and pharmaceuticals.

A foreign company may grant a Chinese manufacturer a non-exclusive right to manufacture and package products according to the 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 in 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 10 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\$75,000 or €60,000)).

Competition law

In a similar manner to competition regimes in other jurisdictions, China’s Antimonopoly Law regulates three types of business activities. First, it prohibits agreements that restrict competition, which it calls “monopolistic agreements”. Second, it prohibits the abuse of market power by businesses that have a dominant market position. Lastly, it regulates M&A activity; parties to certain transactions must seek pre-closing clearance if they meet certain sales thresholds, and the Antimonopoly Law contains a broad prohibition on transactions 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 undertaking businesses with sales or other commercial activities in China conduct M&A activity or making 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 conduct business in China.

Abuse of a dominant position

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

A dominant market position is one which accords affords an undertaking party 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 party is deemed to be dominant if its market share amounts to at least half of the relevant market
- two undertakings parties are held to be jointly dominant if their combined market share amounts to at least two-thirds of the relevant market
- three undertakings parties 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 party 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 businesses 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 10 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 or out of 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 exports, payment for imported goods etc.) and “capital account items” (generally items of a non-trade, non-recurring nature such as investment in China and repayment of loans). SAFE has relaxed the control over foreign exchange flows and delegated authority to the processing bank to deal with the filing/registration of the cross-border payments in most cases, with only limited types of cross-border payments still being required to be approved by SAFE.

When setting up an FIE, the remittance of funds into China for capitalising the FIE requires SAFE registration via the processing bank. Provided that MOFCOM approval has been granted and all the documentation is in order, this should not be a problem, though time for the registration to be completed will depend on the practice of the relevant bank and 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 interest and loan principal in respect of 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 has always been a key consideration for any entity doing business in China. There are many examples of foreign brands being copied or imitated in China. The copying of knowhow, processes and technology is also widespread in industrial concerns.

China is a member of the majority of the international IP organisations and conventions, has acceded to numerous international IP 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

The “first to file” principle is adopted in China, which means that, a trade mark will generally not be protected in China unless the trademark is registered in China, even though it has been registered in another jurisdiction. If there are plans to operate in China, it is advisable to register a trade mark as soon as possible to prevent pre-emptive registration by third parties.

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

A foreign trademark holder should always consider registering a Chinese language version of its overseas trademark as it is common for Chinese consumers to refer to the Chinese language trade mark of a foreign brand. In some cases, if there are no official Chinese versions of the brand, Chinese consumers may even “invent” a Chinese language version themselves, which may lessen the value of the trademark locally. The protection period for registered trademarks is ten years starting from the registration date. The holder can extend this period by applying for renewal up to six months before the expiry.

Please also note that a unique sub-class system is adopted in China, and identical or similar marks can be allowed to be registered in the same class as long as they cover dissimilar sub-classes.

Therefore, we usually advise clients to cover all dissimilar sub-classes in a trade mark application for defensive purposes.

Copyright material

Copyright is registrable in China, which serves as prima facie evidence of ownership of copyright simplifying enforcement. That said, copyright in original work is automatically protected upon creation, and it does not need to bear any formal 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.

It is important to enter into written contracts with relevant parties so as to state clearly the ownership of copyright in the relevant works. For example, if the drawings or designs are considered as created in the course of employment, the “right of authorship” shall vest in the relevant employee(s) who created the work, and the employer may state explicitly in the contract that the employer shall own the other rights, including the copyright of the drawings or designs. If the drawings or designs are considered as a commissioned work, copyright ownership may be determined by contract. In the absence of a contract or an explicit agreement in the contract, the copyright in such a work shall belong to the commissioned party.

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 otherwise be held liable for any defects arising from the infringing products or any damage caused by a product carrying its counterfeited trademark, since it may 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. Please note that Chinese patent applications are only processed in the Chinese language, so it is important to ensure that any Chinese translation is a precise translation of the overseas claim.

Trade secrets

According to the Anti-Unfair Competition Law in China, “trade secrets” are defined as any non-published information with commercial value to the owner, that is guarded by confidentiality measures. 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. It is now common for foreign clients to insist on entering into confidentiality agreements before disclosing any confidential information.

Proceedings to protect IP rights

In case of any infringement, it is common to consider the following steps in enforcing IP rights.

Evidence Preservation

Before taking any action, it is important to preserve evidence at an early stage. Some examples of evidence preservation include conducting website notarisation or notarised purchase (if applicable).

Cease and Desist letter/ Preliminary Negotiation

As in many other jurisdictions, it is common for a foreign brand owner first to issue a cease and desist letter to the suspected infringer to demand it to stop infringing the brand owner’s IP rights, and to sign an undertaking that it will not infringe against the owner’s IP rights in the future. This is a relatively cost-effective way in dealing with numerous infringement cases in China. However, the suspected infringer may not necessarily respond to cease and desist letters, and an undertaking may only bind the persons/companies signing it, but not related parties which are not revealed from ordinary company searches.

Administrative Actions

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

Administrative actions offer a relatively quick and cost-effective way to tackle straightforward infringement cases. For example, in a trade mark infringement case, provided that the complainant can provide evidence of the trade mark registration in China, the local administration body may conduct raid actions effectively. However, for more complicated cases, the administrative body may be reluctant to take action. 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 unfortunately

have no power to order the infringing party to pay damages.

Court Actions

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.

Other Considerations

Patents or trademarks should never normally 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.

A foreign company should be pragmatic in its approach towards protection of its IP. In addition to the protection strategies outlined above, it should consider conducting regular surveillance of the Chinese market for any hint of infringement and be proactive in seeking out infringers and infringing activity.

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 legal entities. LURs are granted in exchange for 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 entities. 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 first been 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. 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 used to not be approved until some time after a bid has been won. In such circumstances, 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. However, the practice now varies and sometimes a FIRE is established before commencement of the LUR tendering procedures.

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.

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 entity, the FIRE may not have been established at this stage. The foreign developer or its Chinese partner (as the case may be) will in that case enter into the land use rights grant 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 one 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.

Funds management

Regulatory bodies

The primary regulator of the Chinese fund management industry is China Securities Regulatory Commission (**CSRC**).

Since 2013, CSRC has authorised the Asset Management Association of China (**AMAC**), under the supervision of CSRC, to formally regulate privately raised funds. CSRC remains the key regulator for publicly raised funds, also known as mutual funds.

Licensing/registration of the fund manager

An entity wishing to manage mutual funds in China will be subject to CSRC approval. A CSRC approved and licensed mutual fund manager may engage in securities investment fund management business, including fund-raising and promotion, fund distribution and fund investment in China. Subject to obtaining specific approval from CSRC or other competent authorities, a licensed mutual fund manager may also engage in other ancillary business, such as segregated account business, bond market business, corporate annuity business etc.

A foreign investor is permitted to hold equity interests in a CSRC licensed mutual fund manager of up to 49 per cent, by way of establishing a new mutual fund manager with Chinese partners or acquiring equity interests in an existing mutual fund manager. Under the Closer Economic Partnership Arrangement (**CEPA**) with Hong Kong, qualified Hong Kong-funded financial institutions are now allowed to set up mutual fund managers in mainland China with the foreign shareholding percentage of these Hong Kong-funded institutions exceeding 49 per cent.

An entity wishing to manage private funds in China will be subject to registration with AMAC. There are no foreign shareholding restrictions on a foreign investor in a private fund manager.

Registration/filing of the fund

A mutual fund that is offered to Chinese retail investors must be registered with CSRC. CSRC usually takes around 20 days to six months to approve the fund registration, depending on the nature of the mutual fund to be registered. The capitals of a mutual fund can only be raised after such mutual fund has been registered by CSRC.

Establishment of a fund manager

Establishment of a mutual fund manager is subject to CSRC approval and, if a foreign-invested mutual fund manager is contemplated, foreign investment approval from MOFCOM. Establishment of a mutual fund manager is also subject to stringent qualification requirements. For example, a foreign-invested mutual fund manager must have a minimum paid-up capital of RMB300 million.

Establishment of a private fund manager is much more straightforward. No such prior CSRC approval is required, though a foreign-invested private fund manager remains subject to foreign investment approval from MOFCOM.

Both a mutual fund manager and a private fund manager must be registered with AIC, after obtaining MOFCOM approval.

Fund disclosure document

The interests in a mutual fund will need to be offered to retail investors in China by way of a regulated fund prospectus. The content of a mutual fund prospectus must comply with prescribed content requirements and be disclosed to the public. Certain other mutual fund documents also need to be publicly disclosed including mutual fund contracts with investors and mutual fund custodian agreements with custodian banks.

The offering documents of a private fund are not subject to public disclosure. The private fund manager only needs to file certain required information with AMAC after fund-raising is completed.

Operator compliance obligations

A fund manager must put in place adequate arrangements for the management of conflicts of interest, for example, conflicts between its duties to investors/fund unit holders in a scheme and its personnel's individual investments. Both mutual fund managers and private fund managers must also comply with other ongoing reporting requirements including regular and routine reports on the status of funds and interim reports on significant changes (such as material adverse change to its financial status) and any material compliance breaches of its key personnel etc.

In addition, a mutual fund manager is also subject to more stringent compliance obligations than a private fund manager. For example, every mutual fund manager shall set aside risk reserves from the management fee of mutual funds. These risk reserves can be used to compensate losses suffered by the fund or unit holders in the fund where the mutual fund manager is in breach of law or fund contracts.

Market misconduct rules

Fund managers and their employees carrying on fund business in China must comply with various market misconduct related legislation, including with respect to unfair treatment on different fund assets, comingling fund assets with their own assets for further investment, leaking insider information, insider trading and market manipulation.

Mutual fund recognition

The Hong Kong Securities and Futures Commission and CSRC signed a Memorandum of Regulatory Cooperation in 2015 regarding the Mainland-Hong Kong Mutual Recognition of Funds (**MRF**). The aim of MRF is to allow eligible Mainland and Hong Kong funds to be distributed in each other's market through a streamlined vetting process.

This regime may be copied between mainland China and other countries/regions in the near future.

Fuel regulation

Overview

Since China joined the WTO, the restrictions imposed by fuel regulations have been gradually relaxed. In 2015, the Chinese government made some notable reforms to fuel policies and regulation, especially in the fields of crude oil importation, the use of imported crude oil, and the operation of petrol stations.

Oil importation

China implements a quota system for the importation of both crude and refined oil. This is divided into state-operated and non-state operated quotas. In order to obtain a quota under this system, importers (whether state-operated or non-state operated) must satisfy certain criteria.

To apply for a quota to import crude or refined oil, the importer must satisfy certain criteria covering its qualification, operational facilities and financing arrangements. However, it is likely to be easier for a crude oil processing enterprise to apply for non-state import qualification compared to other enterprises. Crude oil processing enterprises can obtain the import qualification for crude oil if they have comprehensive oil refinery facilities, as well as product quality and work safety conforming to relevant requirements.

Right to use imported oil

Although non-state operated enterprises can obtain the qualification to import crude oil, they are not thereby entitled to use imported oil. Not very long ago, only China National Petroleum Corporation (**CNPC**) and Sinopec were permitted to use imported crude oil. However, this position changed in 2015 under new rules issued by National Development and Reform Commission (**NDRC**). Crude oil processing enterprises can obtain approval to use imported crude oil only if they meet the requirements for the import qualification and also dispose of all refining facilities with low capacity (i.e., crude oil refineries with a crude oil processing capacity of no more than two million tons per year).

With regard to the use and processing of imported refined oil, there are no special requirements or limitations according to current laws and regulations.

Wholesaling of oil

Any entity may apply for approval to carry on the wholesaling of both crude and refined oil if they meet certain requirements.

Petrol stations

There are lengthy and complicated procedures which need to be undertaken in order to establish a petrol station in China and various licences and permits will need to be obtained.

A Chinese domestic enterprise can establish a petrol station if it has a stable petroleum supply and the design, safety and facilities of the proposed petrol station conform with applicable requirements.

Foreign investment is permitted for the ownership and control of petrol stations in the PRC and could be achieved either through acquisition or by establishing new petrol stations although the large-scale operation of petrol stations (i.e., a chain of more than 30 stations retailing different brands) is in the restricted category of the Investment Catalogue and may only be done in joint venture with Chinese parties (who must hold a majority interest).

As an exception to these restrictions, a recent Decision issued by the State Council (1 July 2016) permits foreign investors established in the Pilot Free Trade Zones of Shanghai, Guangdong, Tianjin and Fujian to engage in the construction and operation of petrol stations in the form of wholly foreign-owned enterprises without limitation on the number of petrol stations involved. This Decision indicates the government's intention to relax the restrictions relating to foreign investment in the petrol station operation sector.

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 March 2015 and the revised catalogue became effective on 10 April 2015) (**Investment Catalogue**), through limits on the types of investment vehicles open to foreigners and on the percentage of shares foreigners can hold, 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 (**Western Catalogue**). The latest revision of the Western Catalogue (which was issued in May 2013) provides that investments in irrigation technology, mineral exploration, telecommunications services, infrastructure work and modern information technology services, among others, may be eligible for a relaxation of foreign ownership restrictions.

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 a 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 liberalisation 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.

In addition, the State Council has approved the establishment of pilot free trade zones in four regions, namely, Shanghai, Guangdong, Tianjin and Fujian since 2013. In lieu of the Investment Catalogue, the pilot free trade zones adopt a "negative list" regarding restriction of foreign investment by entities established within the zones. Any foreign investment listed in the negative list is

still subject to restrictions on shareholding percentages and government approval procedures, whilst foreign investment not contained in the list is exempted from foreign investment restrictions and is subject to simplified government administration procedures. It is expected that more free trade zones will be established in the near future.

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 (**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 equity from the existing shareholders, or through subscription to new equity 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 consent of transferred employees and other parties to any transferred business contracts. Also, the transfer of different assets may require the involvement of various governmental authorities at different levels, 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 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 may be required to provide approval, in addition to, or in place of, MOFCOM. Investments in some 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 CSRC 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 the 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 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**). Qualified Hong Kong investors may also acquire A shares under the

Shanghai-Hong Kong Stock Connect (SH-HK Stock Connect) as a third channel, which is a pilot scheme launched by CSRC in November 2014.

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 10 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 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 MOFCOM. 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 for 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 10 per cent of the share capital of a single issuer.

The SH-HK Stock Connect is a pilot program which enables investors in mainland China and Hong Kong to place orders, through their local securities brokers, to trade eligible shares listed on the stock exchange of the other. Stock Connect opens up another channel for Renminbi to flow across borders. Currently, stock investments in both directions are subject to an overall quota and daily quota requirements. The regulatory authorities may change such quotas as and when needed.

Government initiatives and incentives

The preferential tax treatment for FIEs that had been in place since the beginning of the reform 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)
- income 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.

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 10 per cent (in some cases lower), and if no tax treaty with a particular country is in place, then this 10 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.

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, under current rules 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, an open-ended employment contract should be entered into upon the employee's requests, unless the employee in question requests a fixed-term contract.

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 basic 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 statutory 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 10 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 employee 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. The right of an employee to be a member of a trade union is enshrined in law, and the employer cannot contract out of this right.

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 large-scale strikes affecting foreign-invested enterprises are fairly rare, collective labour conflicts are not

uncommon in the PRC, especially in the manufacturing clusters of Southern China.

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 a joint venture contract) 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 often 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 normally (with certain exceptions) two years from the date of the award, or if an enforcement period is specified, the last day of such period.

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

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Contributed by Norton Rose Fulbright

Hong Kong

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. Thus Hong Kong operates a common law legal system with a strong rule of law and an independent judiciary. It is still 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

Visa/entry permit requirement

In general, any person intending to enter Hong Kong must obtain a visa/entry permit to enter, take up employment (whether paid or unpaid), to establish, or join in, any business, unless that person has the right of abode or right to land in Hong Kong.

Visitors

Nationals from about 170 countries and territories may visit Hong Kong without a visa/entry permit for a period ranging from seven to 180 days (depending on the individual's nationality). A visa application must be made if the visitor's stay will be longer than the permitted visa-free period or if the visitor is a national of a country not covered by the visa-free policy.

Short-term visitors are permitted to engage generally in certain limited business-related activities including negotiating and concluding contracts, submitting tenders, participating in exhibitions or trade fairs (with certain restrictions) or attending short-term seminars or business meetings.

Typically, an applicant will also have a local sponsor which would usually be a Hong Kong company or a resident who is at least 18 years old and who must know the applicant personally. The sponsor must certify the applicant's suitability for entry into Hong

Kong for the stated purpose and must undertake to assume responsibility for the applicant's repatriation.

General Employment Policy (GEP)

Applications for visas may be made under GEP by individuals from most countries with a limited number of exceptions (including residents of mainland China) who have a good educational background, technical qualifications or proven professional experience. GEP is not limited to a certain business sector and there is no quota for visas.

Additional immigration schemes exist for individuals from mainland China, for highly skilled or talented individuals who have not yet secured a job offer in Hong Kong, for non-local graduates of full-time Hong Kong accredited institutions and for the children of overseas Hong Kong permanent residents.

Professionals may apply to enter Hong Kong to take up employment under the GEP. In granting a visa, the Immigration Department will usually consider the following criteria:

- the applicant has a confirmed offer of employment for a genuine job vacancy that cannot be readily taken up by the local workforce
- the remuneration package is commensurate with the prevailing market rate in Hong Kong

Entrepreneurs who plan to invest in, establish, or join in, a business in Hong Kong may also apply under the GEP. An applicant must be in a position to make a substantial contribution to the economy of Hong Kong. In granting a visa, the Immigration Department will usually consider the following factors: the business plan and turnover, financial resources, investment sum, number of jobs created and any introduction of new technology or skills. Applications may also be made for start-up businesses.

If approved, a visa issued under the GEP will typically allow the individual to stay for two years (but for professionals this period will usually match the duration of employment, if shorter). This period may be extended provided that the applicant continues to meet the relevant criteria. Spouses and children of persons holding a visa issued under the GEP are normally permitted to stay in Hong Kong as dependants. Such dependants are not restricted from taking up employment in Hong Kong.

Business entities

General

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

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

- listed company

Some of these 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 within one month of the commencement of such business. 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 for a foreign company establishing itself in Hong Kong. This enables the company to evaluate the Hong Kong 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 incorporate 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 (e.g., pre-emption rights or a directors' discretion to refuse to register the transfer) and cannot invite the public to subscribe for shares. 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 articles of association which can only be amended by a special resolution (i.e., 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 carry on a business in common with a view to making a profit. The main advantage of a partnership is that it is inexpensive to form and flexible but, as a partnership is not a separate legal entity, a partner's liability may be unlimited.

Limited liability partnerships are not generally permitted under Hong Kong law and thus limited liability partnerships are rarely used except where laws or regulations relating to a business sector permit it 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 1,600 companies listed on the Exchange's main board and over 200 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 entities were Hong Kong, Bermuda, Cayman Islands and mainland China. However, the Exchange now accepts applications from entities incorporated in any of over 20 additional approved jurisdictions including Australia, England & Wales, India and Russia.

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 57.5 per cent of GDP in 2014.

Financial services

Hong Kong is home to one of the highest concentrations of banking institutions in the world, with all but one of the 30 global systemically important banks operating in the city. It also supports a very high concentration of stock brokers, fund managers and insurance companies. 16.6 per cent of Hong Kong's GDP can be attributed to the financial services industry.

Trading and logistics

Following the Second World War, Hong Kong became a notable manufacturing centre, particularly in the areas of textiles, clothing, machinery and electrical products. Manufacturing for most industries has now migrated out of Hong Kong and to mainland China in particular. 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 accounts for 23.4 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 12.4 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 is 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 accounts for 5.1 per cent of GDP, with the sector continuing to grow.

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 on the reversion of sovereignty 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 the handover in 1997 will be maintained, except for any laws that contravene the Basic Law and subject to the existing laws being amended by the Legislative Council. 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's judiciary remains independent. 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.

Funds management

Regulatory bodies

The primary regulator of funds, fund managers, trustees and custodians is the Securities and Futures Commission (**SFC**).

The SFC is also the relevant authority under the Anti-Money Laundering and Counter-Terrorist Financing (Financial Institutions) Ordinance (Cap 615) (**AMLO**) for supervising licensed corporations' compliance with the legal and supervisory requirements set out in the AMLO, including those with respect to client due diligence, and additional requirements set out in the SFC's Code of Conduct for Persons Licensed by or Registered with the SFC.

The Mandatory Provident Fund Scheme Authority regulates, supervises and monitors the operations of Hong Kong's mandatory provident fund schemes and occupational retirement schemes.

The Office of the Privacy Commissioner for Personal Data is the regulator responsible for managing the handling of personal information in accordance with privacy law.

Licensing of the fund manager

A person wishing to carry on any regulated activity in Hong Kong will require a licence issued by the SFC. The types of regulated activities and the licences required to carry on the regulated activities are as follows:

- Type 1 licence – dealing in securities
- Type 2 licence – dealing in futures contracts
- Type 3 licence – leveraged foreign exchange trading
- Type 4 licence – advising on securities
- Type 5 licence – advising on futures contracts
- Type 6 licence – advising on corporate finance

- Type 7 licence – providing automated trading services
- Type 8 licence – securities margin financing
- Type 9 licence – asset management
- Type 10 licence – providing credit rating services

The types of licence required for a fund manager depend on their functions. Typically, a fund manager should be licensed for Type 9 regulated activity. If the fund manager is also dealing in securities (which has a wide statutory definition), then they must also hold a Type 1 licence, unless the dealing is wholly incidental to the business of a fund manager licensed for Type 9 regulated activity.

If a regulated activity is conducted offshore Hong Kong, provided that the fund manager is not actively marketing to the Hong Kong public a service that, if provided in Hong Kong, would constitute a regulated activity, then the fund manager need not be licensed in Hong Kong.

Registration of the fund

A fund (for Hong Kong purposes referred to as a 'collective investment scheme') must be authorised by the SFC before any interest in the fund is offered to the public in Hong Kong, unless an exemption applies. For example, funds that exclusively target 'professional investors' (as defined under the Securities and Futures Ordinance (Cap 571) (**SFO**)) do not require authorisation from the SFC.

To apply for authorisation from the SFC, the fund will need to submit an application form, an information checklist, the fund's offering document and constitutive documents, and other documents required under the Code on Unit Trusts and Mutual Funds issued by the SFC (**UT Code**).

Appointment of trustee / custodian

A fund for which authorisation from the SFC is required, must appoint a trustee / custodian (independent of the fund manager) acceptable to the SFC. A trustee / custodian, who will hold the assets of a fund, must be:

- a licensed bank
- a trust company which is a subsidiary of a bank
- a trust company registered under the Trustee Ordinance (Cap 29) (**TO**)
- a banking institution or trust company incorporated outside Hong Kong which is acceptable to the SFC

A trustee / custodian must also meet certain capital requirements as set out in the UT Code.

Appointment of fund manager

A fund for which authorisation from the SFC is required must appoint a fund manager which is acceptable to the SFC, unless it is a self-managed scheme. The acceptability of a fund manager will be assessed based on certain criteria set out in the

UT Code, including experience, sufficiency of resources and overall integrity.

In the case of an overseas fund manager, the fund manager must be licensed or registered with and properly supervised by a securities regulator in an 'Acceptable Inspection Regime' (**AIR**) (for further details, please refer to 'Arrangements for foreign licensed firms' below).

Offering document

The offer of interests in a fund to retail client investors in Hong Kong will need to be offered by way of an offering document. The offering document must be provided in both English and Chinese languages. The content of an offering document must comply with certain content requirements set out in the UT Code. An authorised fund must issue a Product Key Facts Statement (**Product KFS**) which is deemed to also form a part of the offering document. The Product KFS is required to contain information that enables investors to comprehend the key features and risks of the fund. A copy of the offering document must be lodged with the SFC when making an application to the SFC for their authorisation.

Post-authorisation requirements

A fund has to comply with the post-authorisation requirements set out in the UT Code. These requirements include reporting obligations in respect of valuation, pricing errors, transactions with connected persons, the merger or termination of funds and ongoing reporting requirements. Any changes to a fund with respect to (i) constitutive documents; (ii) key operators (including the trustee / custodian and fund manager) and their regulatory status and controlling shareholder; (iii) investment objectives, policies and restrictions, fee structure and dealing and pricing arrangements; and (iv) any other changes that may materially prejudice holders' rights or interests, must be submitted to the SFC for prior approval. The SFC will determine whether the holders should be notified, and if so, the period of notice that should be applied before the changes can take effect.

Obligations of a fund manager

A fund manager must:

- (i) manage the fund in accordance with the fund's constitutive documents in the best interest of the holders and other duties imposed on them by the general law
- (ii) maintain proper books and records of the fund and prepare the fund's accounts and reports, which must be filed with the SFC and sent to all registered holders
- (iii) appoint an auditor, who is independent of the fund manager, trustee / custodian, and in the case of a mutual fund operation, the directors, to audit the fund's annual reports
- (iv) ensure that the constitutive documents are available for public inspection.

It is also worth noting that, where the investment management functions are delegated to third parties, there should be on-going supervision and regular monitoring of the competence of the delegates by the fund manager to ensure that the fund manager's accountability to investors is not diminished. Although the investment management role of the fund manager may be delegated to a third party, the responsibilities and obligations of the fund manager may not be delegated.

Market misconduct rules

Persons carrying on business in Hong Kong must comply with various market misconduct related legislation, including with respect to insider dealing, false trading, price rigging, disclosure of information about prohibited transactions, false or misleading information inducing transactions, and market manipulation.

Arrangements for non-Hong Kong based funds

There are additional requirements under the UT Code for a fund that is not based in Hong Kong. A non-Hong Kong based fund is required to appoint a representative in Hong Kong (**Representative**) if its fund manager is not incorporated and does not have a place of business in Hong Kong. A Representative, once appointed, has to be maintained throughout the period the fund is authorised in Hong Kong. The Representative must be (i) licensed or registered under the SFO; or (ii) a trust company registered under the TO provided such company is an affiliate of an authorised financial institution and acceptable to the SFC. Details of all contracts entered into with the Representative and a written undertaking from the Representative that they will perform the duties required under the UT Code must be supplied to the SFC.

For straightforward equity / bond funds that are already established in recognised jurisdictions (known as 'recognised jurisdiction schemes'), applications for authorisation of such funds will generally be reviewed on the basis that the fund's structural and operational requirements, and core investment restrictions, already substantially comply with the UT Code by virtue of prior authorisation in a regulated jurisdiction. In addition to the documents ordinarily required for an application for authorisation, an application for authorisation of a recognised jurisdiction scheme should also include evidence of the fund's authorised status in the relevant jurisdiction. Nonetheless, the SFC will still expect a recognised jurisdiction scheme to comply with the UT Code in all material respects and reserves the right to require such compliance as a condition of authorisation.

The SFC and the China Securities Regulatory Commission, the securities regulator in Mainland China, have recently launched the Mainland-Hong Kong Mutual Recognition of Funds (**MRF**) initiative. Through MRF, the SFC will allow Mainland funds that meet the eligibility requirements in China to follow streamlined procedures to obtain

authorisation for offering the funds to retail investors in Hong Kong.

Arrangements for foreign licensed firms

As noted above, an overseas fund manager who manages a fund in Hong Kong must be licensed or registered with and properly supervised by a securities regulator in an AIR. The list of AIR jurisdictions can be found on the SFC's website and currently includes Australia, France, Germany, Ireland, Hong Kong, Luxembourg, Malaysia (in respect of Islamic funds only), Taiwan (in respect of index tracking ETFs only), the United Kingdom and the United States.

An overseas fund manager must also obtain the relevant licences from the SFC, unless:

- the regulated activity is conducted offshore Hong Kong
- the fund manager is not actively marketing to the public in Hong Kong a service that, if provided in Hong Kong, would constitute a regulated activity

Fuel regulation

Overview

In Hong Kong, fuels, including petroleum and liquefied petroleum gas, are generally regarded as 'dangerous goods' (as defined under the Dangerous Goods Ordinance (Cap 295) (**DGO**)). Unless a licence or permit has been granted, no person shall manufacture, store, convey or use any dangerous goods in Hong Kong.

The Dangerous Goods (Application and Exemption) Regulations (Cap 295A) sets out the classification of different types of dangerous goods. For example, petroleum constitutes 'Category 5' dangerous goods and liquefied petroleum gas (**LPG**) constitutes 'Category 2' dangerous goods.

Depending on the types of dangerous goods, different sets of regulations apply. Generally, the regulations applicable to the various types of dangerous goods are set out in the Dangerous Goods (General) Regulations (Cap 295B) (**DGGR**), except for LPG, which is governed by the regulations under the Gas Safety Ordinance (Cap 51) (**GSO**).

Petroleum and other fuels

Any person who wishes to manufacture, store or transport petroleum or other types of fuel is required to obtain a licence by submitting an application in writing to the relevant authority. In the case of manufacturing, storage or the transportation of petroleum, the relevant authority is the Fire Services Department. An application for a licence to manufacture, store or transport petroleum should be made in accordance with the relevant requirements under the DGGR, which include certain content requirements.

Gases

A company that carries on business as a gas supply company has to comply with the requirements

under the GSO. A 'gas supply company' is defined under the GSO as a company which as a business imports, manufactures, or supplies any gas.

As compressed gases are regarded as dangerous goods, the requirements under DGO and the supplementary regulations generally apply to a gas supply company as well, unless the gas is LPG.

No person other than a registered gas supply company shall carry on the business of a gas supply company, save that a person may supply LPG if he has the written approval of a registered gas supply company that imports or manufactures LPG.

To be registered as a gas supply company, an applicant shall make an application in the approved form with a non-refundable application fee to the Director of Electrical and Mechanical Services, who is the Gas Authority under the GSO.

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 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, mainland China 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) with China which came into effect in 2004 (with subsequent supplements). CEPA is a free trade agreement which gives 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 People's Republic of China) have secured its development as the gateway to mainland China.

Foreign ownership restrictions

There are very few foreign ownership restrictions in Hong Kong. Two notable exceptions are set out in the table following.

Sector	Foreign investment restriction
Television broadcasting and cable	Prior approval is required for the holding, acquisition or exercise of voting control by non-resident investors of two per cent 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 per cent.

Anti-trust and merger control regulations

The Hong Kong Competition Ordinance entered into force in December 2015. The Ordinance provides for a cross-sector competition law regime which contains a general prohibition on restrictive agreements and concerted practices (the first conduct rule) as well as a prohibition on the abuse of a substantial degree of market power (second conduct rule). The Competition Commission and the Communications Authority (concerning only the broadcasting and telecommunications sectors) have concurrent jurisdiction to administer the Competition Ordinance, while a specialist tribunal (**the Competition Tribunal**) has been established to adjudicate cases brought under the Competition Ordinance.

Subject to a limited exception (see below), the Competition Ordinance does not provide for a cross-sector merger control regime. To rule out the possibility that merger activity might still be reviewed under the first or second conduct rule, Schedule 1 to the Ordinance expressly provides that agreements to implement a merger are not caught under the first conduct rule. In this context, a merger refers to a situation where two or more undertakings cease to be independent of each other or where one undertaking acquires direct or indirect control over another undertaking or its assets. This definition captures most M&A transactions, including 'full function' joint venture transactions, whereby the joint venture performs on a lasting basis all functions of an independent economic entity.

The Ordinance does provide for a merger control regime whose scope of application is currently limited to undertakings that hold telecommunications carrier licences or which directly or indirectly control such licensees. These undertakings are prohibited from carrying out a merger that has or is likely to have the effect of substantially lessening competition in Hong Kong. While there is no formal pre-clearance notification

procedure under the Competition Ordinance, the Commission and the Communications Authority encourage merging parties to approach them to discuss their transaction and seek informal advice on a confidential basis. Mergers that fall within the regime under the Competition Ordinance and that substantially lessen competition in Hong Kong will still be allowed to proceed if the economic efficiencies that arise from the merger outweigh the merger's restrictive effects. Mergers that would otherwise be prohibited can still be exempted by the Chief Executive-in-Council for exceptional and compelling reasons of public policy.

Government initiatives and incentives

Hong Kong's government has traditionally pursued a non-interventionist policy regarding the economy by providing a framework for business to function effectively with minimum interference. The territory's low tax environment is a particular attraction for businesses.

For the last 22 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.

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
- royalties 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.

Dividends are not subject to profits tax. Capital gains and receipts that are capital in nature are also not generally 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.

Royalties tax

Although there is no withholding tax in Hong Kong, deductions may be made for royalties paid to non-residents for the use of or right to use intellectual property in Hong Kong (and outside Hong Kong in certain circumstances). Such royalties are deemed to be taxable in Hong Kong at a rate of 30 per cent (equating to 4.5 per cent for unincorporated businesses and 4.95 per cent for corporations) and the effect is therefore similar to a withholding tax.

Salaries tax

Salaries tax is chargeable on any income arising in or deriving from Hong Kong, from any office, employment or pension. However, income from a non-Hong Kong source can also 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, share 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 10 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 charged to the owner of any land or buildings in Hong Kong at the standard rate on the net assessable value of the property (which is typically the rental income from the property). Permissible deductions are bad debts and rates, together with a statutory allowance of 20 per cent for repairs and outgoings. If a company carrying on a trade, profession or business in Hong Kong receives a rental income from a property and this income is included in its profits for profits tax purposes, the company may either apply for an exemption from property tax or offset the property tax payments against the profits tax payable by the company.

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

Stamp duty

Ad valorem stamp duty is payable in connection with the following transactions:

- Conveyances of real property - at a maximum rate of 8.5 per cent (for a consideration of more

than HK\$21.7 million) on either the sale and purchase agreement or the conveyance on sale. However, if the purchaser/transferee is a Hong Kong permanent resident the maximum rate will be 4.25 per cent. Where residential property bought on or after 27 October 2012 is resold within 36 months, additional 'special stamp duty' is payable at a rate of up to 20 per cent (for properties held for six months or less) calculated by reference to the stated consideration or the market value of the property (whichever is the higher). 'Buyer's stamp duty' (BSD) is also payable on an agreement for sale or a conveyance on sale executed for the acquisition of any residential property, unless the purchaser/transferee is a Hong Kong permanent resident. BSD is charged at 15 per cent on the stated consideration or the market value of the property (whichever is the higher).

- 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' (applicable if the transfer must be registered in Hong Kong) - at a rate of 0.2 per cent of the consideration or the value of the shares (whichever is higher) typically paid by both the buyer and the seller (who each pay 0.1 per cent). A fixed nominal duty of HK\$ five is 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.

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 be 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 (i.e., currently set at HK\$32.50). 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 twelve 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 and paternity 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.

Male employees who have been continuously employed for a period of 40 weeks or more with a child born on or after 27 February 2015 are also entitled to three days of paternity leave. The daily rate of paternity leave pay is 4/5 of the average daily wages of the employee during the twelve-month period immediately before the commencement of the paternity 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
- 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

An employer and an employee are free to agree on the length of the notice period at the time of entering into the employment contract. In the case of a continuous employment (i.e., for four weeks or more with not less than 18 hours every week), the parties may agree to at least 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 (i.e., summarily dismiss an employee) if the employee:

- wilfully 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.

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 for which he or she was employed by the employer
- 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. The employer and the employee are each required to contribute a minimum of five per cent of the employee's monthly income to the MPF Scheme, subject to certain minimum and maximum income levels. An employee earning less than HK\$7,100 per month does not need to make any contribution, while each of the employer's and employee's respective contributions are capped at HK\$1,500 for an employee earning more than HK\$30,000 per month. Both employees and employers are free to make voluntary contributions in addition to mandatory contributions.

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, transfer and use of personal data in direct marketing), 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 handle properly employees' personal data and other guidelines on employee monitoring. Whilst the Code does not have the force of law, the Privacy Commissioner recommends employers 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 the claim exceeds HK\$8,000 or where the number of claimants exceeds 10. There is no upper limit on the amount of the 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 has traditionally been 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). However, a change to the relevant legislation passed in 2010 allowed solicitors to apply for 'higher rights of audience' to give them the right to make submissions in the higher courts of Hong Kong without limitation. Solicitors with such rights are called solicitor advocates.

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. The Civil Justice Reform implemented stricter timetabling and case management provisions, and encouraged parties to consider alternative dispute resolution mechanisms with the aim of creating a more expedient procedural system that reduced delay and expense whilst still enabling parties to achieve just resolutions of their disputes. In developing the Civil Justice Reform, Hong Kong considered and drew 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 (**HKIAC**) 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 governed by the Arbitration Ordinance which came into force on 1 June 2011. The Arbitration Ordinance introduced and incorporated amendments made to the UNCITRAL Model Law in 2006 including provisions addressing tribunal-ordered interim measures. The Ordinance also abolished the distinction between domestic and international arbitration (which had existed under the previous ordinance) in favour of a unified regime.

The aim of the Arbitration Ordinance was 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. While the Arbitration Ordinance simplified the arbitration regime, parties are permitted to agree to opt in to provisions similar to parts of the previous 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 Arbitration Ordinance enhances Hong Kong's importance as an arbitration centre in Asia for international users. This is strengthened by the International Chamber of Commerce having established its branch secretariat office in Hong Kong in late 2008 and the 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 mainland China under the New York Convention. Under the Arrangement Concerning Mutual Enforcement of Arbitral Awards between the mainland and Hong Kong (which became effective as from 1 February 2000), Hong Kong arbitration awards may be enforced directly in courts in mainland China.

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

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Contributed by Cyril Amarchand Mangaldas

India

India has the distinction of being one of the most consistently growing economies in the world. In just over two decades, liberalisation has transformed India from being an inward looking state-based economy, into a globalised market-based economy, now identified as one of the most attractive investment destinations globally. Over the past few years, the Indian economy has shown itself to be robust and remarkably resilient during the global economic slowdown. Further, the recent change in leadership in India has brought to the fore a government with a strong mandate to bring economic reform, through implementation of regulatory changes targeted towards improving the ease of doing business in India. As a result, India's GDP growth projections have shown tremendous improvement, with India being forecasted to outpace China by the year 2017. A strong, stable government at the centre and a buoyant growth rate have given an impetus to investment and positioned India as a premier investment hub.

Visas and work permits

Business visas

A business visa is essential for foreign nationals who wish to undertake business activities and transactions in India. A business visa can be valid for one year or more with multiple entries. It can be issued for up to five years (10 years for U.S citizens) but the period of stay in India for each visit is limited to six months.

Residential permits

Foreign citizens are required to obtain a residential permit from a Foreigners Regional Registrar Office (**FRRO**) or with the superintendent of a local police station under whose jurisdiction they stay if they are staying for a period longer than 180 days.

Employment visa

Employment of a foreign national is permitted in India subject to the possession of a valid employment visa.

Employment visas cannot be issued for routine types of employment such as secretarial or electrical repair jobs. They can be issued to skilled / qualified professionals or to persons engaged or appointed on contractual or employment basis and not otherwise.

The minimum salary threshold limit for grant of employment visa is currently USD25,000 per annum. However, certain categories of employees such as ethnic cooks, language teachers etc. have been exempted from the above mentioned threshold and they may be sponsored for employment visa in India on a salary of less than USD25,000 per annum.

Income tax clearance certificate

A foreign national who has come to India in connection with business, profession or employment and/or who has income derived from any source in India, may leave the territory of India

only upon obtaining a tax clearance from competent authority. A tax clearance certificate issued to such foreign national must state that he/she has no tax liabilities under the Income Tax Act 1961.

Business entities

Introduction

Business ventures can be carried on in India through sole proprietorships, partnerships (including limited liability partnerships (**LLP**)) or through companies incorporated in India. Additionally, non-residents can carry on certain limited business activities through a branch, liaison or project office.

Sole proprietorship

It is the simplest form of business. The owner of a sole proprietorship is personally entitled to all the profits and is liable for all the losses arising from the business.

Non-Resident Indians (**NRI**) and Persons of Indian Origin (**PIO**) resident outside India can make investment in a sole proprietorship except those engaged in prohibited sectors on the following basis: (a) on a non-repatriation basis without approval of the Reserve Bank of India (**RBI**) subject to certain conditions and restrictions; and (b) on a repatriation basis with prior approval of the RBI. Non-residents (other than NRIs and PIOs) are not allowed to make any investment in a sole proprietorship without prior approval of the RBI.

No business specific registration is required under Indian law for constitution of a sole proprietorship.

As prior approval of the RBI is required for non-residents to make investments in a sole proprietorship, the RBI may put in conditions and fetters at the time of granting its approval. In any event, there is a general prohibition of foreign investments through sole proprietorship (even by NRIs and PIOs resident outside India) in agricultural, plantation, real estate business or print media sector.

Partnership

Partnerships in India, other than limited liability partnerships, are regulated under the Partnership Act 1932. Partners of a firm are jointly entitled to all the profits in the manner agreed amongst them and are also jointly and severally responsible for:

- all the liabilities arising from the business
- for all acts done by the partnership, during their respective tenure as partners

While it is not mandatory, most partners enter into a partnership deed to govern their *inter-se* relationship. A partnership does not have a corporate character distinct from its members. A partnership may even have corporations as its partners.

NRIs and PIOs resident outside India can make an investment in a partnership:

- on a non-repatriation basis without approval of the RBI subject to certain conditions and restrictions
- on a repatriation basis with prior approval of the RBI. Non-residents (other than NRIs and PIOs) are not allowed to make any investment in a partnership without prior approval of the RBI

The Partnership Act 1932 does not require mandatory registration of the partnership; however, an unregistered partnership and partners of such an unregistered partnership are prohibited from instituting suits to enforce certain rights.

As prior approval of the RBI is required to make investments in a partnership, the RBI may impose certain conditions and fetters at the time of granting its approval. In any event, there is a general prohibition of foreign investments (even by NRIs and PIOs resident outside India) in agricultural, plantation, real estate business or the print media sector.

Limited liability partnerships (LLP)

LLPs are a new form of a hybrid corporate entity with characteristics of both a limited liability company and a partnership and are regulated by the Limited Liability Partnership Act 2008. The nature of an LLP is that of a body corporate with perpetual succession and it is a legal entity separate from its partners. An LLP can sue and be sued in its own name. Two or more persons (including a body corporate) can incorporate an entity as an LLP under the Limited Liability Partnership Act 2008. Every LLP is required to nominate at least two individuals as designated partners, one of whom should be resident in India. After incorporation, the partners of an LLP may enter into an LLP agreement which will govern their mutual rights and obligations. Such an LLP agreement is optional. If such an agreement does not exist, the rights and obligations of the partners of the LLP would be governed by the provisions set out in the first schedule of the Limited Liability Partnership Act 2008. For the purposes of its business, every partner of the LLP is an agent of the LLP and not of the other partners.

Any obligation of the LLP arising out of contracts or otherwise, is solely that of the LLP and liabilities of the LLP, if any, have to be met out of its property. The liability of an LLP becomes unlimited in case of a fraud committed against any person with the knowledge and authority of the LLP.

In order to incorporate an entity as an LLP the partners would have to file the 'incorporation document' (which is similar to a Memorandum of Association of a company). Pursuant to filing of the document, a Certificate of Incorporation is issued by the Registrar of Companies (**RoC**) which is conclusive evidence of the incorporation of an LLP.

Foreign Direct Investment (**FDI**) is permitted in an LLP, with the prior approval of the Foreign Investment Promotion Board (**FIPB**), in those sectors/activities where 100 per cent FDI is allowed through the Automatic Route and there are no FDI

linked performance related conditions. However, there are certain restrictions on the activities of LLPs with FDI.

Company

A company may be incorporated in India either as a private company or a public company under the Companies Act 2013 (**Companies Act**).

In accordance with a recent amendment in 2015, it is no longer required for companies to maintain any minimum share capital.

However, FDI in certain sectors such as Non-banking finance companies (**NBFCs**) are subject to minimum capitalisation requirements.

The extent and conditions of FDI in a company incorporated in India is regulated by the various regulations under Foreign Exchange Management Act 1999 (**FEMA**) and the extant FDI Policy. Currently, FDI are not allowed in companies engaged in certain sectors such as real estate business (with certain exemptions), gambling and betting, lottery, including government/private/online lottery etc, chit funds, nidhi (or a non-banking) company, trading in Transferable Development Rights (**TDRs**), atomic energy and railway operations, manufacturing of cigars, cheroots, cigarillos and cigarettes, of tobacco or of tobacco substitutes.

Joint Venture/Wholly Owned Subsidiaries

Business in India may be undertaken by foreign investors by incorporating wholly owned subsidiaries (**WOS**) or through joint ventures which are partly owned by such foreign investor with the remaining ownership being typically held by Indian strategic investors or Indian / foreign financial investors (**JV**). A WOS / JV company is also governed by the Companies Act FEMA and extant Foreign Direct Investment Policy.

Branch/Liaison/Project offices

Foreign companies (i.e., companies incorporated outside India) can set up branch offices, liaison offices or project offices in India.

Foreign companies which establish a place of business in India through branch office must be registered with RoC and must have complied with certain other conditions.

A branch office may enter into contracts on behalf of the non-resident parent and may generate income. Retail trading, manufacturing, and processing activities in India are not permitted to be undertaken by a branch office except in Special Economic Zones (**SEZ**). The activities that can be undertaken by a branch office are restricted to exporting/importing goods, rendering professional or consultancy services, carrying on research work in which the parent company is engaged, promoting technical or financial collaborations between Indian companies and the parent or overseas group company, representing the parent company in India and acting as buying/selling agent in India, rendering services in information technology and development of software in India, rendering

technical support to the products supplied by parent/group companies and foreign airlines/shipping companies. The branch office should normally be engaged in the activity in which the parent company is engaged. Profits earned can be remitted outside India, subject to payment of applicable taxes.

A liaison office, on the other hand, is not permitted to carry on commercial, trading or industrial activity either directly or indirectly in India. It cannot earn any income in India. Its activities are restricted to representing the parent company/group companies in India, promoting export/imports from/to India, promoting technical/financial collaborations between parent/group companies and companies in India, and acting as a communication channel between the parent company and Indian companies.

The expenses of liaison offices are to be met by way of inward remittance from the non-resident.

A project office represents the interest of a foreign company executing projects in India. Typically, these are representative offices of foreign companies undertaking large projects such as major construction, civil engineering and infrastructure.

Distributorship arrangement

Foreign companies are entitled to appoint a distributor. This helps in understanding the market in order to assess market potential and market risk for their product or service. India has excellent distribution channels which operate both at the national and local level.

Foreign direct investment (FDI)

FDI in India is primarily regulated by: (i) FEMA and rules promulgated there under; (ii) the annual master circular on FDI in India consolidating the various notifications and circulars issued by the RBI along with other regulations; and (iii) the consolidated Foreign Direct Investment Policy read with various press notes issued by the Department of Industrial Policy and Promotion, Ministry of Commerce and Industry, and Government of India.

Investment channels

A foreign investor may invest in India through three routes, namely:

- FDI, either under the Automatic Route or the Approval Route (**Government Route**)
- Investment under the Portfolio Investment Scheme as a Registered Foreign Portfolio Investor (**RFPI**), subject to prior registration with the Securities and Exchange Board of India (**SEBI**) in terms of SEBI (Foreign Portfolio Investors) Regulations, 2014
- investment as a Foreign Venture Capital Investor (**FVCI**), subject to prior registration with SEBI

FDI beyond automatic approval

An Indian company can also have FDI through Depository Receipts (**DR**) and Foreign Currency Convertible Bonds (**FCCB**).

DRs are negotiable securities issued outside India by a depository bank, on behalf of an Indian company, which represent the local Rupee denominated equity shares of the company held as a deposit by a custodian bank in India. DRs are typically traded on stock exchanges in the US, Singapore, Luxembourg, London, etc. DRs are issued in accordance with the provisions of Foreign Exchange Management Act Notification 20/2000 read with Foreign Exchange Management (Transfer or issue of Security by a Person Resident outside India) (Seventeenth Amendment) Regulations, 2014, the Depository Receipts Scheme, 2014, and guidelines issued by the Government of India thereunder from time to time.

FCCBs are bonds issued by an Indian company expressed in foreign currency, the principal and interest of which is payable in foreign currency. FCCBs are issued in accordance with the Foreign Currency Convertible Bonds and Ordinary Shares (Through Depository Receipt Mechanism) Scheme, 1993 and subscribed by a non-resident entity in foreign currency and convertible into ordinary shares of the issuing company in any manner, either in whole, or in part.

Considering DRs and FCCBs are convertible into equity, they are also subject to the FDI norms.

Repatriation of investment capital and profits earned in India

There are no restrictions specific to non-residents on the remittance of dividends. However, restrictions do exist on the ability of a company to declare a dividend under the Companies Act. The dividend payable on compulsorily convertible preference shares or bonds (which are treated as FDI) is restricted to 300 basis points over the prime lending rate of the State Bank of India as on the date of the Board meeting approving the issue of such instruments. Non-convertible or optionally convertible preference shares and bonds are treated as an External Commercial Borrowing (**ECB**) and the rate of interest has to be within the limits provided in the ECB policy.

The law relating to royalty payments has been recently liberalised and currently all remittances for royalties fall under the Automatic Route. Remittances of consultancy fees exceeding: (a) US\$10 million for any consultancy services procured by an Indian entity in respect of infrastructure projects; and (b) US\$1 million for other consultancy services from outside India, requires the prior approval of the RBI. However, this rule does not apply if payments are made out of funds held in a Resident Foreign Currency (**RFC**) account of the remitter.

Business environment

Intellectual property protection

India has a robust intellectual property regime with legislations in place to protect various forms of statutory intellectual properties including copyright, designs, patents, trademarks, and geographical indications. As a signatory to *inter alia* the Paris Convention and the TRIPS Agreement (The Agreement on Trade-Related Aspects of Intellectual Property Rights), India has made amendments and harmonised all intellectual property laws for compliance. Being a common law jurisdiction, India also affords protection to business goodwill and reputation represented by a mark, name or get-up under the law of passing off. In addition, the law also provides remedies for breach of confidentiality.

Patents

The Patents Act 1970 read along with Patent Rules 1972 govern the registration of patents in India. India is a member of the TRIPS Agreement and a signatory to the Paris Convention, the Patent Cooperation Treaty and the Budapest Treaty.

For the grant of a patent, the new invention should be novel, it should have an inventive step and it should be capable of industrial application. Moreover, it should not fall within the restrictions provided in Section three and four of the Patents Act 1970 which relates to inventions that are not patentable. The period of protection granted is 20 years from the date of filing the patent application.

Trademarks

The Indian Trademarks Act 1999 enforced on September 15, 2003 has extensive provisions for registration, protection, Licencing, and assignment of trademarks. Registration under the Trademark Act 1999 confers upon the registered proprietor exclusive rights to the use of the trademark, subject to any conditions imposed, and third party rights. The proprietor is entitled to take action for infringement of a trademark against unauthorised use and claim remedies such as interlocutory orders and damages. The law also takes care of issues of comparative advertising, misuse in advertisements and unfair and dishonest commercial practices.

The law also offers protection to goodwill and reputation under the law of passing off. Indian courts have also recognised trans-border reputation of an overseas trader.

Copyright

Copyright law in India is governed by the Copyright Act 1957. The owner of a copyright work is entitled to protect the copyright against unauthorised use and/or misappropriation of the work or a substantial part of it and obtain relief from a court of law including injunction, damages, and accounts of profits for a period of the life of the author and 60 years thereafter. Copyright is protected in all original literary, dramatic, musical, artistic works, cinematograph films and sound recordings. The law also provides for criminal remedies against

misuse. The law does not make registration of a work mandatory for protection or claiming damages against infringement. However it is recommended to register the copyright as the registration serves as evidence in the court of law.

Designs

Industrial designs in India are governed by the Designs Act 2000. Industrial design protects the aesthetic and ornamental appearance of a product. The purpose of the Designs Act 2000 is to protect industrial designs and promote innovation. The period of protection afforded to a registered design is 10 years which can be extended to 15 years.

Geographical Indications

The Geographical Indications Act 1999 provides for registration and protection of geographical indication (**GI**) i.e., indication which identifies goods as agricultural, natural or manufactured as originating, or manufactured in a particular country, region or locality, where a given quality, reputation or other characteristic of such goods is essentially attributable to its origin, GI is not granted to any individual. It is only granted to associations of persons or producers or an organisation representing the interest of the producers of goods.

Semiconductor integrated circuits layout-designs

Semiconductor Integrated Circuits Layout-Design Act 2000 refers to a product which have transistors or other circuitry elements, which are inseparably formed on a semiconductor material or an insulating material or inside the semiconductor material and designed to perform an electronic circuitry function. The protection is granted for a period of 10 years.

Computer software and programs

India recognises and protects computer programmes, tables, and compilations including computer databases as literary works under the Copyright Act 1957. Both the object and source codes can be protected as literary works and the term of protection extends to life of the author and 60 years.

Patent law also provides protection to computer implemented inventions and claims to methods are allowed. Whilst at present the jurisprudence from the European Patent Office is more acceptable, the U.S. position at times also finds favour. The rights provided by patent law bestow on the patentee, the exclusive right to prevent third parties from the acts of using, offering for sale, selling or importing for those purposes, the patent article.

Trade secrets and confidential information

A right to restrain breach of trust or confidence is specifically saved under Section 16 of the Indian Copyright Act 1957 and the principles to protect confidential information and trade secrets are now well settled. To obtain relief from a court of law, the burden is upon the plaintiff to:

- identify what information it was relying on

- show that it was handed over in circumstances of confidence
- show that the information was of the type which could be treated as confidential
- show that it was used without Licence or there is a threat that it would be misused

Confidential information may be protected contractually as well as at common law. However it is always recommended that there are specific covenants included in defining a relationship (such as an employer/employee) to treat business information received during the term of employment as confidential.

Banking sector

The banking sector in India comprises state owned banks (majority ownership held by Government of India) and private banks (which may be majority owned by foreign entities). Most banks in India are authorised by RBI as authorised dealer banks and have been granted authority to approve a host of investments and remittance related transactions.

FDI in the private banking sector is permitted up to 74 per cent. Approval is granted through the Automatic Route up to 49 per cent and through the Government Route up to 74 per cent.

This 74 per cent limit includes investment under the Portfolio Investment Scheme (**PIS**). Further, at least 26 per cent of the paid up capital will have to be held by residents, except in regard to a wholly-owned subsidiary of a foreign bank. The FDI cap in the public sector banks is 20 per cent. The mode of entry is through the Government Route only.

Competition law

Competition law in India is governed by the Competition Act 2002 and its rules and regulations. The Competition Act 2002 provides for *inter alia* the establishment of the Competition Commission of India (**CCI**), the nodal authority for monitoring, enforcement, and implementation of competition law in India. Appeals from decisions of the CCI can be filed within 60 days, before the Competition Appellate Tribunal (**COMPAT**). Further, appeals from the orders of the COMPAT can be filed within 60 days, to the Supreme Court of India.

The Competition Act primarily seeks to regulate the following:

- anti-competitive agreements
- abuse of dominance
- combinations

Under the Competition Act 2002, horizontal agreements (any agreement between enterprises or persons, or associations, which are engaged in identical or similar trade or provision of goods or services), including cartels, which directly or indirectly determine the purchase or sale price; limit or control production, supply, markets, technical development, investment or provision of services; share the market or source of production or

provision of services; or directly or indirectly result in bid rigging or collusive bidding, are presumed to have an AAEC (Appreciable Adverse Effects on Competition). Further, vertical agreements (agreements between enterprises or persons, or associations thereof, which are engaged at different levels of the production or supply chain) that cause or are likely to cause AAEC in India, are prohibited.

Environmental laws

The key legislation dealing with environmental protection in India is the Environment (Protection) Act 1986 and its rules, the Air (Prevention & Control of Pollution) Act 1981, the Water (Prevention & Control of Pollution) Act 1974 and the Rules if any, made by the pollution control board of every state. Additionally, environmental law has also been developed in India pursuant to various decisions by Indian courts, whereby the judiciary has enunciated certain principles of liability in case of environmental violations and injury caused.

Franchising

India does not have any specific laws governing franchising. However, Franchise under the Finance Act 1999, is defined as an agreement by which the franchisee is granted a representational right to sell or manufacture goods or to provide service or undertake any process identified with the franchisor, whether or not a trademark, service mark, trade name or logo or any such symbol, as the case may be, is involved. A number of allied laws such as Competition Law, Contract Law, IP law and Consumer Protection law govern franchising in India. Further, the RBI also oversees the terms and conditions of the payment agreement where one of the parties to a franchise agreement is a foreign entity.

Funds management

Introduction

The regulatory regime for investment funds in India is set out in the exchange control regulations and securities regulations. The exchange control regulations are issued by the Reserve Bank of India (**RBI**) based on policy driven by the Central Government through its Department of Industrial Policy and Promotion. The Securities Exchange Board of India (**SEBI**) is the regulatory body responsible for granting approval to and supervising Indian investment funds and offshore funds investing into India.

The multiple routes of investing in or types of investment funds for investment in Indian securities are summarised below.

Alternate investment funds (AIFs)

The SEBI (Alternate Investment Funds) Regulations, 2012 set out the regulatory framework for raising and managing private pools of capital. It would be pertinent to note that the AIF regulations prescribe registration for the investment fund not the investment manager. Hence, no registration is required for an Indian entity to act as a manager for an AIF. However, if an Indian entity is foreign

owned it needs to comply with the minimum capitalisation requirements under the FDI) policy.

The AIF regulations define an AIF to mean *a fund established or incorporated in India as a trust, company, limited liability partnership or a body corporate which is a privately pooled investment vehicle with Indian or foreign investors.*

The AIF regulations contemplate three categories of AIFs:

- **Category I AIF:** AIFs that invest in start-up or early stage ventures or sectors considered socially or economically more desirable and thus may be entitled to benefits and subject to greater regulation, viz. venture capital funds, angel funds, SME funds, infrastructure funds, and social venture funds
- **Category II AIF:** AIFs that do not fall in Category I or III and do not employ any leverage or borrowing other than to meet day to day operational requirements and as such do not get any special benefits, viz. private equity funds and debt funds
- **Category III AIF:** AIFs that employ diverse or complex trading strategies and may employ leverage including through investment in listed and unlisted derivatives, viz. hedge funds. Under this category, AIFs are typically open ended and interested in making short term returns

The AIF regulations set out the investment limitations for each category. The AIF regulations also stipulate requirements dealing with disclosures, reporting to investors, matters that will require investor consent, reports to be filed by AIFs with SEBI, matters requiring prior approval of or intimation to SEBI etc.

Foreign direct investment (FDI)

The Foreign Exchange Management (Transfer or Issue of Security by a Person Resident outside India) Regulations, 2000 read with Schedule 11 permits investment by a person resident outside India in regulated investment vehicles in India under the automatic route, i.e., without any need for seeking prior approval of the Central Government.

Accordingly, a person resident outside India may, subject to the conditions laid down, invest in units of an 'investment vehicle'. The term investment vehicle is defined to mean *an entity registered and regulated under relevant regulations framed by SEBI or any other authority designated for the purpose including Real Estate Investment Trusts, Infrastructure Investment Trusts and AIFs.*

If neither the sponsor nor the manager nor the investment manager of the investment vehicle is Indian 'owned and controlled' then downstream investment by such an investment vehicle in an eligible investee company shall have to conform to the sectoral caps and conditions / restrictions applicable to that investee company under the FDI of India.

Foreign portfolio investment (FPI)

Investment by FPIs is governed by the SEBI (Foreign Portfolio Investors) Regulations, 2014. The FPI Regulations merged the existing categories of Foreign Institutional Investors and Qualified Foreign Investors into a new investor called Registered Foreign Portfolio Investor. FPIs are categorised into three classes:

- **Category I:** government and government related foreign investors such as central banks and sovereign wealth funds
- **Category II:** appropriately regulated entities such as Broad Based Funds, banks and asset management companies, Broad Based Funds that are not appropriately regulated but whose manager itself is an RFPI of this category
- **Category III:** all others not eligible under Category I or II such as endowments, charitable societies and family offices

FPIs belonging to the same investor group are not permitted to hold more than 10 per cent of the total paid-up capital of an Indian company by way of direct investment or through offshore derivative instruments. The aggregate holding of all FPIs capped at 24 per cent of total paid-up capital of the Indian company which may be increased up to the relevant sectoral cap as per the FDI policy.

Category III FPIs and certain Category II FPIs are prohibited from issuing, subscribing or otherwise dealing in ODIs. ODIs can only be issued to persons (a) who are regulated by an appropriate foreign regulatory authority, and (b) who meet Know Your Client norms. In June 2016, SEBI has further tightened the norms regarding KYC, transferability of ODIs, reporting of suspicious transactions, periodic review of systems and prescribed modified ODI reporting format.

Foreign venture capital investor (FVCI)

A vehicle that pools investors outside India can register itself with SEBI as an 'FVCI' under the SEBI (Foreign Venture Capital Investor) Regulations, 2000. The FVCI route is generally preferred for investments in unlisted companies although in certain cases investments can also be made in listed Indian companies. Under the FVCI regulations FVCIs must maintain a prescribed asset composition of its investible funds i.e., at least 66.67 per cent of its investible funds must be invested in unlisted equity shares or equity linked instruments. Alternatively, a FVCI can invest its entire corpus in Category I AIF. One significant advantage of FVCI is that it can make and dispose of investments at negotiated prices i.e., FVCIs are not subject to the pricing restrictions that are otherwise applicable for investments/divestments under the FDI route.

Infrastructure investment trusts (InvITs)

SEBI introduced the InvITs regime through notification of the SEBI (Infrastructure Investment Trusts) Regulations, 2014 in September 2014. The InvITs regulations lay down the regulatory framework for registration and regulation of InvITs

in India and prescribe, *inter alia*, conditions for making a public offer and private placement, initial and continuous disclosures, investment conditions, unit holder approvals, related party disclosures. The InvITs regime has not yet taken off in India on account of several rigidities in the regulations. Few examples are: an InvIT can have only a maximum of three sponsors, the sponsor(s) is/(are) required to hold, on a collective basis, not less than 25 per cent of the total units of the InvIT on a post-issue basis for a period of not less than three years from the date of listing of such units; InvITs are not permitted to hold infrastructure projects through multi-tier structure i.e., 90 per cent of the assets have to be held through single tier SPV; units proposed to be offered to the public cannot be less than 25 per cent of the total outstanding units and minimum public holding post listing should be 25 per cent; investment manager of an InvIT to have not less than five years of experience in fund management, advisory services or development in infrastructure sector. In June 2016, SEBI issued a consultation paper for public comments recommending several amendments to the InvIT regulations to iron out the rigidities and thus pave the path for InvITs listing in India.

Real estate investment trusts (REITs)

SEBI introduced the REITs regime through notification of the SEBI (Real Estate Investment Trusts) Regulations, 2014. The REITs regulations and InvIT regulations have several similarities and both regulations lay down the requirements relating to public offering of units, disclosures in offering document, minimum standards of net worth, qualifications and experience for, and rights and responsibilities of, sponsors, the manager and the trustee, rights and responsibilities of the trust's valuers and auditors, minimum holding of sponsor(s) and lock in requirements, to name a few. As was the case with InvITs regulations, in June 2016 SEBI issued a consultation paper for public comments proposing various amendments to the REITs regulations to ease the norms and revive the real estate investments market, such as (a) REITs to be allowed to invest up to 20 per cent in under-construction assets; (b) restriction on SPVs investing in other SPVs to be relaxed; (c) minimum public holding requirement to be realigned with existing norms; and (d) related party transactions contours to be rationalised.

Safe harbor regime

In order to encourage development of onshore fund management regime, the Government of India introduced the safe harbor regime under Section 9A of the Income-tax Act 1961 (read with applicable rules) whereby an eligible investment fund (EIF) would not be subject to tax in India merely on account of having an eligible fund manager (EFM) in India, subject to satisfaction of several conditions, to name a few: (a) EIF shall be a resident of a country notified by the Central Government; (b) the aggregate participation or investment in EIF, directly or indirectly, by persons resident in India shall not exceed five per cent of the corpus of EIF; (c) EIF shall have a minimum of 25 members who are,

directly or indirectly, not connected persons (look through permitted only for the direct investor); (d) aggregate participation interest, directly or indirectly, of 10 or less members along with their connected persons in EIF, shall be less than 50 per cent; (e) EIF shall not invest more than 25 per cent of its corpus in any entity; and (f) EIF shall not carry on or control and manage, directly or indirectly, any business in India, i.e., EIF cannot hold more than 26 per cent of the share capital of the investee company. In June 2016, SEBI issued consultation paper for public comments which sets out proposed regulatory regime for EFMs by proposing to introduce a new chapter under the SEBI (Portfolio Managers) Regulations 1993. The proposed amendments include net worth condition for EFMs, appointment of principal officer and minimum two employees having requisite qualification and experience as well as other obligations and responsibilities of EFMs.

Fuel regulation

General background

The oil and natural gas sector in India was previously restricted to only public sector undertakings. However, the last two decades have witnessed the liberalisation and privatisation of this sector to a large extent. In the upstream sector of exploration and production of petroleum, participation of international players started in the year 1994. Thereafter in 1999, the Government allowed 100 per cent FDI for exploration activities. Subsequently, a number of domestic and international private companies have entered the market. With the further liberalisation of Foreign Direct Investment (FDI) regulations, foreign players are now being encouraged to invest in India.

Needless to say, India has always been dependent on imports for its fuel needs while its production capacities remain untapped. India imports three-quarters of its petroleum requirement from countries such as Saudi Arabia, Iraq, Nigeria, Venezuela, Kuwait, Qatar, Iran and the UAE. India's demand for petroleum vis-à-vis the automobile and aviation industry is continuing to soar with its growing population. To match this soaring demand, there has been an aggressive increase in imports as well. In the last financial year, 2015-16, 28,300,000 metric tonnes of petroleum products¹ worth USD10,000,000,000 (United States Dollars Ten Billion) were imported by India.

This article provides the broad legal framework for the Oil & Gas sector with further insight into the regulatory framework for importing petroleum products and marketing of the same via the setting up of petrol pumps. We will also be discussing all ancillary licences and regulations applicable to a private company importing and marketing petroleum products.

¹ Petroleum products refer to any hydrocarbon oil which is used as fuel in spark ignition engines.

Regulatory mechanism

In India, laws governing petroleum products are passed at the central level by the Parliament of India. The Ministry of Petroleum and Natural Gas (**MOPNG**) is the nodal Ministry for the oil and natural gas industry. The MOPNG also relies on the Petroleum Planning and Analysis Cell (**PPAC**) for pricing of domestic natural gas and other petroleum products, whereas the Health, Safety and Environment aspects are regulated by the Oil Industry Safety Directorate (**OISD**).

The regulatory framework can be divided into the three conventional sectors of the industry, viz. upstream, midstream and downstream:

Upstream

The relevant statutes are the Oilfields (Regulation & Development) Act 1948 (**ORDA**), read with the Petroleum and Natural Gas Rules 1959 (**PNG Rules**) framed thereunder. MOPNG, under its powers conferred by the ORDA and the PNG Rules has established the Directorate General of Hydrocarbons (**DGH**) which is the supervisory authority for all activities related to exploration and production of hydrocarbon. Offshore operations have to comply with the Petroleum and Natural Gas (Safety in Offshore Operations) Rules 2008 framed under the ORDA.

Midstream

The governing statute for pipelines is the Petroleum and Minerals Pipelines (Acquisition of Right of User in Land) Act 1962. The Petroleum and Natural Gas Regulatory Board (**PNGRB**) established under the Petroleum and Natural Gas Regulatory Board Act 2006 is tasked with regulation and supervision of all pipeline related activities. The PNGRB has in turn formulated regulations for the regulation of pipelines.

Downstream

MOPNG is assisted by other governmental agencies such as the Oil Industry Development Board (**OIDB**), PPAC, Petroleum Conservation Research Association and the PNGRB to regulate the fuel industry.

The Petroleum Act 1934, Petroleum Rules 2002, and Petroleum and Natural Gas Regulatory Board Act 2006 are key legislations for the regulation of the oil and natural gas sector. The Petroleum Act 1934 (**Petroleum Act**) regulates the import into India, transport, storage, production, refining and blending of petroleum. In order to prescribe a more detailed procedure for the aforementioned activities, the Petroleum Rules 2002 (**Petroleum Rules**) were framed by the Central Government. The Petroleum and Natural Gas Regulatory Board Act 2006 provides for the setting up of a regulatory board to regulate the refining, processing, storage, transportation, distribution, marketing and sale of petroleum, petroleum products and natural gas excluding the production of crude oil and natural gas.

Under the Petroleum Rules petroleum may be imported into India by sea or by land. However, the import of petroleum products in India is regulated and controlled. Section Three of the Petroleum Act requires a person who intends to import, transport or store any petroleum product to comply with the Licencing requirements under the Petroleum Rules and other regulations made by the Central Government pursuant to Section Four of the Petroleum Act. Under Section Four of the Petroleum Act the Central Government has wide powers to make rules regarding various aspects of imports such as permitted place of imports in India, transport and storage of petroleum etc. The import licence may have certain terms and conditions attached to it which the importer must comply with.

The entry of petroleum/crude oil import consignments in to the territory of India is regulated by Petroleum Rules. Under Rule 16 of Petroleum Rules Petroleum may only be imported through the ports which are duly approved for this purpose by the Ministry of Shipping, Government of India in consultation with the Chief Controller and declared as Custom's ports by the Commissioner of Customs. However, the Collector of Customs may, on the recommendation of the Chief Controller, allow importation through any other port.

At present, there are 12 major ports in India, viz. those of Mumbai, Kolkata, Cochin, Kandla, Chennai, Mormugao, Kamarajar (Ennore), Visakhapatnam, V.O.Chidambaram (Tuticorin) and Mangalore. The tariff for services available at major ports is fixed by the Tariff Authority for Major Ports formed by the 1997 amendment to the Major Port Trusts Act 1963. In addition to these 12 major ports, there are 187 minor ports which are under the jurisdiction of various State Governments.

While under Rule 25 of the Petroleum Rules Petroleum may be imported by land only at places specifically authorised for this purpose by the Central Government.

Price regulation

In India, the Public Sector Undertaking (**PSU**) oil companies like Bharat Petroleum Corporation Limited, Indian Oil Corporation Limited and Hindustan Petroleum Corporation Limited make majority of petroleum product import every year. These PSUs dominate the downstream activity of marketing of petroleum products through petrol stations.

Petroleum is an "essential commodity" as defined by the Essential Commodities Act 1955. Accordingly, the Government of India, under the said Act is empowered to regulate and control the prices of petroleum products, which continued till 2010. In furtherance of liberalisation of the oil and gas sector, MOPNG has deregulated the control of petrol and diesel vide its press notes dated June 25, 2010, October 18, 2014 and December 22, 2014 respectively. However, kerosene continues to be regulated.

Private players and PSUs are now treated equally. No special treatment is meted out to PSUs for

losses accrued as a result of selling petroleum products below the market price. There is fair market competition amongst the private and public sector oil marketing companies.

Despite deregulation of diesel and petrol, their pricing is not completely independent as it is influenced by various components such as the basic fuel component, customs duty, excise duty, Sales VAT and dealer commission. In order to control the pricing of these sensitive commodities, the government can increase or decrease the taxation component. This directly affects the final cost of marketing petrol and diesel.

Foreign investment in the petroleum industry

In recent years, India has encouraged foreign investment in the petroleum sector to supplement domestic investment and improve technological capabilities. The current foreign direct investment policy issued by Department of Industrial Policy and Promotion, Ministry of Commerce and Industry, Government of India (**FDI Policy**) allows 100 per cent foreign direct investment (**FDI**) through the automatic route in the following sectors:

- 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

FDI up to 49 per cent is allowed through the automatic route in petroleum refining being operated by an existing PSU, without any disinvestment or dilution of domestic equity in the existing PSUs.

Setting up petrol stations in India

Marketing of petroleum products and setting up of petrol pumps may only be done by a company holding a petroleum marketing Licence.

The petroleum marketing Licence is granted by MOPNG by powers vested in it vide MOPNG notification dated March 08, 2002 bearing reference number P-23015/1/2001-MKT (**Marketing Licence Resolution**). The Marketing Licence Resolution lays down guidelines for issuance of Licence for marketing petroleum products (**Marketing Licence**).

The following companies are *suo motu* eligible to apply for Marketing Licence:

- any company which already owns and operates refineries with an investment of at least INR20,000,000,000 (Indian Rupees Twenty Billion)
- any company which is in the business of oil exploration and production, producing at least

3,000,000 (three million) tonnes of crude oil, automatically qualifies to apply for a marketing Licence

Grant of Marketing Licence to new entrants is subject to an applicant investing or proposing to invest INR20,000,000,000 (Indian Rupees Twenty Billion) (**Investment Amount**) in exploration or production, refining, pipelines or terminals. The timeline for investing in these sectors is 10 years, while the timeline for the applicant to achieve financial closure is five years.

Investment in following assets is considered eligible for the purposes of Marketing Licence:

- setting up grass root refineries and/or expansion of the existing refineries along with facilities like crude oil receipt and transportation facilities
- exploration and production of hydro carbons including coal bed methane, and associated facilities like crude oil / natural gas pipelines, crude oil and natural gas processing plants
- terminals for crude oil / liquid nitrogen gas
- common carrier natural gas / petroleum products / liquefied petroleum gas pipelines

It is to be noted that the Investment Amount may be utilised in a combination of the abovementioned eligible activities. It is not restricted to any single activity.

Allowed funding routes

Under the Marketing Licence Resolution, the investments made or proposed to be made in the eligible activities must be in the form of equity, equity like instruments, e.g., convertible debentures (fully or partially), or debt with recourse to the company. Therefore, non-recourse funding is not an option for such investments.

Procedure for grant of marketing licence

For grant of Marketing Licence, an application must be submitted to MOPNG along with an application fee of INR1,000,000 (Indian Rupees One Million). This application must contain a scheme of marketing. There is no limit to the quantum and size of the scheme or the number and location of retail outlets. However, the scheme must contain following particulars:

- the source of supply of products to be marketed
- the tankage and details of other proposed or established infrastructure
- means of transportation of products to the depots and retail outlets
- the number and location of retail outlets along with details of their storage and dispensing capacity
- the total quantum and type of products to be covered under the marketing scheme

Upon approval of the scheme of investment, MOPNG may grant the Marketing Licence. MOPNG may in its discretion impose the obligation

to service remote areas and low service areas in public interest. The Marketing Licence shall be subject to compliance of terms and conditions attached to it.

Furthermore, additional obligation of the Licensee *inter alia*: (a) obligation to comply with the prescribed timelines for investment of Investment Amount, and completion of the project; and (b) obligation to procure ancillary approvals from different ministries and departments etc. are usually recorded in an agreement between the applicant and MOPNG.

Indicative list of ancillary licences and applicable compliances

Environment clearances

Approvals and clearances from the Ministry of Environment, Forest and Climate Change (**MOEF**) may need to be obtained in order to commence certain petroleum sector operations such as oil explorations, petroleum refining, setting up of petrochemical complexes, laying of oil and gas transportation pipelines. Further clearances may also be needed to be obtained from the respective state pollution control boards.

Storage of petroleum

The Petroleum Act 1934 classifies 'petroleum' into three categories, namely, Petroleum Class A (having flash-point below 23 degrees centigrade), Petroleum Class B (having flash-point of and above 23 degrees centigrade but below 65 degrees centigrade) and Petroleum Class C (having flash point of and above 65 degrees centigrade).

Chapter I of the Act in Section Three specifies *inter alia* that import, storage and transport of petroleum can only be undertaken upon obtaining requisite licences under the Act. Section Four of the Act also empowers the Central Government to make rules in relation to the abovementioned activities.

However, Section 11 of the Act clearly specifies that Chapter I of the Act (which requires Licencing of, and specifies applicability of the Rules to, import, storage and transport of petroleum) must not be applicable to any petroleum which has its flash point above 93 degrees centigrade.

Rules 116 to 135 of the Petroleum Rules lay down guidelines for storage of petroleum products in bulk. These guidelines *inter alia* include storage tank specifications, minimum safety requirements in design and fire protection.

Section 15(1) of the PNGRB Act 2006 requires every person marketing or storing petroleum product to register itself with the PNGRB. However, please note that the Rules in relation to the registration with PNGRB have not been formulated till date.

Transport licence

Under the Petroleum Rules petroleum products may be transported by water and land only in vessels/ vehicles prescribed in the Petroleum Rules with prior approval of the concerned authority. The

Petroleum Rules also lay down guidelines for safety measures to be taken while loading, unloading and transport of petroleum products.

Under the Hazardous Wastes (Management, Handling and Transboundary Movement) Rules 2008, an approval may be required by the owner of the transport tanks for handling of the oil containing cargo residue, washing water and sludge, if the same is generated during storage and transportation of the petroleum products.

Land acquisition

Compulsory acquisition (temporary & permanent) of land for a public purpose by the Government is governed by the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act 2013.

Consensual land acquisition, either through sale or lease, is governed by the Transfer of Property Act 1882 and relevant local laws.

Under the Section Two of the Forest Conservation Act 1980 read with Forest Conservation Rules 2003, a prior permission of the MOEF is required for usage of any forest land for non-forest purposes. If the company engaged in petroleum business intends to use any forest land, the herein mentioned forest approval will be applicable. Similarly, if the land used by the company forms part of the wildlife reserves of the country, a prior permission from the Indian Wild Life Board would be required.

Lubricants

In case the sale of petroleum at petrol stations is accompanied with the manufacturing / processing / packaging / trading of lubricants, separate Licences would be required under the Lubricating Oils and Greases (Processing, Supply and Distribution Regulation) Order, 1987 formulated by the Central Government under the Essential Commodities Act 1955.

Excise and customs

Import of petroleum products is subject to excise and customs duty under Section 12 of the Customs Act 1962 read with Section Two of the Customs Tariff Act 1975.

Foreign Investment Policy

General

India has now opened most sectors for 100 per cent FDI and ownership. A detailed table setting out the current FDI caps and conditions is available in Annexure 1 at the end of this chapter.

Foreign institutional investors

SEBI, notified SEBI (Foreign Portfolio Investors) Regulations, 2014 (**FPI Regulations**) on 7 January 2014 which came into effect on 1 June 2014. The FPI Regulations merge the existing categories of Foreign Institutional Investors (**FII**s) and Qualified Foreign Investors (**QFI**s) into a new investor class, viz. FPIs. The FPI Regulations have specific categories for different classes of eligible applicants, viz. Category I (for governmental and

government related entities); Category II (for appropriately regulated broad based funds, university and pension funds, unregulated broad based funds with regulated investment managers, etc.); and Category III which is a residual category. Registration applications for these entities are now required to be processed through Designated Depository Participants which will replace SEBI as the primary authority that vets these applications. The FPI Regulations contain grandfathering provisions for existing FIIs, sub-accounts and QFIs, which will have to take steps to ensure a seamless transition to the new regime. The nature of investments that can be made by FIIs broadly continues to remain unchanged, with the exception of unlisted equities, which are not referred to in the FPI Regulations.

Government initiatives and incentives

Doing business in India: Initiatives

The Department of Industrial Policy and Promotion (DIPP) of India have listed their key achievements with regard to ease of doing business in India in recent times.

Ease of doing business in India: key achievements

- SARFAESI (Central Registry) Rules 2011 has been amended to record security interest created on all types of property viz. movable, immovable as well as intangible
- Insolvency and Bankruptcy Code 2016 has been passed in the Parliament
- site inspection for construction permits has been minimised by way of self- certification and introducing third party certification. During construction, submission of video clips by architects has been introduced in online Auto DCR system
- VAT Registration Certificate is issued within one working day (24 hours)
- environment clearance is not required for 36 white industries. Validity of environment clearance has been increased from five years to seven years. Industrial sheds and educational institutions have been exempted from Environmental clearance
- the competent authorities in the State Government have been delegated powers to issue permission for tree felling and commencement of work for a period of one year of linear projects without waiting for final approval under the Forest Conservation Act 1980
- mine prospecting projects have been exempted from the requirement of compensatory afforestation and Forest Rights Act 2006 (FRA) certificate for grant of forest clearance. Also, no site inspection is required for projects on forest land for less than 100 hectares for construction of new roads/drilling of bore hole/sample collection pits

- no Objection Certificate/Consent to establish is not required for getting industrial electricity connection for setting up new industries and projects
- eBIZ Platform (Online Single Window):
 - one-stop access for investors to know more about investment opportunities and information on number of Licences/approvals required from Government agencies
 - user-friendly features such as payments through net-banking, credit & debit cards, status tracking, SMS alerts and help-desk support enabled
 - Composite Application Form and one-time payment designed for obtaining approvals from multiple ministries/departments and elimination of multiple visits to different agencies

Taxation

Corporate taxes

A non-resident can operate in India through the establishment of a branch office, project office or a liaison office. Alternatively, it may also incorporate an Indian company, either as a wholly owned subsidiary or as a joint venture company, in partnership with another resident or non-resident entity. The choice of the nature of entity in India would depend upon the commercial exigencies.

The rate of tax (excluding specified incomes chargeable at special rates) depends upon the taxable income of the entity, which is as follows:

- Indian company

Normal corporate taxes

Taxable Income	Rates (%)
Up to INR10 million (USD148,136 approx.)	30.90
Above INR10 million – Up to INR100 million (above USD148,136 to USD1,481,362 approx.)	33.06
Above INR100 million (above USD1,481,362 approx.)	34.61

Minimum Alternate Tax (MAT)

In the event a company's tax liability is less than 18.5 per cent of its 'book profits', then instead of paying corporate tax at the above rates, the company is required to pay MAT on the adjusted book profits (as prescribed) at the following tax rates:

Taxable Income	Rates (%)
Up to INR10 million (up to USD148,136 approx.)	19.06
Above INR10 million – Up to INR100 million (above USD148,136 to USD1,481,362)	20.39

approx.)	
Above INR100 million (above USD1,481,362 approx.)	21.34

Tax credit is available in respect of tax paid under MAT, for a period of 10 years.

Recently, there has been significant controversy on the applicability of MAT to FPIs, which had led to the Indian revenue authorities issuing tax notices to corporate FPIs, asking them to show cause as to why they ought not to be paying MAT on their book profit in India.

In order to address this issue, the Finance Act 2015 has amended the Income Tax Act 1961. By virtue of this amendment, the capital gains from transfer of securities and interest, accruing or arising to a foreign company will now be excluded from the chargeability of MAT, if tax payable on such income is less than 18.5 per cent. Further, expenditures, if any, debited to the profit and loss account, corresponding to such income shall also be added back to the book profit for the purpose of computation of MAT.

Dividend distribution tax (DDT)

A company is liable to pay DDT at 20.36 per cent on the amount of dividend declared, distributed or paid to its shareholders.

Branch Office/Project Office

A branch or a project office of the foreign company located in India is considered a permanent establishment in the country. Therefore, generally, the income attributable to the activities undertaken in India is taxable and the tax rates are as under:

Normal Corporate Tax

Taxable Income	Rates (%)
Up to INR10 million (up to USD148136)	41.20
Above INR10 million – Up to INR100 million (above USD148,136 to USD1,481,362 approx.)	42.02
Above INR100 million (above USD1,481,362 approx.)	43.26

MAT

Taxable Income	Rates (%)
Up to INR10 million (up to USD148,136 approx.)	19.06
Above INR10 million – Up to INR100 million (above USD148,136 to USD1,481,362 approx.)	19.44
Above INR100 million (above USD1,481,362 approx.)	20.01

Tax credit is available in respect of tax paid under MAT, for a period of 10 years.

Liaison Office

A liaison office is not permitted to carry on business activities in India. Thus, generally, the liaison office does not form a permanent establishment in India and accordingly, no taxable income can be attributed to the activities carried out in India. However, in case the liaison office carries on business activities and forms a permanent establishment in India, then the tax rates applicable to the branch/project office, would apply.

Corporate residency

The concept of corporate residency is essential for the purpose of taxation in India. A corporation registered in India is taxed on its global income. A corporation which is not registered in India is only taxed 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. However, the Indian government plans on introducing the concept of "Place of effective management" in order to tax companies which are registered outside India but have their place of effective management in India from April 2017.

Personal income-tax

Income-tax is levied on the following heads:

- income from business or profession
- income from house property
- income from salary
- income from capital gains
- income from other sources

The tax rates for individuals or Hindu undivided family or Association of Person or Body of Individuals or any other artificial juridical person for the period between April 2016 to March 2017 are as follows:

Taxable Income	Rate
Up to INR2,50,000 (USD3,705 approx.)	Nil
Rs.2,50,000 to Rs.5,00,000 (USD3,705 to USD7,409 approx.)	10% of the amount by which the total income exceeds Rs.2,50,000/-
Rs. 5,00,000 to Rs. 10,00,000 (USD7,409 to USD14,819 approx.)	Rs.25,000/- plus 20% of the amount by which the total income exceeds Rs.5,00,000/-
Above Rs.10,00,000 (USD14,819 approx.)	Rs.1,25,000/- plus 30% of the amount which the total income exceeds Rs.10,00,000/-

The tax rates for resident senior citizen (who is 60 years or more at any time during the previous year but less than 80 years on the last day of the previous year) for the period between April 2016 to March 2017 are as follows in the table over:

Taxable Income	Rate
Up to INR3,00,000 (USD4,446 approx.)	Nil
INR3,00,000 to INR5,00,000 (USD4,446 to USD7,409 approx.)	10% of the amount by which the total income exceeds Rs. 3,00,000/-
INR5,00,000 to INR10,00,000 (USD7,409 to USD14,819 approx.)	Rs. 20,000/- plus 20% of the amount by which the total income exceeds Rs.5,00,000/-
INR10,00,000 (USD14,819 approx.)	Rs. 1,20,000/- plus 30% of the amount by which the total income exceeds Rs.10,00,000/-

The tax rates for resident super senior citizen (who is 80 years or more at any time during the previous year) for the period April 2016 to March 2017 is as follows:

Taxable Income	Rate
Up to INR5,00,000 (USD7,409 approx.)	Nil
Rs.5,00,000 to Rs.10,00,000 (USD7,409 to USD14,819 approx.)	20% of the amount by which the total income exceeds Rs.5,00,000/-
Above Rs.10,00,000 (USD14,819 approx.)	30% of the amount by which the total income exceeds Rs.10,00,000/-

In addition to the above rates, the following additional taxes shall be imposed:

- **Surcharge:** The amount of income-tax shall be increased by a surcharge at the rate of 12 per cent of such tax, where total income exceeds INR1,00,00,000. However, the surcharge shall be subject to marginal relief (where income exceeds INR1,00,00,000, the total amount payable as income-tax and surcharge shall not exceed total amount payable as income-tax on total income of INR1,00,00,000 by more than the amount of income that exceeds INR1,00,00,000)
- **Education Cess(or levy):** The amount of income-tax and the applicable surcharge, shall be further increased by education cess calculated at the rate of two per cent of such income-tax and surcharge
- **Secondary and Higher Education Cess:** The amount of income-tax and the applicable surcharge, shall be further increased by secondary and higher education cess calculated at the rate of one per cent of such income-tax and surcharge

- **Rebate under Section 87A:** The rebate is available to a resident individual if his total income does not exceed Rs. 5,00,000. The amount of rebate shall be 100 per cent of income-tax or Rs. 2,000, whichever is less

A partnership firm is taxable at 30 per cent for the assessment year April 2016 to March 2017.

- **Surcharge:** The amount of income-tax shall be increased by a surcharge at the rate of 12 per cent of such tax, where total income exceeds INR1,00,00,000. However, the surcharge shall be subject to marginal relief (where income exceeds INR1,00,00,000, the total amount payable as income-tax and surcharge shall not exceed total amount payable as income-tax on total income of INR1,00,00,000 by more than the amount of income that exceeds INR1,00,00,000)

- **Education Cess:** The amount of income-tax and the applicable surcharge, shall be further increased by education cess calculated at the rate of 2 per cent of such income-tax and surcharge

- **Secondary and Higher Education Cess:** The amount of income-tax and the applicable surcharge, shall be further increased by secondary and higher education cess calculated at the rate of 1 per cent of such income-tax and surcharge

A domestic company is taxable at 30 per cent for the assessment year April 2016 to March 2017.

- **Surcharge:** The amount of income-tax shall be increased by a surcharge at the rate of seven per cent of such tax, where total income exceeds INR1,00,00,000 but not exceeding INR10,00,00,000 and at the rate of 12 per cent of such tax, where total income exceeds INR10,00,00,000. However, the surcharge shall be subject to marginal relief, which shall be as under:
 - where income exceeds INR1,00,00,000 but not exceeding INR10,00,00,000, the total amount payable as income-tax and surcharge shall not exceed total amount payable as income-tax on total income of INR1,00,00,000 by more than the amount of income that exceeds INR1,00,00,000
 - where income exceeds INR10,00,00,000, the total amount payable as income-tax and surcharge shall not exceed total amount payable as income-tax on total income of INR10,00,00,000 by more than the amount of income that exceeds INR10,00,00,000

- **Education Cess:** The amount of income-tax and the applicable surcharge, shall be further increased by education cess calculated at the rate of 2 per cent of such income-tax and surcharge

- **Secondary and Higher Education Cess:** The amount of income-tax and the applicable surcharge, shall be further increased by secondary and higher education cess calculated at the rate of 1 per cent of such income-tax and surcharge

- **Secondary and Higher Education Cess:** The amount of income-tax and the applicable surcharge, shall be further increased by

secondary and higher education cess calculated at the rate of 1 per cent of such income-tax and surcharge

A foreign company is taxable at the following rates for the assessment year April 2016 to March 2017.

Nature of Income	Tax Rate (%)
Royalty received from Government or an Indian concern in pursuance of an agreement made with the Indian concern after March 31, 1961, but before April 1, 1976, or fees for rendering technical services in pursuance of an agreement made after February 29, 1964 but before April 1, 1976, or fees for rendering technical services in pursuance of an agreement made after February 1964 but before April 1, 1976 and where such agreement has, in either case, been approved by the Central Government	50
Any other income	40

- **Surcharge:** The amount of income-tax shall be increased by a surcharge at the rate of 2 per cent of such tax, where total income exceeds INR1,00,00,000 but not exceeding INR10,00,00,000 and at the rate of five per cent of such tax, where total income exceeds INR10,00,00,000. However, the surcharge shall be subject to marginal relief, which shall be as under:
 - where income exceeds INR1,00,00,00,000 but not exceeding INR10,00,00,000, the total amount payable as income-tax and surcharge shall not exceed total amount payable as income-tax on total income of INR1,00,00,000 by more than the amount of income that exceeds INR1,00,00,000
 - where income exceeds INR10,00,00,000, the total amount payable as income-tax and surcharge shall not exceed total amount payable as income-tax on total income of INR1,00,00,000 by more than the amount of income that exceeds INR10,00,00,000
- **Education Cess:** The amount of income-tax and the applicable surcharge, shall be further increased by education cess calculated at the rate of 2 per cent of such income-tax and surcharge
- **Secondary and Higher Education Cess:** The amount of income-tax and the applicable surcharge, shall be further increased by secondary and higher education cess calculated at the rate of 1 per cent of such income-tax and surcharge

Capital gains tax

Capital gains earned on the sale of a capital asset are subject to capital gains tax. The capital gains are computed by reducing the cost of acquisition, cost of improvement and sale-related expenses from the sale consideration. The capital gains can

be classified into (a) short-term or (b) long-term, depending on the period of holding.

Nature of gains	Period of holding (listed securities, units of Unit Trust of India, units of an equity oriented fund or zero coupon bond)	Period of holding (in case of unlisted shares)	Period of holding (all other assets)
Long-Term	> 1 year	>2 years	> 3 years
Short-Term	≤1 year	≤ 2 years	≤ 3 years

In certain situations, the period of holding of a previous owner of the asset is counted for the purpose of ascertaining whether the capital asset is short-term/long-term. Further, in case of long-term capital gains, the cost of acquisition and cost of improvement is subject to indexation, which is the cost inflation multiplier prescribed for each year to increase the original cost of acquisition/cost of improvement for inflation, subject to the residential status of the seller and the nature of the asset being alienated. In case of long-term capital gains arising to a non-resident in respect of investment in convertible foreign exchange, the gains can be computed after taking into account the foreign exchange calculation as per the prescribed formula.

Tax incidence is generally higher in the case of short-term capital gains as compared to long-term capital gains.

Particulars	Listed Securities Rate of Tax (%)		Unlisted securities and assets other than Securities Rate of Tax (%)
	Where Securities Transaction Tax (STT) has been paid	Where STT has not been paid	
Long-Term Capital Gains	Exempt from tax	11.53	23.07
Short-Term Capital Gains	17.30	34.60	34.60

Non-resident company

Particulars	Listed Securities Rate of Tax (%)		Unlisted securities Rate of Tax (%)	Other Assets Rate of Tax (%)
	Where STT has been paid	Where STT has not been paid		
Long-Term Capital Gains	Exempt from tax	10.82	10.82	21.63

Particulars	Listed Securities Rate of Tax (%)		Unlisted securities Rate of Tax (%)	Other Assets Rate of Tax (%)
	Where STT has been paid	Where STT has not been paid		
Short-Term Capital Gains	16.22	43.26	43.26	43.26

In case the sale consideration is payable to a non-resident, then the buyer is required to withhold tax at the time of credit or payment, whichever is earlier. Further, the non-resident would be entitled to DTAA benefits, only if it obtains a tax residency certificate from its Government authorities and provides necessary documents prescribed under the Income Tax Act 1961.

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

Royalties and/or fees for technical services received by a foreign company (not having a permanent establishment in India) are liable to tax in India at the rate of 10 per cent. However, on account of surcharge and education cess, the expected tax rate would be 10.82 per cent, for income exceeding Rs. 100 million.

This tax is required to be withheld by the payer at the time of credit or payment, whichever is earlier. However, this rate is subject to any concessional rate available under any Double Taxation Avoidance Agreement (DTAA).

Repatriation of profits

To obtain this facility, the applicant is required to submit a certificate from a chartered accountant stating that taxes have been duly paid. Subsequently, the Income Tax department will issue a no-objection certificate.

Advance rulings

India has a body known as the Authority for Advanced Rulings (AAR). It is a body which determines tax liability in advance for non-residents and certain specified residents. The applicant can request AAR to pronounce an advance ruling in order to avoid unforeseen tax liability issues at a later stage. This ruling is binding on the relevant income tax authorities.

Double tax treaties

India has double tax avoidance agreements with over 90 countries around the world. Non-residents have a choice of being taxed either under the domestic law or under the double tax treaty.

Transfer pricing

Cross border transactions with 'associated enterprises' (AE) that fall within the ambit of Indian transfer pricing regulations shall have to be undertaken having regard to the Arm's Length Price (ALP). ALP means one price which is applied or

proposed to be applied in a transaction between persons other than AE, in uncontrolled conditions. Similarly, whether or not the transacting parties are treated as AE, shall have to be determined based on prescribed criteria, which include equity participation, control, economic dependence, etc. In case any international transaction is undertaken by the taxpayer without regard to the ALP, then the revenue authorities are empowered to make appropriate adjustments to the income/expenses declared by the taxpayer.

The transfer pricing regulations require maintenance of prescribed documentation on a contemporaneous basis by the person who has entered into international transaction(s). A transfer pricing report from an independent chartered accountant, providing the details of the transactions with the AE and the ALP, also has to be filed with the revenue authorities within the prescribed time limit. Failure to maintain the documentation or provide prescribed information to the revenue authorities or obtain the transfer pricing report, can attract penalties.

Safe harbour rules

To reduce the increasing number of transfer pricing audits and prolonged disputes, safe harbour rules have been recently introduced for determination of ALP in respect of specific international transactions. The ALP determined under the safe harbour rules would be accepted by the revenue authorities. The specific international transactions include the following:

- provision of software development services and information technology enabled services
- provision of knowledge process outsourcing services
- intra-group loans to wholly owned subsidiaries
- provision of corporate guarantee to wholly owned subsidiaries
- provision of contract R&D services, wholly or partly relating to software development or generic pharmaceutical drugs
- manufacture and export of core auto components

The notified safe harbour rules will be applicable for five years starting from financial year 2012-13. A taxpayer can opt for the safe harbour regime for a period of his choice, but not exceeding five years.

Indirect taxes

Excise duty

Excise duty is imposed on the manufacture of goods in India. The power to levy excise duty primarily remains with the Central Government, though the power to levy excise duty on alcoholic products has been conferred upon State Governments.

Excise duty may range between nil and 12.5 per cent depending upon the classification of the final dutiable goods manufactured.

Central excise duty is levied on the goods manufactured in India under the provisions of Central Excise Act 1944 and the Central Excise Tariff Act 1985.

Customs duty

Customs duty is imposed on the import and export of goods from India and is levied in terms of the Customs Act 1962 and Customs Tariff Act 1975 on the transaction value of goods unless otherwise specified.

Service tax

The service tax regime in India is governed by Finance Act 1994. Presently all services provided in the taxable territory (whole of India except Jammu and Kashmir) except those specified in the negative list or specifically exempt are subject to the levy of service tax.

The Government has also introduced Swachh Bharat Cess at the rate of 0.5 per cent and Krishi Kalyan Cess also at 0.5 per cent on the value of all taxable services.

Central sales tax (CST)

CST is levied on inter-state sales. The power to levy CST is conferred on the Central Government. The levy of CST is governed by the CST Act. The rate of CST is 2 per cent, subject to the production of statutory declaration forms. Where the statutory declaration forms are not produced, the rate of tax applicable in the state of origin of sale would apply.

Value added tax (VAT)

VAT is levied by states on the intra-state sale of goods. Every state has enacted its own VAT legislation to levy tax on such sales. VAT rates may range from nil to 20 per cent depending upon the nature of goods. However, most goods are levied with VAT at a revenue neutral rate of 12.5 per cent to 15 per cent.

Goods and services tax (GST)

GST has been proposed to replace multiple indirect taxes, currently in place, with a single unified system of tax. It purports to streamline the indirect tax regime by subsuming taxes like central excise duty, service tax, value added tax/sales tax and entry tax.

Workplace relations

General

India has numerous legislation governing workplace relations. They cover aspects such as minimum wage, payment of gratuity, industrial disputes, trade unions, prevention of sexual harassment etc.

Labour laws

The Indian Parliament as well as the legislature of the relevant State has the power to concurrently legislate on the subject of labour. Broadly, the key

labour legislations in India can be grouped as follows:

Group I

Laws to provide basic protection to industrial workers:

- Factories Act 1948
- Payment of Wages Act 1936
- Minimum Wages Act 1948
- Contract Labour Act 1970
- Employees Compensation Act 1923
- Fatal Accidents Act 1885

Group II

Laws for promoting industrial peace, harmony, conciliation, and adjudication of industrial disputes:

- Industrial Disputes Act 1948
- Industrial Employment (Standing Orders) Act 1946
- Trade Unions Act 1926

Group III

Laws providing social security and welfare of employees:

- Employees Provident Funds and Miscellaneous Provisions Act 1952
- Employees State Insurance Act 1948
- Payment of Gratuity Act 1972
- Payment of Bonus Act 1965
- Maternity Benefit Act 1961
- Sexual Harassment of Women at Workplace Act 2013

Group IV

General law:

- Constitutional provisions relating to fundamental rights enshrined in the Constitution of India
- Indian Contracts Act 1872

Group V

State laws:

- Shops and Establishments Acts in force in various States
- State amendments to Central laws and certain statutes that are State specific (and present only in some States) such as the Maharashtra Private Security Guards Act 1981

Dispute resolution

Courts

An elaborate and extensive judicial and quasi-judicial system exists in India with courts being the judicial authority, and regulators like SEBI (for the

securities market) being quasi-judicial authorities. A separate civil and criminal system exists in each State with the highest court for each State being the High Court. Appeals from the High Court's lie with the Supreme Court of India, which is the apex judicial authority in India.

Arbitration

Alternative methods of dispute resolution may be adopted by the parties to a contract. These may include resolution of disputes through appointment of mediators, conciliation or arbitration.

The Arbitration and Conciliation Act 1996 which is based on the UNCITRAL Model Law provides for arbitration and conciliation. This legislation brings Indian law in tune with international principles on arbitration as well as recognition of foreign arbitral awards.

If the seat of the arbitration is in India, the arbitral award is a domestic award and is directly enforceable in the same manner as a decree of a court. Therefore, only an execution proceeding needs to be initiated for the enforcement of such awards. Foreign awards under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and under the Geneva Protocol on Arbitration Clauses are also deemed to be decrees of a court, once an Indian court holds that they are enforceable in India under the provisions of the Arbitration and Conciliation Act 1996.

All other foreign awards which are not made in a convention country as provided above will be enforceable only through institution of a separate action before the relevant Indian court.

Choice of law

Indian courts generally recognise choice of law and jurisdiction clauses.

However, with regard to choice of law clauses, it must be noted that Indian courts can invalidate choice of law clauses if they perceive the same to be against the 'public policy' of India. If a foreign law is chosen only to evade mandatory provisions of Indian law, the same shall be invalidated on grounds of being opposed to public policy.

Also, it is a settled position that as a matter of Indian public policy, Indian nationals contracting between themselves are not permitted to contract out of the application of Indian law. This rule extends to even wholly owned subsidiaries of foreign companies incorporated in India. Further, parties entering into contracts with Indian companies enforceable under a foreign law must note that if an action is brought under such contract in an Indian court, foreign law will have to be pleaded like an ordinary fact and proved by experts.

With regard to choice of jurisdiction clauses, it must be noted that parties, by agreement, cannot confer jurisdiction on a court which otherwise does not have jurisdiction over the subject matter. Indian law differs from English law on this aspect, as an Indian court cannot assume jurisdiction merely on the basis of a contractual stipulation between the parties. However, if two or more courts have jurisdiction over the subject matter, an agreement between the parties that the disputes between them shall be subject to one of such courts shall be valid, as long as it does not amount to an absolute ouster of the jurisdiction of the civil courts. It has been held by Indian courts on several occasions that if jurisdiction has been conferred on a foreign court alone, Indian statutes and the jurisdiction of Indian courts shall, to that extent, be inapplicable. However, an Indian court may refuse to enforce a stipulation as to the choice of forum where it is of the opinion that such choice is oppressive, unfair or inequitable and does not bear any real or substantial connection to the subject matter of the dispute.

Annexure 1 (as of June 20, 2016)

Sector Number	Sector/Activity	FDI Cap/Equity (%)	Entry Route	Conditions
1.	Agriculture & Animal Husbandry	100	Automatic	The term “under controlled conditions” covers the following: <ul style="list-style-type: none"> ‘Cultivation under controlled conditions’ for the categories of floriculture, horticulture, cultivation of vegetables and mushrooms is the practice of cultivation wherein rainfall, temperature, solar radiation, air humidity and culture medium are controlled artificially. Control in these parameters may be effected through protected cultivation under green houses, net houses, poly houses or any other improved infrastructure facilities where micro-climatic conditions are regulated anthropogenically
	1.1 Floriculture, horticulture and cultivation of vegetables & mushrooms under controlled condition 1.2 Apiculture 1.3 Development and Production of seeds and planting material 1.4 Animal husbandry (including breeding of dogs), Pisciculture and Aquaculture 1.5 Services related to agro and allied sectors Note: Besides the above, FDI is not allowed in any other agricultural sector/activity.			
2.	Plantation Sector	100	Automatic	Prior approval of the State Government concerned is required in case of any future land use change.
	2.1 Tea Sector including tea plantations 2.2 Coffee Plantations 2.3 Rubber Plantations 2.4 Cardamom Plantations 2.5 Palm Oil Tree Plantations 2.6 Olive Oil Tree Plantations Note: Besides the above, FDI is not allowed in any other agricultural sector/activity			
3.	Mining and Petroleum & Natural Gas			<ul style="list-style-type: none"> FDI for separation of titanium bearing minerals & ores will be subject to the following additional conditions: <ul style="list-style-type: none"> value addition facilities are set up within India along with transfer of technology disposal of tailings during the mineral separation shall be carried out in accordance with regulations framed by the Atomic Energy Regulatory Board such as Atomic Energy (Radiation Protection) Rules 2004 and the Atomic Energy
	3.1 Mining and Exploration of metal and non-metal ores including diamond, gold, silver, and precious ores but excluding titanium bearing minerals and its ores	100	Automatic	
	3.2 Coal & Lignite 3.2.1 Coal & Lignite mining for captive consumption by power projects, iron & steel and cement units and other eligible activities permitted under and subject to the	100	Automatic	

Sector Number	Sector/Activity	FDI Cap/Equity (%)	Entry Route	Conditions
	provisions of Coal Mines (Nationalization) Act 1973. 3.2.2 Setting up coal processing plants like washeries subject to the condition that 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.			(Safe Disposal of Radioactive Wastes) Rules 1987 <ul style="list-style-type: none"> 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. Clarification: <ul style="list-style-type: none"> For titanium bearing ores such as Ilmenite, Leucosene and Rutile, manufacture of titanium dioxide pigment and titanium sponge constitutes value addition. Ilmenite can be processed to 'produce Synthetic Rutile or Titanium Slag as an intermediate value added product The objective is to ensure that the raw material available in the country is utilised for setting up downstream industries and the technology available internationally is also made available for setting up such industries within the country. Thus, if with the technology transfer, the objective of the FDI Policy can be achieved, the conditions prescribed at (i) (A) above shall be deemed to be fulfilled
	3.3 Mining and mineral separation of titanium bearing minerals and ores, its value addition and integrated activities 3.3.1 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	Government	
4.	Petroleum & Natural Gas			
	4.1 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, 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.	100	Automatic	-
	4.2 Petroleum refining by the Public Sector Undertakings (PSU), without any disinvestment or dilution of domestic equity in the existing PSUs.	49	Automatic	-

Sector Number	Sector/Activity	FDI Cap/Equity (%)	Entry Route	Conditions
5.	Manufacturing	-	Automatic	Subject to the provisions of the FDI policy, FDI in 'manufacturing' sector is under Automatic Route. Further, a manufacturer is permitted to sell its products manufactured in India through wholesale and/or retail, including through e-commerce without Government approval.
6.	Defence	100	Automatic Up to 49 per cent Above 49 per cent under Government route; wherever it is likely to result in access to modern technology or for other reasons to be recorded.	<ul style="list-style-type: none"> • Infusion of fresh FDI within the permitted automatic route level, in a company not seeking industrial Licence, resulting in change in the ownership pattern or transfer of stake by existing investor to new foreign investor, will require Government approval • Licence applications will be considered and licences given by the Department of Industrial Policy & Promotion, Ministry of Commerce & Industry, in consultation with Ministry of Defence and Ministry of External Affairs • FDI in the sector is subject to security clearance and guidelines of the Ministry of Defence • Investee company should be structured to be self-sufficient in areas of product design and development. The investee/joint venture company along with manufacturing facility, should also have maintenance and life cycle support facility of the product being manufactured in India
	6.1 Defence industry subject to Industrial Licence under the Industries (Development & Regulation) Act 1951; and manufacturing of arms and ammunition under the Arms Act 1959.			
7.	Broadcasting	100	Automatic	Infusion of fresh FDI, beyond 49 per cent in a company not seeking Licence/permission from sectoral Ministry, resulting in change in the ownership pattern or transfer of stake by existing investor to new foreign investor, will require Government approval.
	7.1 Broadcasting Carriage Services			
	7.1.1 (1) Teleports(setting up of up-linking HUBs/Teleports); (2) Direct to Home (DTH); (3) Cable Networks (Multi System operators (MSOs) operating at National or State or District level and undertaking upgradation of networks towards digitalisation and addressability); (4) Mobile TV; (5) Headend-in-the Sky Broadcasting Service (HITS)			
	7.1.2 Cable Networks (Other MSOs not undertaking upgradation of networks towards digitalisation and addressability and Local Cable Operators (LCOs))	100	Automatic	

Sector Number	Sector/Activity	FDI Cap/Equity (%)	Entry Route	Conditions
	7.2 Broadcasting Content Services			-
	7.2.1 Terrestrial Broadcasting FM (FM Radio), subject to such terms and conditions, as specified from time to time, by Ministry of Information & Broadcasting, for grant of permission for setting up of FM Radio stations.	49	Government	-
	7.2.2 Up-linking of 'News & Current Affairs' TV Channels	49	Government	-
	7.2.3 Up-linking of Non-'News & Current Affairs' TV Channels/Down-linking of TV channels.	100	Automatic	-
8.	Print Media			
	8.1 Publishing of newspaper and periodicals dealing with news and current affairs	26	Government	-
	8.2 Publications of Indian editions of foreign magazines dealing with news and current affairs	26	Government	<ul style="list-style-type: none"> • 'Magazine', for the purpose of these guidelines, will be defined as a periodical publication, brought out on non-daily basis, containing public news or comments on public news • FDI would also be 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
	8.3 Publishing/printing of scientific and technical magazines/specialty journals/ periodicals, subject to compliance with the legal framework as applicable and guidelines issued in this regard from time to time by Ministry of Information and Broadcasting	100	Government	-
	8.4 Publication of facsimile edition of foreign newspapers	100	Government	<ul style="list-style-type: none"> • 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 facsimile edition of foreign newspapers can be undertaken only by an entity incorporated or registered in India under the provisions of the Companies Act as applicable • Publication of facsimile edition of foreign newspaper 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

Sector Number	Sector/Activity	FDI Cap/Equity (%)	Entry Route	Conditions
				Information & Broadcasting on 31.3.2006, as amended from time to time
9.	Civil Aviation			<ul style="list-style-type: none"> • 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, as per the limits and entry routes mentioned above • Foreign airlines are also allowed to invest in the capital of Indian companies, operating scheduled and non-scheduled air transport services, up to the limit of 49 per cent of their paid-up capital. Such investment would be subject to the following conditions: <ul style="list-style-type: none"> - it would be made under the Government approval route - the 49 per cent limit will subsume FDI and FII/FPI investment - the investments so made would need to comply with the relevant regulations of SEBI, such as the Issue of Capital and Disclosure Requirements (ICDR) Regulations/Substantial Acquisition of Shares and Takeovers (SAST) Regulations, as well as other applicable rules and regulations • A Scheduled Operator's Permit can be granted only to a company: <ul style="list-style-type: none"> - that is registered and has its principal place of business within India - the Chairman and at least two-thirds of the Directors of which are citizens of India - the substantial ownership and effective control of which is vested in Indian nationals. • All foreign nationals likely to be associated with Indian scheduled and non-scheduled air transport services, as a result of such investment shall be cleared from security view point before deployment • All technical equipment that might be imported into India as a result of such investment shall require clearance from the relevant authority in the Ministry of Civil Aviation <p>Note: The FDI limits/entry routes, mentioned above, are applicable in the situation where there is no investment by foreign airlines. Further, the dispensation for NRIs regarding FDI will also continue in respect of</p>
	9.1 Airports			
	9.1.1 Greenfield Projects	100	Automatic	
	9.1.2 Existing Projects	100	Automatic	
	9.2 Air Transport Services			
	9.2.1.1 Scheduled Air Transport Service/Domestic Scheduled Passenger Airline 9.2.1.2 Regional Air Transport Service	100	Automatic route Up to 49 per cent Government above 49 per cent Automatic route Up to 100 per cent for NRIs	
	9.2.2 Non-Scheduled Air Transport Service	100	Automatic	
	9.2.3 Helicopter services/seaplane services requiring DGCA approval	100	Automatic	
	9.2.4 Other services under Civil Aviation sector			
	9.2.5 Ground Handling Services subject to sectoral regulations and security clearance	100	Automatic	
	9.2.6 Maintenance and Repair organisations; flying training institutes; and technical training institutions	100	Automatic	

Sector Number	Sector/Activity	FDI Cap/Equity (%)	Entry Route	Conditions
				the investment regime specified above. The policy mentioned above is not applicable to M/s Air India Limited.
10.	Construction Development: Townships, Housing Built-up Infrastructure			
	10.1 Construction-development projects (which would include development of townships, construction of residential/commercial premises, roads or bridges, hotels, resorts, hospitals, educational institutions, recreational facilities, city and regional level infrastructure, townships)	100	Automatic	<p>Each phase of the construction development project would be considered as a separate project for the purposes of FDI Policy. FDI will be subject to the following conditions:</p> <ul style="list-style-type: none"> • exit permitted on completion of the project or after development of trunk infrastructure • exit may be allowed subject to lock-in-period of three years, calculated with reference to each tranche of FDI. This restriction is not applicable in hotels & tourist resorts, hospitals, Special Economic Zones (SEZ), educational institutions, old age homes and investment by NRIs • transfer of equity in a construction company from one foreign entity to another foreign entity is permitted • compliance with extant construction standards, applicable clearances and laws • FDI is not permitted in an entity which is engaged or proposes to engage in real estate business, construction of farm houses and trading in transferable development rights
11.	Industrial Parks			
	11.1 Industrial Parks – new and existing	100	Automatic	
12.	Satellites – establishment and operation			
	12.1 Satellites – establishment and operation, subject to the sectoral guidelines of Department of Space/ISRO	100	Government	-
13.	Private Security Agencies			
	13.1 Private Security Agencies	74	Automatic up to 49 per cent Government route beyond 49 per cent and	FDI in Private Security Agencies is subject to compliance with Private Security Agencies (Regulation) (PSAR) Act 2005, as amended from time to time.

Sector Number	Sector/Activity	FDI Cap/Equity (%)	Entry Route	Conditions
			up to 74 per cent	
14.	Telecom Services			
	14.1 Telecom Services (including Telecom infrastructure Providers Category-1) All telecom services including Telecom Infrastructure Providers Category-I, viz. Basic, Cellular, United Access Services, Unified Licence (Access Services), Unified Licence, National/International Long Distance, Commercial V-Sat, Public Mobile Radio Trunked Services (PMRTS), Global Mobile Personal Communications Services (GMPCS), All types of ISP Licences, Voice Mail/Audiotex/UMS, Resale of IPLC, Mobile Number Portability Services, Infrastructure Provider Category-I (providing dark fibre, right of way, duct space, tower) except Other Service Providers.	100	Automatic up to 49 per cent Government route beyond 49 per cent	FDI in Telecom sector is subject to observance of Licencing and security conditions by Licensee as well as investors as notified by the Department of Telecommunications (DoT) from time to time, except "Other Service Providers", which are allowed 100 per cent FDI on the automatic route.
15.	Trading			Subject to provisions of the FDI Policy.
	15.1 Cash & Carry Wholesale Trading/Wholesale Trading (including sourcing from MSEs)	100	Automatic	-
	15.2 E-Commerce activities	100	Automatic	<p>Subject to provisions of FDI Policy, e-commerce entities would engage only in Business to Business (B2B) e-commerce and not in Business to Consumer (B2C) e-commerce.</p> <p>Guidelines for FDI in E-commerce sector:</p> <ul style="list-style-type: none"> • 100 per cent FDI under Automatic Route is permitted in marketplace model of e-commerce • FDI is not permitted in inventory based model of e-commerce <p>Other Conditions:</p> <ul style="list-style-type: none"> • digital & electronic network will include network of computers, television channels and any other internet application used in automated manner such as web pages, extranets, mobiles etc • marketplace e-commerce entity will be permitted to enter into transactions with sellers registered on its platform on B2B basis • E-commerce marketplace may provide support services to sellers in respect of warehousing, logistics, order fulfilment, call centre,

Sector Number	Sector/Activity	FDI Cap/Equity (%)	Entry Route	Conditions
				<p>payment collection and other services</p> <ul style="list-style-type: none"> • E-commerce entity providing a marketplace will not exercise ownership over the inventory i.e., goods purported to be sold. Such an ownership over the inventory will render the business into inventory based model • an e-commerce entity will not permit more than 25 per cent of the sales affected through its marketplace from one vendor or their group companies • in marketplace model goods/services made available for sale electronically on website should clearly provide name, address and other contact details of the seller. Post sales, delivery of goods to the customers and customer satisfaction will be responsibility of the seller • in marketplace model, payments for sale may be facilitated by the e-commerce entity in conformity with the guidelines of the Reserve Bank of India • in marketplace model, any warrantee/ guarantee of goods and services sold will be responsibility of the seller • E-commerce entities providing marketplace will not directly or indirectly influence the sale price of goods or services and shall maintain level playing field <p>Subject to the conditions of FDI policy on services sector and applicable laws/regulations, security and other conditions, sale of services through e-commerce will be under Automatic Route.</p>
	15.3 Single brand Retail	100	Automatic up to 49 per cent Government route beyond 49 per cent	<ul style="list-style-type: none"> • FDI in Single Brand product retail trading (SBPRT) is aimed at attracting investments in production and marketing, improving the availability of such goods for the consumer, encouraging increased sourcing of goods from India, and enhancing competitiveness of Indian enterprises through access to global designs, technologies and management practices. • FDI in SBPRT would be subject to the following conditions: <ul style="list-style-type: none"> - products to be sold should be of a 'Single Brand' only - products should be sold under the same brand internationally i.e., products should be sold under the same brand in one or more countries other than India - SBPRT would cover only products which are branded during

Sector Number	Sector/Activity	FDI Cap/Equity (%)	Entry Route	Conditions
				<p>manufacturing</p> <ul style="list-style-type: none"> - a non-resident entity or entities, whether owner of the brand or otherwise, shall be permitted to undertake SBPRT in the country for the specific brand, directly or through a legally tenable agreement with the brand owner for undertaking SBPRT. The onus for ensuring compliance with this condition will rest with the Indian entity carrying out SBPRT in India. The investing entity shall provide evidence to this effect at the time of seeking approval, including a copy of the Licencing/franchise/sub-licence agreement, specifically indicating compliance with the above condition. The requisite evidence should be filed with the RBI for the Automatic Route and Secretariat for Industrial Assistance (SIA) SIA/FIPB for cases involving approval - in respect of proposals involving FDI beyond 51 per cent, sourcing of 30 per cent of the value of goods purchased, will be done from India, preferably from MSMEs, village and cottage industries, artisans and craftsmen, in all sectors. The quantum of domestic sourcing will be self-certified by the company, to be subsequently checked, by statutory auditors, from the duly certified accounts which the company will be required to maintain. This procurement requirement would have to be met, in the first instance, as an average of five years' total value of the goods purchased, beginning 1st April of the year of the commencement of the business i.e., opening of the first store. Thereafter, it would have to be met on an annual basis. For the purpose of ascertaining the sourcing requirement, the relevant entity would be the company, incorporated in India, which is the recipient of FDI for the purpose of carrying out single-brand product retail trading subject to the conditions mentioned in this Para, a single brand retail trading entity operating through brick and mortar stores, is permitted to undertake retail trading through e-commerce • Application seeking permission of the Government for FDI exceeding 49 per cent in a company which proposes to undertake SBPRT in India would be made to the SIA in the Department of Industrial Policy & Promotion. The applications would specifically indicate the product/product categories which are proposed to be

Sector Number	Sector/Activity	FDI Cap/Equity (%)	Entry Route	Conditions
				<p>sold under a 'Single Brand'. Any addition to the product/product categories to be sold under 'Single Brand' would require a fresh approval of the Government. In case of FDI up to 49 per cent, the list of products/product categories proposed to be sold except food products would be provided to the RBI</p> <ul style="list-style-type: none"> • Applications would be processed in the Department of Industrial Policy & Promotion, to determine whether the proposed investment satisfies the notified guidelines, before being considered by the FIPB for Government approval • Sourcing norms will not be applicable up to three years from commencement of the business i.e., opening of the first store for entities undertaking single brand retail trading of products having 'state of art' and 'cutting-edge' technology and where local sourcing is not possible. Thereafter the sourcing norms will be applicable
	15.4 Multi brand Retail Trading	51	Government	<p>FDI in multi brand retail trading, in all products, will be permitted, subject to the following conditions:</p> <ul style="list-style-type: none"> • Fresh agricultural produce, including fruits, vegetables, flowers, grains, pulses, fresh poultry, fishery and meat products, may be unbranded • Minimum amount to be brought in, as FDI, by the foreign investor, would be US\$100 million • At least 50 per cent of total FDI brought in the first tranche of US\$100 million, shall be invested in 'back-end infrastructure' within three years, where 'back-end infrastructure' will include capital expenditure on all activities, excluding that on front-end units; for instance, back-end infrastructure will include investment made towards processing, manufacturing, distribution, design improvement, quality control, packaging, logistics, storage, warehouse, agriculture market produce infrastructure etc. Expenditure on land cost and rentals, if any, will not be counted for purposes of backend infrastructure. Subsequent investment in backend infrastructure would be made by the Multi Brand Retail Trade (MBRT) retailer as needed, depending upon its business requirements • At least 30 per cent of the value of procurement of manufactured/processed products purchased shall be sourced from Indian micro, small and medium industries, which have a total

Sector Number	Sector/Activity	FDI Cap/Equity (%)	Entry Route	Conditions
				<p>investment in plant & machinery not exceeding US\$ two million. This valuation refers to the value at the time of installation, without providing for depreciation. The 'small industry' status would be reckoned only at the time of first engagement with the retailer, and such industry shall continue to qualify as a 'small industry' for this purpose, even if it outgrows the said investment of US\$ two million during the course of its relationship with the said retailer. Sourcing from agricultural co-operatives and farmers co-operatives would also be considered in this category. The procurement requirement would have to be met, in the first instance, as an average of five years' total value of the manufactured/processed products purchased, beginning 1st April of the year during which the first tranche of FDI is received. Thereafter, it would have to be met on an annual basis</p> <ul style="list-style-type: none"> • Self-certification by the company, to ensure compliance of the conditions above, which could be cross-checked, as and when required. Accordingly, the investors shall maintain accounts, duly certified by statutory auditors • Retail sales outlets may be set up only in cities with a population of more than 10,00,000 as per 2011 Census or any other cities as per the decision of the respective State Governments, and may also cover an area of 10 kms around the municipal/ urban agglomeration limits of such cities; retail locations will be restricted to conforming areas as per the Master/Zonal Plans of the concerned cities and provision will be made for requisite facilities such as transport connectivity and parking • Government will have the first right to procurement of agricultural products • The above policy is an enabling policy only and the State Governments/Union Territories would be free to take their own decisions in regard to implementation of the policy. Therefore, retail sales outlets may be set up in those States/Union Territories which have agreed, or agree in future, to allow FDI in MBRT under this policy. Such agreement, in future, to permit establishment of retail outlets under this policy, would be conveyed to the Government of India through the Department of Industrial Policy & Promotion. The establishment of the retail sales outlets will be in compliance of applicable State/Union Territory laws/ regulations,

Sector Number	Sector/Activity	FDI Cap/Equity (%)	Entry Route	Conditions
				<p>such as the Shops and Establishments Act etc</p> <ul style="list-style-type: none"> • Retail trading, in any form, by means of e-commerce, would not be permissible, for companies with FDI, engaged in the activity of multi-brand retail trading • Applications would be processed in the Department of Industrial Policy & Promotion, to determine whether the proposed investment satisfies the notified guidelines, before being considered by the FIPB for Government approval
	15.5 Duty Free Shops	100 per cent	Automatic	<ul style="list-style-type: none"> • Duty Free Shops would mean shops set up in custom bonded area at International Airports/ International Seaports and Land Custom Stations where there is transit of international passengers • FDI in Duty Free Shops is subject to compliance of conditions stipulated under the Customs Act 1962 and other laws, rules and regulations • Duty Free Shop entity shall not engage into any retail trading activity in the Domestic Tariff Area of the country
	15.6 Food Products manufactured or produced in India	100	Government	<ul style="list-style-type: none"> • Trading permitted through e-commerce websites
16.	Railway			
	<p>16.1 Railway Infrastructure</p> <p>Construction, operation and maintenance of the following:</p> <ul style="list-style-type: none"> • Suburban corridor projects through PPP • High speed train projects • Dedicated freight lines • Rolling stock including train sets, and locomotives/coaches manufacturing and maintenance facilities • Railway Electrification • Signalling systems Freight terminals • Passenger terminals • Infrastructure in industrial park pertaining to railway line/sidings including electrified railway lines and connectivities to main railway line 	100	Automatic	<ul style="list-style-type: none"> • Foreign Direct Investment in the abovementioned activities open to private sector participation including FDI is subject to sectoral guidelines of Ministry of Railways • Proposals involving FDI beyond 49 per cent in sensitive areas from security point of view, will be brought by the Ministry of Railways before the Cabinet Committee on Security (CCS) for consideration on a case to case basis

Sector Number	Sector/Activity	FDI Cap/Equity (%)	Entry Route	Conditions
	<ul style="list-style-type: none"> Mass Rapid Transport Systems. 			
17.	Financial Services			FDI in other financial services, other than those indicated below, would require prior approval of the Government
	17.1 Asset Reconstruction Companies – It means a company registered with the Reserve Bank of India under Section Three of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act 2002 (SARFAESI Act)	100	Automatic	<ul style="list-style-type: none"> Persons resident outside India can invest in the capital of Asset Reconstruction Companies (ARCs) registered with RBI, up to 100 per cent on the Automatic Route Investment limit of a sponsor in the shareholding of an ARC will be governed by the provisions of Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act 2002, as amended from time to time. Similarly, investment by institutional/non-institutional investors will also be governed by the said Act as amended from time to time The total shareholding of an individual FII/FPI shall be below 10 per cent of the total paid-up capital FIIs / FPIs can invest in the Security Receipts (SRs) issued by ARCs registered with Reserve Bank of India. FIIs / FPIs may be allowed up to 100 per cent of each tranche in SRs issued by ARCs, subject to directions / guidelines of Reserve Bank of India All investments would be subject to provisions of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act 2002, as amended from time to time
18.	Banking – Private Sector			
	18.1 Banking – Private Sector	74	Automatic up to 49 per cent Government route beyond 49 per cent and up to 74 per cent	<ul style="list-style-type: none"> This 74 per cent limit will include investment under the PIS by FIIs/FPIs, NRIs and shares acquired prior to September 16, 2003 by erstwhile OCBs, and continue to include IPOs, Private placements, Global Depository Receipts/American Depository Receipts and acquisition of shares from existing shareholders The aggregate FDI in a private bank from all sources will be allowed up to a maximum of 74 per cent of the paid up capital of the Bank. At all times, at least 26 per cent of the paid up capital will have to be held by residents, except in regard to a wholly-owned subsidiary of a foreign bank The stipulations as above will be applicable to all investments in existing private sector banks also

Sector Number	Sector/Activity	FDI Cap/Equity (%)	Entry Route	Conditions
19.	Banking – Public Sector			
	19.1 Banking – Public Sector subject to Banking Companies (Acquisition & Transfer of Undertakings) Act 1970/80. The 20 per cent ceiling is also applicable to State Bank of India and its associate banks.	20	Government	-
20.	Credit Information Companies (CIC)			
	20.1 Credit Information Companies	100	Automatic	<ul style="list-style-type: none"> • FDI in Credit Information Companies is subject to the Credit Information Companies (Regulation) Act 2005 • FDI is permitted subject to regulatory clearance from RBI • Such FII/FPI investment would be permitted subject to the conditions that: <ul style="list-style-type: none"> - single entity should directly or indirectly hold below 10 per cent equity - any acquisition in excess of 1 per cent will have to be reported to RBI as a mandatory requirement - FIIs/FPIs investing in CICs shall not seek a representation on the Board of Directors based upon their shareholding
21.	Infrastructure Company in the Securities Market			
	21.1 Infrastructure companies in Securities Markets, namely, stock exchanges, commodity exchanges, depositories and clearing corporations, in compliance with SEBI Regulations	49	Automatic	<ul style="list-style-type: none"> • FII/FPI can invest only through purchases in the secondary market • No non-resident investor/entity, including persons acting in concert, will hold more than five per cent of the equity in commodity exchanges • FDI in commodity exchanges will be subject to the guidelines of the Central Government/SEBI from time to time
22.	Insurance			
	22.1 <ul style="list-style-type: none"> • Insurance company • Insurance Brokers • Third Party Administrators • Surveyors and Loss Assessors • Other Insurance Intermediaries appointed under the 	49	Automatic	<ul style="list-style-type: none"> • No Indian Insurance company shall allow the aggregate holdings by way of total FDI in its equity shares by foreign investors, including portfolio investors, to exceed 49 per cent of the paid up equity capital of such Indian Insurance company • The FDI up to 49 per cent of the total paid-up equity of the Indian Insurance Company shall be allowed on the Automatic Route subject to approval/verification by the Insurance Regulatory and

Sector Number	Sector/Activity	FDI Cap/Equity (%)	Entry Route	Conditions
	provisions of Insurance Regulatory and Development Authority Act 1999			<p>Development Authority of India</p> <ul style="list-style-type: none"> • FDI in this sector shall be subject to compliance with the provisions of the Insurance Act 1938 and the condition that Companies receiving FDI shall obtain necessary Licence /approval from the IRDA of India for undertaking insurance and related activities • An Indian Insurance company shall ensure that its ownership and control remains at all times in the hands of resident Indian entities as determined by Department of Financial Services/ Insurance Regulatory and Development Authority of India as per the rules/regulation issued by them from time to time • Foreign portfolio investment in an Indian Insurance company shall be governed by the provisions contained in sub-regulations (2), (2A), (3) and (8) of Regulation 5 of FEMA Regulations, 2000 and provisions of the Securities and Exchange Board of India (Foreign Portfolio Investors) Regulations, 2014 • Any increase in FDI in an Indian Insurance company shall be in accordance with the pricing guidelines specified by Reserve Bank of India under the FEMA Regulations • The foreign equity investment cap of 49 per cent shall apply on the same terms as above to Insurance Brokers, Third Party Administrators, Surveyors and Loss Assessors and Other Insurance Intermediaries appointed under the provisions of the Insurance Regulatory and Development Authority Act 1999 • Provided that where an entity like a bank, whose primary business is outside the insurance area, is allowed by the Insurance Regulatory and Development Authority of India to function as an insurance intermediary, the foreign equity investment caps applicable in that sector shall continue to apply, subject to the condition that the revenues of such entities from their primary (i.e., non-insurance related) business must remain above 50 per cent of their total revenues in any financial year
23.	Pension Sector			
	23.1 Pension Sector	49	Automatic	<ul style="list-style-type: none"> • FDI in the Pension Funds is allowed as per the Pension Fund Regulatory and Development Authority (PFRDA) Act 2013 • FDI in Pension Funds will be subject to the condition that entities bringing in foreign equity investment as per Section 24 of the

Sector Number	Sector/Activity	FDI Cap/Equity (%)	Entry Route	Conditions
				<p>PFRDA Act shall obtain necessary registration from the Pension Fund Regulatory and Development Authority and comply with other requirements as per the PFRDA Act 2013 and rules and regulations framed under it for so participating in Pension Fund Management activities in India</p> <ul style="list-style-type: none"> Wherever such foreign equity investment involves control or ownership by the foreign investor or, transfer of control or ownership of an existing pension fund from resident Indian citizens and/ or Indian companies owned and controlled by resident Indian citizens to such foreign investing entities as a consequence of the investment, including through transfer of shares and or fresh issue of shares to Non-Resident entities through acquisition, amalgamation, merger etc., it would require Government approval in consultation with the Department of Financial Services, PFRDA and other entities concerned and the onus of compliance to these conditions will be on investee Indian pension fund company. The meaning of ownership and control would be as per the Foreign Direct Investment policy
24.	Power Exchanges			
	24.1 Power Exchanges registered under the Central Electricity Regulatory Commission (Power Market) Regulations, 2010	49	Automatic	<ul style="list-style-type: none"> FII/FPI purchases shall be restricted to secondary market only No non-resident investor/entity, including persons acting in concert, will hold more than five per cent of the equity in these companies The FDI would be in compliance with SEBI Regulations; other applicable laws/regulations; security and other conditions
25.	White Label ATM Operations (WLA)			
	25.1 White Label ATM Operations	100	Automatic	<ul style="list-style-type: none"> Any non-bank entity intending to set up WLAs should have a minimum net worth of Rs. 1,00,00,00,000 as per the latest financial year's audited balance sheet, which is to be maintained at all times In case the entity is also engaged in any other 18 NBFC activities, then the FDI in the company setting up WLA, shall also have to comply with the minimum capitalisation norms for FDIs in NBFC activities FDI in the WLAO will be subject to the specific criteria and guidelines issued by RBI vide Circular No. DPSS.CO.PD.No. 2298/02.10.002/2011-2012, as amended from time to time

Sector Number	Sector/Activity	FDI Cap/Equity (%)	Entry Route	Conditions
26.	Non-Banking Finance Companies (NBFC)			
	<p>26.1 FDI in NBFC is allowed under the Automatic Route in only the following activities:</p> <ul style="list-style-type: none"> • Merchant Banking • Under Writing • Portfolio Management Services • Investment Advisory Services • Financial Consultancy • Stock Broking • Asset Management • Venture Capital • Custodian Services • Factoring • Credit Rating Agencies • Leasing & Finance • Housing Finance • Forex Broking • Credit Card Business • Money Changing Business • Micro Credit • Rural Credit 	100	Automatic	<p>Investment would be subject to the following minimum capitalisation norms:</p> <ul style="list-style-type: none"> • US\$0.5 million for foreign capital up to 51 per cent to be brought upfront • US five million for foreign capital more than 51 per cent and up to 75 per cent to be brought upfront • US\$50 million for foreign capital more than 75 per cent out of which US\$7.5 million to be brought upfront and the balance in 24 months • NBFCs (i) having FDI more than 75 per cent and up to 100 per cent, and (ii) 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. The minimum capitalisation condition shall not apply to downstream subsidiaries • Joint Venture operating NBFCs that have 75 per cent or less than 75 per cent FDI can also set up subsidiaries for undertaking other NBFC activities, subject to the subsidiaries also complying with the applicable minimum capitalisation norm • Non- Fund based activities: US\$0.5 million to be brought upfront for all permitted non-fund based NBFCs irrespective of the level of FDI subject to the condition that it would not be permissible for such a company to set up any subsidiary for any other activity, nor can it participate in any equity of an NBFC holding/operating company. <p>Note: The following activities would be classified as Non-Fund Based activities:</p> <ul style="list-style-type: none"> • Investment Advisory Services • Financial Consultancy • Forex Broking • Money Changing Business • Credit Rating Agencies <p>This will be subject to compliance with the guidelines of RBI.</p>

Sector Number	Sector/Activity	FDI Cap/Equity (%)	Entry Route	Conditions
				<p>Note:</p> <ul style="list-style-type: none"> • Card business includes issuance, sales, marketing & design of various payment products such as credit cards, charge cards, debit cards, stored value cards, smart card, value added cards etc • Leasing & Finance covers only financial leases and not operating leases. FDI in operating leases is permitted up to 100 per cent on the Automatic Route • The NBFC will have to comply with the guidelines of the relevant regulator/s, as applicable
27.	Pharmaceuticals			<ul style="list-style-type: none"> • 'Non-compete' clause would not be allowed except in special circumstances with the approval of the Foreign Investment Promotion Board • The prospective investor and the prospective investee are required to provide a certificate along with the FIPB application • Government may incorporate appropriate conditions for FDI in brownfield cases, at the time of granting approval <p>Note: FDI up to 100 per cent, under the Automatic Route is permitted for manufacturing of medical devices. The above mentioned conditions will, therefore, not be applicable to greenfield as well as brownfield projects of this industry.</p>
	27.1 Greenfield	100	Automatic	
	27.2 Brownfield	100	Automatic up to 74 per cent Government route beyond 74 per cent	

Disclaimer: It may be noted that the above description of relevant statutes is merely illustrative and is limited to the Central statutes. Depending on the precise business model being envisaged, a comprehensive analysis of the applicable statutory provisions of Central, State and local laws could be undertaken.

Indonesia

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Indonesia

Indonesian regulation and law may appear mercurial but many foreign investors feel the opportunities and rewards offered by Indonesia outweigh the country's characteristic uncertainty. The Indonesian economy enjoys strong, consistent growth and the government recognises that foreign investment and know-how are instrumental not only in maintaining that growth but in ensuring that the Indonesian economy moves up (or at least expands across) the value chain. Certain trends can be discerned: during times of strong economic growth, the legal limits on foreign ownership take a more restrictive footing, whereas when growth flags the foreign ownership limits are often relaxed. Similarly, as Indonesia develops more generally, economic activity that can be undertaken by domestic small and medium enterprises increasingly is limited for foreign investors whereas the opportunities for large scale investment (notably physical infrastructure) increase. In all this, Indonesia's rich natural resources, large human resource pool and strategic geographical position offer a constant which draws foreign investors.

Visas and work permits

In 2016, the Government of Indonesia (GOI) removed visa requirements for foreigners from 169 countries who plan to stay in Indonesia for less than 30 days, provided their visit is not for business purposes.

For a slightly longer stay in Indonesia, visitors can apply for a visitor visa (*visa kunjungan*), which is valid for 60 days. And to stay in Indonesia even longer, a visitor can apply for a limited stay visa (*visa tinggal terbatas*) and limited stay permit card (*kartu izin tinggal terbatas*) for various purposes, which may include working, establishing a foreign investment company, or studying. A limited stay permit is usually valid for up to 12 months and can then be renewed.

Prior to employing a foreigner, an Indonesian employer is required to obtain approvals in the form of a Foreign Worker Utilisation Plan (*Rencana Penggunaan Tenaga Kerja Asing* or **RPTKA**) and Foreign Worker Utilisation Permit (*Izin Mempekerjakan Tenaga Kerja Asing* or **IMTA**). The RPTKA and IMTA can be used for temporary work, urgent and emergency work, impresario work, work in a special economic and free trade zone, among others.

Visas, immigration affairs and work permits are currently regulated by the Directorate General of Immigration (*Direktorat Jenderal Imigrasi*), which is part of the Ministry of Law and Human Rights (*Kementerian Hukum dan Hak Asasi Manusia* or **MOLHR**).

Business entities

General

Indonesia allows several types of business entity for foreign investors wishing to develop their business in Indonesia. The most common is to establishing a

limited liability foreign investment company in Indonesia. Other options include:

- foreign company representative office
- foreign company trade representative
- foreign construction service business entity
- branch of foreign company
- foundation (*yayasan*)

Limited liability foreign investment company

A limited liability foreign investment company (*Perseroan Terbatas Penanaman Modal Asing* or **PT PMA**) is the only form of company allowed for foreign investors. The other forms of companies recognised by law but not permitted for foreign investors are ordinary Indonesian companies (*Perseroan Terbatas Biasa*) and domestic capital investment companies (*Perseroan Terbatas Penanaman Modal Dalam Negeri*).

As a company, a PT PMA is subject to all rules and regulations issued by the MOLHR and the industry-specific ministry, as well as by the Investment Coordinating Board (*Badan Koordinasi Penanaman Modal* or **BKPM**). To establish a PT PMA, a foreign company must fulfil several requirements:

- comply with the restriction on foreign share ownership set out in Government Regulation No. 44 of 2016 regarding List of Businesses Closed and Open with Conditions to Investment (**2016 Negative List**)
- comply with a minimum capital requirement of IDR 10 billion, with minimum issued and paid-up capital of IDR2.5 billion
- obtain from BKPM: (i) an investment principle licence, being the initial government approval for foreign investors before they invest in Indonesia; and (ii) an investment business licence, being a permanent licence once the company is ready to operate commercially

Foreign company representative office

A Foreign Company Representative Office (*Kantor Perwakilan Perusahaan Asing* or **KPPA**) may be established by a foreign entity that does not intend to conduct commercial business in Indonesia or is still preparing to establish an Indonesian legal entity. The activities of a KPPA are limited to coordinating, liaising, managing and supervising functions related to the principal foreign company's interests in Indonesia. Furthermore, a KPPA is also prohibited from generating any revenues, directly entering into a contract or transaction for business purposes or, engaging in the management of a company.

A KPPA must be located in a provincial capital and domiciled in an office building. A licence from BKPM is required to establish a KPPA. Any foreign workers employed by the KPPA must comply with the foreign worker utilisation requirements.

Foreign trading company representative office

A foreign trading company wishing to enter the Indonesian market without establishing a local business entity can instead establish a Foreign Trading Company Representative Office (*Kantor Perwakilan Perusahaan Perdagangan Asing* or **KP3A**). The KP3A may be a sales, manufacturing or purchasing agent. It can:

- introduce, promote and market the goods produced by a parent company, and provide information, or directions for the use and import of goods to companies and users in Indonesia
- conduct market research and monitoring in Indonesia of the domestic sale of goods produced by the parent company
- conduct market research on the items required by the companies/users in Indonesia as well as providing information on the terms for the export of goods to companies in Indonesia
- enter into contracts for and on behalf of a company in Indonesia that is appointed by the parent company in Indonesia to export goods

A KP3A can be established after obtaining a licence from BKPM. It must be domiciled in the capital of an Indonesian province or regency/city. The application to obtain the licence must go through BKPM's website and meet all the required document.

Foreign construction services business entity

Construction services companies classified as large scale can establish a Foreign Construction Service Business Entity (*Badan Usaha Jasa Konstruksi Asing* or **BUJKA**). Cooperation with a 100 per cent Indonesian-owned construction services business is required in the procurement, performance and completion of construction work. A BUJKA is required to perform high-risk, hi-tech construction work with a value of at least IDR 100 billion for construction work or IDR 10 billion for planning and supervisory work.

The foreign construction company should apply to BKPM for a BUJKA licence, using BKPM's online service. The BUJKA must undertake a community social responsibility program annually and transfer knowledge and technology to Indonesians.

Branch of a foreign company

In Indonesia, only banks and oil and gas companies have established branches of foreign companies. Under a banking bill still being deliberated, the branch office of a foreign bank must be in the form of limited liability company. Indonesia's Financial Services Authority (*Otoritas Jasa Keuangan* or **OJK**) has stated that it will not allow establishment of further foreign bank branch offices, and the OJK is actively encouraging existing branches of foreign banks to establish limited liability companies instead.

Foundations

Another form of business entity that foreign investors can establish is a foundation (*yayasan*). As a non-profit entity, a foundation can only be established for social, religious and humanitarian purposes. A foundation established by a foreign party must have initial assets of at least IDR 100 million.

Business environment

Financial services

The financial services industry in Indonesia has been regulated by the OJK since 2013. This industry covers:

- banks
- capital markets
- financing companies
- micro-finance companies
- venture capitalists
- insurance companies;
- pension funds
- sharia business

OJK's authority in the banking sector is limited to micro-prudential regulation and supervision of a bank's institutional, soundness and prudence. Indonesia's central bank – Bank Indonesia – retains authority over macro-prudential activities of banks.

Anti-monopoly and unfair business competition law

Indonesia's main anti-monopoly and unfair business competition legislation is Law No. 5 of 1999 (**Competition Law**). While a new bill has been proposed, no new law has yet been enacted.

The Competition Law prohibits certain types of agreement and practices. These include, among others, oligopoly, price fixing, determination of a distribution area, monopoly, cartel, and trust. Even if an agreement or practice is declared prohibited under the Competition Law, it is the sole responsibility of the Business Competition Supervisory Commission (*Komisi Pengawas Persaingan Usaha* or **KPPU**) to determine whether this will potentially result in monopoly practices and unfair business competition. The Competition Law also regulates on abuse of a dominant position, i.e., where one business actor or group of business actors controls more than 50 per cent of the relevant market, or two or more business actors or groups together control 75 per cent of the relevant market.

The powers and duties of the KPPU are to:
(i) conduct investigations and its own proceedings regarding any alleged cases of competition; (ii) determine losses suffered by business actors and society as a result of monopolistic practices and unfair business competition; and (iii) impose administrative sanctions on business actors that violate the Competition Law.

In addition to the administrative sanctions available to the KPPU (including a fine ranging from IDR 1 billion to IDR 25 billion), a district court may impose criminal and additional sanctions for violations of the Competition Law.

Consumer protection

Consumer protection in Indonesia is governed by Law No. 8 of 1999 on Consumer Protection (Consumer Protection Law), which is the legal basis for the rights and obligations of both consumers and business actors in Indonesia with respect to the sale of products and services. The GOI has established a Consumer Dispute Resolution Board (*Badan Penyelesaian Sengketa Konsumen*) to enforce the Consumer Protection Law and resolve consumer disputes outside a court of law.

In addition, the OJK has issued several regulations on consumer protection specifically for the financial services sector, and has also established a centre for consumer complaints and objections, and dispute resolution. Consumer protection principles under the OJK regime include transparency, fair and equal treatment, professionalism, and the confidentiality and security of consumer data and information.

A range of sanctions can be imposed for violations of the Consumer Protection Law:

- administrative sanctions, taking the form of compensation of up to IDR 200 million
- criminal sanctions, including up to five years in prison and a fine of up to IDR two billion; and
- additional sanctions, including revocation of the business licence and payment of compensation

Intellectual property rights

Intellectual property matters in Indonesia are administered by the Directorate General of Intellectual Property Rights (*Direktorat Jenderal Hak atas Kekayaan Intelektual*) under the MOLHR.

A new copyright law was issued in 2014. Law No. 28 of 2014 (**Copyright Law**) contains several new provisions, which are summarised below:

- the economic rights of an author or copyright holder include rights to: (a) publish a work; (b) reproduce a work; (c) translate the work; (d) adapt, arrange and transform the work; (e) distribute the work and copies thereof; (f) perform the work; (g) announce the work; (h) communicate the work; and (i) rent the work
- the moral rights of an author or copyright holder over the work include rights to: (a) be (or not to be) attributed to a work; (b) use their real name or an alias; (c) alter their work in line with moral and social values; (d) change the title and contents; and (e) preserve the integrity of the work. Moral rights can only be assigned if the author passes away and the recipient of the moral rights opts to either waive or decline to implement the moral rights

- the duration of copyright protection is extended to cover the author's lifetime plus 70 years for certain works, including books, pamphlets and other writing, music and songs, drama and musicals, artwork in paintings, drawings, carvings and sculptures, and architectural work
- an assignment of rights over works such as books, writings, songs and music where the duration of the assignment is not stated shall automatically revert to the original author after 25 years
- criminal sanctions for copyright infringement range from one to ten years' imprisonment and/or a fine of between IDR 100 million and IDR four billion

Electronic information and transactions

Indonesia has become known for its fast-growing e-commerce business. Following the issuance of an updated Negative Investment List in May 2016, an e-commerce business is now permitted to be 100 per cent foreign-owned where the investment value exceeds IDR 100 billion. Where the investment value is lower, foreign entities can only own up to 49 per cent of the shares.

Although foreign entities are being encouraged to invest in the e-commerce business in Indonesia, the Government has not yet issued clear implementing guidelines for Law No. 11 of 2008 on Electronic Information and Transactions or Law No. 7 of 2014 on Trading. It is anticipated that the implementing regulation for the e-commerce business will be issued by the end of 2016.

In relation to electronic information providers, Indonesia's Minister of Communications and Information Technology has announced that the Government plans to regulate foreign over-the-top service providers in Indonesia, such as Facebook and twitter. In the announcement, the Minister told foreign over-the-top service providers to be prepared to conduct content filtering and censorship, use an Indonesian entity for their national payment gateway, and use an Indonesian internet protocol number. They will also be required to create a permanent establishment in Indonesia. To follow up this announcement, the Minister is expected to issue a new regulation on over-the-top service providers by the end of 2016.

Environment

The Ministry for the Environment and Forestry is authorised to enact regulations and guidelines on environmental issues such as pollution, natural resources, and waste. In 2012, to implement Law No. 32 of 2009 regarding Environmental Protection and Management, the GOI issued a regulation requiring all parties engaged in business to conduct an environmental impact analysis (*Analisis Mengenai Dampak Lingkungan*) or undertake environmental management and monitoring efforts (*Usaha Pengelolaan Lingkungan Hidup dan Upaya Pemantauan Lingkungan*) to obtain an environmental license.

In 2013, the Minister for the Environment and Forestry issued a regulation requiring an environmental audit of any business or activity considered to be high risk and/or where there is evidence of non-compliance.

Fund management

Regulatory bodies

Indonesia's regulator of the financial services industry (including fund management) is the OJK.

Licensing of fund operator

A person or entity intending to carry out activities in the financial services sector will generally be required to obtain an approval and licence from the OJK, whose licensing authority covers fund operator activities such as:

- registration and marketing of financial products
- acting as a mutual fund agent
- acting as an investment manager, investment advisor or investment fund sales agent
- acting as a custodian bank

Registration of fund

Before an investment fund can be offered and marketed to the public, it must first be approved by and registered with the OJK. The OJK requires various supporting documents to be submitted when registering a fund, depending on the type of fund. The required documents will generally include a registration statement, prospectus, marketing and operational plan for the fund.

Registration of fund operator

A fund operator must be an Indonesian limited liability company that has been approved by the OJK as an investment manager. There are three key requirements to fulfil:

- the fund operator's shareholders and controllers must fulfil the OJK's requirements on integrity and financial soundness
- at least two directors and two commissioners must be domiciled in Indonesia
- directors and commissioners must comply with the requirements on integrity and competency, as evidenced by their experience

Fund disclosure document

The fund must be offered to public investors through a prospectus or disclosure document which contains material information regarding the fund. The prospectus must be in the form regulated by the OJK. Prior to public announcement of the prospectus, the fund operator must report to OJK and provide a copy of the prospectus to the Indonesian Stock Exchange.

Operator compliance obligations

Prior to any transaction with its clients, a fund operator must disclose in writing any conflict of interest, which must be recorded and documented.

The fund operator must arrange and implement written policies and procedures on conflicts of interest.

A fund operator must make and maintain full documentation and records on its fund management. These records must include information on clients' account records and all transactions performed as fund operator.

A fund operator must also arrange and provide written policies and procedures on, among other things:

- research and analysis in decision making
- fair sale and purchase allocations for each client
- confidentiality of client data and information.

These policies and procedures must be reported to OJK

Market misconduct rules

Rules relating to market misconduct in Indonesia cover:

- misleading representations regarding material facts
- market manipulation
- insider trading
- deceptive acts

Foreign firms

Foreign firms cannot act as fund operators in Indonesia.

Fuel regulation

Regulatory bodies

Fuel supply and distribution are regulated by the Ministry of Energy and Mineral Resources (**MEMR**) and the Regulatory Agency for Downstream Oil and Natural Gas (Badan Pengatur Hilir Minyak dan Gas Bumi – BPH Migas). Fuel imports are regulated by the Ministry of Trade (**MOT**).

Licensing of fuel importers

Indonesia limits the types of fuel that can be imported and only allows imports when they are needed to meet domestic demand. The various types of fuel that can be imported include:

- fuel with RON > 97
- fuel with RON 90 – 97
- fuel with RON of < 90
- aviation gasoline
- aviation turbine
- diesel fuel
- diesel oil
- fuel oil
- kerosene

Only a direct user or an oil company that is an Indonesian legal entity may import fuel. The Indonesian oil company must be a company engaging in the downstream oil and gas business and hold a commercial business licence issued by the MEMR. The direct user may be any business entity that imports fuel for its own use, and not for commercial purposes.

The fuel importer must obtain a registered importer certificate and import approval issued by the MOT after first obtaining a recommendation from the MEMR.

Licensing of petrol stations

Petrol stations in Indonesia must be established by an Indonesian company (which may be a foreign-owned investment company). Licences to open petrol stations are issued by the regional government.

A company wishing to distribute and sell fuel must also obtain a wholesale commercial business licence from the MEMR.

Foreign investment policy

General

Recent government policies and regulations have strongly supported investment growth in Indonesia. The 2016 Negative Investment List increased the number of business fields fully open to investment, and raised maximum foreign ownership levels in other fields.

Simplified bureaucracy and licensing procedures for investments are expected to encourage prospective investors in Indonesia. Most licensing processes at ministries and other government agencies now benefit from a "One-Stop-Service" (*Pelayanan Terpadu Satu Pintu*) at the BKPM office. Some licences can now also be applied for and obtained online through government websites.

Foreign investment law

The prevailing law on investment in Indonesia is Law No. 25 of 2007 (**Investment Law**). As the government agency authorised to implement the Investment Law, BKPM has issued several regulations and guidelines setting out procedures and requirements for obtaining the licences required for investment.

BKPM regulates that two licences are required to establish an Indonesian legal entity with foreign investment (**PT PMA**):

- principle licence, being the government approval to establish the PT PMA
- business licence, being approval for the PT PMA to commence operations

These licences from BKPM can now be applied for and obtained online through BKPM's website. BKPM has also provided an online platform for companies to store their licences and corporate documents. The digitation of licensing processes is one of several BKPM and GOI programs to reduce bureaucratic hurdles.

A further improvement is a "3-Hour Licensing Service" policy which, as the name suggests, enables foreign investors to obtain their investment licences in three hours. This facility is made available to foreign companies intending to establish Indonesian entities with investments of at least IDR 100 billion or that will employ at least 1,000 employees.

Additionally, in operating its business, a PT PMA can make use of certain facilities for its business, including taxation facilities, industry incentives, and free trade areas.

Restrictions on investment

The 2016 Negative List significantly improves foreign investment opportunity in several sectors.

- 45 business fields are now open for investment and can be fully owned by foreign entities, including the film industry, e-commerce with a minimum investment of IDR 100 billion, toll road operations, and healthcare product manufacturers.
- maximum foreign ownership has increased in 44 business fields, including trading, storage and distribution
- the requirements and recommendations needed in several business sectors have been simplified, including the plantation and seeding businesses

The 2016 Negative List also protects micro, small and medium Indonesian enterprises and cooperatives (**MSMEs**) and simplifies several lines of business previously categorised as "open with conditions".

Nominee arrangements

Prior to the issuance of the Investment Law, it was common for foreign entities to establish Indonesian entities using a nominee arrangement. However, the Investment Law expressly prohibits nominee arrangements, whereby one party holds shares on behalf of another party.

Franchising in Indonesia

The Indonesian franchising business is governed by the Ministry of Trade. The general requirements for a franchisor to open an Indonesian franchisee include, among others: (a) the franchisor must have been in business for at least five years; (b) the franchisee must be profitable and operational; and (c) the franchisee must own at least one company to operate the franchise in Indonesia.

The Ministry of Trade also requires the franchisor to make certain disclosures prior to execution of the franchise agreement in order to obtain franchise registration certificate. Franchises that have obtained franchise registration certificates must also comply with the regulations on the installation of franchise logos and outlets.

In respect of franchises for the food and beverage business, in 2014 the Ministry of Trade issued a regulation requiring business owners to report to the

Ministry of Trade any change in the number of outlets. It also permitted a franchise with more than 250 outlets to continue to operate, even where a previous regulation had limited its operational period to five years.

Government initiatives and incentives

As mentioned, the GOI has recently been actively promoting investment in Indonesia. In that pursuit, the regulatory requirements in order to obtain licences have been simplified, and the licensing process has now been digitised. In 2013, “One-Stop-Services” (*Pelayanan Terpadu Satu Pintu*) were placed in BKPM offices and in all regencies and cities in Indonesia. Since investors no longer have to travel from one government agency to another, licensing procedures that used to take more than 14 days can now be processed in less than a week, or even in just a few hours if the “3-Hour Licensing Service” applies.

As well as simplifying the regulatory requirements and licensing procedures, the GOI has introduced several taxation incentives for foreign investment, including:

- duty-free machinery imports, with several requirements
- income tax allowances in 145 business fields, including power plants and the textile and food industries
- income tax holidays for pioneer industries, including sea transportation, ICT, and machine manufacturing

The GOI has offered incentives to investors from ASEAN countries by raising maximum foreign ownership limits for certain business fields. Globally, Indonesia has signed a number of bilateral investment agreements, and has been actively promoting inbound investment at international investment forums.

Taxation

Tax system

The tax system in Indonesia is a self-assessment system where taxpayers calculate, pay and report their own taxes. Taxation comes under the Ministry of Finance and its Directorate General of Taxation. Meanwhile, the Tax Court established back in 2002 is authorised to process and settle disputes. Both central and regional governments have the capacity to impose taxes, including tax on motor vehicles, restaurants, entertainment, and advertising.

Income tax

Indonesia’s 2008 income tax law covers individuals and their estates, corporations, and permanent establishments (*badan usaha tetap*). The rates vary for each type of taxpayer.

For corporations, a flat rate of 25 per cent applies to Indonesian companies and permanent establishments. Public companies that have listed at least 40 per cent of their shares will receive a tax rebate of five per cent.

For individuals, the income tax rate ranges from five per cent for up to IDR 50 million in annual income up to 30 per cent for annual income in excess of IDR 500 million. In 2015, the Government raised the non-taxable income (*penghasilan tidak kena pajak*) threshold to encourage spending.

In 2013, online retailing also became subject to income tax.

Withholding tax

Withholding is the system commonly used to collect income tax. Withholding tax is applied to, among others:

- imports of certain consumer end-products
- exports of coal, metal and non-metal minerals
- rental on land and buildings
- proceeds from the transfer of land and buildings
- fees for the performance, planning and supervision of construction work

Other taxes

Several other taxes are applicable in Indonesia:

- value added tax (**VAT**) at a flat rate of 10 per cent for all transfers of taxable goods and services
- luxury goods tax at rates ranging from 10 per cent to 125 per cent, for the import and delivery of luxury goods
- land and building tax at a rate determined annually by the regional government
- stamp duty at IDR 6000 or IDR 3000 for executed documents

Workplace relations

General

Indonesia regulates workplace relations under Law No. 13 of 2003 regarding Manpower (**Manpower Law**). The Manpower Law in general regulates the relationship between employer and employee, defining employees as all workers, regardless of their position or status, both managerial and non-managerial.

Minimum rates of pay

Minimum wages are determined by the governor of each province annually. In some provinces, there may also be a regency/city minimum wage and an industry sectoral wage, which is set by the governor of each province. The minimum wage therefore varies between regions.

Government Regulation No. 78 of 2015 regarding Wages covers the components of the wage and the procedure for its payment, providing clearer guidelines and a legal basis for wages.

Statutory contributions

With respect to statutory contributions, the Government has issued a regulation on social security which requires an employer to register all

employees in the manpower social security program (*BPJS Ketenagakerjaan*, previously known as *Jamsostek*) and a public health insurance scheme (*BPJS Kesehatan*). The social security program includes a pension guarantee, old-age benefit, workplace injury benefit, and death benefit, with a two per cent contribution of the gross salary coming from the employer and one per cent from the employee.

Another statutory contribution is the religious holiday allowance (*Tunjangan Hari Raya* or THR) which is commonly paid prior to the Muslim *Eid* or Christmas holiday. This allowance is equivalent to one month's salary for workers with at least 1 full year of employment and is prorated for those with less than a year's employment.

Leave entitlements

There are several types of paid leave, including annual leave, maternity leave, and religious leave. Annual leave is an entitlement of employees who have completed 12 months of continuous service, and they are entitled to up to 12 working days per year. Paid maternity leave is for a maximum of three months before or after giving birth. Religious leave can be taken by employees performing their religious obligations, such as a pilgrimage or *hajj*.

Expatriate employees

Prior to employing foreign workers, an employer is required to comply with several requirements under Ministry of Manpower regulations. Among the requirements is approval for the RPTKA and IMTA in line with the type of work being conducted in Indonesia (temporary, urgent, emergency, impresario services, etc.). The RPTKA and IMTA applications can now be processed online through the Ministry of Manpower website.

Termination of employment

The Manpower Law sets out the procedures and amount of compensation payable by employers upon termination of employment. Prior to the termination of employment, the Manpower Law requires that the employer endeavour to avoid terminating the employment relationship. Acceptable reasons for terminating employment under the Manpower Law are:

- employee resigns from workplace, whether voluntarily, at the end of the contract term, or after reaching the pension age
- employer makes changes to company status, embarks on efficiency measures, or suffers losses
- employee violates the employment agreement or faces criminal proceedings
- employee passes away
- employee is absent from work for five consecutive work days without reason; and/or
- employee commits serious misconduct, for example, immoral conduct or disclosure of confidential data

In principle, the Manpower Law requires an employer to obtain a decision from the Industrial Relations Court prior to terminating an employee. An Industrial Relations Court decision can only be sought once bipartite negotiations between employer and the employee or their union fail to achieve settlement. Exceptions to this requirement are when termination is due to the employee's resignation, when termination is during the probationary period, and when the employee reaches the retirement age.

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. Since no such treaties are currently in force, a judgment handed down by a foreign court against an Indonesian company would be enforceable against the company only to the extent that the company has assets within the jurisdiction where the judgment is granted.

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 shall govern the agreement
- disputes shall be referred exclusively to foreign arbitration and may not be referred to Indonesian courts for resolution

If an agreement is governed by Indonesian law, certain standard provisions should be included. For example, an express waiver of certain provisions of the Indonesian Civil Code is needed to prevent a court order being required for early termination of an agreement.

Indonesia's 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. In August 2015, in a case between Nine AM Ltd. against PT Bangun Karya Lestari, the Supreme Court affirmed that agreements which involve Indonesian parties must be executed in the Indonesian language. Failure to do this will cause the agreements to become null and void.

Foreign governing law

Indonesian courts are reluctant to apply a foreign law that governs an agreement being referred to Indonesian courts for resolution. Where a dispute concerns a foreign law governed contract, while the court will usually accept jurisdiction, the court will tend to apply Indonesian law to assess the contract. Accordingly, the use of an arbitration board for

settlement of disputes is preferable for a contract governed by a foreign law.

Foreign arbitration

While foreign court judgments are not enforceable in Indonesia, Indonesia is a contracting state to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

Accordingly, a foreign arbitral award handed down overseas may be enforced in Indonesia, provided that:

- the country in which the award is handed down is a contracting state of the New York Convention
- the dispute concerns matters which can be arbitrated under Indonesian law
- the award does not conflict with national security
- an execution order is obtained from appropriate officials

In practice, a District Court is more likely to issue an execution order for a foreign arbitral award if the agreement is governed by Indonesian law.

Issues with enforcement

Although Indonesian judges have been known to question foreign arbitral awards during the enforcement process, this is becoming less common. In a controversial case involving Karaha Bodas (a company controlled by American interests) and Pertamina (Indonesia's state oil and gas company), the Central Jakarta District Court annulled the decision of a Swiss arbitration panel which had ordered Pertamina to pay Karaha Bodas US\$261 million. This case came under public scrutiny since many practitioners believed the Central Jakarta District Court had negated the jurisdiction of the Swiss Federal Tribunal because of the seat of arbitration. The Supreme Court eventually overruled the District Court, declaring that the District Court had no jurisdiction to hear the case.

Enforcement of foreign arbitral awards in Indonesia has clearly improved in recent years. Nevertheless, in practice, unless a party has a strong objection, it is advisable for agreements involving Indonesian parties to be governed by Indonesian law. This will remove the potential for enforcement issues to arise down the road.

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Contributed by Anderson Mori & Tomotsune

Japan

Japan is an island nation, with a population of approximately 128 million. It has the third largest national GDP in the world, after the United States and China. The parliamentary democracy is headed by the 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.

Japan has an export-oriented economy, and its manufacturing reputation is especially strong in automobiles and electronics. Furthermore, Japan maintains an excellent service sector, including in relation to tourism.

Faced with a rapidly ageing population (it has the lowest birth rate in the OECD), as well as growing international competition, Japanese corporations have recently increased their overseas presence. This includes strategies such as acquisitions, as well as the shifting of production facilities overseas, with a particular emphasis on the South East Asian region.

Visas and work permits

This section is designed for non-Japanese employees and executives dispatched to Japan to perform their work roles and responsibilities. It provides information as to the relevant immigration procedures.

Temporary visitors' visa

Temporary visitors may only engage in "non-working activities" while in Japan. "Non-working activities" include activities commonly completed during business trips, including: attending meetings, conferences or training seminars, negotiating and signing business deals, performing business marketing services, and other similar duties.

If an individual is a citizen of a country that has a visa exemption agreement with Japan, the individual may not require a visa prior to his/her arrival to engage in non-work related activities in Japan. For example, citizens from the United States may stay in Japan for up to 90 days without a visa. Citizens from the United Kingdom, Ireland, Australia, and Germany (among others), may apply to extend their original 90 day permission by an additional 90 days. Citizens from visa-exempt countries will be screened for entry upon arrival in Japan and, in most cases, need not do anything prior to such entry.

For citizens from countries which do not have a visa exemption agreement with Japan, a Temporary Visitor's visa must be obtained from a diplomatic mission abroad near to their residence prior to their arrival in Japan.

The permitted period of stay for a non-exempt temporary visitor (either 15, 30, or 90 days) is determined by the diplomatic mission abroad, taking into account the individual's itinerary and purpose of visit to Japan.

Work visas

"Working activities" includes any employment in Japan or payment by a company for work performed in Japan, regardless of whether the payment is made within or from outside of Japan. For such activities, a work visa must be obtained prior to arrival in Japan. The application process should generally be started approximately three (3) months before entering Japan.

For non-Japanese citizens, securing permission to perform working activities in Japan is a several step process. It includes: (a) obtaining a Certificate of Eligibility (COE) from the Japanese Immigration authorities; and (b) applying for and receiving a visa from a Japanese diplomatic mission abroad. Together, these documents will be submitted to the Japanese immigration authorities upon arrival in Japan. Lastly, after arrival, the employee/executive must register their address in Japan with the relevant municipal hall/ward office if they were issued with an ID card called "Residence Card" from the Immigration authorities at the arrival airport.

Certificate of eligibility

To acquire a visa, the employee/executive must first apply for and receive a COE. COEs can only be processed within Japan at the Immigration Bureau of Japan. The immigration authorities must determine if the proposed work activity corresponds to the visa being sought.

There are several working statuses for which non-Japanese employees/executives frequently qualify. These include: Intra-Company Transferee; Engineer/Specialist in Humanities/International Services; and Business Manager. Recently, Highly-Skilled Professional visas (type (a) through (c)) have been introduced for foreign nationals with a high degree of education and experience. In order to obtain a Highly-Skilled Professional visa, the employee/executive must fill in a prescribed chart and score 70 or above. The Highly-Skilled Professional visa allows the employee/executive to engage in a broader range of business. Furthermore, under certain circumstances, they can bring their domestic helper to Japan. Moreover, the employee/executive may be eligible to be allowed to stay in Japan permanently, provided they satisfy certain requirements.

There is no COE application fee. The application procedure typically takes two to three months to complete. Once approved, the original COE should be sent to the individual through the Employer in Japan so that it can be presented in support of a work visa application.

Visa application

Once the COE has been issued, the employee/executive should visit a Japanese diplomatic mission abroad near their residence, and apply for the work visa. A visa is a recommendation for entry into Japan which certifies that the holder's passport is valid and that there are no impediments to allowing the holder to enter Japan within the scope of the visa. Diplomatic missions abroad

include Japanese Embassies and Japanese consulates located overseas.

After receiving the work visa back from the overseas diplomatic mission, the employee/executive must enter Japan with both the visa and the COE within three months. The issued visa itself is valid for three months, but they will be allowed to stay in Japan for either for a period of three months, one year, three years, or five years, depending on the description in their COE. A visa application accompanied by a COE typically takes two to seven business days to process. Some diplomatic missions may require visa fees, and some, such as those in China, may only accept visa applications submitted through accredited agencies. These agencies may request additional filing and processing fees.

Other visas

It is possible for the employee/executive's spouse and child/children to apply for a dependent visa through the employer in Japan or by the employee/executive as the guarantor if he/she is already staying in Japan under the work visa status. The necessary steps are the same as those required for a work visa.

If a non-Japanese citizen is married to a Japanese citizen and it is provable (e.g., via the family registry), he/she can apply for a visa as a spouse. This visa is issued based on the marriage, and will allow the holder to engage in any work activities in Japan. Furthermore, it is not necessary for the visa holder to inform the immigration authorities of any job changes.

Registration of address in Japan

Upon receipt of an ID card (**Residence Card**), the holder must register his/her address in Japan with the relevant municipal hall/ward office within 14 days from the date when a residence in Japan has been secured. The municipal hall/ward office will update the Residence Card and return it to its holder. The Residence Card must be carried at all times.

Re-entry permit

Foreign nationals who have a valid passport and Residence Card (showing their current visa status and their permitted period of stay) are allowed to depart and return to Japan without obtaining a re-entry permit from the immigration authorities. They must return to Japan within one year, or within the expiry date of the effective term of their Residence Card.

If the foreign national expects to return to Japan outside of the one-year period, he/she must obtain a re-entry permit in advance (even if it is within the expiry date of the effective term of their Residence Card).

Single entry permit: JPY 3,000

Multiple re-entry permit: JPY 6,000

Validity period: five years or end of current period, whichever is the shorter period.

The re-entry permit period of validity will generally coincide with that of the work visa.

Additional immigration procedures

Depending on the circumstances, foreign nationals with visas (not limited to work visas) may apply for an extension or a status change in Japan. A long-term visa holder's visa extension application is usually accepted three months prior to the expiration date.

It costs JPY 4,000 for an extension and a status change application, respectively.

Separately, foreign nationals must report to the relevant authorities within 14 days if any change occurs during their stay in Japan. Such changes include a change of employer (for a work visa holder) or divorce (for a spouse visa holder).

Assistance in immigration procedures

Although somewhat tedious and time consuming, the COE and work visa application process in Japan can be handled by the individual employee/executive together with the company in Japan at which he/she will work. Alternatively, a Japanese lawyer registered as an immigration expert with the Bar Association or a licensed Japanese immigration specialist can be engaged as an agent to prepare and file the necessary documents with the relevant immigration authorities on behalf of the applicant(s).

Business entities

General

A foreign company may conduct business activities via three main forms: (a) by establishing a branch office; (b) by incorporating a new company or acquiring shares or equity interests in an existing company; or (c) by forming a partnership (such as a limited liability partnership). In addition, a foreign company may open a representative office for the purpose of performing preparatory and ancillary activities such as a market research and collecting information before the commencement of continuous business activities in Japan.

Branch office

Pursuant to the Companies Act of Japan, when a foreign company intends to conduct continuous business activities in Japan, the company is required to: (a) specify its representatives in Japan (and at least one of whom must be domiciled in Japan, however does not need to be a Japanese national); and (b) register itself as a foreign company. Although foreign companies who wish to conduct a continuous business activity in Japan are not required to establish a branch office in Japan, in practice, they often do so in order to provide a base for their business activities. Such branch office must be registered with the local Legal Affairs Bureau.

A branch office has no independent legal personality and it is treated as a part of the foreign company. Accordingly, the foreign company will generally be directly liable for obligations that arise from the business activities of its branch office in Japan, and be subject to taxation in Japan on the income of its branch office.

Company

Under the Companies Act of Japan, there are two types of companies: a joint stock company (*kabushiki kaisha*; **KK**) or a membership company (*mochibun kaisha*). In a KK, all investors (shareholders) have indirect limited liabilities, i.e., they only bear the risk of their shares of the company decreasing in value. As for membership companies, there are three subsets: a general partnership company (*gomei kaisha*), a limited partnership company (*goshi kaisha*) and a limited liability company (*goshi kaisha*; **LLC**). The first two subsets are rarely used since they require that all or some investors assume direct unlimited liabilities instead of limited liabilities. In a LLC, all investors have indirect limited liabilities, however the internal matters of the LLC are mostly governed by the principles of a partnership (*kumiai*). Unlike United States LLCs, Japanese LLCs do not offer the advantage of pass-through taxation and are therefore subject to corporate income tax. While a KK is by far the most popular form of company in Japan, a LLC, which was relatively newly introduced by the Companies Act, has gradually become more popular because of the simplicity of its governance.

There is no minimum capital requirement for both Kks and LLCs, and therefore, they can be incorporated with at least one yen, and all shares/equities can be held by one or more shareholder(s)/equity holder(s), who can be either Japanese or a foreign national (corporation). Kks may be able to issue several classes of shares, while LLCs cannot. As for the company structure, the Companies Act requires that Kks must have at least a shareholders' meeting and director(s), one of whom may be appointed as a representative director to represent the company. A (representative) director may be either a Japanese national or a foreign national, and can either be a resident in Japan or a non-resident. Other bodies that may be established are: a board of directors; company auditor(s); a board of company auditors; accounting auditor(s); accounting advisor(s); and certain kinds of committees under the board of directors. In this sense, Kks have a great deal of flexibility in terms of their structures, and these structures must be set forth in the company's articles of incorporation. In a LLC, at least one of the members (equity holders) must be appointed as a managing member. In the event that such managing member is a corporation, an administrator (who is a natural person) is required to be appointed to act on behalf of such managing member. The incorporation of a KK or a LLC must be registered with the local Legal Affairs Bureau that has jurisdiction over its head office. Upon registration, the KK or the LLC is legally incorporated and can begin conducting business operations.

Partnership

It is also possible for a foreign company to conduct business activities in the form of a partnership (*kumiai*) or a limited liability partnership (**LLP**), instead of a company. These business types are characterised by the fact that the company's internal regulations are determined by the mutual agreement of the capital investors (partners). Furthermore, although the partnership itself is not obligated to pay tax, the distribution of profits to the

partners is subject to taxation (i.e., pass-through taxation).

Notifications to be filed at incorporation

In addition to the registration of incorporation with the Legal Affairs Bureau, the following notifications are generally required to be submitted at the time of incorporation:

After-the-fact report

In principle, when a foreign investor establishes a branch office, incorporates or acquires a Japanese company, the foreign investor is required to submit to the relevant government agencies, through the Bank of Japan, an after-the-fact report related to inward direct investment.

Tax, labour and other various regulations

A foreign company, which establishes a branch office or incorporates as a Japanese company, is required to submit certain documents to the relevant tax office. In the case of employing employees, certain documents and notifications may be required to be submitted to the Labour Standards Inspection Office (*rado kijun kantoku-sho*), the Public Employment Security Office (*kokyo shokugyo anteijo*) and other governmental agencies. Other permissions and notifications may also be required under laws which regulate the specific industry to which the company's business belongs.

Business environment

Intellectual property

The following paragraphs highlight certain intellectual property issues that are often of concern to foreign companies.

Trademarks

Foreign companies contemplating the possibility of conducting business in Japan should plan to register their important trademarks in Japan at the earliest possible time. This is because the availability of the trademarks can significantly impact their business in Japan. Furthermore, ill-intentioned parties will sometimes register trademarks of foreign companies that they believe may enter the Japanese market in the future, for reasons such as: 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 improper reasons.

A foreign company may submit an application to register a trademark in Japan, even if it does not have a subsidiary or other presence in Japan.

The Japan Patent Office (**JPO**) maintains an online trademark database, which the general public can access to confirm whether an application for a trademark has been made (and if so, whether it is registered). The online database, however, does not include the most recent filings. Some parts, but not all, of the database search pages are available in English. The website is accessible from the following URL: <https://www.j-platpat.inpit.go.jp/web/all/top/BTmTopEnglishPage>.

Trademark registrations are effective for 10 years and can be renewed thereafter for 10-year renewal

terms indefinitely. However, if a trademark is not used in Japan during any three-year period during the registration term (including renewal terms), it is subject to cancellation.

Trademarks can be registered prior to actual use of the trademark in Japan, so long as the trademark holder uses the trademark in Japan within three years from the date of registration. Japan currently utilises the Nice Classification system (an international classification of goods and services) for new applications, however older registrations may utilise the local Japanese classes that were used prior to Japan's adoption of the international classifications (entered into force in 1990).

Registered trademarks can consist of: written characters; a logo; a three-dimensional object (for example, a figurine that sometimes appears in front of restaurants); a movement (for example, a sequence of moving images appearing on TV advertisements); a position (for example, the position of lines or logos attached to the sides of athletic shoes); a colour (for example, a specific colour associated with a designer); a combination thereof; or a sound sequence (such as a jingle attached to TV advertisements). 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 in appearance, pronunciation, or meaning to another person's registered trademark that has an earlier application date with the same or similar designated goods or services. One potential issue is that often, foreign companies with English trademarks cannot foresee the possibility that although 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.

A Japanese trademark application can be filed through the Madrid System for the international registration of marks. If an international registration is granted, a corresponding national application will be deemed to have been filed. A relevant mark is nationally registered unless the JPO notifies a refusal of application within 12 months (this period can be prolonged by up to 18 months). International trademark registrations are effective for 10 years and can be renewed thereafter for 10-year renewal terms indefinitely.

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 ill-intentioned 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 having a residence in Japan and are not limited to Japan-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

Patented inventions are protected by the Patent Act. Patent applications are published 18 months after an 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, provided that the Japanese application asserting a priority claim is filed within one year of 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. A "national phase" is required to be initiated in Japan within 30 months of the filing of the international application.

Designs

Registered designs are protected by the Design Act. Design applications are not made public until the publication of design registrations in the design bulletin. Applicants may request that a design,

which is currently undergoing examination for registration, be kept secret from the public for no more than three years.

In addition, a design (related design) which is similar to another applicant's applied design (principal design) may be registered. Other than related design applications, a design which is similar to another applied design will be refused.

In May 2015 Japan adopted the Geneva Act of the Hague Agreement concerning the international registration of industrial designs, which allows for an international application to the JPO. If an international application is filed and internationally registered, the JPO shall examine it within 12 months and then register the applied design (or notify the applicant of its reasons for refusal). International registration dates (normally the same date as international filing dates) are deemed to be the national filing dates of the corresponding Japanese application. An applicant can maintain the priority date of international application with respect to Japanese prosecution by submitting a certificate of priority with the JPO. A request for keeping an applied design secret cannot be filed where a Japanese application is filed via international registration, since the international publication of such design has already been issued. Regarding related designs, international applications or Japanese design applications filed via international registration may be used as a basis of both principal designs and related designs.

Copyright

The significance of copyright has increased recently in Japan as the economy begins to reflect the growth of internet-based businesses. For example, uploading and downloading files could constitute copyright infringement, since they could be deemed to be a reproduction of works.

In addition, the judgment of the IP High Court dated 22 October 2014 concluded that a business operator who converted paper-based books to PDF files was a reproducer and responsible for copyright infringement, since such business operator controlled the process of the conversion and gained profit from such conversion. Since the scope of this judgment is not sufficiently certain, it is unclear whether this judgment will negatively affect internet-based businesses, especially cloud-related businesses.

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.

Competition Law

Overview

Japanese competition law regulations consist of both ex-ante and ex-post regulations. Merger control applies prior to the execution of a reportable transaction. On the other hand, other anti-competitive acts, i.e., cartels, private monopolisation and unfair trade practices, are subject to cease and desist orders, administrative monetary penalty payment orders, or criminal penalties after the implementation of such acts.

Merger control

The Act on Prohibition of Private Monopolisation and Maintenance of Fair Trade (Act No. 54 of 1947, as amended; the **AMA**) prohibits acts aimed at business combinations, such as share acquisitions, business acquisitions or mergers, in the event that such business combinations may substantially restrain competition in any relevant market.

Any company intending to execute any type of business combination has to notify the Japanese Fair Trade Commission (**JFTC**) prior to the execution of such business combination. Prior consultation with the JFTC before filing a notification is available and recommendable. If a notification is filed, the JFTC will examine if such business combination may substantially restrain competition in any relevant market. A Phase 1 examination takes 30 calendar days, during which time it is prohibited for a reporting company to execute such a business combination (**stand-still period**). A reporting company is able to submit a petition for a reduction of the stand-still period. At the end of the initial Phase One review period, the JFTC issues a notification of non-issuance of a cease and desist order (i.e., a clearance), or opens an in-depth Phase Two investigation, which lasts 90 days starting from a date determined by the JFTC. If the JFTC intends to proceed to Phase Two, the notifying company can abandon the notification and file it again after modifying the areas that the JFTC initially had a concern with (the so-called "pull and refile" practice).

Cartels

The AMA prohibits the act of deciding, maintaining or raising prices in cooperation with other companies, or the act of restraining reciprocally business activities of other companies based on an agreement of multiple companies, in the event that such act may substantially restrain competition in any relevant market.

If any company engages in such activity, such company may be subject to a cease and desist order and an administrative monetary penalty payment order (known as a "surcharge" in Japan). Furthermore, such company and/or its officers may be subject to criminal penalties.

Private monopolisation

The AMA prohibits the act of forcing others to exit from a relevant market or controlling others' activities in a relevant market, which may substantially restrain competition in any relevant market.

If any company engages in such activity, such company may be subject to a cease and desist order and a surcharge. In addition, such company and/or its officers may be subject to criminal penalties.

Unfair trade practices

The AMA prohibits specified unfair trade practices which may interfere with fair competition in a relevant market. Specified unfair trade practices consist of: (a) unreasonable refusals of transaction; (b) unreasonable price discriminations; (c) forced entrance into transactions; (d) transactions with unreasonable restraint conditions; (e) abuses of dominant position; and (f) interference with competitors.

Any company which has committed an act of concerted boycotting, unreasonable price discrimination, unreasonable resale price restraint, or abuse of dominant position may be subject to a cease and desist order and a surcharge. On the other hand, any company which has committed a different type of unfair trade practice may be subject only to a cease and desist order. In addition, in both cases, such company and/or its officers may be subject to criminal penalties.

Leniency programme

A company which notified a violation of the Anti-Monopoly Act of the JFTC may benefit from the Leniency Programme. The following discounts of the surcharge to be imposed by the JFTC are applicable in case leniency is granted by the JFTC.

1st reporter before the commencement of inspection	100% (exempt)
2nd reporter before the commencement of inspection	50% discount
3rd reporter before the commencement of inspection	30% discount
4th reporter before the commencement of inspection	30% discount
5th reporter before the commencement of inspection	30% discount
Reporters after the commencement of inspection	30% discount

Fund management

Types of investment funds

Investment funds may be formed using one of the following forms, which are subject to different regulatory frameworks:

Trust: A pool of assets for investment may be created by an agreement to create a trust between a settlor and a trustee. A trust for investment purposes may be divided into two types, namely: an investment trust, which is managed based on the instructions of the settlor; and an investment trust, which is managed based without the instructions of the settlor. The latter type of trust is managed by the trust bank and used for pension funds. The former type may also be used for pension funds and mutual funds. Securities investment trusts are

equivalent to mutual funds used in other jurisdictions. These funds are created as a trust by a settlor, which is an investment trust management company. The investment trust management company manages the assets of mutual funds to invest mainly in securities and distributes the trust beneficiary interests to investors.

Corporation: Stock corporations or other forms of corporations incorporated under the Companies Act are not suitable for investment funds because they are taxable entities. An investment corporation will be incorporated under the Act Concerning Investment Trusts and Investment Corporations (**ITIC Act**). For example, J-REITS, real estate investment trust listed on the Tokyo Stock Exchange, is in the form of an investment corporation.

Partnership: A pool of assets for investments may also be formed as a partnership. The following types of partnerships are used for such purposes: a general partnership (*nin-i kumiai* or **NK**), formed pursuant to the Civil Code; a silent partnership (*tokumei kumiai* or **TK**), formed pursuant to the Commercial Code; and an investment limited partnership (LPS), pursuant to the Investment Limited Partnership Act. A TK is used together with a limited liability corporation (*godo kaisha* or **GK**) as vehicle for investments in real estates, which is known as GK-TK Scheme.

Entity regulations

The formation and administration of an investment fund may be subject to regulations. The primary regulator in Japan is the Financial Services Agency (**FSA**) and its regional divisions.

Trust: An investment trust management company is required to file the trust deed and related materials with the FSA before creating a securities investment trust (i.e., a mutual fund). The FSA has the authority to enter the premises of the investment management company and the trustee and audit the operations of securities investment trusts.

Corporation: A founder of an investment corporation is required to file a notification with the FSA regarding the establishment of the investment corporation. An investment corporation is required to register with the FSA. The FSA has the authority to enter the premises of the investment corporation, custodian and officers and audit the operations of investment corporations.

Partnerships: There is no regulation on the formation and administration of partnership type investment funds, except that an LPS should be registered with the Legal Affairs Bureau.

Regulations of asset managers

Trust: An investment trust management company which manages assets of securities investment trusts must be registered as a financial business operator under the Financial Instruments and Exchange Act (**FIEA**). A trust bank which manages the assets of trust funds must be licensed as a bank and a trust company under the Banking Act and the Act Concerning Concurrent Engagement of Trust Business by Financial Institutions.

Corporation: An investment corporation is required to delegate the management of its assets to an asset manager who is registered as a financial business operator under the FIEA.

Partnership: A partner (in the case of a NK), a manager (in the case of a TK) or a general partner (in the case of a LPS) is usually authorised under the relevant partnership agreements to manage the partnership assets. Such partner, manager or general partner is required to be registered with the FIEA. However, a private placement with qualified institutional investors (**QII**) will not be required to register with the FIEA, provided the QII satisfies the conditions under Article 63 of the FIEA (**QII Exemption**). Partnership form funds are usually structured to satisfy the QII Exemption so that the partner, manager or general partner does not need to be registered under the FIEA. A partner, manager or general partner who manages partnership assets without registration pursuant to the QII Exemption is required to file a notification with the FSA. Alternatively, a partner, manager or general partner is exempt from the registration requirements if it delegates all of its investment authority to a person who is duly registered to conduct the asset management business under the FIEA.

Regulations on distributions

Trust and Corporation: Trust beneficiary interests in securities investment trusts are “securities” for the purposes of the FIEA. Shares or units in investment corporations are also “securities” for the purposes of the FIEA. A public offering of these securities is subject to registration with the FSA and prospectus requirements. Private placements exemptions are available, in which case, a prospectus is not required and instead, there will be resale restrictions.

Partnership: Solicitation of partnership interests by a partner, manager or general partner is subject to the registration requirements under the FIEA with the QII Exemption. Partnership form funds are usually structured to satisfy the QII Exemption so that the partner, manager the general partner does not need to be registered under the FIEA. A partner, manager or general partner who solicits partnership interests without registration pursuant to the QII Exemption is required to file a notification with the FSA.

Offshore funds / cross border asset management services

Sale of Offshore Funds in the Form of Trust and Corporation: The offshore fund is required to file a notification with the FSA pursuant to the ITIC Act before commencement of solicitation in Japan, whether in the form of a public offer or private placement. Interests in offshore funds in the form of trust and corporation are “securities” for the purposes of the FIEA. A public offering is subject to the same requirements as the sale of domestic investment trusts and investment corporations. Private placement exemptions are available. In addition, an offshore dealer and broker may not solicit residents of Japan to offer offshore funds unless it is registered under the FIEA (with certain exceptions).

Sale of Offshore Funds in the Form of Partnerships: A sale of offshore funds in the form of partnerships to residents of Japan may trigger the registration requirements under the FIEA, except where the following conditions are satisfied:

- residents who directly invest in the fund should be limited to a QII or a person who filed a QII Exemption
- residents who indirectly invest in the fund should be limited to QIIs
- total number of residents who directly or indirectly invest in the fund should be less than 10
- amount of funds invested by residents does not exceed one third of the entire fund

Cross Border Asset Management Services: Any person who provides asset management services for residents of Japan is required to be registered under the FIEA. As an exception, a foreign investment advisor may provide asset management services without registration under the FIEA for persons who are registered to conduct the asset management business under the FIEA (Article 61 of the FIEA). A number of Japanese mutual funds are managed by offshore investment advisors pursuant to an investment management agreement between such offshore investment advisor and the investment trust management company duly registered under the FIEA.

Fuel regulation

Importation

As to ex ante regulations, the importation of petroleum and petroleum gas is not permitted unless the following requirements are fulfilled: (a) an importer has to obtain a registration from the Minister of Economy, Industry and Trade (**METI**) (pursuant to the Oil Stockpiling Act (Act No. 96 of 1975, as amended)); and (b) such importer has to present the Japanese customs authority with a copy of a notification of registration of petroleum importer issued by the METI. Included in a written request for this registration was: the storage capability and location of the storage facilities; the proposed business commencement date; and the estimated import volume of petroleum by type, etc.

As to ex post regulations, an importer of petrol has to notify the METI of the information regarding quality, volume and prices of imported petrol, place of embarkation, place of discharge, date of importation, each time the importer imports petrol for the purpose of being sold or consumed as fuel for cars (pursuant to the Act on the Quality Control of Gasoline and Other Fuels (Act No. 88 of 1976, as amended; the **AQCG**)).

With respect to liquefied gas discharged directly from a high-pressure gas carrier through a pipe, such importation is not subject to the inspection for certification (pursuant to the High Pressure Gas Safety Act (Act No. 204 of 1951, as amended)).

Refining

In the event that volume in excess of the specified level (200L for petrol, 1000L for paraffin and light gas oil, or 2000L for heavy oil; **Specified Volume**)

of petrol, paraffin, light gas oil or heavy oil is refined out of petroleum, the refinery has to obtain permission, pursuant to the Fire Service Act (Act No. 186 of 1948, as amended), from a mayor or prefectural governor of the region in which such refinery is located. In order to be permitted, the refinery must keep a specified distance from certain facilities such as schools, hospitals or residences, and cultural properties, and obey with technical specifications on structure and equipment of the refinery. In addition, their staff have to conform to safety regulations specified by relevant laws and ministerial orders. Further, the refinery has to appoint a hazardous materials security superintendent from among qualified hazardous materials engineers.

With respect to the composition of refined oil, the Act on Sophisticated Methods of Energy Supply Structures requires refiners who consume at least 300 million kilo-litre of petroleum to blend designated volume of bio-ethanol into refined oil. In addition, such refiners have to furnish the METI each year with a plan to achieve their goals pertaining to consumption of bio-ethanol, reduction of greenhouse gas emission, or effects of bio-ethanol consumption on food supply or biodiversity.

Storage

Pursuant to the Fire Service Act, above the Specified Volume, petrol, paraffin, light gas oil or heavy oil has to be stored in a storage facility which obtained permission for operating storage facilities from a mayor or prefectural governor of a region in which such storage facility is located. The requirements to be permitted are similar to those for refineries. Safety requirements on handling petroleum are necessary, as well as the duty to appoint a qualified hazardous materials engineer also apply to storage facilities.

With respect to storages of liquefied petroleum gas, similar regulations exist pursuant to the Act on the Securing of Safety and the Optimization of Transaction of Liquefied Petroleum Gas (Act No. 11 of 1997, as amended), except that permission for the establishment of a storage facility is issued only by a prefectural governor.

Transport

In the event that petroleum or any refined oil is transported with a tanker lorry, the transporter has to conform to the abovementioned regulations concerning storage facilities, since a tanker lorry is deemed a storage facility. In this case, a hazardous materials engineer has to be present on board.

On the other hand, in the case of transport with a lorry other than tanker lorries, the transporter has to obey with legal regulations concerning materials and structure of transporting vessels, loading and transporting method (for example, safe and stable driving) specified for the safety of transport.

With respect to liquefied petroleum gas, filling gas into cylinder is required to be furnished with permission issued by a prefectural governor. In order to be permitted, any cylinder has to meet with the technical specifications provided in the relevant ministerial orders. In addition, any procedure to fill gas into cylinder must fulfil the technical

specifications provided in the relevant ministerial orders.

Sales

Any company that intends to sell petroleum or any refined oil is required to obtain a registration from the METI, pursuant to the Oil Stockpiling Act. In addition, the sale of petroleum or any refined oil is not permitted unless it is sold at a distributing facility which obtained permission from a mayor or prefectural governor of a region in which such storage facility is located. The requirements are similar to those for refineries and storage facilities, except that any distributing facility must not be located within a specified distance from roads and buildings. Safety requirements on handling petroleum and the duty to appoint a qualified hazardous materials engineer also apply to distributing facilities.

With respect to petrol, any company that intends to sell petrol is required to obtain a registration from the METI, pursuant to the AQCG. Petrol that does not meet the technical specifications cannot be sold. In order to ensure the quality of petrol to fulfil such technical specifications, any petrol distributor has to appoint a quality controller and ensure that the quality controller executes its duties, such as quality inspection of petrol. A label indicating information such as the name of the business operator, as well as the selling point, registration number, and the name of quality controllers have to be attached to any selling point.

With respect to liquefied petroleum gas, the sale of such gas to consumers is not permitted unless a distributor obtains a registration from a prefectural governor, pursuant to the Act on the Securing of Safety and the Optimization of Transaction of Liquefied Petroleum Gas. Each distributing facility is required to appoint a sales safety chief qualified pursuant to the High Pressure Gas Safety Act as a safety superintendent. In addition, any liquefied petroleum gas which does not meet technical specifications cannot be sold.

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 example, Japan's net inward FDI in 2015 was actually negative US\$42 million (net withdrawal of investment by foreign investors), compared to the outbound investment of US\$130 billion. The amount of inward investment stocks as a percentage of GDP in 2012 was 3.5 per cent in Japan, compared to 54.4 per cent in United Kingdom, 26.2 per cent in United States and 10.3 per cent in China. This section outlines the regulatory framework relevant to inward foreign direct investments and then, in the following section, introduces the government initiatives to stimulate inward foreign direct investments.

The primary source of law governing inward direct investment is the Foreign Exchange and Foreign Trade Act (FEFTA). Foreign transactions including inward direct investments can be, in principle, conducted. However: (a) investments from countries with which no treaties on inward direct

investment have been entered (including some countries in Africa and Central Asia); and (b) investments in certain industries such as aircraft, weaponry, nuclear power, space development, energy, telecommunications, broadcasting, railway, passenger transportation, oil and leather goods require a notification to be filed with the Minister of Finance and the competent minister (through the Bank of Japan), at least 30 days prior to the investments. The government may recommend a change to the details of, or the cancellation of, the investment upon its review of the notification. A foreign investor who receives such recommendation may either accept or reject it. If the foreign investor rejects the recommendation, the government may order a change to the details of, or the cancellation of, the investment, which is legally binding. The inward direct investments which do not require a prior notification may be conducted without any clearance subject to a post facto reporting obligations.

In addition to the regulations under the FEFTA above, the industry regulations such as telecommunications, broadcasting and aircraft regulate foreign investments in the relevant industry. For example, the Civil Aeronautics Act provides that if one-third or more of the voting rights of a corporation are held by foreign entities, the aircraft owned by the corporation may not be registered, which means that an airline may not continue its business operations if one-third of its voting rights are owned by foreign entities. In order to avoid this, the Civil Aeronautics Act permits airlines to reject any request for a registration of foreign entities in its shareholders registry if the change will result in one-third or more of the shares being held by foreign entities.

Government initiatives and incentives

In order to create employment and innovation, it is imperative to attract overseas manpower and technologies. The government committed to develop an environment where all companies and human resources enjoy the benefits of the global economy and facilitate full-fledged globalisation in Japan. It aims to double inward FDI stocks to 35 trillion yen in 2020 (17.8 trillion yen at the end of 2012).

The Cabinet organises the Council for Promotion of Foreign Direct Investment in Japan, which consists of the prime minister and the relevant ministers to propose policies and coordinate efforts to stimulate inward FDI. On March 17, 2015, the Council published "Five Promises for Attracting Foreign Business to Japan". The five promises are: (i) foreign language signs should be placed in public spaces such as retail shops, hospitals and public transportation; (ii) free public wireless LAN for foreign visitors to Japan; (iii) accept business jets at all regional airports to improve access to the business base and R&D base; (iv) appropriate educational environment for children from overseas; and (v) promote the network of the national government and municipalities for attracting investments in Japan.

The government further plans to make Japan a hub of international trade and investment. The Council adopted on May 20, 2016 a package of policy

measures entitled "Policy Package for Promoting Foreign Direct Investment into Japan to Make Japan a Global Hub". It emphasises the need to match foreign corporations and SMEs in Japan and to promote investments in broader regions. Further to the Five Promises, it commits to a business friendly environment, including streamlining regulatory process and support for overseas visitors.

The Japan External Trade Organisation (**JETRO**) is the main government-related organisation tasked with facilitating inward FDI. JETRO has over 74 overseas offices in more than 55 countries, which serve as liaison offices for foreign companies interested in doing business in Japan. 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. "Invest Japan Hotline" is a one stop service provided by JETRO, which will provide consultation regarding administrative procedures, arrange meetings with officials of regulatory agencies if necessary, and transmit requests for regulatory reforms to the relevant agencies. JETRO's webpage provides a wide range of useful information in English and is a good starting point in the information-gathering process.

Taxation

The following outlines taxation on foreign corporations, non-resident individuals and sales transactions (**VAT**).

Taxation on income earned by foreign corporations

General

Corporate Tax, which is a tax on a corporation's income, is imposed on net income (calculated in accordance with the Corporate Tax Act) earned by corporations at the rate of 23.4 per cent, which similarly applies to domestic corporations and foreign corporations.

Any corporation established in a jurisdiction other than Japan is categorised as a "foreign corporation." Corporate Tax is imposed on foreign corporations under certain circumstances.

There are various factors that affect the taxation on foreign corporations, such as: the existence of a permanent establishment in Japan; the existence of domestic source income; and the type of any such domestically sourced income.

If a foreign corporation is subject to Corporate Tax, the corporation must annually file a tax return and pay tax within two months from the end of the fiscal year.

Permanent establishment

When a foreign corporation has a permanent establishment in Japan, it will be subject to Corporate Tax in respect of its domestic source income and will be required to pay self-assessed taxes. Permanent establishment occurs in the following circumstances:

- Branch: a place where business activities are conducted
- Construction work: a place where a construction work is conducted for more than one year
- Agent: a party who is authorised (i) to execute an agreement, (ii) to hold inventory and deliver inventory to a customer, or (iii) conduct significant aspects of contract negotiations

Domestic source income

Foreign corporations are subject to Japanese taxation only in respect of their domestic source income. Domestic source income for Corporate Tax purposes is as follows:

- income attributable to PE
- income from holding or operating assets in Japan
- income from transfer of such assets as prescribed by an Ordinance, including real estate in Japan and five per cent or more of controlling shares (25 per cent or more) in a Japanese corporation
- consideration for providing personal services
- rents from real property, ships and airplanes

Withholding at source

The following items are subject to withholding at source. The tax rate is 20.42 per cent, unless specifically indicated below.

- income from a partnership
- income from transfer of real estate-10.21 per cent
- income from providing personal services
- rents from real property, ships and airplanes
- interest on bonds or debentures-15.315 per cent
- dividends
- interest on loans
- royalties from intellectual property / rents from movables
- awards received from sales promotional activities
- annuity from life insurance policies
- profit from quasi-financial products-15.315 per cent
- distribution of profit from a silent partnership (*tokumei kumiai*)

The amount of withholding tax is creditable from the amount of corporate tax.

Tax treaties

To avoid international double taxation, tax treaties are concluded between countries. If there are conflicts between tax treaties and Japanese domestic tax laws, tax treaties will take precedence. Tax treaties often contain provisions on exemption from tax in Japan or reduction of tax rates from the domestic tax rates.

Local taxes

Local taxes may be levied if a foreign company has a branch or other PE in Japan. The rates vary depending upon the localities.

Taxation on income earned by non-resident individuals

Income Tax with respect to an individual is a tax on personal income. It is paid either through a self-assessment or by being withheld at the source of the income (e.g., by an employer). It is important to note that withholding tax at the source on income by corporations is regarded as "Income Tax", as opposed to "Corporate Tax". This is because the framework for withholding tax at the source (either for individuals or corporations) is only stipulated by the Income Tax Act.

An individual is categorised, for the purpose of Japanese Income Tax, as either: (1) a resident; (2) a non-permanent resident; or (3) a non-resident.

A resident, defined as any individual who has his/her residence (*jusho*) in Japan and/or has had his/her temporary residence (*kyosho*) in Japan for more than one year, is subject to income tax with respect to all of the income he/she has in and outside of Japan. This is provided, however, that a non-permanent resident (which is defined as any individual who is a resident of Japan but does not have Japanese nationality and has had his/her residence (*jusho*) or temporary residence (*kyosho*) in Japan for five years or less in total in the past 10 years) is subject to income tax only with respect to domestic sourced income and any amount of foreign sourced income paid in or transmitted to Japan.

A non-resident (i.e., any individual other than any type of resident) is subject to income tax only with respect to domestically sourced income.

Tax on sales transactions (VAT)

Consumption tax is a value-added tax imposed on nearly all domestic transactions (e.g., the sale and lease of goods and provision of services) as well as transactions involving the importation of goods. Consumption tax is payable by the seller or the provider of services, as the case may be, at the rate of 8 per cent (6.3 per cent is national tax and 1.7 per cent is local tax, payable in aggregate) of the sales proceeds, by a business entity conducting any domestic transaction or importation transaction, if such business entity's amount of revenue for the fiscal year was at least 10 million yen.

Certain transactions (such as transfers and lending of land, transfers of securities or financial transactions) are not subject to consumption tax. Export transactions are exempt from consumption tax.

A taxpayer entity is allowed to credit, from the amount of consumption tax that it owes, the amount of consumption tax paid in relation to the purchases of goods or services it provides (the so-called "input tax credit").

Workplace 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 type

There are two main types of employment: indefinite-term and fixed-term employment. Both employment types can be either full-time or part-time. It is also common in Japan to use agency type workers (*haken rodosha*), which are contracted to agency companies, in order to accommodate the employer's labour force requirements.

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. Firstly, 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.

Secondly, 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).

Finally, 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 (as opposed to 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 10 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. The employer must have an "appropriate reason" to terminate the employee. Even with respect to redundancies and layoffs, unilateral termination is unlikely to be considered "appropriate," unless the employer's business has significantly deteriorated. In other words, general economic reasons, such as a drop in sales or transfer of part of the Japanese operation to another office to reduce costs, will unlikely be considered appropriate reasons. This is because termination due to redundancy is no fault of the employee's.

The employee's failure to properly perform their job functions may be considered an appropriate reason, but as a matter of practice, it is sometimes very difficult for the employer to provide sufficient proof to support its position.

In light of the difficulty of lawfully terminating employees, foreign employers who wish to terminate an employee for economic reasons will often need to induce the employee to voluntarily resign by offering a cash 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 begin looking for a new job rather than stay in their current position. If the work rules or employment contracts provide for severance pay, those provisions will apply as well.

Working hours and holidays

In general, statutory working hours are limited to eight hours a day and 40 hours a week. An employer is required to grant at least one day-off per week or four days-off per four weeks to its employees. In order for an employer to require its employees to work overtime or on holidays, an employer-employee agreement must be executed and be submitted to the local Labour Standards Inspection Office in advance. If an employee works overtime, late at night (10.00 pm to 5.00 am), or on holidays, the employer will be required to pay him/her increased wages at an enhanced rate of 125 per cent to 175 per cent.

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 June 2016, the rate was 17.828 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.

Labour unions

An employee has the right to join or form a labour union at any time for any reason. A labour union, satisfying certain requirements, will be protected under the Labour Union Act. The labour union or its members may file affirmative relief with the local Labour Relations Commissions, if an unfair labour practice (e.g., refusal to engage in collective bargaining without any reasonable grounds) is found.

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 such proceedings could bring to the relationship between the parties. The great majority of disputes are thus resolved informally, either through a negotiated settlement or through the aggrieved party simply giving up.

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 on 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.

Court system

Although Japan is divided into prefectures and other political units, the court system is national. The courts are 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, 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.

The Consumer Contract Act allows qualified consumer organisations to bring claims for injunctive relief against business operators. A Japanese class action system which allows qualified consumer organisations to bring claims for recovery of damages will be introduced as of October 1, 2016.

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 use that judgment in 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 Japanese law
- 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 stricter 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.

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.

Obtaining oral or documentary evidence for use in foreign proceedings

There are two procedures for obtaining oral or documentary evidence for use in civil proceedings in other jurisdictions. One is to request a Japanese court to provide judicial assistance and obtain evidence in accordance with the Convention Relating to Civil Procedure or bilateral international agreements. The Japanese court may examine a witness based on written questions annexed to letters rotatory received from a foreign court through the Minister of Foreign Affairs. The other is to take depositions at consular premises in accordance with the consular Convention between Japan and the United States or the Consular Convention between Japan and the United Kingdom. Obtaining evidence for use in other jurisdictions in any matter that is not in compliance with international conventions is generally considered to constitute a violation of Japan's judicial sovereignty.

International arbitration

International arbitration has become more common in Japan in recent years as arbitration clauses have become more common in international business contracts involving Japanese parties.

Arbitration in Japan is 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 exceptions.

Malaysia

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Contributed by Skrine

Malaysia

Introduction

Malaysia is a federation of 13 states comprising of Peninsular Malaysia, Sabah and Sarawak. The country is a founding member of the Association of Southeast Asian Nations (**ASEAN**) and the Organisation of Islamic Cooperation (**OIC**) and a member of the United Nations (**UN**), the Asia-Pacific Economic Cooperation (**APEC**) and the Non-Aligned Movement (**NAM**). Prior to the 1980s, Malaysia's economy was based primarily on agriculture and mining. However, in the past few decades the country has shifted its focus to other sectors of the Malaysian market, and today the country's growth is driven primarily by its manufacturing industries and international trade. At end of 2015, Malaysia's economy saw a growth of 1.2 per cent in international trade to reach RM1.466 trillion, compared to RM1.448 trillion in the previous year, despite the challenges of the market environment throughout that year. The Malaysian External Trade Development Corporation (**MATRADE**) reports that the increase in trade with China, the United States, ASEAN and the European Union contributed greatly to this growth.

Recent years have seen vast and varied changes to Malaysia's legislation, regulations and policies across all levels of trade and government in order to facilitate and encourage foreign investment within the country. Various types of incentives have been offered by the government in efforts to lower the entry barriers for foreigners wishing to invest or set up business in Malaysia, ranging from tax exemptions and relaxation of foreign equity participation restrictions in different sectors of the Malaysian market. Malaysia has also signed on to various free trade agreements, including the Trans-Pacific Partnership Agreement (**TPPA**). This relatively recent trend towards liberalisation and inclusiveness of foreign investors and competitors is driven in no small part by Malaysia's Eleventh Malaysia Plan, an economic policy which goal is for Malaysia to become a self-sufficient, fully developed country by the year 2020.

Visas and work permits

The Malaysian government issues certain types of passes for those entering the country as expatriates for business or employment related purposes.

Short-Term Social Visit Pass

Short-Term Social Visit Passes are issued to foreign citizens at the entry point of the country and are limited to certain social/business visits only. These passes are usually given for a validity period of 30 days or less, but the validity period is discretionary. The limited business purposes include the attendance at conferences, seminars, business meetings, discussions regarding potential investments or business prospects.

Short-Term Social Visit Passes may be extended. Such an application for extension will be decided on

merits on a case by case basis and will only be approved for special reasons e.g., medical emergencies.

Employment Pass (EP)

Foreign employees who are employed under a paid contract of services with an employer are referred to as expatriates and are required to hold employment passes to work in Malaysia. The validity of the EP will depend on the terms of the contract of services. An EP is usually issued a period between 24 to 36 months, with the maximum period being 60 months.

There are three categories of EP and they are:

Category	Employment Pass
1	The position pays a minimum salary of RM5,000 per month AND is for a minimum of two years.
2	The position pays a minimum salary of RM5,000 per month AND is for a duration of less than two years.
3	The position pays a salary of between RM2,500 and RM4,999 per month AND is for a duration of less than 12 months. This category of EP is only renewable for a maximum of two times.

EPs have to be applied via the Immigration Department through its Expatriate Services Department (**ESD**) portal. The Immigration Department does not prescribe a predetermined number of expatriate positions allowable per company. However, please note that any application for an EP, even if it fulfils all the requirements, is at the discretion of the relevant authorities.

There are four stages in the application process for EPs. The stages and their suggested allocation times are:

Stage	Details	Suggested Allocated Time
1	The company must be registered on the ESD portal. This is a one-time registration and is only applicable to companies that have not previously registered on the ESD portal.	One day
2	The company will need to upload information and documents as requested on the ESD portal. This is also a one-time process.	One month
3	Application for the employment pass.	14 days
4	Endorsement of passport.	Seven days

Companies who wish to apply for EPs using the ESD must be registered with either:

- the CCM under the Companies Act 1955
- the Registry of Societies Malaysia (**ROS**) under the Societies Act 1966
- other bodies (e.g., co-operatives) under the relevant laws of Malaysia

The minimum paid-up capital required for the companies are as follows:

- for 100 per cent locally owned companies – RM250,000
- for local and foreign owned companies (with a minimum foreign equity of 30 per cent) – RM350,000
- for foreign-owned companies (with foreign equity of 51 per cent and above) operating in wholesale, retail and trade sectors OR those involved in the sub sectors on unregulated services – RM1,000,000

In considering the application for an expatriate position, the Immigration Department takes into account:

- the company's shareholding
- the company's activities
- relevance of the post to the company's activities
- monthly income
- age and working experience

Professional Visit Pass (PVP)

PVPs are issued to foreign citizens for the purposes of short term attachments in Malaysia. The foreign citizens applying for the PVP must not be employed by a Malaysian employer and must not receive a salary from the Malaysian employer.

There are three categories of PVP and they are:

Category	Professional Visit Pass
1	Expertise Transfer
2	Research
3	Internship (must be relevant to the applicant's education background)

A Malaysian company may apply for the PVP on behalf of a foreign citizen that will be doing an attachment in the company by using the Immigration Department's online 'ESD portal'. Any company seeking to make such an application will have to meet the relevant criteria as the applicant company.

The Immigration Department strictly requires that the foreign citizen must be in his country of origin when the application is made and cannot be in Malaysia prior to the approval of the PVP application. The foreign citizen must also enter

Malaysia with an entry visa issued by the Malaysian embassy/consulate/diplomatic mission in the country of origin.

The validity period of a PVP varies but is usually for a period of three months, and it is restricted to one contract/project. It can be renewed for a total period of not more than 12 months.

Residence Pass – Talent

The Residence Pass – Talent are issued to foreign citizens, who are considered as high achieving individuals with the capacity to drive business result that contribute towards Malaysia's economic transformation, who have been living and working in Malaysia for at least three years on a continuing basis. The Residence Pass - Talent as is only available in Peninsular Malaysia, and not in the states of Sabah and Sarawak.

Certain industries are given special preference for the Residence Pass – Talent and they include oil, gas and energy, palm oil, financial services, electronics and electrical, education, healthcare, agriculture etc.

Applications can be made online using www.expat.com.my/rp.

Dependant Pass

Dependants of an EP holder (Category One and Two) may apply for a Dependant Pass which allows the holder to reside in West Malaysia. Dependants include an expatriate's spouse, children below the age of 21, handicapped/disabled children of any age, and legally adopted children. Dependants of Category Three EP holders and other passes are not eligible to apply for the Dependant Pass.

Spouses of Category One and Two EP holders are permitted to work without having to change their Dependant Passes to EP, on the condition that they obtain approval from the Immigration Department.

Long-Term Social Visit Pass

Children who are over the age of 18 and unmarried, as well as parents and parents-in-law of EP holders are eligible for the Long Term Social Visit Pass.

Business entities

Persons wishing to conduct business and provide goods and/or services in Malaysia may do so if they register their business with and obtain a business registration number from the Companies Commission of Malaysia (**CCM**). The business may be set up and registered with the CCM as a sole proprietorship, a partnership, a limited liability partnership, or a company, under the Registration of Businesses Act 1956, the Partnership Act 1961, the Limited Liability Partnerships Act 2012 and the Companies Act 1965 respectively. It should be noted that the Companies Bill 2015 was passed in Malaysian Parliament in April 2016, and when it comes into force it will replace entirely the existing Companies Act 1965. At the time of writing, it is not yet known when the Companies Bill 2015 will come into force, and it is worth noting that while the

provisions of the Companies Bill are substantively similar to the Companies Act 1965, there are some key differences, including that the appointment of a qualified company secretary will only be mandatory for private limited companies, and that contracts between a single member company with that member must be in writing or recorded in the minutes of directors meeting immediately after the making of the contract.

A sole proprietorship is a business which is wholly owned by a single individual, usually using their personal name or a trade name. A partnership is owned by at least two but not more than 20 persons.

When a sole proprietorship applies to be registered with the CCM, they may only be so registered for a maximum of five years, after which they would have to renew their registration if so desired. Also, the person who comprises the sole proprietorship does not have the benefit of the corporate veil which limited liability partnerships and companies enjoy; the person owning the business is not considered as a separate legal entity from the sole proprietorship, and therefore such a person may be sued in his personal capacity for the conduct of their business.

Limited liability partnerships (**LLP**) are governed by the Limited Liability Partnerships Act 2012. A LLP may be formed with two or more partners, and such partners may consist wholly or partly of individuals and bodies corporate, who jointly carry on a business with a view to making a profit, in accordance with the terms of the partnership agreement between them. The primary difference between a LLP and a partnership is that any rights, liabilities or obligations arising on the part of the LLP in contract, tort or otherwise belongs solely to the LLP; furthermore, a partner in the LLP will not be personally liable for the acts or omissions of the LLP or any other partner in the LLP. Conversely, the partners of a partnership are jointly and severally liable for the debts and obligations of the partnership should its assets be insufficient.

As to companies, they may be divided into two main types: private limited companies (which are most commonly companies are limited by shares) and public companies. The Companies Act 1965 provides that the articles of association of a private company must:

- restrict its right to transfer its shares;
- limit the number of shareholders such that it does not exceed 50;
- prohibit the shares of the company from being offered to the public; and
- prohibit any invitation to the public to deposit money with the company for fixed periods or payable at call, whether bearing or not bearing interest

A company must have at all times no fewer than two directors who have their main or only place of residence within Malaysia. A company must have

appointed an auditor to prepare its annual audited accounts (which must be filed with the CCM at the end of each financial year), and a company secretary who has obtained a license from the CCM.

Similarly to a LLP, a company is considered a separate legal entity from the persons which comprise it, and may sue and be sued in its own capacity.

Foreign companies seeking to set up their business in Malaysia may do so by registering a branch office and appointing an agent, who registers themselves with the CCM. The agent shall be responsible for accepting all notices and communications on behalf of his foreign principal and shall be responsible for all obligations of the company under the Companies Act 1965.

Where a foreign company has a registered branch office within Malaysia or carries on business within Malaysia, the branch office does not constitute a separate legal entity to its parent foreign company. The foreign company shall be subject to the provisions of Part XI of the Companies Act 1965 vis a vis its local branch office / agent.

Business environment

The eleventh Malaysia Plan

When Malaysia's then-Prime Minister Tun Dato' Seri Dr Mahathir Mohamad tabled the Sixth Malaysia Plan in 1991, he also introduced the ideal known as "Vision 2020" / "Wawasan 2020", embodying the aim that Malaysia should be a 'fully developed country' by the year 2020. The Eleventh Malaysia Plan (**RMK-11**), tabled by Prime Minister Dato' Seri Najib Tun Razak in 2015, represents the last leg of the journey towards the Vision 2020 goal set by his predecessor 25 years ago.

The RMK-11 as a five-year economic plan focuses heavily on Malaysia's human resources to propel the nation towards a higher income status by 2020. It envisages that the Malaysian GDP will grow at around five to six per cent per annum, and it is targeted that the per capita income would be RM54,100 by the end of the RMK-11's implementation in 2020. The preamble text to the RMK-11 emphasises the importance of the growth of Malaysia's citizens in order for the plan to succeed. It is the first Malaysia Plan to include not only national growth targets, but also targets for household income and the Malaysian Wellbeing Index.

The incentives and focuses within the RMK-11 are broadly encapsulated within the theme that a successful 'people economy' driven by significant increases in productivity as well as reduced input from capital and labour will break the country out of "business as usual" practices and set Malaysia on an accelerated growth trajectory. Increased consumption and investment in the private sector, particularly in services, plays a significant role in growth of Malaysia's economy under the RMK-11. The Malaysian Government intends to take on more of a regulatory and facilitative role in increasing

private investment through targeted strategies such as improving access to financing and improving Regulations to be more business-friendly.

Competition and regulation

The primary legislation regulating competition on the market in Malaysia is the Competition Act 2010 (**CA 2010**), which came into force on 1 January 2012, with the aim of promoting economic development by promoting and protecting the process of competition, thereby protecting the interests of consumers.

The CA 2010 applies to commercial activity (carried out by both local and foreign entities) within Malaysia, and outside Malaysia if it has an effect on competition in any market in Malaysia.

While the CA 2010 contains prohibitions on anti-competitive agreements and abuses of dominance, it has no provisions on merger control.

Chapter 1 of the CA 2010 contains a prohibition on anti-competitive agreements. Specifically, it prohibits horizontal or vertical agreements that have the object or effect of significantly preventing, restricting or distorting competition in any relevant market. The term "agreement" has a broad definition under the CA 2010, and it is taken to mean any form of contract, arrangement or understanding between enterprises, whether or not it is legally enforceable, and would include decisions made by an association and concerted practices. Certain specified horizontal agreements – fixing prices, dividing markets, limiting production or supply, or rigging bids – are deemed to have the object of significantly preventing, restricting or distorting competition. Other agreements would infringe Chapter one if they have the effect of significantly preventing, restricting or distorting competition.

Chapter two of the CA 2010 contains a prohibition on abuse of dominance. To be potentially subject to Chapter two, an enterprise must have a dominant position. Conduct which may constitute an abuse of a dominant position include imposing unfair purchase or selling prices, limiting production or market access, and price discrimination.

The CA 2010 designates the Malaysia Competition Commission (**MyCC**) as both the investigative and adjudicative authority for competition law matters in Malaysia, with full powers of investigation and the ability to impose infringement decisions, directions and financial penalties. Infringements are liable for fines of up to 10 per cent of an enterprise's worldwide turnover during the period of the infringement. The CA 2010 contains leniency provisions that provide for up to a 100 per cent reduction in applicable fines for enterprises liable for hard-core infringements of Chapter one that report their activity to the MyCC and cooperate with the investigation. The MyCC is also empowered to accept voluntary undertakings from parties to cease infringements. A decision by the MyCC is subject to appeal to the Competition Appeal Tribunal, the decision of which is final and binding. The CA 2010 also permits a private right of action for any person

who suffers loss or damage directly as a result of an infringement.

Since the implementation of the CA 2010, the market has increasingly recognised the importance of fair and healthy competition to the growth of the economy, and this is materialised in recent legislation. The newly enacted Malaysian Aviation Commission Act 2015 and the Gas Supply (Amendment) Bill 2016 which was very recently passed in Parliament contain provisions to safeguard against anti-competitive conduct and encourage healthy competition in regulated industries in Malaysia, in order to better consumer protection and make these industries more attractive to investors both locally and abroad.

Whistleblower protection

Recent economic developments – in Malaysia as well as globally – have impressed more than ever upon the people a need to identify, check and combat corruption, fraud and other wrongdoings in both public and private sectors.

The Whistleblower Protection Act 2010 (**WPA 2010**), which came into force on 15 December 2010, has the stated aim of protecting persons who make any disclosure of improper conduct to any enforcement agency, so long as he makes such disclosure based on his reasonable belief that any person has engaged, is engaging or is preparing to engage in improper conduct. The protections afforded to whistleblowers under the WPA 2010 include the following:

- protection of confidential information
- immunity from civil and criminal action
- protection against detrimental action for the whistleblower as well as any person related to or associated with him

Such protections will be extended regardless of whether the whistleblower's belief was later proven to be false, so long as the whistleblower's belief was reasonable.

Employers will now have to consider the WPA 2010 in the context of their relationship with their employees. The provisions of the WPA 2010 render any provision in any contract of employment as void in so far as it purports to preclude the making of a disclosure of improper conduct. In addition, if the whistleblower fears that detrimental action may be taken against him or any person associated with him in reprisal for disclosure of improper conduct, he may, either himself or via the enforcement agency, make an application to the courts seeking damages, compensation, an injunction (final as well as interim) or any other remedy that the courts deem fit. Any person against whom such action is taken shall be liable in his personal capacity.

Other remedies which the court may order include ordering the reinstatement of the whistleblower (if he had been dismissed in reprisal for the disclosure of improper conduct). The person who had taken then detrimental action may also be ordered by the

court to rescind any such action and pay compensation to the whistleblower, not only for expenses and financial losses but also for pain and suffering arising from that detrimental action.

However, the protections under the WPA 2010 may be withdrawn by the relevant enforcement agency in several circumstances, including where the whistleblower himself had participated in the improper conduct, or where disclosure of improper conduct principally involves questioning the merits of government policy, including policy of a public body.

In addition to protecting the whistleblower, the WPA 2010 imposes upon the relevant enforcement agency an active duty to conduct an investigation into any disclosure made by a whistleblower and to prepare a report which contains the findings of their investigation.

In addition to the WPA 2010, the Companies Act 1965 and the CapITAI Markets and Services Act 2007 (**CMSA**) provides immunity to officers and auditors of a company from lawsuits which arise from such officer or auditor acting in good faith in the course of his duties. However, the ambit of the WPA 2010 is much wider, as it grants the court powers to order a greater variety of remedies which may not be available under the Companies Act 1965 or the CMSA.

Personal data protection

The Personal Data Protection Act 2010 (**PDPA**) came into force in Malaysia on 15 November 2013 and is aimed at safeguarding personal data in commercial transactions by requiring data users to comply with certain obligations. It also confers data subjects with various rights in respect of one's own personal data.

Definition of personal data

Personal data is defined very widely under the PDPA as *"any information in respect of commercial transactions... that relates directly or indirectly to a data subject, who is identified or identifiable from that information or from that and other information in the possession of a data user, including any sensitive personal data and expression of opinion about the data subject."*

Principles under the PDPA

The PDPA imposes the obligation on data users in commercial transactions to comply with seven Personal Data Protection Principles in relation to the use and processing of personal data.

Data users have to comply with various requirements, most notably the requirements of providing written notice to data subjects, obtaining consent, and taking steps to protect personal data from loss, misuse, modification, unauthorised or accidental disclosure.

Besides imposing obligations on data users, data subjects are also afforded rights under the PDPA such as the right to access the subject's personal data, to correct said personal data, to withdraw

consent, or to prevent processing for direct marketing.

Registration of class data users

Businesses in the following industries should take note that certain classes of data users are required to be registered with the Personal Data Commission. These include businesses in Communications, Banking and Financial Institutions, Insurance, Health, Tourism and Hospitality, Transportation, Education, Direct Selling, Real Estate, Utilities and Services such as legal, audit, accountancy, engineering or architecture, retail or wholesale, private employment agencies.

Data transfer and outsourcing

The PDPA generally prohibits the transfer of personal data out of Malaysia with a few exceptions, such as if consent has been obtained, or if the transfer is necessary for the performance of a contract between the data subject and the data user.

Non-application of the PDPA

The PDPA does not apply to the Malaysian Federal Government and the Governments of each State. It also does not apply to the processing of credit information by credit reporting agencies (which is governed by the Credit Reporting Agencies Act 2010), nor to any personal data processed outside Malaysia, unless that personal data is intended to be further processed in Malaysia.

Intellectual property rights

The primary body administering intellectual property rights is the Intellectual Property Corporation of Malaysia (**MyIPO**), an agency under the Ministry of Domestic Trade, Co-operatives and Consumerism (**MDTCC**).

Legislations governing Intellectual Property Rights in Malaysia include the Copyright Act 1987, Trade Mark Act 1976, Industrial Design Act 1996, Patents Act 1983, Layout Designs of Integrated Circuit Act 2000 and Geographical Indications Act 2000.

Forthcoming amendments to the various legislations are anticipated following Malaysia signing on to the TPPA on 4 February 2016.

The common law torts of passing off and breach of confidential information are also actionable in Malaysia.

Copyright

Malaysia is a party to the Berne Convention for the Protection of Literary and Artistic Works Copyright (**Berne Convention**) and eligible works first published or made by authors in Berne Convention countries are generally afforded copyright protection as if first published in Malaysia or authored by Malaysians. Registration of copyright works is not a requirement in Malaysia, but the Copyright Act 1987 provides a procedure for voluntary notification of copyright works to be made and recorded with MyIPO.

The following categories of works are eligible for copyright in Malaysia:

- musical works
- literary works
- artistic works
- films
- sound recordings
- broadcasts; and
- published editions

Broadly speaking, copyright initially vests with the author of the work. Nonetheless, unless otherwise agreed, copyright in commissioned works or works made under employment are deemed transferred to the person who commissioned the work or the author's employer.

Currently, the duration of copyright protection in Malaysia for literary, musical and artistic works lasts the duration of the life of the author plus 50 years. Copyright in sound recordings, broadcasts, film and published editions persists for 50 years.

Trade marks

Trade marks may be registered in accordance with the provisions of the Trade Marks Act 1976 (**TMA**) which grants the owner of a registered trade mark exclusive rights to its use in Malaysia. Trademark infringement proceedings under the provisions of the TMA can only be brought in respect of registered trademarks.

Where an applicant for trade mark registration does not reside or carry out business in Malaysia, registration can only be done through an appointment of a local trade mark agent. Trade mark registrations are administered by MyIPO, both manually and online.

Applications are examined by MyIPO and may be objected to on grounds such as if the mark is not distinctive, or is identical or confusingly similar to other similar registrations or applications. If an application is accepted, the application is required to be advertised in the Federal Government Gazette. If there are no oppositions to the application by third parties, the trade mark will proceed to be registered. In cases where there is evidence that potential infringement exists, it may be possible to apply for expedited examination of a trademark application.

Malaysia recognises a 'first-to-use' principle in that the rights to a trade mark is, as a rule, regarded to accrue to its first user in Malaysia, and not necessarily its first registrant. Rectification proceedings may be brought by any aggrieved person, such as the rightful proprietor of a trade mark, seeking the expungement of a registered trade mark.

The registration of a trade mark is valid for 10 years from the deemed date of registration, and may be renewed for subsequent terms every 10 years. Registered trade marks which have not been used

for more than three years and one month may be subjected to cancellation proceedings brought by other parties.

Separately, the tort of passing off affords some measure of protection over the goodwill of trade names or trade marks which have not been registered, but that have been usurped by third parties. Actions for passing off may be brought in respect of both registered and unregistered trade marks, but it is the only cause of action available against unauthorised third party use of unregistered trade marks.

To bring a valid action on passing off, it must be established that there is goodwill and reputation in the trade name or trade mark belonging to the proprietor, that the third party has misrepresented his business or his goods to be that of the former, and that damage has been caused by this misrepresentation.

Patents

Patents are governed by the Patents Act 1983. A patent grants its owner exclusive rights to a novel and non-obvious invention, which may be of either a product or a process.

Software is largely viewed as non-patentable in Malaysia, although protected under our copyright laws. Additionally, the following are non-patentable:

- discoveries, scientific theories and mathematical methods
- plant or animal varieties or essentially biological processes for the production of plants or animals, other than man-made living micro-organisms, micro-biological processes and the products of such micro-organism processes
- schemes, rules or methods for doing business, performing purely mental acts or playing games
- methods for the treatment of human or animal body by surgery or therapy, and diagnostic methods practised on the human or animal body

Applications for the grant of a patent may be filed at MyIPO. Malaysia is also a contracting party to the Patent Cooperation Treaty (**PCT**), and applications may be made through international PCT applications. In Malaysia, the duration of any patent granted is 20 years.

Applications may similarly be made to obtain exclusive rights to 'Utility Innovations' which are innovations that are new, but that may not involve an inventive step to make to make it eligible for a grant of a patent.

Inventions made in the course of employment or under commission are also deemed to accrue to the employer or the person commissioning the work, unless any terms to the contrary are included in the contract of employment or commissioning agreement. It should be noted however, that the Patents Act 1983 recognises that employees may be entitled to equitable remuneration in certain circumstances e.g., if the employee is not required to engage in inventive activities, or if the invention

acquires an economic value much greater than the parties could reasonably have foreseen.

Industrial design

Industrial designs must be new and must be registered to be protected under the Industrial Designs Act 1996. In general terms, an industrial design consists of the ornamental or aesthetic aspects of an article or product.

A registered industrial design confers the owner of a registered design various exclusive rights, including the exclusive right to make, import, supply or deal in trade products subject of the registered design. Registration affords an initial protection period of five years from the date of filing which may be extended for four further consecutive terms of five years each. This amounts to a maximum protection period of 25 years.

Generally the author of the industrial design is regarded as its owner. However, designs created in the pursuit of a paid commission are to be treated as belonging to the person commissioning the design, unless any agreement to the contrary is made. Similarly, an employer is the deemed owner of a design created by an employee in the course of employment unless otherwise agreed.

Geographical indication

Geographical indications are indications which identify goods as originating from a particular country or territory, or a region or locality, where a given quality, reputation or other characteristic of the goods are known e.g., Swiss chocolates. Protection of geographical indications is accorded by the Geographical Indications Act 2000 (**GIA**).

Registrations of geographical indications are not necessary to obtain protection of the GIA against any wrongful use of a geographical indication. Nonetheless, an indication may be registered by a particular trader or producer from the geographical area related to the particular indication, by a trade association, or by a competent authority. A registered geographical indication is given 10 years of protection and is renewable every 10 years.

Layout design of an integrated circuit

Integrated circuits (**IC**) may be more commonly known as 'chips' or 'microchips'. The layout designs to such IC are protected under the Layout Designs of Integrated Circuits Act 2000.

These designs, like copyright works, automatically arise so long as they are original, have been fixed in material forms, and are made by qualifying persons e.g., a Malaysian citizen or permanent resident.

The proprietor of a protected layout-design has the right to reproduce and to authorise the reproduction of his protected layout-design; to commercially exploit and to authorise the commercial exploitation of the layout-design, an IC in which the layout-design is incorporated, or an article that containing the IC.

However the duration of protection for original IC layout designs is much shorter than that for

copyright works. Layout-designs for an IC are protected for 10 years from the date they are commercially exploited, and if not commercially exploited then protection lapses 15 years after its creation.

Franchising

Franchises are regulated by the Franchise Act 1998 (**FA**). Franchises are quite widely defined under the FA to include any contract or agreement in which the franchisor grants the franchisee the right to operate a business according to a franchise system where the franchisor has the right to administer continuous control over the franchisee's business operations during the term of the franchise, and in return the franchisee is granted the right the right to use certain intellectual properties of the franchisor.

Registration requirements

A franchisor is required to register his franchise with the Franchise Development Unit of the MDTCC (**the Registry of Franchise**) before he can operate a franchise business or offer to sell the franchise to any person. Foreign franchisors are required to obtain approval from the Registry of Franchise. Strictly speaking, parties should not sign the franchise agreement before the franchisor has obtained approval/registration from the Registry of Franchise. Ensuring that a franchise is registered is pivotal for franchisors as the Malaysian courts have held that failure by the franchisor to register the franchise would render the franchise agreements null and void, consequently entitling the franchisee to claim for restitution.

In addition, the franchisee is also required to register with the Registry of Franchise before commencing the franchise business, where a franchisee has been granted a franchise from a foreign franchisor and within 14 days of signing the franchise agreement where the franchises has been granted a franchise by a local franchisor.

Registration can now be done online at <http://myfex.kpdnkk.gov.my/portal/>.

Minimum requirements

As part of the franchisor's application for registration and approval, certain disclosures have to be made to the Registry of Franchise including the franchise agreement and three years' audited financial accounts. The FA sets out some minimum requirements for the Franchise Agreement, the purpose of which are primarily to protect franchisees. It should also be noted that any conditions, stipulations or provisions in a franchise agreement purporting to bind a franchisor or franchisee to waive compliance with any provision of the FA are unenforceable and deemed void.

Potential businesses looking to sell or buy a franchise in Malaysia should also be mindful that the FA affords franchisees the right to renew the franchise agreement on similar or no less favourable terms. Unless breaches of the franchise agreement have occurred, a franchisor is potentially required to renew for as long as the franchisee wishes to continue and as long as adequate notice

is provided of the renewal request each time. Non-renewal will amount to an offence if the franchisee is not compensated and any non-compete obligation imposed on the franchisee under the franchise agreement is not waived by the franchisor six months prior to the expiry date of the franchise agreement.

Other noticeable requirements imposed by the FA are as follows:

- **Confidential information**

A franchisee is required to give a written guarantee to a franchisor that it will not disclose confidential information during the franchise term and for two years after expiry or termination of the franchise
- **Prohibition against similar business**

A franchisee is required to give a written guarantee to a franchisor that it 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 expiry or termination of the franchise
- **Termination of franchise agreement**

Both franchisor and franchisee are prohibited from unilaterally terminating a franchise agreement except for good cause. Good cause includes, but is not limited to, breach of the franchise agreement accompanied by failure to remedy the breach upon written notice being given. Parties are required to be provided a minimum of 14 days to rectify any breach
- **Cooling off period**

A franchise agreement must incorporate a cooling off period during which a franchisee has the option of terminating the franchise. The duration of this cooling period can be fixed by the contracting parties, but must last a minimum of seven working days
- **Promotion Fund**

A franchisor that requires a franchisee to pay fees for the purpose of the promotion of a franchise is required to establish a 'Promotion Fund'. The fund should be managed under a separate account and only be used for the promotion of products under the franchise
- **Minimum term**

The minimum term of a franchise agreement is five years, and a franchise term may only be terminated before the minimum term only if both parties to the agreement agree to terminate or there is good cause for termination as defined under the FA

Exchange controls

The flow of funds across Malaysian borders is regulated by the national bank of Malaysia, Bank Negara Malaysia (**BNM**), under the ambit of the Financial Services Act 2013 (**FSA**). The FSA provides that the act of buying, selling, exchanging,

borrowing or lending foreign currency requires the prior permission of BNM.

The Foreign Exchange Notices (**Forex Notices**) published by BNM contain guidance as to those payments and transfers for which BNM's permission are required. Different rules apply depending on, among other things, whether the money is being transferred in Malaysian Ringgit or in a foreign currency, as well as whether the transferor and the transferee are Malaysian residents or non-residents. For the purposes of the Forex Notices, Labuan entities are considered to be non-resident. Non-residents may open Malaysian Ringgit accounts with any financial institutions in Malaysia either individually, jointly with another non-resident, jointly with a resident (who is not the non-resident's spouse, or where opening such account is not for the purposes of a joint venture), or via a resident, who operates the account on trust for and on behalf of the non-resident. Such accounts are referred to as 'external accounts' in the Forex Notices. In addition, any person, whether resident or non-resident, has the option of opening foreign currency accounts with Malaysian conventional financial institutions or Islamic financial institutions.

Rules applicable to residents

Pursuant to BNM's Forex Notices, there is no limit to the amount of Malaysian Ringgit which a resident entity may borrow from its direct shareholder, or from any non-resident entity within its group of entities, provided such borrowing is used to finance activities in the real sector in Malaysia. The BNM Forex Notices explain that 'activities in the real sector' refers to the construction or purchase of a residential or commercial property (excluding the purchase of land only), and the production or consumption of goods or services (excluding activities in the financial services sector, the purchase of security or Islamic security, or the purchase of any financial instrument or Islamic financial instrument). However, if said borrowing is obtained from any other non-resident entity which is not a financial institution, then BNM's permission must be obtained in respect of any borrowing in excess of RM1,000,000.

The restrictions on borrowing which apply to resident individuals differ slightly from those which apply to residents which are not individuals. A resident individual may borrow any amount in Malaysian Ringgit from his non-resident immediate family members, or his non-resident employer in Malaysia if his employer is a consulate, high commission, Labuan entity, central bank, supranational, embassy, or international organisation, and the amount which is borrowed is to be used in Malaysia. However, where the borrowing is made from any other non-resident (excluding a non-resident financial institution), then the Malaysian Ringgit borrowing which is obtained requires BNM permission where the amount exceeds RM1,000,000.

The rules applicable also vary where the borrowing is not in Malaysian Ringgit, but is instead in foreign currency. In such case, a resident entity may

borrow foreign currency in any amount in several circumstances, including:

- from a licensed onshore bank
- from its resident or non-resident entities within its group of entities
- from its resident or non-resident direct shareholder
- where the borrowing is obtained through the issuance of foreign currency

Nevertheless, BNM's approval must be obtained where the borrowing exceeds RM100,000,000 equivalent and is not obtained from any of the non-resident entities named above. The RM100,000,000 equivalent is based on the aggregate borrowing of the resident entity and other resident entities within its group of entities with a parent-subsidiary relationship.

The Forex Notices provide that, save in specific circumstances, where a borrowing in foreign currency is obtained by a resident from a non-resident financial institution, the resident shall accord the right of first refusal to a Labuan entity undertaking Labuan banking business.

Any borrowing of Malaysian Ringgit from a non-resident financial institution requires the permission of BNM, regardless of the amount of the borrowing.

Rules applicable to non-residents

A non-resident is allowed to borrow any amount in Malaysian Ringgit from a resident without applying to BNM for permission, if the borrowing is made either through the issuance of private debt securities or Islamic private debt securities in Malaysian Ringgit approved by BNM. In addition, the borrower need not apply to BNM for permission where the borrowing is used to finance activities in the real sector in Malaysia.

Any borrowing made by a non-resident from a licensed onshore bank requires BNM permission, except in the following situations:

- the borrowing is obtained via a trade financing facility obtained by a non-resident to finance the purchase or sale of goods or services with a resident
- the borrowing is by means of an overdraft facility obtained by a non-resident custodian bank or a non-resident stockbroking corporation to facilitate the settlement of shares or Ringgit instruments traded on Bursa Malaysia Main Market
- the borrowing is in the form of a repurchase agreement or a sale buy back agreement entered with the licensed onshore bank, provided that the total borrowing in the form of the repurchase agreement and sale buy back agreement is not more than RM10,000,000 in aggregate

A non-resident may borrow any amount in foreign currency without applying to BNM for permission in the following instances:

- in any amount from a licensed onshore bank
- in any amount from another non-resident in Malaysia
- in any amount from any of his immediate family member

Export of goods

Payment received by a resident for the export of goods out of Malaysia may be made in Malaysian Ringgit or any foreign currency, provided that such payment must be made in full on or before the payment date stated on the export contract, which must not exceed six months from the date of the report; otherwise, BNM permission must be obtained.

Investment in foreign assets

The Forex Notices not only regulate borrowings but also investments in foreign currency assets. A resident is free to make any investment in foreign currency asset onshore for its own account or on behalf of his clients. Residents with no domestic borrowings are free to invest abroad without being required to obtain prior permission from BNM.

Resident entities with domestic Malaysian Ringgit borrowing may invest any amount abroad if the investment is funded using foreign currency funds:

- from abroad
- from a non-resident (provided such funds are not obtained via a foreign currency borrowing)
- from a foreign currency borrowing obtained from a licensed onshore bank for direct investment abroad
- from a foreign currency account owned by the resident entity

In addition, a resident may invest any amount up to the amount of the proceeds sourced from the listing of shares through an initial public offering on the Main Market of Bursa Malaysia without requiring BNM permission. However, the amount it may invest abroad is limited to RM50,000,000 per calendar year where the investment is made using foreign currency funds sourced from conversion of Malaysian Ringgit, where the funds are obtained by means of a foreign currency borrowing obtained from a licensed onshore bank for purposes other than direct investment abroad, or via swapping of financial assets. Any amount which is intended to be invested abroad in excess of this limit requires that BNM permission must first be obtained.

Resident individuals are free to invest abroad without restriction if the funds are sourced from abroad or from a non-resident (other than foreign currency borrowing). However, BNM permission is required if the amount which the resident individual seeks to invest exceeds the equivalent of RM1,000,000 in aggregate per calendar year if

funded from conversion of ringgit or swapping of financial assets, or if the investment is funded by means of a foreign currency borrowing from a licensed onshore bank or a non-resident and the amount to be invested is in excess of RM10,000,000.

Funds management

Under the Securities Commission Act 1993, the Securities Commission of Malaysia (**SC**) has the function to regulate and encourage the development of the securities and futures industry in Malaysia. As part of the Malaysian government's efforts to promote the fund management industry, the SC is entrusted to administer the establishment of foreign fund management companies. All applications and enquiries regarding such companies should be addressed to the SC.

Application to establish a fund management company

An application for the establishment of a foreign fund management company must be made to the SC by completing the 'Application for the Establishment of a Foreign Fund Management Company'. For the purpose of managing domestic unit trust funds, a foreign fund management company must make a separate application in writing to the SC.

The application submitted to the SC must also include an application for licences under the CMSA for the foreign fund management company as well as for all persons who are in the employment of or acting for or by arrangement with that foreign fund management company performing fund management functions for the company. The application may also require supporting documents to be provided such as details on the business activities of the shareholders of the proposed foreign fund management company or details on the fund management process to be adopted by proposed foreign fund management company. The extent and type of supporting documents to be submitted varies depending on the individual facts and circumstances of each application.

Once the application has been approved by the SC, the applicant is required to apply to the CCM for the incorporation of a foreign fund management company. Upon such incorporation, the applicant must inform the SC of the date of incorporation, the number of its Certificate of Incorporation and the date of commencement of the business.

Establishment requirements

A foreign fund management company must be a company with more than 50 per cent foreign equity and incorporated in Malaysia. It may carry out fund management activities as defined under the CMSA, subject to the terms and conditions of its licence and it must do so from an office located in Malaysia. Furthermore, the paid-up capital of the foreign fund management company must be at least RM2,000,000 and its parent company (or holding or related company) must have a good track record in the international fund management industry.

Restrictions on fund management

Generally, a foreign fund management company with 100 per cent foreign shareholding must only manage funds sourced from and on behalf of clients outside of Malaysia. The funds that are being managed may be invested in Malaysia or outside Malaysia.

A foreign fund management company may only manage funds sourced from within Malaysia subject to the following conditions:

- at least 30 per cent of its shareholding must be held by local shareholders
- the foreign fund management company must manage or undertake to manage funds, sourced from and on behalf of clients outside Malaysia in the amount of at least USD100 million
- the amount of each fund sourced within Malaysia shall be at least RM10 million

Employees/representatives

Any person who is in the employment of or acting for or by arrangement with the foreign fund management company and performs fund management functions for that foreign fund management company must comply with the licensing requirements under the CMSA and must have sufficient relevant qualification and experience in fund management activities.

A foreign fund management company may employ expatriate staff based on regional coverage of the funds, size of funds managed and the experience and qualification of the expatriate staff.

Fuel regulation

According to the statistics as reported by Malaysia's Energy Commission, Malaysia is a net importer of motor petrol as at the end of 2014 importing 8,134 kilotonnes of oil equivalent (**ktoe**), despite petroleum and petrochemical products being one of the country's most valuable exports. The petroleum industry in Malaysia is primarily governed by the Petroleum Development Act 1974 and its production is regulated by Malaysia's national oil company, Petroliaam Nasional Berhad (**PETRONAS**), in which is vested the entire ownership, rights, powers, liberties and privileges of exploring, winning and obtaining petroleum both onshore and offshore in Malaysia. Any company wishing to carry out exploration and production activities in the oil and gas industry in Malaysia must enter into production sharing contracts with PETRONAS.

The Petroleum Regulations 1974 provide that an application for permission to operate any business relating to the processing or refining of petroleum or petrochemical products – including motor fuel – must be made to MITI. There are no restrictions on the foreign equity participation in a company which wishes to make such an application to MITI under the Petroleum Regulations 1974. The company would also be required to obtain other general approvals in order to construct the infrastructure

necessary to operate the business, including approvals from the Malaysian Department of Environment as well as the relevant state and local authorities.

In addition to the above, the Petroleum Regulations 1974 stipulate that the MDTCC is vested with powers to regulate all downstream activities, which includes the marketing and distributing of motor gasoline. Consequently, any entity seeking to operate a petroleum retail station is required to apply for and obtain the prior approval of the MDTCC. A controlled goods licence must also be obtained from MDTCC for the retail trade of petroleum products under the Control of Supplies Regulations 1974, as it is regulated as a controlled article in Malaysia under the Control of Supplies Act 1974, as the prices and distribution of petroleum products are regulated by the MDTCC.

In the case of foreign-owned entities seeking to market and / or distribute motor gasoline in Malaysia, the MDTCC has stated in its Guidelines for Approval Applications under the Petroleum Development Act that it will not give its approval unless the shareholding of the entity is such that at least 70 per cent of its equity is held by Malaysian citizens, and at least 30 per cent is held by persons of Bumiputera status. It further states that the maximum percentage of foreign equity participation permitted is limited to 30 per cent of the total equity of the applicant company. The MDTCC have also indicated in their guidelines that priority will be given to those companies which are owned 100 per cent by Bumiputeras. Companies which seek to enter into the business of wholesale trading of petrol products, diesel products, liquefied petroleum gas products and kerosene products are required to have a minimum Bumiputera shareholding of 51 per cent.

The import of motor gasoline in to Malaysia is not subject to any income tax, nor would the importer be required to obtain a licence from the Royal Malaysian Customs. However, the transport, storage and supply of motor gasoline, whether by railway, road transportation, water transportation or pipeline are subject to the provisions of the Petroleum (Safety Measures) Act 1984 and the Regulations made thereunder. The Petroleum (Safety Measures) Act 1984 and its Regulations provide generally that the design, fabrication, installation, testing and the safety aspects of the operation and maintenance of any transport system used must meet the prescribed minimum technical specifications, which vary according to the mode of transport and the product being transported. The transport and storage of motor gasoline may also require the operating company to obtain other licences, authorisations or permissions from other regulatory authorities; for instance, permission from the Malaysia Department of Occupational Safety and Health is required to install and operate petroleum pipelines, and any vessels transporting petroleum by sea is required to be properly licensed / certified by the Surveyor General of Ships of the Malaysian Marine Department.

Foreign investment policy

Since April 2009, the Malaysian government has been liberalising the services industry in Malaysia with the intention of attracting foreign investors and strengthen competitiveness in the relevant sectors. Foreign investment in Malaysia has seen a rapid rise in the past half-decade. This can be attributed in part to recent policies developed by the Malaysian government with the goal of having Malaysia achieve a developed nation status by the year 2020. On 25 September 2010, the Malaysian government launched the Economic Transformation Programme (**ETP**) with the intention that the programme would help to elevate the country to developed-nation status by 2020, with a gross national income per capita of USD15,000. The policies implemented under ETP targets to attract USD444 billion in investments which is hoped, in turn, to create an estimated 3.3 million new jobs.

Since 2009, Malaysia has seen progressive liberalisation in various sectors of the services industry. This includes liberalisation in telecommunications, healthcare, education, professional services, environmental services, distributive trade services, tourism services, and many others. Prior to 2009, foreign participation in most of these sectors was restricted to varying degrees.

At present, foreign investments in these sectors are generally facilitated by the National Committee for Approval of Investments in the Services Sector, which is established under the Malaysian Investment Development Authority (**MIDA**). The liberalisation is progressing in stages, and the ultimate aim is to allow for 100 per cent foreign equity participation in these service sectors.

There is no singular entity or authority responsible for the regulation of foreign investment in the Malaysian market. Foreign investors will be subject to the supervision and authority of the same regulators and / or public authorities as would normally supervise local investment in the relevant market sectors. Generally, the Ministry of International Trade and Industry (**MITI**) and the agencies under it (including MIDA) are the first port of call for foreign investors seeking to enter the Malaysian market. Various forms of incentives are offered in order to encourage foreign investment and participation in the liberalised sectors. These incentives are detailed in the "Government Incentives and Initiatives" section below.

Malaysia's market will likely see further liberalisation in the coming years, with Malaysia's signing and ratification of the TPPA. The TPPA intends to establish a predictable legal and commercial framework for trade and investment by focusing on smaller, piecemeal goals, including committing to eliminate – if not reduce – tariff and non-tariff barriers across substantially all trade in goods and services amongst TPPA countries. It is hoped that this will lead to new opportunities and benefits for businesses, workers and consumers, which, according to prevailing economic theory, should enhance efficiency, encourage healthy competition

by exposing local markets to foreign investment and vice versa, and implementing high labour and environmental standards on all TPPA members. While only time will tell what the practical effects of the TPPA will be on Malaysia's markets in the long run, effective implementation of the TPPA is likely to further and facilitate increase foreign participation in Malaysia, especially by other TPPA signatory countries.

Government incentives and initiatives

In Malaysia, both direct and indirect tax incentives are provided for in the Promotion of Investments Act 1986, Income Tax Act 1967, Customs Act 1967, Sales Tax Act 1972, Excise Act 1976 as well as the Free Zones Act 1990. These legislations set out the incentives provided for investments in the manufacturing, agriculture, tourism (including hotel) and approved services sectors as well as research and development, training and environmental protection activities.

Direct tax incentives are a grant of partial or total relief from income tax payment for a specific period. Indirect tax incentives on the other hand, are exemptions from import duty, sales tax and excise duty.

Incentives for manufacturing companies

The two main tax incentives available to investors in the manufacturing sector are the grant of Pioneer Status and the Investment Tax Allowance. Companies wishing to enjoy these incentives have to meet various criteria relating to, among others, the value added to the product, the technology used and industrial linkages. Eligible activities and products are defined as "promoted activities" and "promoted products" respectively.

Pioneer Status

A Pioneer Status company enjoys a five year partial exemption from income tax payment. Tax is payable on only 30 per cent of its statutory income (**Pioneer Period**). The Pioneer Period commences from production day which is the day the company's production level reaches 30 per cent of its capacity.

Unabsorbed capital allowances as well as accumulated losses incurred during the Pioneer Period can be carried forward and deducted from the post pioneer income of the company.

Investment tax allowance

A company can also apply for an Investment Tax Allowance incentive. If granted, the company is entitled to a percentage allowance on its qualifying capital expenditure which is incurred within five years from the date the first qualifying capital expenditure is incurred. This qualifying capital expenditure can either be a factory, plant machinery or other equipment used for the approved project.

The company can then offset this allowance against a portion of its statutory income for each year of assessment. A carry forward can be made to subsequent years for any unutilised allowance until it is fully utilised. The remainder of the company's

statutory income will be taxed at the prevailing company tax rate.

Incentives for high technology companies

A high technology company is one that engages in promoted activities or in the production of promoted products in areas of new and emerging technologies. Such a company would qualify for the Pioneer Status, and would be eligible for an incentive income tax exemption of 100 per cent of the statutory income for a period of five years. They can also benefit from an Investment Tax Allowance of 60 per cent on the qualifying capital expenditure incurred within five years from the date the first qualifying capital expenditure is incurred. In order to qualify for these Incentives, the companies must meet certain criteria:

- the company must, within three years of its date of operation or commencement of business, obtain a percentage of local research and development expenditure to gross sales should be at least one per cent on an annual basis
- at least 15 per cent of the company's total workforce should comprise of scientific and technical staff having degrees or diplomas with a minimum of five years' experience in related fields

Incentives for strategic projects

Strategic projects are products or activities of national importance. They involve heavy capital investments with long gestation periods, have high levels of technology, are integrated, generate extensive linkages and have significant impact on the economy.

These projects qualify for Pioneer Status of 100 per cent on statutory income for a period of 10 years, and Investment Tax Allowance of 100 per cent on the qualifying capital expenditure incurred within five years from the date of the first qualifying capital expenditure.

Incentives for small and medium scale companies

Small and medium enterprise (SMEs)

For the purposes of imposition of income tax and tax incentives, a SME is defined as a company resident in Malaysia with a paid up capital of RM2.5 million or less in ordinary shares at the beginning of the basis period of a year of assessment whereby such company cannot be controlled by another company with a paid up capital exceeding RM2.5 million. SMEs are eligible for a reduced corporate tax of 20 per cent on chargeable incomes of up to RM500,000. The tax rate on the remaining chargeable income is maintained at 25 per cent.

Small scale companies

Tax incentives for small scale companies are available under the Promotion of Investments Act 1986 (**PIA**), including a Pioneer Status incentive with income tax exemption of 100 per cent of the statutory income for a period of five years, and

Investment Tax Allowance of 60 per cent on qualifying capital expenditure incurred within five years. In order to qualify, the company must meet the following criteria:

- where its shareholders' funds are RM500,000 or less, at least 60 per cent of its shareholding must be held by Malaysians
- where its shareholders' funds are more than RM500,000 but does not exceed RM2.5 million, then at least 100 per cent of its shareholding must be held by Malaysians

If the company's shareholders' funds exceed RM2.5 million, then it is not eligible for this tax incentive.

The company will also have to meet various other requirements, including the employment of a minimum percentage of managerial, technical and supervisory staff, and a cap on the percentage of its paid-up capital which may be owned by a related company having shareholders' funds of more than RM2.5 million. The extent of these requirements varies according to the shareholders' funds of the company applying for the incentive.

Incentives for the multimedia super corridor (MSC)

The MSC is intended to be a hub for the development and nurturing of Malaysia's information and communications technology (ICT) industry, facilitating companies wanting to create, distribute and employ multimedia products and services.

The Government of Malaysia through the Multimedia Development Corporation (MDeC) grants MSC Status to companies which participate and undertake ICT activities in the MSC. Companies with MSC Status enjoy various incentives and benefits that backed by the Government of Malaysia's Bill of Guarantees.

MSC Status multimedia companies which operate in MSC Malaysia Cybercities or Cybercentres are eligible for the following incentives and facilities:

- Pioneer Status with income tax exemption of 100 per cent of the statutory income for a period of 10 years or Investment Tax Allowance 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 Research & Development grants (for majority Malaysian-owned MSC Malaysia Status companies)

Other stated benefits and incentives include:

- duty-free import of multimedia equipment
- intellectual property protection and a comprehensive framework of cyberlaws
- globally competitive telecommunication tariffs and services
- consultancy and assistance by MDeC to companies within the MSC

Business incentive and support package developed by the Iskandar Regional Development authority

Iskandar Malaysia consists of five key and focal economic/flagship zones namely Johor Bahru City Centre, Nusajaya, Western Gate Development, Eastern Gate Development and Senai-Skudai, and is governed under the Iskandar Regional Development Authority (IRDA), a federal statutory body formed under the Iskandar Regional Development Authority Act 2007. It is tasked with regulating and driving various stakeholders in both public and private sector towards realising the vision of developing Iskandar Malaysia into a strong and sustainable metropolis of international standing.

Incentives are provided for the following qualifying activities if they are carried out in any of the Five Flagship Zones of Iskandar Malaysia:

- Tourism – New four or five star hotel projects
- Healthcare – New Traditional Complementary Medicine (TCM) centre projects
- Education – New Private Higher Education Institution (PHEI) projects

The incentives for these may be either fiscal or non-fiscal. Under fiscal incentives, there is a five year corporate tax exemption or an Investment Tax Allowance. There is also an import duty and sales tax exemption on qualifying equipment and machinery subject to prevailing MIDA guidelines. Under non-fiscal incentives, there is flexibility to recruit foreign knowledge workers, subject to the guidelines of the Iskandar Malaysia Expatriate Committee as well as flexibility from foreign exchange administrative rules set forth by BNM.

An Incentive Support Package (ISP) is also available for the following qualifying activities carried out in the Medini region within Iskandar Malaysia:

- creative industries and related services
- educational services
- financial advisory and consulting services
- healthcare and related services
- logistics services
- tourism

The ISP has the following benefits:

- approved developer: tax exemption on income derived from disposal of land in Medini or income derived from sale or rental of a building in Medini
- approved development manager: tax exemption on income derived from the provision of management, supervisory and marketing services to an approved developer company, carrying out an approved project in Medini

- any company which is granted Iskandar Development Region status: 10 year corporate tax exemption or Investment Tax Allowance

Other stated incentives include:

- that each foreign knowledge worker employed by an ISP-approved company will be eligible to import or purchase a duty free car for his or her own personal use
- flexibility to recruit foreign knowledge workers, subject to the guidelines of the Iskandar Malaysia Expatriate Committee
- flexibility from foreign exchange administrative rules set forth by BNM

Taxation

Scope of taxation

The basic taxation system in Malaysia is territorial in nature. All income of companies and individuals accrued in, derived from or received in Malaysia from outside Malaysia, are liable to income tax. However, foreign sourced income received in Malaysia from outside Malaysia by any person (other than a resident company carrying on banking, insurance, air and sea transportation business which is taxed on world income basis) is exempted from income tax in Malaysia.

Tax structure

The Malaysian taxation system comprises direct and indirect imposition of taxes. The forms of direct taxes are income tax, petroleum income tax, real property gains tax, and stamp duty. Indirect taxes come in the form of customs duties, excise duty and goods and services tax (which replaces sales tax and service tax with effect from 1st April 2015). There is no capital gains tax in Malaysia apart from real property gains tax.

Income tax

Under the Income Tax Act 1967 (**ITA**) the classes of income chargeable to income tax are as follows:

- gains or profits from an employment (salaries, remunerations, etc.)
- gains and profits from a business which includes profession, vocation and trade and every manufacture, adventure or concern in the nature of trade
- dividends, interests or discounts
- rents, royalties or premiums
- pensions, annuities or other periodic payments
- other gains or profits of an income nature not falling under any of the above
- special classes of income

The basis period for a particular year of assessment for an individual is the calendar year, whilst for a company is the accounting year end. An individual not carrying on a business is required to file tax return by 30 April of the following year. For an

individual carrying on a business, the tax return filing deadline is 30 June of the following year. A company is required to file tax return within seven months from the date of the close of its accounting year end.

Personal tax

An individual in Malaysia is chargeable to income tax on income accruing in or derived from Malaysia. The rate of tax depends on the individual's resident status, which is determined by the duration of his stay in the country as stipulated under section 7 of the ITA. Generally, an individual residing in Malaysia for more than 182 days in a year has tax resident status.

A resident individual is taxed on his chargeable income at a graduated rate from zero per cent to 28 per cent after deducting tax reliefs. Effective from the year of assessment 2016, the maximum income tax rate was increased from 25 per cent to 28 per cent. With effect from year of assessment 2014, an employee with monthly tax deductions made by his employer for a year of assessment which is deemed equivalent to the tax payable for that year of assessment may elect not to submit his annual tax returns provided certain conditions are fulfilled.

A non-resident individual is not eligible for any personal tax relief and is subject to 28 per cent tax on the chargeable income accruing in or derived from Malaysia from business and employment income unless reduced by double tax agreements. As of 2016, the fixed tax rate for non-resident individuals was increased to 28 per cent from previously 25 per cent. Other sources of income received by a non-resident individual are subject to withholding tax as discussed below.

An employee on a short term visit to Malaysia enjoys tax exemption in respect of his income from an employment exercised in Malaysia when his employment does not exceed 60 days in a calendar year and he is a non-resident. However, the income of a non-resident individual who performs independent services such as consultancy services is not exempted from tax.

A preferential income tax rate of 15 per cent on the employment income was introduced in 2012 to encourage skilled Malaysian professionals to return and boost the country's economic growth under the Returning Expert Programme (**REP**). The REP status must be applied for with TalentCorp Malaysia Berhad. If the application is successful, he will be entitled to enjoy preferential income tax rate for five years, in addition to the other existing incentives available under the REP.

Company tax

A company, whether resident or not, is assessable on income accrued in or derived from Malaysia. With effect from year of assessment 2004, income derived from sources outside Malaysia and remitted by a resident company is exempted from tax, except in the case of the banking and insurance business, and sea and air transport undertakings. For tax purposes, a company is considered a

resident in Malaysia if the control and management of its affairs are exercised in Malaysia.

Effective from the year of assessment 2009, the corporate tax rate for all companies was reduced from 26 per cent to 25 per cent. The corporate tax rate has been further reduced to 24 per cent for the year of assessment 2016 and subsequent years of assessment. Companies with a paid up capital of RM2.5 million and below (and not part of a group of companies where any of their related companies have a paid-up capital of more than RM2.5 million) will be charged at a tax rate of 20 per cent (reduced to 19 per cent from year of assessment 2016 onwards) for the first RM500,000 of chargeable income and any subsequent chargeable income is taxed at 25 per cent (reduced to 24 per cent for year of assessment 2016 onwards).

Withholding tax

Under the ITA, withholding tax is to be withheld and remitted to the Malaysian Inland Revenue Board (**IRB**) by the resident payer within 30 days after payment or crediting such payment to a non-resident person (this includes individual and company).

Withholding taxes in Malaysia are limited to certain categories of income under the ITA as follows:

- 10 per cent on the following special classes of income derived in Malaysia in respect of:
 - amount paid in consideration of services rendered in connection with the use of property or rights belonging to, or the installation or operation of any plant, machinery or other apparatus purchased from, such person
 - amount paid in consideration of technical advice, assistance or services rendered in connection with technical management or administration of any scientific, industrial or commercial undertaking, venture, project or scheme
 - rent or other payment made under any agreement or arrangement for the use of any moveable property

Withholding tax will not be applicable for income received in respect of the first two services listed above, where rendered or performed outside Malaysia.

- 10 per cent of the gross income the income of non-residents under section 4(f) of the ITA. Income under section 4(f) refers to gains and profits not covered under sections 4(a) to 4(e) of the ITA
- 10 per cent on royalties derived from Malaysia or attributable to a business carried on in Malaysia
- 15 per cent on interest derived from Malaysia or attributable to a business carried on in Malaysia
- five per cent on interest (except exempt interest) paid by approved financial institutions in Malaysia

- 15 per cent on the services of a public entertainer in Malaysia
- distribution of income of a Real Estate Investment Trust (**REIT**) to persons other than a resident company (including resident and non-resident individuals) at 10 per cent, non-resident company at 25 per cent and foreign institutional investors at 10 per cent
- profit distribution from takaful operators to resident and non-resident individuals at eight per cent and non-resident company at 25 per cent
- 10 per cent on contract payment in respect of services rendered in Malaysia under a contract and three per cent on contract payment to the employees of that non-resident company. (As opposed to the other categories above, this is not a final tax but an advance payment to the IRB until the final tax of the non-resident is computed)

The withholding tax rates are subject to reduction in the double taxation agreements, if any. As of December 2015, Malaysia has entered into more than 73 bilateral double taxation agreements.

Petroleum income tax

Under the Petroleum Income Tax Act 1967 (**PITA**), income tax is levied annually on the chargeable income derived by any person carrying on petroleum operations (i.e., the searching for and the winning or obtaining of petroleum and any sale or disposal of petroleum so won or obtained) in Malaysia. Petroleum operations are conducted within the framework of the production sharing agreements (**PSCs**) which are entered into between PETRONAS, and the petroleum companies (**PSC Contractors**).

PETRONAS as well as PSC Contractors are subject to tax on their respective shares of profit oil and profit gas. Miscellaneous receipts incidental to and arising from petroleum operations are also subject to petroleum income tax. Various deductions are given to petroleum companies under Schedules to PITA including qualifying exploration expenditure, transfer of asset, capital allowances and charges.

PETRONAS and PSC Contractors are subject to a flat tax rate of 38 per cent. Petroleum income derived from Malaysia-Thai Joint Development Areas is taxed at zero per cent for the first eight years of production, followed by 10 per cent for the next seven years and subsequent years of production at 20 per cent. However, income derived from refining or liquidifying of petroleum and any activity dealing with refined products is subject to the normal company tax rate as provided under the ITA.

The Malaysian government has also announced additional incentives relating to PITA including reducing the petroleum income tax rate from 38 per cent to 25 per cent for marginal oilfields, i.e., oilfields with less than 30 million barrels of

reserves. Besides that, capital allowance would be sped up from 10 to five years for marginal oilfields, and investment allowance given to projects requiring high capital expenditure and technical skills. These incentives had been gazetted in 2013 and deemed to have come into operation on 30 November 2010.

Real property gains tax

Capital gains are generally not subject to tax in Malaysia. Under the Real Property Gains Tax Act 1976 (**RPGT Act**), real property gains tax (**RPGT**) is chargeable on capital gains arising from the disposal of real property and on the disposal of shares in a real property company.

Effective 1 January 2014, the RPGT rate was increased following announcements in the 2014 Budget to further curb speculative activities in the property market. The RPGT rates are as follows:

Disposal period	RPGT rate 2014 onwards		
	Companies (%)	Individual (Citizen & Permanent Resident) (%)	Individual (Non-citizen) (%)
For disposals within three years	30	30	30
For disposals in the fourth year	20	20	30
For disposals in the fifth year	15	15	30
For disposals in the sixth and subsequent years	5	0	5

Stamp duty

Stamp duty is imposed on certain instruments and documents under the Stamp Act 1949. The rate of stamp duty chargeable depends on the nature of the instrument involved and varies from a fixed charge, ad valorem or a certain percentage of the value of the subject matter of the transaction.

Custom duties

Customs duties (include import duty and export duty) are imposed under the Customs Act 1967. The rates of customs duties vary based on the types of goods. The rates of and exemption from

customs duties are prescribed in subsidiary legislation made under the Customs Act 1967.

Excise

Excise duties are levied on selected products manufactured in Malaysia for local consumption and selected imported goods. Goods which are subject to excise duty include cigarettes, liquor and motor vehicles. In order to encourage the export of locally manufactured goods, companies with Licensed Manufacturing Warehouse (**LMW**) status that manufacture goods subject to excise duty are exempted from being licensed under the Excise Duty Act 1976.

Goods and services tax

Goods and services tax (**GST**) was introduced on 1 April 2015 pursuant to the Goods and Services Tax Act 2014 with a standard rate of six per cent to replace the previous sales tax (five per cent and 10 per cent) and service tax (six per cent) which used to be imposed on selected goods and services consumed in Malaysia. The salient features of the GST model implemented in Malaysia are detailed below:

- GST is a multi-stage consumption tax on goods and services and is charged on goods and services supplied within Malaysia or imported into the country
- supplies made by the Malaysian Federal and State government departments are not within the scope of GST except for some services prescribed by the Minister of Finance
- supplies made by the local authorities and statutory bodies in relation to regulatory and enforcement functions are not within the scope of GST
- GST charged on all business input is known as input tax whilst GST charged on all supplies made is known as output tax. Eligible businesses can claim the input tax credit from the Malaysian government through the input tax credit mechanism
- goods and services are broadly categorised into three types of supplies:
 - standard rate supply
 - standard rate supply means goods and services supplied by businesses that are subject to GST at the rate of six per cent
 - zero-rated supply
 - Zero-rated supply means goods and services sold by businesses that are charged GST at a zero rate. GST paid on their input can be claimed as credit.
 - Exempt supply
 - Exempt supply means goods and services supplied by businesses that are exempt from GST, but GST paid on their input cannot be claimed as credit

Workplace relations

Employment relations in Malaysia are governed by both the individual contract of employment between the employer and the employee and by legislation.

Employment Act 1955

The Employment Act 1955 prescribes the minimum terms and conditions for certain categories of employees (**EA Employees**) and provides a process that employees may use to make claims for breach of contract or non-compliance with the provisions of the Employment Act 1955.

An EA Employee refers to any person or class of persons who, irrespective of his or her occupation, has entered into a contract of service with an employer and whose monthly wages does not exceed RM2,000, or any person who, irrespective of the amount of wages he or she earns in a month:

- is engaged in manual labour, including labour as an artisan or apprentice
- is engaged in the operation or maintenance of any mechanically propelled vehicle operated for the transport of passengers or goods or for reward or for commercial purposes
- supervises or oversees other employees engaged in manual labour employed by the same employer in and throughout the performance of work
- is engaged in any capacity on any vessel registered in Malaysia and who is not an officer certified under the Merchant Shipping Acts of the United Kingdom as amended from time to time, is not the holder of a local certificate as defined in Part VII of the Merchant Shipping Ordinance 1952, and has not entered into an agreement under Part III of the Merchant Shipping Ordinance 1952
- is engaged as a domestic servant

The Employment Act 1955 only applies to Peninsular Malaysia. The Sabah Labour Ordinance and the Sarawak Labour Ordinance apply to their own respective States. They apply to the same categories of employees that fall within the EA save that the Sabah Labour Ordinance and Sarawak Labour Ordinance apply to persons whose monthly wages do not exceed RM2,500 per month.

The Industrial Relations Act 1967

The Industrial Relations Act 1967 provides for the protection of certain rights of workers and employers and their trade unions, including the protection against unjust dismissal of workmen, the process by which a trade union may claim recognition, the process for collective bargaining, and the mechanism for resolution of trade disputes.

The Trade Unions Act 1959

The Trade Unions Act 1959 provides for the registration, constitution, rights, liabilities and management of trade unions.

The Employees Provident Fund Act 1991

The Employees Provident Fund Act 1991 is a statutory scheme which provides for a mandatory monthly contribution on the amount of wages which is to be made by both the employer and the employee to a government-managed retirement fund.

For employees who earn wages of more than RM5,000 a month, the employer is to contribute 12 per cent of the income while the employee contributes 11 per cent of the income while, for employees who earn less than RM5000 a month, the employers are obliged to contribute a higher rate of 13 per cent of the income while the employee's rate remain unchanged. Employees who have attained the age of 55 years will have a lower contribution ratio rate of six to five. With effect from March 2016 until December 2017, there has been a reduction of the statutory contribution rate for employees from 11 per cent to eight per cent is for employees below the age of 60 while there is a reduction from 5.5 per cent to four per cent is for employees above age 60.

A failure to make such contributions according to the provisions of the Employees Provident Fund Act 1991 is considered an offence.

The Employees Social Security Act 1969

The Employees Social Security Act 1969 provides for contributions to be made by both the employee and the employer to a government-managed programme similar to an insurance scheme. As of 1 June 2016, the operation of the Employees Social Security Act 1969 has been extended to all employees, other than those described in the First Schedule, regardless of the amount of their wages. Previously, the Employees Social Security Act 1969 did not apply to persons whose monthly wages exceeded RM3,000.

Employment contracts

In relation to EA Employees, section 10 of the Employment Act 1955 requires a contract for services exceeding one month to be made in writing. For non-EA Employees, a written employment contract is recommended to properly define the relationship between the parties.

As for EA Employees, any term or condition in the contract which is less favourable than that prescribed by the Employment Act 1955 shall be considered void and of no effect, and the more favourable provision shall replace it.

Fixed-term contracts are allowed and there is no legislation mandating a maximum period for fixed-term contracts. However, for the purposes of a claim for dismissal without just cause or excuse, the Industrial Court will still inquire into whether the fixed-term contract is genuine or a permanent contract disguised as a fixed-term contract.

It is recommended that an employment contract should stipulate in writing essential terms including job title, probationary period (if any), remuneration, manner of termination, transfer clause, hours of

work and benefits such as leave entitlements and retirement age (if any). The terms of an employment contract can be varied by mutual agreement of the employer and employee. However, the agreement to vary constitutes a separate contract in itself and requires the existence of consideration between the parties. In any case, the employer may not unilaterally impose changes that are detrimental to the employee, even if it reserves the right to do so.

Probationary periods

Probationary periods are permitted under Malaysian Law. The law does not prescribe a maximum probationary period but, in practice, a period of three to six months is common. A probationer would enjoy the same protection from dismissal as a permanent/confirmed employee and would be able to bring a claim for reinstatement for dismissal without just cause or excuse under section 20 of the Industrial Relations Act 1957, but any award for such a claim will be limited to 12 months back wages.

Restrictive covenants

Under the Contracts Act 1950, any agreement by which anyone is restrained from exercising a lawful profession, trade or business of any kind, is to that extent void. Therefore, it follows that a post-termination non-compete clause in an employment contract will be considered void. However, such a clause is enforceable while the employment contract subsists. Restrictive covenant clauses stating that an employee is not to solicit clients and employees of his or her employer are likely to be enforceable if they are reasonable.

Data protection

The PDPA applies to employment relationships and so long as an employer processes any personal information of its employees within the scope of the PDPA an employer shall be bound by the PDPA.

Registration

The PDPA requires an employer to register with the Personal Data Protection Commission if it falls within the class of data users required to be registered as data users. The employer will have a duty to inform his employees of the information being processed (i.e., name, address and identification number) and the consent of the employee who is the subject of that information would be required to be given except in situations of:

- the performance of a contract to which the data subject is a party
- the taking of steps, at the data subject's request, with the view to entering into a contract
- compliance with any legal obligation to which the data user is the subject, other than a contractual obligation
- protecting the vital interests, namely matters relating to the life, death or security of the data subject

- the administration of justice
- the exercise of any functions conferred on any person under any law

Processing of personal data

Under such processing of personal data, such data shall not be processed unless;

- it is for a lawful purpose directly related to the activity of the data user
- it is necessary for or directly related to that purpose
- the data is not excessive for that purpose

An employer will additionally have to issue a written notice in English and Bahasa Malaysia to inform the employee the following irrespective of whether the data falls under the abovementioned category;

- that personal data of the data subject is being processed by or on behalf of the data user, and to provide a description of the personal data to that data subject;\
- the purposes for which the personal data is being or is to be collected and further processed
- of any information available to the data user as to the source of that personal data
- of the data subject's right to request access to and to request correction of the personal data and how to contact the data user with any inquiries or complaints in respect of the personal data
- of the class of third parties to whom the data user discloses or may disclose the personal data
- of the choices and means the data user offers the data subject for limiting the processing of personal data, including personal data relating to other persons who may be identified from that personal data
- whether it is obligatory or voluntary for the data subject to supply the personal data
- where it is obligatory for the data subject to supply the personal data, the consequences for the data subject if he fails to supply the personal data

The employer has to take further practical steps to protect the employee's data and ensure that there are adequate security measures in place to protect such data.

Cross border

The PDPA does not permit a data user to transfer any personal data to a place outside Malaysia unless it is to a place specified by the Minister and published in the Federal Government Gazette.

There are exceptions to this including where the data subject has given consent to the transfer, if the transfer is necessary for the performance of a contract between the data subject and data user or

the transfer is for the purposes of legal proceedings or obtaining legal advice and if the data subject has given consent.

Sensitive data

Sensitive data includes data on physical and mental health or conditions, political opinions and religious or other similar beliefs of a data subject, the commission or alleged commission of an offence by a data subject, and any other data declared by the Minister to be sensitive personal data. Transfers of such data are only allowed upon obtaining the explicit consent of data user.

Background checks

There are no restrictions or prohibition on background checks on prospective employees and checks can be conducted by the prospective employer or a third party. However the data regarding the financial affairs of an employee will be restricted to his employer as per the Financial Services Act 2013.

Transfers of business

Where a change of business occurs, Regulation 8 of the Employment (Termination and Lay off Benefits) Regulations 1980 (**Regulations**) applies to EA Employees. Regulation 8 provides as follows:

- where a change occurs (whether by virtue of a sale or disposition or by operation of law) in the ownership of a business for the purposes of which an employee is employed or of part of such business, the employee shall not be entitled to any termination benefits payable under the Regulations if, within seven days of the change of ownership, the purchaser of the business offers to continue to employ the employee on terms and conditions not less favourable than those under which the employee was employed by the vendor and the employee unreasonably refuses the offer
- if the purchaser does not offer to continue to employ the employee in accordance with the above, the contract of service will be deemed to have been terminated, and consequently, the vendor shall be liable for the payment of all termination benefits under the Regulations
- Where an offer by the purchaser to continue to employ the employee is accepted by an employee, the period of employment of the employee under the vendor shall for the purposes of the Regulations be deemed to be a period of employment under the purchaser and the change of employer shall not constitute a break in the continuity of the period of his employment

In the event of non-compliance with regulation 8, EA Employees will be entitled to the minimum amount of termination benefits payable under regulation six of the Regulations.

Generally, for administrative ease and to avoid any allegations of discrimination, non-EA Employees

are often dealt with in the same manner as EA Employees under this method.

Employment representations and trade unions

Employees are permitted to form trade unions which must be registered with the Director General of Trade Unions.

The Trade Unions Act 1959 (**TUA**) provides for the registration, constitution, rights, liabilities and management of trade unions.

In order for a trade union to have the power to collectively bargain on behalf of the employees in an employer's company, the trade union must be recognised by the employer. Once the trade union is recognised, collective bargaining must be done with the trade union. When collective bargaining negotiations are successful, a collective agreement is drawn up, signed, taken cognisance of by the Industrial Court and implemented.

Once a collective agreement has been taken cognisance of by the Industrial Court, the collective agreement shall be binding on the parties to the collective agreement including the parties' successors, assignees or transferees, as well as all workmen who are subsequently employed in the said enterprise. The collective agreement will be an implied term in the employment contract of during the period stated in the collective agreement.

An employer must grant leave of absence to a workman intending to carry out his or her duties to exercise his or her right as an officer of trade union if the duration of the leave applied for is reasonable.

Termination / discontinuing employment

The Industrial Relations Act 1967 has created a procedure which effectively protects an employee/workman from being dismissed save with just cause or excuse. The protection extends to every situation where the employer has caused the employment contract to be terminated. This includes situations where an employee has been terminated with contractual notice by the employer or dismissed for misconduct or when the employee claims that he has been constructively dismissed or forced to resign or when a fixed term contract which is found not to be genuine is not renewed. As the principle of estoppel has no application to the Industrial Court, even if an employee has signed an agreement to say he has no claims against the Company, he can still initiate the procedure provided for under section 20 of the Industrial Relations Act 1967 to say that he has been dismissed because he was forced to sign the agreement to terminate his contract.

Industrial Court

The Industrial Court was created by, and derives its powers and functions from, the Industrial Relations Act 1967. It operates as a quasi-judicial body. An award of the Industrial Court is binding on the parties involved in the dispute, the successor, assignees or transferees of any employer or trade union which is party to the disputes and all workmen who were employed in the undertaking to

which the dispute relates. The Industrial Court has the statutory duty to have regard to equity, good conscience and the substantial merits of the case without regard to technicalities and legal form in rendering its award.

The award of the Industrial Court may be challenged by way of a judicial review application to the High Court on the grounds that, in making its award, the Industrial Court has committed an error of law. Questions of law arising from the proceedings may also be referred to the High Court under s.33A of the Industrial Relations Act 1967.

Within 60 days of the dismissal by the employer, a workman may submit a representation to the Director General of Industrial Relations stating that he considers himself to have been dismissed without just cause or excuse and that he seeks reinstatement. An Industrial Relations Officer would then make attempts to reconcile the parties through mediation. In the event that the matter is not settled during mediation, the Director General of Industrial Relations will notify the Minister of Human Resources who will then make a decision whether to refer the representation to the Industrial Court for adjudication. It has been held by the courts that the Minister should refer all representations to the Industrial Court unless it is frivolous or vexatious. Upon a reference to it, the Industrial Court will adjudicate on the representation to determine if the employee's dismissal has been with just cause or excuse. The burden of proving that the employee has been dismissed is on the employee while the burden of proving that there was just cause or excuse for the dismissal is on the employer. In the event that the Industrial Court finds that the employee's dismissal was without just cause or excuse, the Industrial Court has wide powers to grant a remedy. In the case of permanent employees, the Industrial Court has the power to award one of the following:

- reinstatement and up to 24 months back wages from the date of dismissal to date of reinstatement
- up to 24 months last drawn salary as back wages and one month's salary for each year of service in lieu of reinstatement (less payments already made to the employee, if any)

The employee's post-dismissal income will be taken into account in determining the amount of back wages but not necessarily on a mathematical basis. Amounts paid to the employee such as for termination benefits will normally be deducted from the final award. In the case of probationary employees, the amount of back wages that may be awarded by the Industrial Court is limited to 12 months last drawn salary.

Foreign entities

Foreign employers

Foreign companies who are not locally incorporated or do not have a registered branch office may recruit employees through an agency or any other

third parties and may engage an independent contractor to act on its behalf in Malaysia.

Independent contractors will not normally create a permanent establishment of the foreign employer, especially in situations where the independent contractor carries on business in its own name and charges a fee for the use of its services by the foreign employer.

If the foreign employer is found to be carrying on business in Malaysia, then it must either incorporate or register a foreign branch, otherwise it will be committing an offence under the Companies Act 1965.

Foreign employees

An employer who employs foreign employees must, within 14 days of the employment, furnish the Director General of Labour with the particulars of the foreign employee. The employer may also be required to provide particulars of employment of the foreign employee, if so requested by the Director General. There is currently no limitation on the number of foreign employees that can be recruited and that number would depend on a number of factors, such as the capitalisation of the employer and the availability of local workers.

An expatriate or foreign worker is only allowed to work in Malaysia if issued with a work permit. The types of passes issued by the Malaysian Immigration Department can be found in the "Visas and Work Permits" section, as follows. An employer who employs anyone who is not in possession of a valid pass will be guilty of an offence under the Immigration Act 1959.

Dispute Resolution

Courts

In Malaysia, the courts are identified by their hierarchy. The subordinate courts are the magistrates' courts, with a civil jurisdiction for an amount not exceeding RM100,000 and the sessions' courts, with a civil jurisdiction for an amount not exceeding RM1,000,000. The superior courts are the High Courts, the Court of Appeal and the Federal Court. Leave must be obtained before any appeal is allowed to be filed before the Federal Court.

Malaysia's capital, Kuala Lumpur, has specific divisions for civil, criminal, commercial, intellectual property, admiralty, construction, Islamic banking, and appellate and special powers (which, among others, deal with appeals from the lower courts and applications for judicial review).

In relation to bringing a claim in the Malaysian courts, the time limit for doing so will depend on the type of claim being brought. In general, the civil claims arising from breach of contract or negligence must be brought within six years from the date of the accrual of the cause of action. If a party wishes to rely on a defence of limitation, it must expressly plead it as a defence to an action. Having said that, there are no time limits imposed for certain actions

such as those involving fraudulent breach of trust or the recovery of trust property or proceed thereto.

All civil court trials are conducted in public. However, in rare situations, such as when evidence adduce is confidential, the hearing may be held by camera. Originating cause papers and any court judgment or orders which have been filed in the Court registry can be accessed by the public. However, any other document filed in relation to ongoing proceedings can only be obtained with the leave of the registrar.

The Chief Justice has imposed deadlines on the judiciary to dispose of matters within a short period of time to ensure an expedited process. The courts usually target that a case be heard within nine months from the filing date, however there is some flexibility and cases are generally heard within 15 months.

On conclusion of a trial, the courts have wide powers to grant a remedy, including an order for the payment of damages, injunctions, specific performance and declarations. The court may also order that interest be paid on any monetary sum that is awarded to a party. The losing party may choose to appeal to a superior court. However, the appeals procedure as well as the requirement for leave to appeal will depend on which court the matter was originally heard in.

Judgments obtained in Malaysian courts can be enforced through many different modes which include obtaining a writ of seizure and sale, an order for committal, a charging order, a judgment debtor summons or commencing garnishee, bankruptcy or winding up proceedings. Meanwhile, the enforcement of foreign judgments obtained from courts in other jurisdiction is governed by the Reciprocal Enforcement of Judgments Act 1958.

Alternate dispute resolution (ADR)

ADR is readily available and frequently used in the resolution of commercial disputes in Malaysia. In addition, Malaysia has a number of specialist statutory courts and tribunals that are confined to specific types of disputes, for instance, the Industrial Court, the Consumer Claims Tribunal and the Homebuyers' Claims Tribunal.

Arbitration

Arbitration in Malaysia is governed by the Arbitration Act 2005, which is based on the United Nations Commission on International Trade Law's (**UNCITRAL**) Model Law, and court proceedings in respect of arbitration are governed by Order 69 of the Rules of Court 2012. Arbitration proceedings are available to parties who have agreed to use arbitration instead of the bringing an action in a court of law.

Mediation

Mediation is governed by the Mediation Act 2012 and can run on its own or as a preliminary step before arbitration or court proceedings. A mediator can be appointed by the parties involved or the court may allocate a judge to act as mediator. The

mediator's role is to find a compromise that is agreeable by both parties without making any binding decision. If a solution is arrived at, this solution will then be recorded in writing.

Myanmar

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Contributed by DFDL

Myanmar

While the initial rush of foreign investors to Myanmar slowed down in 2015, likely due to the November elections, there still remains intense investor interest in what is one of the world's largest underdeveloped markets while existing investors are consolidating their gains, some even exiting at a profit. Whereas market entry was the name of the game in 2013-14, we are now seeing sophisticated financings of infrastructure projects and some M&A in the form of sales of foreign-held stakes in successful Myanmar companies. These are healthy developments that indicate the early stages of market normality that just did not exist until recently.

With most sanctions now removed, Myanmar is trying hard to turn its geopolitically strategic position, its rich natural resources, its young labour force, over 50 million strong population, and proximity to some of the most dynamic economies in the world, into the engine that drives it into the modern age. To do so, Myanmar is actively encouraging foreign investment. Many international companies have arrived and many more are keen to come. However, risks remain.

Visas and work permits

Foreigners who arrive from abroad with various entry visas who want to stay more than 90 days in Myanmar must apply for foreigner registration to the Registration Section of Foreigner (Primary), Immigration and National Registration Card Department, Pansodan Street, Yangon. The application fee is nine US dollars and the following documents and information are required:

- passport
- personal data
- Permission order of the Ministry of Immigration and Population

Every foreigner who wishes to stay in Myanmar for more than 90 days legally requires a Certificate of Foreigner Registration (**FRC**).

There are 12 types of entry visa and three types of re-entry visa that are granted to business people and foreigners who visit Myanmar for various reasons. These visas are considered in further detail below.

The 12 types of entry visa are as follows:

- **Tourist Visa:** the terms and conditions required for a tourist visa application are vacation, visit or temporary stay only, return air ticket, provide the address of the hotel or the tour/ travel agent and the details and itinerary of the tour and undertaking by the tour/ travel agent. The visa holder may stay for a period of up to 28 days and the visa fee is US\$20. The visa duration is three months and cannot be extended
- **Business Visa:** the terms and conditions required for a business visa application are forms prescribed by Myanmar Investment Commission Ministries e.g., Form 6/Form 26 by

the Ministry of Commerce and the relevant company or firm. The visa holder may stay for a period of up to 70 days and the visa fee is US\$36. The visa duration is three months and may be extended if required

- **Employment Visa:** the terms and conditions required for an employment visa application are certificates of employment as recommended by the relevant Ministry (e.g., Ministry of Construction, Ministry of Hotel & Tourism, Ministry of Communication & Information Technology, Oil Exploration, Fisheries), labour registration certificates issued by the Ministry of Labour and employment and social welfare receipts certifying payment of taxes imposed. The visa holder may stay for a period of up to 70 days and the visa fee is US\$36. The visa duration is three months and may be extended if required
- **Social Visa:** the terms and conditions required for a social visa application are documents certifying that the visa applicant is an ex-Myanmar citizen, documents certifying the relationship with the Myanmar citizen and the full address of stay. The visa holder may stay for a period of up to 28 days and the visa fee is US\$36. The visa duration is three months and may be extended if required
- **Religious Visa:** the terms and conditions required for a religious visa application are the visa application submitted together with a letter of recommendation from the Ministry of Religious Affairs. In the event of an application for meditation: (a) recommendation by the Ministry of Religious Affairs certifying that the meditation centre is recognised by the ministry; (b) recommendation by the person in-charge of the meditation centre; (c) undertaking not to do any job except meditation; and (d) return air ticket

The visa holder may stay for a period of up to 70 days and the visa fee is US\$36. The visa duration is three months and may be extended if required.
- **Education Visa:** the terms and conditions required for an education visa application are a recommendation from the respective university or university of foreign languages in the event of schooling and recommendation from the respective schools in the event of lecturing at the schools under the Ministry of Education. The visa holder may stay for a period of up to 70 days and the visa fee is US\$36. The visa duration is three months and may be extended if required
- **Journalist Visa:** the terms and conditions required for a journalist visa application are recommendation of employment in local media, documents certifying that the media employer is recognised by the Ministry of Information/ Ministry of Home Affairs and recommendation from the relevant Ministry to certify the attending of a local event. The visa holder may stay for a

period of up to 28 days and the visa fee is US\$36. The visa duration is three months and may not be extended

- **Gratis Diplomatic / Official Courtesy Visa:** the terms and conditions required for Gratis Diplomatic / Official Courtesy visa application are the order of Myanmar assignment as a diplomat / member of diplomatic mission by the relevant country and list of duty assignment by the relevant Ministry. The visa holder may stay for the period of the tour of duty and there is no visa fee. The visa duration depends on the length of the tour of duty and may be extended if required
- **International Organisations (Official Visa):** the terms and conditions required for an international organisations visa application are International Organisations recognised by United Nations, organisation that has been registered according to the Myanmar Association Registration Law, recommendation by the Focal Ministry and Place of Business within Myanmar, the type of Business and the undertaking to abide by the existing national laws. The visa holder may stay for a period of up to 28 days and the visa fee is US\$20. The visa duration is three months and may be extended if required
- **Crew Visa:** the terms and conditions required for a crew visa application are entry visa for those working as crew members: (a) invitation letter by a local air line / recommendation for employment as current crew member; and (b) permission / recommendation by the Ministry concerned recognising the airline. The visa holder may stay for a period of up to 28 days and the visa fee is US\$36. The visa duration is three months and may be extended if required
- **Workshop / Seminar/ Meeting / Research Visa:** the terms and conditions required for this visa application are in the event of application for attending Workshop/ Seminar/ Meeting: (a) mention exact dates of events; and (b) direct invitation by the Ministry and undertaking to abide by visa rules with FAPC permission

The visa holder may stay for a period of up to 28 days and the visa fee is US\$36. The visa duration is three months and the Research Visa may be extended if required but Workshop, Seminar and Meeting Visas cannot be extended
- **Transit Visa:** the terms and conditions required for transit visa application are an air ticket departing Myanmar. the visa holder may stay for a period of up to 24 hours and the visa fee is US\$18. The visa duration is 24 hours and may not be extended

All visas must be applied for at respective Myanmar Embassies and Consulates. The visa on arrival, business visa, workshop / seminar / meeting / research visas, crew visa and transit visa applications will be permitted by Yangon International Airport, Mandalay International Airport and Nay Pyi Taw International airport.

The three types of re–entry visa are as follows:

- **Multiple Journey Special Re-entry Visa:** the terms and conditions required for this visa application are people from enterprises, companies and organisations holding a business visa, crew visa, gratis diplomatic / official courtesy visa or an official visa. Visa holders must submit sound reasons why they need a multiple journey special re-entry visa along with recommendations from the relevant Ministry. The visa fees is US\$180 and the visa duration may be extended if required
- **Special Re-entry Visa or Single Re-entry Visa:** visa holders of an official visa, business visa, employment visa, social visa, religious visa, education visa and research visa can apply for a re-entry visa if they wish to leave Myanmar during the permitted period but must re-enter before the expiry of the permitted period. The visa fee is US\$54
- **Re-entry Visa (for the foreigners entitled to reside within the country permanently):** in the event of living abroad continuously, a six month stay abroad permit can be extended three times at the relevant embassy. Permanent Resident Status holder foreigners cannot extend a stay abroad permit. Foreigners are permitted to live abroad for six months and the visa fee is 5000 kyats. The duration of the visa is two months from the date of permission. In the event of more than 24 consecutive months stay abroad

Permanent residency

Permanent Residency means permission to stay in Myanmar during the allowed period for foreigners who meet the criteria in the 1947 Myanmar Immigration (Recent Enactments) Act Law. A person who is a foreigner shall hold a visa which does not allow him or her to stay for 10 years from the day that he or she applies, stay in Myanmar for at least three years to travel in and out of Myanmar and has less than continuous 90 days in a year during the stay outside of Myanmar.

An applicant who applies for Permanent Residency shall bring the following documents to the Sub-Department in-person:

- a Permanent Residency Application form Aa-Ma-Na-1 for foreigners
- an authorised unexpired passport, a travel document and its photocopy (if the applicant holds more than one passport, these original passport and photocopies shall be submitted)
- proof of citizenship from an original country
- an employment letter or invitation letter where the applicant has worked for more than a year
- proof certificates relating to educational background of expats and their official documents to show their professional experience and corresponding organisations

Investors shall submit the following requirements:

- company registration and permission under the investment law
- business plan of the company

- if the investor has other business in other states, proof of bank statements of the company

Business entities

Overview

A foreign investor may establish a 100 per cent foreign-owned company, a branch office or enter into a joint venture arrangement with a Myanmar citizen, company, or state-owned entity. These entities are permissible under the Foreign Investment Law and the Companies Act although, as will be discussed later, the Foreign Investment Law places limitations on the use of certain investment vehicles in various sectors (please see section 3.3).

The Foreign Investment Rules, Notifications issued by the MIC and the Directorate of Investment and Company Administration (**DICA**) provide further details and guidance on the Foreign Investment Law.

No foreign company can carry on business in Myanmar unless it has obtained a “permit to trade” (**PTT**) and a Certificate of Incorporation (**COL**) or a Certificate of Registration in the case of a branch of a foreign company (please see Section 27A of Myanmar Companies Act 1914 (**Companies Act**)).

A PTT is a misnomer as it does not allow a company to engage in trading (this activity is currently restricted to local persons by government policy). Rather, a PTT is a foreign business licence that must be obtained by all foreign businesses in all sectors, whether for the provision of services, manufacturing or construction, and whether a company is formed under the Foreign Investment Law or not. A Permit to Trade is obtained by application to DICA, together with the application for a Certificate of Incorporation, without which a company has no valid existence or good standing.

Foreign direct investment in a project to be carried out in Myanmar can be made either:

- under the Foreign Investment Law and Myanmar Companies Act
- for projects falling under the sectors identified by the Foreign Investment Law, the Foreign Investment Rules and the MIC Notifications, foreign investors must apply to the MIC for an investment permit (MIC Permit). Companies having obtained such MIC Permit will be eligible for the key benefits granted to a company formed under the Foreign Investment Law (FIL Companies). Importantly, these FIL Companies must still obtain a Permit To Trade and Certificate of Incorporation from DICA, in addition to the MIC Permit
- under the Myanmar Companies Act alone, or
- for a project for which an MIC permit is not required or for which such project is not eligible for an MIC Permit (e.g., for provision of services), foreign investors can apply for a Permit to Trade and a COL from DICA only without the need to go to the MIC

Investment vehicles

100 per cent foreign-owned company

A 100 per cent foreign-owned company will usually be either a subsidiary of a foreign company or a branch office of the foreign company. In practice, the foreign investor seeking an MIC permit will need to form a subsidiary. Further, the distinctions in potential liability between a subsidiary company and a branch office are not clearly specified in Myanmar law, with the only advantage of opting to open a branch office over a subsidiary company being the less numerous filing and corporate secretarial compliance obligations and a certain amount of flexibility on how much “onshore” activity the branch can undertake. There are two types of limited liability company in Myanmar, namely a private limited liability company and a public limited liability company. Currently, there is no a public foreign company in Myanmar.

Joint venture

A joint venture is permissible for any project in Myanmar, though as discussed below there are certain business sectors specified in the MIC Notification which require a partnership with a Myanmar citizen or company. In general, the shareholding ratios are to be decided “by mutual agreement” of the parties. However the MIC is the power to set shareholding ratios between foreign and local investors in specific sectors. (The FIR rules also refer to a maximum of 80 per cent foreign capital compared to a 20 per cent local capital. In prohibited or restricted business sectors. We understand that this 80-20 ratio of the FIR rules does not. Apply to all joint ventures formed under the Notification and will rather only be applicable to joint ventures with Myanmar citizens or private entities in prohibited sectors). Sometimes, in certain sectors, the FIL requires a public-private joint venture or other analogous system, including a Build Operate Transfer contract (**BOT**) or other partnership with the government.

Foreign investors may also appoint a business representative or enter into an agency arrangement with a Myanmar citizen or 100 per cent Myanmar-owned company for certain activities, such as import / export, trading and retail distribution activities that are generally prohibited to foreigners unless an MIC permit for a foreign-owned factory has been attained, in which case the foreign company can market, sell and distribute the products from that factory under certain conditions.

Business environment

The legal environment is in its early stages of reform and modernisation. The Myanmar government has made progress and continues its feverish pace of drafting new laws. These new laws co-exist both with the old British colonial laws and regulations, which provide much of the fundamental legal framework still in place today, and with the laws and regulations issued by the various military governments over the last fifty years. This mixture of a common law heritage with laws more akin to an abridged civil law approach has been further complicated by the liberal application over the last few decades of “policies and practices”, which are not detailed in any laws or regulations and are often

unpublished. The result is a legal landscape that requires patience and, most importantly, a deep understanding of the colonial laws, former military government laws and practices, and finally the recent pro-foreign investment oriented laws. With careful legal and tax structuring and an appetite for risk, foreign investment can be made in Myanmar on the principle of “high risk/high reward” for the early movers. It is certainly not too late for early mover advantage in many sectors.

The 2013 GDP is estimated to be USD884 per capita, which is six per cent more than the estimates that were provided for 2012 and 2011. As of 31 December 2013, foreign investments in Myanmar since 1988 totalled more than USD44 billion, with the leading investments in power, oil and gas, mining, and manufacturing industries. Furthermore, the country is strategically situated, sharing borders with China and India, as well as Thailand, Laos PDR, and Bangladesh. Various positive economic conditions suggest that as long as the political environment remains stable this economic growth is expected to continue.

Myanmar frequently ranks poorly on doing business indices, in large part due to the lack of transparency in the government approvals process and taxation regimes.

Aside from legal hurdles, there are human resources, infrastructure, geographical and social challenges. Ongoing civil conflict in the northeast, northwest and southwest parts of the country coupled with poor interconnectivity and electricity resources make nationwide business difficult if not impossible.

Business is keenly centred around the major city hubs of Yangon, Mandalay and the administrative capital Nay Pyi Taw.

Funds management

The Government has set up several institutions to establish protection to public and private funds. However, due to the lack of a comprehensive law covering such funds as well as investment funds, certain improvements are required to be carried out. It is apparent that an update to Public Finance Management (PFM) is underway, sponsored by the World Bank. The development objective of the project is to support efficient, accountable, and responsive delivery of public services through the modernisation of Myanmar’s PFM systems and to strengthen institutional capacity. Other areas, including private and investment sectors, will also be improved with the advancement of democratic government in Myanmar.

Regulatory bodies

Funds management is carried out by different governmental and semi-governmental institutions in Myanmar. The following institutions are noteworthy:

Myanmar Investment Commission (MIC) is a government-appointed body responsible for verifying and approving investment proposals, and regularly issues notifications about sector-specific developments. The MIC is comprised of representatives and experts from government ministries, departments and governmental and non-governmental bodies. It has been formed under the

Foreign Investment Law and Myanmar Citizen Investment Law. The objectives of the MIC are as follows:

- to protect investors according to the investment law promulgated by the parliament
- to safeguard environmental conservation;
- to emphasise social impacts
- to practice accounting and auditing in accordance with international standards in financial matters, including transparency and accountability
- to create job opportunities
- to abide by the existing labour laws
- to support corporate social responsibility; and
- to transfer technology

The Central Bank of Myanmar (CBM) was established under the Central Bank of Myanmar Law in July 2013 and was granted far greater autonomy than its predecessor. In section six of the law, the CBM’s objectives are provided as follows:

- to promote monetary stability
- to enhance financial system stability
- to develop an efficient payments and settlement system
- to support the general economic policy of the Government conducive to sustained economic development

Myanmar Securities Exchange Centre Co., Ltd. (MSEC) is a 50/50 joint venture involving Myanmar Economic Bank (MEB) and Daiwa Securities Group, Japan. It was established in June 7, 1996, and since then has been a pioneer at the heart of capital market development in Myanmar. Its stated mission is:

“to satisfy both investors and securities issuers with our one and only capability as the sole leader of the capital market in the country, backed by the firm’s accomplishment spanning over 18 years in Myanmar, and ultimately to establish fair, transparent and sizable efficient securities markets in the country”.

The Anti-Money Laundering Commission has been formed under section six of the Anti-Money Laundering Law. The duties and powers of the body, among others, are as follows:

- to guide the relevant government departments and organisations so that banks, financial institutions and economic enterprises may not be established and operated for the purpose of money laundering
- to issue orders to the responsible persons of banks and financial institutions in order to allow search and seizure of money and property for examination or use as evidence; to allow search and seizure of financial records for use as evidence by the Scrutiny Board; and to revoke the said order

- to issue a prohibitory order to the relevant departments, organisations and persons not to change, transfer, conceal, obliterate or convert money and property relating to money laundering during the investigation period under the Anti-Money Laundering Law, as well as to seal and revoke the said order, and
- to assign duties to the Financial Intelligence Unit, formed under the Anti-Money Laundering Law, to scrutinise, investigate, inspect, search, and seize as evidence in respect of money and property obtained by laundering in accord with the stipulations

On 2 February, 2015 the Central Bank of Myanmar published guidelines for financial institutions on managing risks for money laundering and terrorist financing.

Effective risk management is required under the Basel Committee's core principles for effective banking supervision and the Financial Action Task Force (FATF)'s 40 recommendations. The Basel Committee is the primary global standard-setter for the prudential regulation of banks and provides a forum for cooperation on banking supervisory matters. Its mandate is to strengthen the regulation, supervision and practices of banks worldwide with the purpose of enhancing financial stability. The Committee's Secretariat is at the Bank for International Settlements in Basel, Switzerland.

Public finance management (PFM)

During 2012, the government worked closely with the World Bank and other development partners in reviewing key dimensions of the public financial management system, including budget credibility, comprehensiveness and transparency, policy-based budgeting, predictability and control in budget execution, accounting, recording, and reporting, and external scrutiny and audit. The review concluded that the system is highly constrained in delivering aggregate fiscal discipline, strategic allocation of resources and efficient services. It recommended addressing

"high-priority gaps in the regulatory framework (mainly improvements in financial regulations and minimum rules on procurement and internal audit) while commencing development of stronger overarching budget legislation (e.g., a comprehensive law covering the budgetary process to be implemented over the medium term)".

The reforms undertaken to date have focused very strongly on issues related to transparency and accountability, and it appears that the government intends to continue using the transparency and accountability dimension of Public Finance Management (PFM) reforms to drive the overall reform process.

It is true that standardised and transparent public finance management is of great importance to all stakeholders. It will assist government organisations to assess the impacts of new policies and to make informed decisions in allocating resources. It will improve public confidence in the

government, may increase tax collections, which in turn may contribute investor and donor confidence.

In addition to focusing on issues of transparency and accountability, the PFM reform strategy focuses on reforming systems, procedures and rules for all aspects of public finance management. These include planning and budgeting processes, budget execution, monitoring, accounting and reporting systems and audit and external scrutiny. At present, both the Office of the Auditor-General (OAG) and parliament are already playing an important role. The OAG has purview over all of the public sector, except the Ministry of Defence, and is responsible for setting accounting and auditing policy for the public sector. It has adopted international audit standards, reports to parliament through the president's office, and is playing an active and constructive role. The Public Accounts and Planning and Finance Committees of parliament have also been working hard in reviewing and rationalising budget proposals as well as ensuring that the budget laws are published in the local press.

The government's PFM reform strategy recognises that institutional restructuring must accompany the reforms in systems, procedures and rules. It is assessed that institutional restructuring will need to take place across ministries and from the top to the bottom of the system. The changes are especially required in important institutions responsible for macroeconomic management. Such institutions include the president's office, the Ministry of Finance and Revenue and the Ministry of National Planning and Economic Development.

Even more challenging is that these strategies get implemented and achieve the desired results. Simultaneously, enhancing staff skills, introduction of computer tools, restructuring of business processes and changes in management are required to strengthen local capacity. The impact of training programs for government officials and technical support can be greatly enhanced if they are complemented by broader reforms of government institutions and the civil service.

The investment sectors, will also be improved with the advancement of democratic government in Myanmar.

Fuel regulation

The new government of Myanmar which came to power on 1 April, 2016 is working to ensure that its economic development projects adhere to the highest international standards and the government will require foreign and domestic investors to demonstrate transparency, consider environmental and social impact, and respect corporate social responsibility. In this context, in December 2012, former President Thein Sein announced that Myanmar sought to join the Extractive Industries Transparency Initiative (EITI), and the country was admitted as an EITI candidate in July 2014. Myanmar's participation in EITI requires it to comply with international standards of transparency for all its oil, gas and mining earnings, which can include disclosure of information relating to company ownership, tract terms, state-owned extractive industries and revenue allocation.

It is estimated that Myanmar, which is one of the oldest oil producers in the world, has up to 3.2 billion barrels of oil and 18 trillion cubic feet (Tcf) of natural gas reserves. Unproven resources might potentially expand that figure. Myanmar is currently the 10th largest producer of natural gas in the world.

Additionally, in the fuel sector, an estimated 400 coal occurrences have been identified in Myanmar. The 33 major coal deposits have reserves with a total of 488.7 million tons composing different qualities. However, only one per cent of this estimated potential has been confirmed by the authoritative sources.

Myanmar's fuel sector is full of opportunities and challenges. The opportunities are mainly in oil and gas sector, renewable energy and coal industries. Myanmar's new government is driving for economic development throughout the country. Very recently, Myanmar published The Petroleum and Petroleum Product Bill to be promulgated in the near future. This means the government looks into this sector for the economic development of the country and both foreign and local investors should be eager to make investments in this potential area.

Laws and regulations

Multiple Laws and Regulations govern the oil and gas sector, many of which were enacted in colonial times and have not been thoroughly revised since, including the following:

- the Oilfield Act (1918)
- the Petroleum Act (1934)
- the Oilfield Rules (1936)
- the Petroleum Rules (1937)
- the Essential Supplies and Services Act (1947)
- the Oilfields (Labour and Welfare) Act (1951)
- the Petroleum Resources (Development Regulation) Act (1969)
- the Environmental Conservation Law (2012)

Opportunities

Both foreign and domestic companies have significant opportunities in fuel sector in Myanmar. This sector needs high quality engagement in coal-powered plants and in the oil and gas industry. Investors both foreign and local tend to be offered tenders and licences by the government and may have requests for joint venture partnerships.

Other potential opportunities which are prioritised by the government may be considered. One among them is infrastructure and equipment development, in respect of rehabilitating or building roads, pipelines and other infrastructure to develop this sector.

Myanmar's government and its population strongly desire the fuel sector to meet international standards. Government officials, managers, and labourers need training to be able to draft appropriate legislation, comprehend complex production sharing agreements and contracts, build a physical and corporate infrastructure that complies with international and domestic regulations, and

provide workers with necessary skills. In the sense a number of technical assistance and capacity building opportunities exist.

One more area is environmental and social impact assessment consultancy services which consists of conducting in-depth studies on the environmental and social impact of projects that could mitigate potential social issues and alleviate concerns about environmental degradation.

There are many opportunities for both foreign and domestic investors in this sector, but those who choose to engage must also be aware of the challenges lying ahead. One happens to be that the oil and gas industry largely remains a restricted one compared to other sectors. Another factor is that of lack of both human and physical capacity, an opaque and ever-changing legal system, lack of coordination among the multitude of fuel sector-related industries, remaining U.S sanctions.

Foreign investment policy

One of the main pillars of investment is providing investors with a transparent and rules-based approach to the legal and regulatory frameworks; a clear and well-understood playing field. As mentioned above, this is not yet the case in Myanmar, despite the fact that the old colonial laws and the recent pro-foreign investment oriented laws provide some basics with regards to:

- the industries that international companies may invest in and in what form
- the rules applicable to how they should operate once they have entered the market
- trying to make sure that enforcement of the rules is fair

The effectiveness of the last factor will, of course, become clearer in time. The government appears to be working hard drafting and issuing new laws to create this clear and understood playing field. However, this is not an easy task and will likely have many twists and turns. There has been some solid progress, the most notable being the enactment of the Foreign Investment Law on 2 November 2012 (**FIL**) and the more recent Notification No 49 of August 2014 issued by MIC (the body overseeing foreign investment into Myanmar) that replaced a Notification from 2013 and liberalised more sectors to foreign investment (**FI Notification**). The FIL focuses on the industry sectors that international companies are permitted to enter and in what form, with a focus on infrastructure and manufacturing projects that are jobs- and capital-intensive and bring knowhow and technology to Myanmar and its people.

It is expected that the entry barriers for foreign investors in many of the still-restricted sectors will be relaxed over the coming years, in particular as the Association of Southeast Asian Nations (**ASEAN**) countries approach the agreed target date of a single economic community by end-2015. The government has already opened up the banking sector to foreign banks, albeit on a limited basis of providing capital and services to foreign corporate, but further moves in this and the insurance sector are expected over the coming year or two.

We have seen the passing of the Securities Exchange Law in July 2013, which provides the framework for the establishment of a stock exchange, a very significant market fundamental that will be an important plus for international companies considering making investments in Myanmar, which at present has little in the way of functioning capital markets. This was followed in early 2015 by the SEC Regulations, providing for the regulation of securities businesses, under which an international tender was held earlier this year for the first brokers and securities companies to be licensed under the new law – the winners have not been announced at the time of writing.

The telecoms sector is another success story, with the award of two nationwide mobile network and services licenses to Ooredoo and Telenor, following the enactment of the modernised Telecommunications Law in 2013.

Both these operators are racing to build out their networks to meet the stiff government-set targets, which are proving a legal and regulatory challenge for tower companies, particularly in some of Myanmar's underdeveloped rural areas. The surprise result of the opening up of the telecoms market has been the resurgence of the once-despised Myanmar Posts and Telecommunications (MPT), the state-owned enterprise that had the monopoly on telecoms until October 2014 when the new operators launched their services. MPT has risen to the challenge by partnering with Japanese firms KDDI and Sumitomo and has doubled its subscriber base to over 11 million reported customers, while Ooredoo has close to five million, and Telenor has 10 million. The MPT brand, once moribund, has risen like a phoenix from the flames of its past and is currently beating the newcomers hands down. It is to be hoped that this model of partnership between Myanmar companies and foreign capital and knowhow can be repeated throughout all Myanmar's industry and service sectors to bring the country back to its once pre-eminent position in South East Asia in terms of trading and wealth.

Role of the MIC

The MIC is the government agency that administers the Foreign Investment Law and coordinates with various ministries and organisations to facilitate foreign investment in Myanmar. The MIC evaluates foreign investment proposals and either approves or denies applications based on the quality and completeness of the proposal and the specific goals identified in the Foreign Investment Law. The MIC is an extremely powerful government body in terms of what foreign investment is allowed or not allowed in the country.

An MIC Permit is unlikely to be granted if the proposal does not accord with at least some of the following extracted from the list of investment criteria set out in Article 8 of the FIL:

- to produce mineral and other natural resources sufficient to meet domestic demand and to export the surplus
- supporting capital-intensive industries

- job creation for the people in line with the progress and expansion of work
- to develop human resources, basic infrastructures such as banking and financial activities, modern roads, interstate highways, and national electrical power and energy production
- to develop high-tech industries, including modern information technology
- to develop communications networks, educational systems, and transportation
- for citizens to be able to compete on an international level
- for businesses and investment to operate in line with international standards

In accordance with the FI Rules, the MIC is required to evaluate proposals and accept or reject within 15 days of submission of the application, and shall thereafter issue (or deny) an MIC permit within 90 days. Although there has been a marked improvement in terms of the creation of a rule-based approach in the new Foreign Investment Law compared to the Foreign Investment Law of 1988, the MIC still has broad discretion in approving or denying foreign investment proposals and in practice these timelines are not often adhered to.

An MIC Permit is required for certain sectors and businesses specified in the Foreign Investment Law, in the Foreign Investment Rules and the MIC Notifications. The Foreign Investment Rules contain four schedules of specific activities which are reserved exclusively for Myanmar citizens and entities, including certain production and services activities, agricultural cultivation, livestock breeding and fishing activities.

MIC issued new Notification 49/2014 and repealed Notification 1/2013. MIC subsequently issued Notification 50/2014 (EIA Notification) and Notification 51/2014 (**Tax Notification**). The MIC Notifications provide the lists of business activities which are prohibited and restricted, required environmental impact assessment and not to grant tax exemption and relief for foreign investors. The business activities of MIC Notifications must be conducted under the Foreign Investment Law, i.e., those activities require an MIC Permit. The major categories of business activities are below:

Businesses which are prohibited and restricted for foreign investor:

- manufacturing and related services of Arms and ammunition for the national defence
- managing and conserving of natural forests
- prospecting, exploration and production of jade/gem stones
- production of minerals by medium scale and small scale
- administration of Electric Power System
- inspection of Electrical Works
- Air Navigation Services

- exploitation of minerals including gold in the revering and water way
- Pilot Age Services
- operate Printing and Broadcasting Service jointly without approval of the Union Government
- periodicals in national ethnical languages including Myanmar

Businesses and sectors which require a joint venture with a local partner (shareholding ratios are determined by mutual agreement as between the parties) including:

- production and distribution of hybrid seeds
- production and propagation of high-yield seeds and local seeds
- manufacturing and domestic marketing, distribution and sale of cereal products such as biscuits, wafers, all kinds of noodles, vermicelli and other cereal related food products
- manufacturing and domestic marketing of all kinds of confectionery including those of sweets, cocoa, and chocolate
- preserving, manufacturing, canning and domestic marketing of other food products except milk and dairy products
- manufacturing and marketing of malt and malt liquors and non-aerated products
- distilling, blending, rectifying, bottling and marketing of all kinds of spirits, alcohol, alcoholic beverages and non-alcoholic beverages
- manufacturing and marketing of all kinds of purified ice
- manufacturing of purified drinking water
- manufacturing and marketing of all kinds of rope;
- manufacturing and domestic marketing of enamelware, cutlery, crockery of all kinds
- manufacturing and domestic marketing of plastic wares
- manufacturing of rubber and rubber products
- packaging
- processing of hides, skins and leathers of all kinds, excluding synthetic leather, and manufacturing and domestic marketing thereof including foot wears, handbags, etc.
- manufacturing and marketing of all kinds of paper, raw materials for paper, all kinds of products made by paper, paper board including carbon paper, waxed paper, toilet paper, etc.
- manufacturing and marketing of chemicals based on natural resources available domestically (excluding products of petroleum and gas)
- manufacturing and marketing of solid, liquid, gaseous fuels and aerosol (acetylene, gasoline, propane, hair sprays, perfume, deodorant, insect spray) (excluding products of petroleum and gas)

- manufacturing and marketing of oxidants (oxygen, hydrogen peroxide), compressed (acetone, argon, hydrogen, nitrogen, acetylene) (excluding products of petroleum and gas)
- manufacturing and marketing of corrosive chemicals (sulfuric acid, nitric acid)
- manufacturing and marketing of industrial chemicals gasses including compresses, liquefied, and solid forms
- manufacturing of pharmaceutical raw materials
- small and medium scale production of electricity
- development of international standard golf courses and resorts
- development, sales, and lease of residential apartments/condominiums
- development and sales of office/commercial buildings
- development, sales and lease of residential apartments in the areas related to industrial zones
- development of affordable housing
- domestic air transport service
- international air transport service

Businesses activities permitted with the recommendations of the relevant Ministry and required Joint Venture with the Citizen including:

No.	Type of Economic Activity	Permitting Authority
1	Production of bee and bee products, manufacturing of fishing net, construction of fishing jetty and fish auction market, fishing activities on Sea etc.	Ministry of Livestock, Fisheries and Rural Development (MLFRD)
2	National park, ecotourism, business relating to the reduction of carbon emissions, establishment of forest plantations for production purpose in forest lands with long terms leases, importing, exporting, breeding and fauna species for commercial purposes etc.	Ministry of Environmental Conservation and Forestry (MOECAF)
3	Manufacturing and marketing of soft beverages, aerated and non-aerated products, production of seasoning powder and the medicinal drugs by using controlled chemical.	Ministry of Industry (MOI)
4	Passengers and cargo transport services by vessels and barges, establish nautical and training school, dockyard services and water transport related services on land plots owned by Inland Water Transport.	Ministry of Transport (MOT)

No.	Type of Economic Activity	Permitting Authority
5	Domestic and international postal service.	Ministry of Communications and Information Technology (MCIT)
6	Private hospitals, clinics, diagnostic services, private production of pharmaceuticals and medical devices, private medical/health related education institutions, manufacturing of traditional drugs etc.	Ministry of Health (MOH)
7	Publishing of foreign language periodical newspapers, FM radio broadcasting and television broadcasting using Direct to Home (DTH), DVB-T2 or cable systems, movies production and showing.	Ministry of Information (MOI)

Businesses requiring specific condition and joint venture with a relevant government department including:

No.	Type of Economic Activity	Condition
1	Construction, implementation and importing of oil and gas equipment.	Joint Venture with the Ministry of Energy (MOE)
2	Manufacturing of Cigarette (local Virginia must be used 50 per cent within the first three years or at least 50 per cent of raw materials must be purchased from export earnings of local Virginia and 90 per cent of the products must be exported).	Joint Venture with the Ministry of Industry (MOI)
3	Production and marketing of explosive chemicals and flammable liquid and solid.	Joint Venture with the State Government
4	Distribution in the local market and exporting crops after cultivating and producing using imported necessary input materials.	Permitted only value-added products. Allow shareholding up to 49 per cent. Allow trading locally/export sales, depending on the production of such JV. Strictly prohibited for exporting paddy by sea or through Border Trade.
5	E-Lottery	Joint Venture with the Government and recommendation of

No.	Type of Economic Activity	Condition
		Ministry of Finance (MOF)
6	Development of new satellite town and urban redevelopment.	Joint Venture with Government and recommendation of Ministry of Construction
7	Construction of new railway line, new station and new building, train operation and maintenance, manufacture and maintenance of locomotive, carriages, wagons and spare parts, automobile services for passenger and freight transport operating, vehicle inspection, driving training centre etc.	Joint Venture with relevant enterprise/ department/directorate/ organisation, permission of Union Government and recommendation of Ministry of Rail Transportation.

If permission is granted to conduct one of these activities listed in the table directly above, it will be restricted to a joint venture with a Myanmar citizen or entity and further the equity ratio will be prescribed by the MIC. Usually the maximum foreign investment will be limited to 80 per cent.

Businesses requiring other conditions or authorisations (e.g., the need for an Environmental Impact Assessment (EIA) and/or Social Impact Assessment (SIA)) in certain environmentally or socially sensitive sectors. Although not written into the FI rules, it is becoming clear that the MIC expects an EIA and SIA to be included in almost all proposals submitted to it, across all sectors. The MIC will accept an EIA plan on initial submission, with a more detailed report to come later. A Corporate Social Responsibility (CSR) policy is also viewed favourably.

Businesses which will not be granted exemption and relief from commercial tax and custom duty include:

- manufacturing of alcohol, beer, cigarette, similar products and related service business
- sale and distribution of gasoline, diesel, engine oil and natural gas
- repair and maintenance of vehicles and similar services
- industrial, with not high technology and minimum capital investment, able to be carried out by Myanmar citizen (excluding labour intensive business)
- production, extraction (logging) on the basis of the long-term lease on forest area (reserved, protected forest area)
- extracting natural resources (excluding exploration and production of oil and gas)

- construction and sale of Building
- rental services of vehicle, machinery, and equipment
- restaurant, food and beverages business

Investors in natural resources, infrastructure and manufacturing (in particular) will need to obtain an MIC Permit due to the general restriction on foreigners in Myanmar not being permitted to hold land leases of more than one year at a time (under the Transfer of Immovable Property Restrictions Act of 1987 (**TIPRA**) unless they obtain an exemption under the Foreign Investment Law allowing for longer lease rights for their projects. As further explained below, a FIL company may lease land for an initial term of up to 50 years, renewable twice for terms of 10 years each.

In the services sector, the MIC generally does not grant investment permits unless the project satisfies the investment criteria set out in Art. 8 of the Foreign Investment Law under which the MIC must judge every application made for an MIC permit.

Please note that a foreign investor proposing to invest in a sector or area of business that is not specified in the Notification may still apply to the MIC for an investment permit although it is not required. If not specified by the MIC Notifications, the foreign investor can select the vehicle for its investment in accordance with the Foreign Investment Law.

Licensing and approval process

The process of establishing an entity in Myanmar and obtaining an investment permit from the MIC can be seen as having four individual stages, collectively taking approximately four months to complete. Both the DICA application process for obtaining a Permit To Trade and Certificate of Incorporation as well as the application for an investment permit are done in parallel, although the requirements to obtain a Permit To Trade/Certificate of Incorporation from DICA and an investment permit from the MIC are separate and distinct.

The first stage involves the preparation of applications, the collection of documents and finally the submission of the required information. Unlike in many countries, the process of collecting and submitting the required documents can be very time-consuming, generally taking at least a month. A number of the documents to be submitted in order to incorporate a company (and this also applies for registration of a branch) must be notarised and consularised at the Myanmar Embassy in the parent company's country of residence.

The key application form used to obtain an investment permit from the MIC is Form One. The information required to complete Form One will vary based on the nature of the project. Generally, the required data will include detailed information regarding the equipment and machinery to be imported, a break-down of the staffing needs of the project, financial project, anticipated exports, and copies of key contracts used to affect the project. No single factor will be determinative.

The second stage begins following the submission of the proposal to the MIC, in which an MIC

proposal assessment team will scrutinise the application to ensure its compliance with the requirements of the Foreign Investment Law. The MIC has broad discretion when weighing whether to grant an application for an investment permit and in its evaluation, the committee will often make requests for clarification and additional information on the project. There are no set factors under the law that will cause an application to be approved or denied. It should also be anticipated that meetings will be necessary to answer any questions and concerns of the commission and concerned government agencies.

If the MIC comes to the conclusion that the proposal would be beneficial to Myanmar by meeting most or all of the criteria set out in Article 8 of the Foreign Investment Law, is compliant with the FIL and "no objection" letters from all concerned government parties are received, the process can move to the third stage, where a conditional investment permit will be issued.

The fourth and final stage involves obtaining a Permit to Trade and Certificate of Incorporation from DICA. Under the Foreign Investment Law, the MIC, and DICA applications are required to be submitted simultaneously and completed in parallel. However, in practice when an investor applies for an investment permit, DICA will wait for the conditional permit to be issued by the MIC. DICA will then evaluate the submitted documents, carry out its own scrutiny process and, assuming these are in order, will proceed to grant the temporary Permit To Trade and Certificate of Incorporation (the final Permit To Trade and Certificate of Incorporation will be issued once the foreign investor has deposited the first instalment of the initial minimum capital and fulfilled other conditions).

Myanmar does not have any legal restrictions on debt-equity ratios or thin-capitalisation rules. There are, however, minimum foreign capital requirements. On the issue of the temporary Permit to Trade and Certificate of Incorporation, the company can start its set-up operations. During this phase, a foreign investor will receive instructions to bring 50 per cent of the minimum capital into the country. Currently the standard minimal capital amounts are USD150,000 for manufacturing, construction and industrial businesses and USD50,000 for service providers, of which 50 per cent will be required to be deposited with a bank in Myanmar before DICA will issue the final Permit To Trade and Certificate of Incorporation, both of which will be dated with the same date as the temporary documentation. (Note that these minimums are the standard, but for large-scale, capital-intensive projects, DICA or the MIC could require a larger initial injection of capital). The second instalment of the minimum capital must be brought into the country before the first renewal of the Permit to Trade. Currently, renewal of the Permit to Trade is required every five years.

Government initiatives and incentives

Benefits for foreign investors

One of the main advantages for foreign investors under the Foreign Investment Law is the enjoyment of significant benefits and tax incentives. This

Section gives you an overview of the most relevant benefits and tax incentives available to foreign investors having obtained an MIC permit.

Land use rights

Foreign investors under the Foreign Investment Law have the ability to lease land for an initial maximum term of 50 years (increased from a maximum of 30 years available under the Foreign Investment Law of 1988). The lease can thereafter be extended for two additional ten-year terms. (The FIL provides foreign investors the right to enjoy long term land leases, however the MIC will not grant a lease term longer than the current term enjoyed by the local lessor) Furthermore, a long-term lease may be sub-leased or mortgaged under the terms of the FIL with prior approval from the MIC.

Government guarantees

Foreign investors enjoy three significant guarantees from the government under the Foreign Investment Law that:

- the industry will not be nationalised during the term of the project
- the investors permit will not be revoked without sufficient cause
- the investor will have the right to remit profits in the same currency in which the investment was made

Transfer and sales of shares

The Foreign Investment rules allow a foreign investor to transfer shares to another foreign investor or Myanmar citizen subject to the approval of the MIC. The Foreign Investment Rules state that the MIC will use three criteria in deciding if it will approve a share transfer whether:

- or not the reason to transfer all shares is correct
- or not the interests of Myanmar and its people would harm by allowing the share transfer
- the transferee has the ability to continue the business successfully

If considered to be a permissible transfer, then the full commission will vote to approve or deny the transfer at the next scheduled meeting. It should be noted that the transfer of shares from Myanmar citizens to foreign investors is still not explicitly permitted by law, despite the fact that the recently-enacted Myanmar Citizens Investment Law 2013 (under which local persons can apply to the MIC for a permit.)

To incorporate a company enjoying the same benefits as foreign investors under the Foreign Investment Law, it appears to suggest that the transfer of shares in these companies to foreigners is allowed. However, this right is expressed to be "in accordance with the Foreign Investment Law" and, as has been seen, the FIL itself does not explicitly allow such transfers.

Tax exemptions and reliefs

Under the Foreign Investment Law, a company which has received an investment permit is entitled to an exemption from corporate income tax for a

period of five years beginning from the commencement of commercial operations. In addition, the MIC may grant any or none of the following discretionary benefits:

- if beneficial for the state, depending on the progress of investment activities an additional corporate income tax exemption/relief may be provided for a suitable period
- if the FIL entity reinvests profit from its business or part of its reserve funds within one year, the tax exemption/relief may be extended to income from such reinvested profit or reserve funds
- a right to accelerate the depreciation rate for the machinery, equipment, building or other working capital and to claim the same as a deductible expense
- if the products of any production work are exported, then the tax exemption shall be allowed up to 50 per cent of the profit to the said exports
- foreign employees have the right to declare personal income tax at the same rate as Myanmar citizens
- expenses for research and development may be deducted from income
- a right to carry forward and set-off also up to three consecutive years from the year the loss is sustained, if the loss is sustained within two years of exemption or relief from income tax becoming applicable
- a right to exemption/relief of duty, other internal tax or both on imported raw materials for three years after establishment
- a right to exemption or relief from duty, other internal tax or both on the imported machinery, equipment, tools machinery parts and accessories necessary for the expanded work with the approval of commission
- exemption and relief of commercial tax on the products manufactured for export

It should be noted that the MIC will not automatically grant these exemptions other than the 5-year corporate income tax exemption. Most of the other exemptions and reliefs must be sought by application to the MIC (after the issue of the conditional MIC permit) by using MIC Form 10 in accordance with the FI Rules. The MIC will forward this Form to the Ministry of Finance and Revenue (**MoFR**), which will make the final decision.

MIC Notifications prescribe some local and foreign investment business categories ineligible for exemption and relief from commercial tax and custom duties.

These categories of businesses include manufacturing of alcohol, beer, cigarettes and related services; distribution of gasoline, diesel, machine oil and natural gas; and vehicle services and low technology and low investment industries which can be carried out by Myanmar nationals except for industries that require a large labour force.

The non-tax exemption investment businesses also comprise other businesses such as renting forest areas for agriculture and logging; construction of buildings and sale of them; vehicles and machinery rental service; and restaurants and food-selling business.

However, food industry which is related to milk and dairy products will be granted exemption from custom duties, while the commercial tax remains in place.

Taxation

The Income Tax Law of 1974 (ITL) as amended is the governing law on income taxation in Myanmar. The ITL is supplemented by the Income Tax Rules, the Income Tax Regulations and Notifications issued by the tax authorities from time to time. The Union Revenue Law of 2015 provides for the applicable tax rates.

The Internal Revenue Department (IRD), under the MFR, administers taxation in Myanmar.

Individual and Corporate Annual tax returns must be filed with the IRD within three months of each tax year-end (March 31) or by 30 June. Income taxes are paid on a monthly or quarterly basis. Hence, monthly or quarterly interim returns are also filed. If a business is discontinued, the tax returns are to be filed within one month from the discontinuation of the business.

The employer is responsible for withholding and claiming deductions for income tax on salary at the time of payment to employees. A statement of monthly deductions must be furnished to the revenue office within seven days from the date of deduction. In practice, the tax office allows the quarterly filing of returns. The employer must also provide an annual finalisation statement of salaries paid to employees.

Withholding taxes are also reported within seven days from payment. But in practice, monthly returns are filed.

Income tax returns on capital gains are to be filed within one month of the disposal of the capital assets concerned.

Some important definitions

The definitions of following terms under Section Two of the ITL outline some of the basic principles of income tax law in Myanmar:

- “Income received” means income received or deemed to be received, or income accrued or arisen or deemed to have accrued or arisen
- “Resident foreigner” means:
 - in the case of an individual, a foreigner who resides in Myanmar for not less than 183 days during the income year
 - in the case of a company, a company formed under the Myanmar Companies Act or any other existing law wholly or partly with foreigner share-holders
 - in the case of an association of persons other than a company, an association formed wholly or partly with foreigners and where the control, management and

decision making of its affairs are situated and exercised wholly in the Union of Myanmar

- “Non-resident foreigner” means any (other) foreigner in the Union of Myanmar
- “Non-resident citizen” means any citizen of the Union of Myanmar who resides and earns income outside Myanmar for any time in a year
- “Total income” means the following income received in the income year
 - in the case of a resident citizen or a resident foreigner, all income received within and without the Republic of the Union of Myanmar
 - in the case of a non-resident citizen, all income as prescribed by the Rules
 - in the case of a non-resident foreigner, or a foreigner or a foreign economic organisation investing under the Republic of the Union of Myanmar Foreign Investment Law, all income received within the Union of Myanmar
- “Capital Asset” means is “any land, building and the rooms therein, vehicles and any assets provided as a contribution to an enterprise. In this expression, shares, bonds, security papers and similar instruments are also included”
- “Capital gain” means any profit realised from the sale, exchange or transfer of any capital asset. Any inheritance, gift without consideration and donation shall not be included within the meaning of the term “transfer”

Applicable tax rates

Corporate income tax (CIT)

The tax rates, effective from 1 April 2015, shall be 25 per cent for resident companies and branch offices.

Personal income tax (PIT)

For citizens and resident foreigners, tax on salary is withheld by the employer at 0-25 per cent of worldwide income. If the foreigner works for a foreign invested enterprise under the FIL or is engaged in a state project, the foreigner is treated as a resident foreigner irrespective of the period of stay in Myanmar.

Citizens and resident foreigners are entitled to deduct the following from taxable income:

- basic relief of 20 per cent of total income, up to a maximum of MMK 10,000,000
- spouse relief of MMK 1,000,000, provided the spouse has no assessable income
- relief for parent living with taxpayer MMK 1,000,000
- relief for children below 18 or are above 18 but still receiving full time education MMK 500,000 per child
- life insurance payments on taxpayer and spouse
- an individual is not liable for tax if their income is less than MMK 2,000,000 in a tax year

Citizens and resident foreigners earning income from the exercise of a profession, business, property and other sources are subject to 0 to 25 per cent as well.

For income that has escaped assessment:

	Income (Kyat)		Income Tax Rate (%)
a	1	100,000,000	3
b	100,000,001	500,000,000	5
c	500,000,001	1,000,000,000	10
d	1,000,000,001	1,500,000,000	20
e	Above 1,500,000,001		30

Non-resident foreigners are subject to 0-25 per cent income tax on Myanmar-source compensation income. Other income is subject to 25 per cent.

Capital gains tax (CGT)

Gains from the sale, exchange or transfer by any means of capital assets, in MMKs or foreign currency, are taxed at the rate of 10 per cent, if the proceeds of all assets disposed exceed MMK 10,000,000. Beginning 1 April 2015, in the case of a non-resident foreigner, tax at a rate of 10 per cent is to be paid in the same currency as the disposal or transfer transaction.

Companies carrying on businesses in the oil and gas sector in Myanmar are taxed at a progressive rate from 40 to 50 per cent on gains realised from the sale, exchange or transfer by any means, of any capital assets including shares, capital assets, ownership, and benefits.

Withholding tax (WHT)

WHT on income of residents is creditable. They are final if the recipient is a non-resident.

Withholding tax	WHT Rate for payments to residents (%)	WHT Rate for payments to non-residents (%)
Interest	None	15
Royalties paid for the use of licenses, trademarks, patent right, etc.	15	20
Payments of contracts and buying goods within the country under relevant contracts, agreement or any kinds of agreement, performed for State organisations, city development committees, cooperative societies, registered companies and non-government organisations	2	3.5
Payments of contracts and buying goods inside Myanmar by the	2	3.5

Withholding tax	WHT Rate for payments to residents (%)	WHT Rate for payments to non-residents (%)
consistent contracts or agreement performed for the un-registered foreign entities and foreign companies		

Land use rights and buildings

Ownership rights

In accordance with the Myanmar Constitution of 2008 (**Constitution**), all lands are ultimately owned by the government. Some privately-owned freehold immovable property exists in Myanmar, however, this is very rare.

The Transfer of Property Act of 1882 (**TPA**) is the basic law governing movable and immovable property in Myanmar. Immovable property is defined under the Transfer of Immovable Property Restriction Act of 1987 (**TIPRA**) as “land and benefits from the land, buildings and things constructed or situated on that land and things installed on those buildings”. The TIPRA is the legislation restricting foreign ownership, stating that immovable property may not be transferred to, or by, a foreign person or a company owned by a foreigner. While the prohibitions are framed in terms of “transfer” to or by a foreigner or foreign entity, it is almost impossible for foreigners and foreign entities to become owners of land and buildings in Myanmar. (Except with approval of the relevant ministry – at present, practically never given, other than to missions of foreign governments and, in some limited cases, under inheritance).

Corporate landholding structures where the foreigner would hold only one share in the local company are prohibited and nominee structures are strictly forbidden, with serious sanctions attached to it such as blacklisting of both the local citizen and foreigner.

Lease acquisition structures

Given the foreign ownership restrictions under the TIPRA, foreigners are compelled to lease immovable property. Immovable property can be leased from the Myanmar government directly or sub-leased from a local citizen who has obtained long-term lease rights to the land from the state.

The TIPRA also restricts the lease term for foreigners, prescribing a maximum term of one year for any lease of immovable property by a foreigner or foreign entity, or leasing of immovable property from a foreigner or foreign entity by any person.

However, an exemption to this one-year lease restriction exists for a foreign entity (whether a subsidiary company or a branch office) formed under the auspices of the FIL, having obtained an MIC Permit (**FIL Company**). Such FIL Company can secure long-term leasehold interests in either state or privately owned land for a term of up to 50 years initially, with two possible extensions for a period of 10 years each. It must be underlined that the initial lease term for foreign investors under the

FIL is “up to” 50 years, the current MIC practice being to only grant a lease term to foreign investors which does not exceed the unexpired term of the underlying grant or lease given to the Myanmar citizen who is proposing to sublease the immovable property to the FIL Company.

The FI Notification further gives a detailed list of the business activities allowed or prohibited to foreign investors under the FIL, mainly classifying the business activities into four categories. With regards to real estate development projects, the foreign investor may be required to comply with different conditions in accordance with the scope of the project, such as the requirement to obtain the recommendation from the relevant ministry or government or the obligation to conduct an EIA and SIA for large-scale projects. Furthermore, there are foreign equity restrictions for certain projects; for a hotel project, for example, 100 per cent foreign ownership of the FIL Company is only allowed for three star hotels and above.

Besides the FIL, there are other exemptions to the one year lease restriction under the TIPRA, such as the following:

- under Directive 3/90, the government can give powers to ministries and government bodies (e.g., Yangon City Development Committee (YCDC)) to grant rights of use to citizens and foreigners in respect of land for the economic benefit of the state, usually for a term of 30 years
- for an investment in the SEZs, one can apply for a long term lease of 30 years, renewable for two consecutive renewal periods depending on the size of the project
- finally, the TIPRA itself foresees some exemptions from ownership and lease term restrictions for those with a beneficial relationship with the state e.g., embassies or diplomatic missions, United Nations organisations, or other accredited organisations

Types of land

Although land is almost solely state-owned, the government may provide certain leasehold rights or land use rights to Myanmar individuals and entities. In Myanmar several types of land coexist (such as freehold land, grant land, farm/agricultural land, garden land, grazing land, vacant, fallow and virgin land, forest land, town land, village land, monastery land, and land used for state defence and security), each having a different allowed land-use. Only a limited number of types of land may be leased to foreigners.

This classification of different types of land is relevant especially when the foreign investor intends to lease immovable property from a Myanmar citizen or entity (instead of leasing directly from the government). Conducting a proper land title search before leasing the immovable property in such a case is important. Although the landlord has the duty to inform the foreign investor of any material defect in the immovable property or in his/ her title thereof, the landlord has no such duty if the foreign investor could easily discover such defect. It should hence be checked whether the landlord is

competent to lease the property, whether the immovable property can be leased or not and whether there are any land use limitations or encumbrances (such as existing leases or mortgages) attached to the property.

The following are the most important types of land that can be leased to a foreigner or foreign entity:

- freehold land is the most secure form of land title for foreigners seeking to develop land in Myanmar. However, such type of land is comparatively rare and mostly found in urban areas. Freehold land is privately-owned, has no term or limit of time on ownership, is transferable and leasable, and is not subject to the payment of land revenue to the government
- grant land is granted to citizens by the government, usually the City Development Committees (**CDC**) e.g., YCDC, by way of a lease contract for term of 30, 60 or 90 years depending on the use of the plot of land, i.e., residential, industrial or cultivation, and is subject to the payment of land revenue to the government. Such land is a secure type of land that is transferable and leasable to a Myanmar citizen or company and can be sub-leased to a foreign-owned company or joint venture FIL Company, upon approval of the MIC and the relevant CDC
- farm or agricultural land can only be leased through the transfer of a land use certificate (**LUC**) issued by the Central Farm Land Management Committee (for farm land) or a “LaNa 30” certificate issued by the relevant Township Peace and Development Council (for agricultural land). (The Land Nationalization Act of 1953, referring to agricultural land, was repealed by the Farm Land Law of 30 March 2012 and the Farm Land Rules of 31 August 2012. The term ‘LaNa 30’ refers to Section 30 of the Farm Land Law. The ‘LaNa 30’ certificate replaced the ‘LaNa 39’ certificate which referred to Section 39 of the Land Nationalization Act. The Land Nationalization Act was repealed by the Farm Land Law, but it seems that for land cases that dated prior to the enactment of the Farm Land Law, the reference can be regarded as still applicable) A LUC and LaNa 30 certificate allow use of the farm or agricultural land for purposes other than agriculture, such as for a commercial real estate development. In the event that the LUC certificate is sold mortgaged, leased, exchanged or given to a foreigner or any organisation in which the foreigner is included, the permission of the government is required

It should be noted, however, that even with a LUC or LaNa 30, farm and agricultural land remain at the disposal of the government and may be rescinded by the government if certain conditions are not met for state or public interests.

Workplace relations

Labour law in Myanmar is still a work in progress. There is no single labour law but rather a patchwork body of labour legislation comprising a number of different laws covering different aspects of the employment relationship.

A significant amount of the labour legislation was enacted over 50 years ago and much of it was designed for specific categories of labour such as industry, mining, oilfields, shops and establishments. A number of new laws have been enacted in the last few years, although many of the implementing rules and regulations are still awaited.

In addition to the myriad of laws, there are also accepted practices and policies which should be followed, despite not being codified in any formal legislation.

The standard employment contract – compulsory issue employment contract

If an employer engages an employee then a written employment contract must be constituted within 30 days of the offer being accepted except when the employment is related to a government department or organisation, or if the employment is related to a pre-training or probation period. In such cases, it is not necessary to enter into an agreement.

The Ministry of Labour has issued a pro forma, compulsory employment contract that all eligible employers in Myanmar are required to issue to their employees. Deviations from this standard form contract must be specifically and individually approved by the relevant township labour office.

This may be problematic for foreign employers, especially those with foreign staff as the standard employment contract (**SEC**) is largely inadequate for more sophisticated employment arrangements and also strictly restricts work hours to an eight hour day, with minimal overtime.

In addition, the employee benefits in any modified SEC must not be less than those provided for by existing law. It should be noted that the SEC terms and conditions apply to all employees, whether manual or managerial. However, it is possible to differentiate between the two types of employee in some of their respective rights and obligations, e.g., where one is paid weekly or monthly wages (usually in cash) with possible overtime payments and the other is a monthly salary paid into a bank account with no rights to overtime.

Minimum wage

The Minimum Wage Law entered into force on 22 March 2013 accompanied by implementing Notification No. 64/2013. It applies to both national and foreign entities and sets out a framework for a tripartite committee comprised of employer, employee and government representatives to determine the minimum wage in a broad range of industry sectors.

The law requires employers to inform employees of the prevailing minimum wage in the relevant sector and to pay at least that amount, although higher wage levels may be determined by the employer. Non-compliance is subject to a fine and up to 12 months in prison. It is not permitted to discriminate on grounds of gender and there must be equal pay for men and women.

The National Minimum Wage Committee released Notification No 1/2015 on a minimum wage proposal on 29 June 2015. The proposed minimum wage for the private sector, regardless of place and type of

work, is set at MMK3,600 for an eight-hour day or MMK450 per hour. However, the proposed minimum wage does not apply to small businesses that have 15 workers or fewer or family businesses. This rate was finally approved by the above Committee on 28 August 2015.

Industrial relations

Section 93 of the FIR requires that a dispute arising between an employer or group of employers and an employee or group of employees be settled under the Settlement of Labour Dispute Law of 2012 (**SLDL**). The SLDL creates an ascending system of dispute resolution bodies and the different processes to be adopted in individual and collective disputes.

Employers in any business or trade where more than 30 people are employed must form a Workplace Coordinating Committee (**WCC**) consisting of two representatives of the employer and two representatives of each labour organisation (**LO**) or, if there are no LOs, two elected representatives of the employees. Any grievances rose before the WCC by either the employer, an employee or an LO must be negotiated and a settlement sought within five days. If there is no WCC owing to the small number of employees, the employer must take on the role.

If a settlement cannot be agreed between the parties at WCC level then the SLDL requires the grievance to be referred to the relevant Conciliation Body (**CB**) formed at State/Region level. The CB shall determine whether it is an individual or collective dispute and seek to conciliate within three days. In the case of an individual dispute, if either party is dissatisfied with the outcome they must then initiate civil proceedings in the competent court. This option is not available for collective disputes.

If the CB is unable to resolve a collective dispute to the parties' satisfaction then it must refer the matter to the Dispute Settlement Arbitration Body (**AB**) also at State/Region level who must issue a decision within seven days. If either party is dissatisfied with the decision the following options may be utilised:

- either party may proceed to strike or perform a lockout in accordance with the Labour Organization Law 2011 (this option is not available to essential services whose only recourse (at the instance of either party) is to the Arbitration Council)
- both parties may apply within seven days of the decision from the AB to have the dispute heard by the Arbitration Council (**AC**) at Union level

The AC must form a Tribunal to try the case with 14 days for non-essential services and seven days for essential services. If either party is unhappy with the decision of the Tribunal then final recourse is to litigation before the Supreme Court.

Offences under the SLDL include the failure of an employer to coordinate and/or negotiate a dispute, the failure of either party to abide by or carry out a condition contained in any agreement, preventing a person from exercising their lawful right to strike, and forcing a person who wishes to work to participate in a strike. The stated penalties for

conviction are fines of either MMK 30,000 or 100,000.

In practice, the extent to which the SLDL is being implemented and observed is unclear. It appears that strikes are taking place without being preceded by any formal dispute resolution. Following complaints by labour activists and government officials that employers were ignoring or refusing to abide by decisions rendered by the AC due to the leniency of the penalties imposed, Parliament voted in 2014 to increase the level of the fines to MMK 500,000 and MMK 1,000,000 respectively, but stopped short of introducing terms of imprisonment.

Trade unions

- Basic - requiring a minimum of 30 members
- Township
- Region or State
- Labour Federation
- Myanmar Labour Confederation (MLC)

The labour organisation law (LOL) requires that each LO form an executive committee, draw up a constitution or set of rules and register at the relevant township office. Labour Federations and the MLC must register with the Chief Registrar. Registered LO have the following rights:

- freedom of constitution, election of representatives and organisation of administration
- right to submit demands to, negotiate and settle with, and claim against employer if not granted labour rights contained in the relevant laws
- right to demand the reappointment of any employee if dismissal was due to LO membership or activities, or was not in accordance with labour laws
- right to participate in discussions with the Government and employer groups regarding the content of labour laws
- right to participate in collective bargaining and to represent employees in individual disputes
- right to strike and to take other collective action

Employers must recognise any LOs of his trade, must permit any worker assigned LO duty to perform those duties for up to two days a month as if they were his normal work duties and must respond to, and assist as far as possible with, any request for help by an LO relating to the interests of his employees. An employer is further prohibited from dismissing an employee for reason of his membership in an LO, for opposing an illegal lock-out or for participating in a lawful strike.

Lock-outs and strikes are permitted for utility services (including public utility services) and other industry sectors but are prohibited for essential services which are defined as water, electricity, fire, health and telecommunications. However, the LOL provides that a non-essential service may become essential if the strike or lock-out exceeds certain duration so as to give rise to irreversible damage or is out of all proportion to the occupational interests

of those involved in the dispute. In addition to the requirement that any lock-out or strike be preceded by formal dispute resolution under the SLDL, the LOL imposes a number of additional requirements before a lock-out or strike can be considered lawful and allowed to proceed:

	Lock-Out	Strike (Public Utility)	Strike (Non-Public Utility)
Advance Notice	14 days	14 days	3 days
To whom	Township Labour Organization Conciliation Body	Employer Conciliation Body	Employer Conciliation Body
Information to be provided	Starting day Period of lock-out	Date Place Time No. of participants Manner of strike	Date Place Time No. of participants Manner of strike
Advance Permission required from	Conciliation Body	Labour Federation	Labour Federation

In the case of strikes, the majority of the members of the LO must vote in favour of taking action and in the case of strikes by public services, prior to any dispute the LO must negotiate, discuss and decide on the minimum service required to meet the basic needs of the public during a strike, and must aim to agree with the employers the number and kind of posts that need to be filled and the persons who will be required to remain at work. If an agreement cannot be reached, the minimum service will be determined by the competent court. The SLDL states that it is not necessary to pay wages to striking workers.

A lock-out or strike will be considered illegal if it is carried out by essential services, does not comply with the requirements set out above, does not relate to labour affairs such as wages, working hours, conditions, welfare or other occupational interests of employees, and/or does not conform with the particulars given in the advance notice. Lock-outs and strikes during settlement negotiations in relation to any dispute are also prohibited. The LOL further prohibits any demonstration from taking place within 500 yards of hospitals, schools, religious buildings, airports, railways, bus terminals, ports, diplomatic missions or military or police installations. Penalties for offences under the LOL include fines and/or imprisonment of up to one year.

Dispute resolution

Court system in Myanmar

The current court system is hierarchical and was established under the 2008 Constitution. On 28 October 2010, the Union Judiciary Law was enacted to implement the operation of the judiciary, which comprises the following courts:

- Supreme Court of the Union
- High Courts of the Regions and States
- Courts of the Self-Administered Areas
- District Courts
- Township Courts
- Courts-Martial
- Constitutional Tribunal of the Union
- Special courts to try juvenile, municipal and traffic offenses

Myanmar's legal system is adversarial and the practices and procedures of Myanmar courts were significantly influenced by those of their English counterparts. Court procedure in criminal suits is dictated by the Code of Criminal Procedure 1862 and procedure in civil suits is dictated by the Code of Civil Procedure 1859. Myanmar does not currently have a well-developed alternative dispute resolution system outside of arbitration.

A case is heard before a judge or bench of judges and argued by advocates or pleaders. Chapter XXIII of the Code of Criminal Procedure mandates a jury trial in certain criminal cases, but there have been no such trials since 1946. There is no scope for trial by jury in a civil suit. The Evidence Act applies to all judicial proceedings before any court and to all judges and other persons authorised to hear evidence, but does not apply to arbitration.

Some legal decisions are published yearly. For those decisions that are not published, individuals may request a copy from the relevant court though securing such copy may take time.

Legal profession

Legal professionals comprise judges, judicial officers, and lawyers. Lawyers can be classified into two types; Advocates and Pleaders. Pleaders can be subdivided into ordinary pleaders who handle criminal matters and lower grade civil disputes, and higher grade pleaders who can take on all types of suit. An Advocate is entitled to appear before any Court and tribunal in the Union whereas a Higher Grade Pleader is licensed to practice only before subordinate courts (i.e., not the Supreme Court).

Criminal prosecutions are conducted by law officers based in offices throughout the country, all of whom are subject to the direction of the Attorney-General. The Attorney-General is appointed by the President and advises the Government on legal matters as well as performing other legal duties.

There are an estimated 49,000 lawyers currently practicing in Myanmar, approximately divided between 40,000 pleaders and 9,000 advocates. Very few have any commercial experience.

Arbitration

Myanmar formally acceded to the NYC on 15 July 2013, and adopted domestic implementing legislation in 2015 that will allow for the enforcement of foreign arbitral awards in Myanmar although the Myanmar courts will have to introduce their own rules and procedures for parties who seek the

assistance in obtaining interim relief in aid of arbitration.

The Arbitration Law follows the UNCITRAL Model Law and provides for the recognition and enforcement of foreign arbitral awards by way of a court decree issued by the Myanmar court.

The party applying for the enforcement of a foreign award shall, at the time of the application, produce before the court:

- (the original award or a copy thereof, duly authenticated in the manner required by the law of the country in which it was made
- the original agreement for arbitration or a duly certified copy thereof
- such evidence as may be necessary to prove that the award is a foreign award

These documents must be in Myanmar or English language.

Myanmar courts also retain certain powers to intervene in an arbitration under certain circumstances, if there is no contrary agreement between the parties, in relation to:

- taking evidence
- the preservation any evidence
- pass an order related to the property in disputes in arbitration or any property which is related to the subject-matter of the dispute
- inspection, taking photo for evidence, preservation and seizure of the property which is related to the dispute
- samples to be taken from, or any observation to be made of or experiment conducted upon, any property which is or forms part of the subject-matter of the dispute
- allow to enter in the premises owned by or under the control of the parties to disputes for the purpose of above mentions matters
- sale of any property which is the subject-matter of the dispute
- an interim injunction or appointment of a receiver

The party seeking enforcement must apply to the competent court in Myanmar and if the court cannot find fault with the award it must enforce it as if it were a decree of a Myanmar court.

The court may refuse to recognise the foreign arbitral award if:

- the parties to the arbitration agreement referred was under some incapacity
- the said agreement is not valid under the law to which the parties have subjected to it or, failing any indication thereon, under the law of the country where the award was made
- the party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case

- the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration
- the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place
- the award has not yet become binding on the parties or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made

Enforcement of the foreign arbitral award may be refused if the court finds that:

- the subject-matter of the dispute is not capable of settlement by arbitration under the law of the Republic of the Union of Myanmar; or
- the enforcement of the award would be contrary to the national interest (public policy) of the Republic of the Union of Myanmar.

Definitions of national interest and public policy are not provided in the Law.

The court may refuse to enforce only on the following grounds which have been directly adopted from the UNCITRAL model texts domestic arbitration on the following grounds:

- a party to the arbitration agreement was under some incapacity; or
- the arbitration agreement is not valid under the law to which the parties have agreed or, failing any indication thereon, under the law of the Republic of the Union of Myanmar; or
- the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or
- the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration

Proviso: if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or

- the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or was not in accordance with this Law

Proviso: Such agreement was not in conflict with a provision of this Law from which the parties cannot derogate.

- the subject-matter of the dispute is not capable of settlement by arbitration under the existing law
- the award is in conflict with the national interest (public policy) of the Republic of the Union of Myanmar

At the request of the party against whom it is invoked, if that party furnishes proof that:

- a party to the arbitration agreement was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or under the law of the country where the award was made
- the party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case
- the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration
- the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or in accordance with the law of the country where the arbitration took place
- the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made

If the court finds that:

- the subject-matter of the dispute is not capable of settlement by arbitration under the law of Myanmar
- the recognition/enforcement of the award would be contrary to the public policy of Myanmar

The Bill Law does not specify which court is competent for enforcement and it is to be hoped that the future issue of Rules will centralise enforcement will be centralised at one court so as to create a centre of expertise and ensure that enforcement cases are handled by judges with experience in the matter. Hopefully, the court in question will also exercise restraint when invoking these above grounds.

It is hoped that the passing of new arbitration legislation in the near future will bring Myanmar into the international arbitration community and provide reassurance to foreign investors wary of judicial determination of commercial disputes because of concerns regarding bias, corruption and lack of transparency.

New Zealand

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Contributed by Parry Field Lawyers

New Zealand

Visas and work permits

New Zealand encourages visitors to New Zealand whether on a short term basis or for permanent migration. Immigration New Zealand is the Government service which handles visas, work permits and immigration.

Short term visitors

Many countries have joined a visa-waiver program with New Zealand which means that a visa will automatically be granted on arrival. The list of such countries should be checked before travelling but examples include France, Germany, Hong Kong, Japan, South Korea, United States of America and Singapore. Australians do not need a visa to travel. The person may be asked to show they have tickets for onward travel and funds to maintain their time in New Zealand. A person who fills in a passenger arrival card is deemed to apply for a visitor visa and they are granted for three month periods.

If a person does not automatically qualify for a visitor visa then they will need to apply for one and may be asked to prove they are in good health, are of good character, that a visitor visa will fit with the reason for coming to New Zealand, and that they are a bona fide temporary visitor. In addition, the applicant will need to provide proof of funds and an onward travel ticket. If a visa is applied for then it can be for a short period or a maximum stay of nine – eighteen months, depending on the circumstances.

New Zealand is a member of the APEC Business Travel Card Scheme allowing certain business people who are members to have easier access to visit.

Long term visitors

If you are looking to emigrate to New Zealand there are a number of options to be aware of. As a starting point, the key criteria will be what economic value will be added by allowing a person to enter on a temporary or permanent basis. The following are the key classes of visa:

Work visas: These allow a person to work for a limited period and are generally valid for up to three years. The categories are wide ranging (essential skills work, specific purpose or event, horticulture and viticulture etc.). To receive a work visa there will be certain requirements that need to be satisfied such as basic health and character tests. Generally a New Zealand employer will also need to show that there are no New Zealanders who could do the same job that they have recruited the overseas person to do. Australians will not require a work visa.

Entrepreneur work visa: This visa is for experienced people who want to buy or establish a business in New Zealand. To qualify you need to make a minimum investment of \$100,000, meet or exceed 120 points (points given for certain factors), provide a business plan, meet health and character requirements, English language requirements and

not been involved in fraud or had a bankrupt business in the last five years. If approved the initial work visa will last for twelve months with an additional extension of twenty-four months if certain criteria met.

In the usual course, after obtaining your work visa, you will be entitled to apply for an Entrepreneur residence visa once the business has been operating for a specified length of time.

Investor category visa: For those who have at least NZ\$1.5 million to invest in New Zealand you can apply for an investor category residency. To do this you need to submit an 'expression of interest' and meet certain criteria (including the usual health, character and language requirements). Every fortnight a selection of those are chosen (up to 300 per year). Applications that qualify for more points are selected first.

You must provide evidence that the funds are owned by you and are transferable (among other criteria) and you then have twelve months to actually transfer the funds and put them in an acceptable investment in New Zealand.

Investor plus category visa: If you invest NZ\$10 million in New Zealand then you can apply for this category of visa.

New Zealand residency: To apply for residency you need to come under one of the following categories:

- skilled migrant: you qualify for points based on factors like age, work experience, qualifications. Having a job offer will help to get the right number of points
- business migrant: Could qualify as an entrepreneur or as an investor (see above). You can apply for an entrepreneur residence category visa - exists if your business creates at least three full time jobs and you invest NZ\$500,000 in the business

Visas and immigration rules are subject to change so it is worth speaking with an expert in this area about a specific situation to determine what the best approach will be.

Business entities

There are a number of business structures to choose from when doing business in New Zealand. Taxation and liability are often primary considerations when choosing which business structure to use.

Offshore entities often establish a New Zealand business by using one of the following structures:

- registering a branch of an overseas company
- establishing a local subsidiary company

Other common business entities used in New Zealand include:

- limited partnership
- joint venture

Registering a branch

An overseas company 'carrying on business' in New Zealand must register as an overseas company with the New Zealand Companies Office. An overseas company wishing to register a branch in New Zealand must reserve its name with the Registrar of Companies and apply for registration. The same company name as registered in its home jurisdiction should be used.

Subsidiary company

To incorporate a subsidiary company, a company name needs to be reserved and the registration process followed with the New Zealand Companies Office. A subsidiary company incorporated in New Zealand must have at least one director resident in New Zealand, or who is resident in Australia and is a director of an ASIC registered company. Non-resident shareholders and directors are otherwise permitted.

Incorporated company

The Companies Act 1993 governs incorporating companies in New Zealand. A company name must be reserved with the New Zealand Companies Office. An application for registration must then be lodged. Every company must have at least one shareholder and one director. The Companies Act requires all New Zealand registered companies to have a New Zealand resident director, or a director who is also a director of a company incorporated in, and who also lives in, a country with which New Zealand has reciprocal arrangements (e.g., Australia). Additional evidence may be required by the Companies Office for any overseas shareholders or directors.

Limited partnership

Limited Partnerships in New Zealand are governed by the Limited Partnerships Act 2008. A limited partnership must have at least one general partner and one limited partner (who cannot be the same person at the same time). The general partner is responsible for the day to day management of the limited partnership and is liable for all of the limited partnership's debts and liabilities, to the extent that the limited partnership cannot pay those debts and liabilities. The limited liability partner is liable only to the extent of its capital contribution to the limited partnership.

Joint venture

A joint venture in New Zealand is an arrangement between two or more parties who combine together to invest capital or resources in a particular project. A joint venture can be carried out in one of three ways:

- by a company incorporated under the Companies Act
- by a partnership (including a limited partnership)
- by an unincorporated contractual joint venture

An unincorporated joint venture involves the parties entering into a written joint venture agreement. The

assets of an unincorporated joint venture are owned by the joint venture parties as tenants in common in the proportions agreed between them.

Legal advice is important to ensure the joint venture is not classified as a partnership.

Fund management

The Financial Markets Authority (**FMA**) is one of three important regulators of investment schemes and markets in New Zealand. The introduction of the Financial Markets Conduct Act 2013 has replaced earlier securities legislation and the FMA has received a wider scope of regulatory tools in which to regulate the New Zealand economy. The FMA's primary goals are to promote and facilitate the development of fair, efficient and transparent financial markets, and to promote the confident and informed participation of businesses, investors, and consumers.

Licensing and registration

A requirement of the Financial Markets Conduct Act 2013 is that, to be regulated, a Managed Investment Scheme (**MIS**) must be registered. There are two types of MIS:

- open-ended which includes KiwiSaver, Superannuation, workplace saving schemes, open-ended unit trusts
- closed-ended which includes forestry partnerships and property syndicates that invest in a single asset class

To be regulated under this Act, a MIS must also have a licensed manager if it is the intention and/or requirement of the manager to make a regulated offer of managed investment products to retail investors and register a non-restricted MIS that the manager has been appointed to.

The rationale behind mandatory licensing of MIS managers is to raise industry standards, increase confidence in New Zealand's markets and outcomes for investors and consumers.

To be eligible to obtain a MIS manager licence, the business that is managed must meet the new minimum standards set out in the licensing guide under the Act.

Compliance/enforcement

The Act imposes statutory duties of care on supervisors and licensed managers of MIS.

Environmental laws

New Zealand's central environmental legislation is the Resource Management Act 1991. The purpose of this Act is to 'promote the sustainable management of natural and physical resources' (section 5). To fulfil this purpose, the Act gives the responsibility to local government in the form of city, district and regional councils to develop district and regional plans. These plans set out what activities are permitted, prohibited or require resource consents as a way to manage their environment and resources.

However, this Act is extensive and complicated. The Resource Legislation Amendment Bill 2015 seeks to streamline and standardise the planning process to create national consistency making the process more simple and affordable for businesses and individuals to apply and obtain resource consents, while not compromising the country's commitment to the sustainable management of the environment.

Fuel regulation

The oil industry is the country's largest source of energy and therefore has significant impact on the economy. The industry was deregulated in 1988. Examples of the consequences of deregulation included cessation of governmental involvement in New Zealand's oil refinery and removal of limits surrounding the importation of refined products.

New Zealand is a net importer of both crude and refined oil with it mainly coming from the Middle East, Russia and Asia. New Zealand's oil refinery is sufficient to meet the refining needs for the majority of the country's oil demands. The four largest oil companies in New Zealand are BP, Chevron (Caltex), ExxonMobil (Mobil) and Z Energy. Together, all four companies are the majority stakeholders in the refinery. These companies are also the importers of oil. The New Zealand Government does not independently import fuel. Diesel and petrol are the main fuels consumed in New Zealand. The former being used for commercial land transport and the latter for private use.

However, New Zealand is also an exporter of oil. The oil produced in New Zealand is of a high quality and thus, more valuable to the economy to export rather than consume domestically. Australia is the main buyer of this oil.

The oil producing industry in New Zealand is regulated by legislation and Government agencies and local governments share the responsibility for regulating the industry and enforcing these regulations. Petroleum and mineral activities are carefully managed to lessen detrimental environmental effects and protect the health and safety of the workers in this industry.

Foreign investment policy

General

New Zealand is a small country with a low population compared to its size and as a result the government welcomes foreign investment as a way to develop the economy and boost the capability of New Zealand companies. This openness to foreign investment is shown by the different 'investor' visa types available for immigrants discussed earlier.

There are a limited number of situations where the New Zealand Government may object to an investment by an overseas person. The test which is used relates to whether there is sensitive land or significant business assets being acquired. If certain criteria are met then there is a mandatory application process which must be followed by the overseas investor.

Whether or not consent is required will depend on many factors such as who the purchaser is, where their funding comes from, the amount of money being paid, the type of investment and sector it is in and whether any exemptions apply.

Regulation is in the form of the Overseas Investment Act 2005 (OIA) which is administered and enforced by the Overseas Investment Office (OIO).

Overseas person

An 'overseas person' is defined to be:

- a person who is not a New Zealand citizen or a person ordinarily resident in New Zealand
- an entity (partnership, trust, company) where an overseas person has more than 25 per cent ownership or control

Individual circumstances are likely to affect whether a person or entity will fall within those definitions. Even if the individual making the purchase is not an 'overseas person' they may be an 'associate' of an overseas person. That is, someone overseas is controlling their actions. If so, then approval will still be needed. The term 'control' is given a very wide definition and can be specific or general, indirect or direct and whether actually legally enforceable or not. It is trying to capture the individual that is acting on behalf of someone else that is an overseas person and therefore would need approval if they were the one that applied.

What is consent required for?

The two main categories of investment that require consent are the proposed acquisitions by an overseas person of:

- sensitive land
- significant business assets

Rules also apply to fishing quotas but these are not dealt with in this guide as they are less commonly seen.

Sensitive land

Land will be sensitive if it meets certain criteria set out in the OIA. Before proceeding with an acquisition time should be taken to analyse whether it is:

- five hectares or more of non-urban land (this covers most farms)
- land which is defined to be sensitive, such as land which:
 - is foreshore, seabed or one of certain named islands
 - is greater than 4,000 square metres and contains (or adjoins) a reserve, lake or foreshore
 - has historical or conservation significance

Farm land is a particularly sensitive potential acquisition which has seen significant media commentary in the last few years. If farm land is being acquired one unique criteria is that it must

first have been offered on the market in New Zealand (there are procedures regarding this in regulations).

As the list above indicates there are a number of different types of land which may require consent if an overseas person proposes to acquire them.

Significant business assets

The OIO has chosen the figure of NZ \$100 million to assist in determining if an acquisition or investment is in a significant business asset. If the overseas person is looking to do any of the following then consent will be required to:

- establish a new business at a cost of more than NZ\$100 million
- acquire a business if the value of the business exceeds NZ\$100 million
- acquire 25 per cent or more of a company where the value of the consideration or the assets of the target company and its subsidiaries exceeds \$100 million

These monetary thresholds may be impacted by agreements with other countries. For example, the figure is NZ\$498 million for Australian investors. For those countries which have signed up to the Trans Pacific Partnership the figure will be NZ\$200 million (if the Trans Pacific Partnership proceeds).

Examination of proposals

An application will need to include extensive information about the applicant and the proposed investment.

If you are an overseas person then when you make an application you will need to satisfy both:

- Investor Test
this requires applicants to show good character, that they have business experience, and are financially committed to that investment. There has been recent publicity about this where the OIO approved an acquisition and it later emerged that the overseas persons involved had been convicted of offences in another jurisdiction
- Benefit to New Zealand Test
there are 21 criteria that the OIO will look at. Some of these include:
 - whether there will be creation of new jobs from the investment
 - access to the land by the public
 - additional investment to develop an acquisition
 - new technology that may be brought in
 - protection of historic heritage or conservation areas

The OIO is also interested in understanding the 'counterfactual'. That is, what would happen if this particular applicant did not make the investment. In particular, they will be interested in understanding the likelihood of someone else buying the property

or business and whether they would invest (or not invest) further money in it.

A consent which is granted will typically contain conditions which must be followed and also contain some requirements to report back to the OIO.

If no consent is obtained and there is a breach which the OIO becomes aware of then penalties can be applied such as divestment of the acquisition as well as fines and even imprisonment.

Timing involved

The OIO will categorise the application into one of three types and they will aim to respond within 30 – 70 working days, depending on the category of application. However, there is no statutory timeframe for the decision to be made so it could take less or more time, depending on the situation. The OIO may also ask questions of the applicant which can delay the process so it is really important to get the application right when it is first submitted. Last year 22 per cent of applications were initially rejected as they lacked information or were of poor quality.

Business environment

General

The business environment in New Zealand is a combination of the public and private sector which are both integral to New Zealand's economy.

Intellectual property protection

Intellectual Property Protection is important in a global economy where there are emerging economies, advancing technologies and ever increasing trade deals made between nations. As such, New Zealand has incorporated legislation to protect intellectual property to incentivise businesses, inventors and individuals across all spectrums as well as complying with its international obligations as a signatory to the World Trade Organisation Agreement on Trade Related Aspects of International Property Rights and other various intellectual property related agreements.

Patents

Patents are governed by the Patents Act 2013 and are granted by the Patents Office which gives the patent owner exclusive right to make or sell an invention for the period of 20 years.

The rationale for providing this exclusive monopoly is to incentivise inventors and stimulate economic growth.

The test for an invention to be patentable is as follows (section 14):

- a manner of manufacture within the meaning of section six of the Statute of Monopolies; and
- when compared with the prior art base
 - is novel
 - involves an inventive step
 - is useful

The Patent Act 1953 which the current Act replaced only required an invention be novel (new) in New Zealand. However, the new Act extends the novelty meaning to anywhere in the world, which increases the threshold of what invention can pass the novelty test.

Inventive step means that the invention must not have been obvious to anyone else who has particular expertise in that same field in which the invention is created.

Usefulness is judged by whether or not the invention has a 'specific, credible and substantial utility' (section 10).

The most obvious disadvantage of patenting an invention under the patent system is the requirement of complete disclosure of how the invention works and is made. Although the patent protects the invention for 20 years, when the 20 years has ended, competitors can use the disclosed information to make their own version of the invention.

New Zealand has a small population so the New Zealand patent system is dominated by overseas corporations to whom New Zealand patents are granted. The 2014 figures state that 1,636 patents were granted to New Zealand residents compared with 6,092 patents that were granted to non-residents.

Some inventions are excluded from being patentable as being contrary to public order or morality, for example, an invention that is a process for cloning human beings.

In New Zealand there is also protection for Maori Traditional Knowledge in the form of the Maori advisory committee. This committee can advise if any invention seeking a patent that involves Maori Traditional Knowledge breaches the intellectual property rights of Maori.

Trademarks

Trademarks in New Zealand are governed by the Trade Marks Act 2002. This legislation protects registered trade designations and business goodwill. The reputation of businesses is inextricably linked with their trademark and trade name meaning that the Trade Marks Act 2002 and the common law principle of 'passing off' are more focussed on distribution and marketing the trademark.

Under section 5 of the Act, a Trade Mark is defined as 'any sign capable of being represented graphically; and distinguishing the good or services of one person from those of another person.' A sign includes 'a brand, colour, device, heading, label, letter, name, numeral, shape, signature, smell, sound, taste, ticket, or word; and any combination of signs.'

When a proprietor registers a trade mark under this legislation, they become entitled to the exclusive right to use that trade mark for the business that it was registered for i.e., trademarks are used to

differentiate similar products and services between trading competitors.

Trade mark registrations are valid for 10 years and are renewable.

In New Zealand, the Intellectual Property Office (**IPONZ**) is the body which considers whether a trade mark meets the test of registration. The test is that it a trade mark seeking registration must be a sign under section 5 of the Act and have 'distinctive character' in relation to the products and services that it relates to under section 18. A mere description of the products and services will not be registrable as a trademark.

Passing off and the Fair Trading Act 1986

Passing Off is a common law action which protects business goodwill against misleading conduct by competitors. This action is used to protect the owners of registered and unregistered trademarks from competitors 'passing off' the trademark as their own. The interpretation and application of this common law principle is derived from English and Australian case law, as well as case law in New Zealand.

Although the Fair Trading Act 1986 is consumer protection legislation, traders often bring actions under section 9 in conjunction with an action in 'Passing Off' against other traders for misleading and deceptive conduct to protect their registered or unregistered trademark.

Copyright

Copyright is a property right which is governed by the Copyright Act 1994. Copyright does not protect mere expressions of thought and ideas. For something to be protected by copyright it must fall within a type of work. Section 14 specifies what types of works are protected by copyright. These include:

- literary works
- dramatic works
- musical works
- artistic works
- sound recordings and films
- communications works
- typographical arrangements of published editions

Unlike Patents and Trademarks which are able to be registered, copyright inherently exists if a work is original.

The longevity of copyright is usually calculated by the lifetime of the author plus 50 years, depending on the type of work. This differs from many other jurisdictions which have shifted the duration of copyright protection to be the author's lifetime plus 70 years.

Design

Registered Designs are protected by the Designs Act 1953. Registration under the Act gives the owner of the design the 'exclusive right in New Zealand to make or import for sale or for use for the purposes of any trade or business, or to sell, hire, or offer for sale or hire, any article in respect of which the design is registered' (section 11(1)). In essence, the owner has the copyright of the design.

For a design to be registrable under the Act, it must be new or original, applied to an article, and applied by an industrial process, comprise of features such as shape or pattern and appeal to the eye.

The owner of a design registered under the Act enjoys protection for five years with rights of renewal for two additional five year periods. Fees are payable to be granted renewal rights.

In New Zealand, copyright protection can subsist in designs. Therefore, some businesses choose not to register their designs under the Designs Act 1953 and instead rely on Copyright law. However, the advantage of registering a design under the Designs Act 1953 is most obvious when it comes to enforcing rights against an infringement – particularly competitors' products. To show that a product is infringing the registered design, the owner needs to show that the infringing product is not substantially different from their design. This provides greater protection than copyright because a design can infringe on another even when created independently. Whereas, for a copyright infringement to be enforced, copying needs to be shown to have occurred. This can be difficult to prove.

Plant variety rights

The Plant Variety Rights Act 1984 gives the owner of a registered plant variety the exclusive right to create the variety for sale. It may be licensed, mortgaged or assigned to another person. The Act also gives the owner of fruit and vegetable varieties the exclusive commercial right to commercial production of that fruit or vegetable.

A grant under this Act gives the owner 20-23 years of exclusive protection depending on the type of plant from the date of application.

Trade secrets

There is no specific legislation in New Zealand relating to trade secrets. It is because of this that different forms of protection have emerged such as copyright for computer programs. However, in New Zealand confidential information such as trade secrets are protected under the common law action – breach of confidence. This action also has been applied to employer and ex-employee relationships in New Zealand. This is similar to the law that has developed in England and Australia.

Privatisation

During the 1980s and 1990s, the New Zealand Government systematically privatised many state-owned assets on the advice of the New Zealand Treasury. The goal was to deregulate the economy

and make government more efficient. The assets privatised crossed a range of industries including telecommunications, the finance sector, the electricity and gas sector and transportation.

During the early 2000s many of these assets that were bought back by the New Zealand Government when the privatisation of these assets seemed to have failed. Privatisations ceased during this time. However, since 2008 until now, the policy of the current government is not to carry out a systematic privatisation of state-owned assets but to partially privatise some of them. The intention of the current government is to retain 51 per cent government interest in the assets as well as:

- provide for a future investment fund
- give New Zealanders the opportunity to invest in their own assets
- expand New Zealand capital markets

The goal of this current privatisation policy is to reduce the need to borrow, encourage economic growth and improve public services by providing the investment capital required to achieve this.

Banking sector

The Reserve Bank of New Zealand is New Zealand's central bank established in 1934. The Reserve Bank's primary role is to manage monetary policy and maintain price stability. The Reserve Bank also has the sole right of issuing legal tender in New Zealand. The Reserve Bank is not privately owned, nor does it have any elements of private ownership. It operates under the authority of the New Zealand Government under the Reserve Bank of New Zealand Act 1989. The Reserve Bank has supervisory authority over the New Zealand banking system, but does not offer financial services to the public.

In New Zealand, the 'big four' banks that offer financial services are all Australian owned. They are as follows:

- ANZ – (Australia and New Zealand Banking Group)
- ASB – (Commonwealth Bank)
- BNZ – (Bank of New Zealand which is owned by National Australia Bank)
- Westpac

Combined, these four banks hold the majority of the public's loans, advances and mortgages. Apart from these four banks, New Zealand has 21 other registered banks. Most are subsidiaries of foreign parent company's which provides diversity in ownership and strong growth through offshore investors in the banking sector. Kiwibank is New Zealand's largest New Zealand owned bank. It was established in 2002 and is a subsidiary of the state-owned enterprise New Zealand Post Limited.

Competition policy

Competition policy is governed by the Commerce Act 1986. The goal of this Act is to promote

competition within New Zealand markets for the ultimate benefits of consumers. Any conduct that restricts competition within these markets is prohibited under the Act. It also sets out the rules surrounding mergers and acquisitions which affect New Zealand markets. Prohibited activities under the Act include, but are not excluded to:

- price fixing agreements between competitors
- taking any substantial amount of power in the market for an anti-competitive purpose
- any purchase or arrangement of a business's shares or assets that causes a substantial lessening of competition in the market

The Fair Trading Act 1986 was developed alongside the Commerce Act 1986 to protect consumers from unfair trade practices and misleading and deceptive conduct by traders.

The rules under the Commerce Act 1986 are enforced and regulated by the New Zealand Commerce Commission.

Franchising in New Zealand

New Zealand is an energetic market in which to own and operate a franchised business. However, unlike Australia, New Zealand does not have any specific legislation governing franchises. Franchising in New Zealand is reliant upon normal contract laws and the voluntary Codes of Practice and Ethics put out by the Franchise Association of New Zealand (**FANZ**).

The main goals of the FANZ Code of Practice are:

- to encourage best practice throughout franchising
- to provide reassurance to those entering franchising that those displaying the logo of the FANZ have met the relevant requirements
- to provide the basis of self-regulation for franchising
- to display the effort within franchising to regulate itself

Aspects of legislated principles found in Australian legislation are also found in the FANZ Code of Practice. Examples of what rules this code mandates include disclosure requirements, a cooling off period, dispute resolution procedure and a code of ethics.

Despite no legislation regulating franchises, FANZ is an advocate of and maintains very high standards for franchising practice. The existing laws provided under the Fair Trading Act 1986, the Commerce Act 1986 and the Contractual Remedies Act 1989 give adequate protection to franchisees as they carry out trade.

The annual turnover from New Zealand franchises is over \$18 billion and, as of Autumn 2015, franchisee profitability had increased from 17 per cent to 38 per cent as reported by franchisors.

Government initiatives and incentives

The Government provides some initiatives and incentives for business in New Zealand. These include:

- NZTE Capability Development Vouchers which can be used towards capability development for your business
- research and development funding and support
- financial guarantee products for exporters
- a New Zealand Screen Production Grant for international productions of film in New Zealand

New Zealand also has a competitive and low-compliance tax system which includes:

- no payroll tax
- no social security tax
- a recoverable Goods and Services (**GST**) tax
- tax-deductible business expenses

Potential investors should seek professional advice to determine whether there are any possible incentives available for their proposed investment.

Taxation

Taxation policy

New Zealand wants to encourage investment and so has a tax regime which compares favourably with other countries. As tax laws are complex and can change from time to time consultation with a local adviser is recommended in order to ensure the most effective tax structure is adopted for any investment into New Zealand.

New Zealand income tax will be payable by non-residents of New Zealand on the income which is sourced in New Zealand and by New Zealand residents on their worldwide income.

The tax system is overseen by the New Zealand Inland Revenue Department (commonly called the **IRD**) and the main legislation is the Income Tax Act 2007.

The tax year in New Zealand runs from 1 April to 31 March. It is possible to apply for a non-standard balance date but that requires special approval from the IRD.

Income tax

Both resident and non-resident companies pay income tax at a flat rate of 28 per cent on amounts received in income.

Individual residents pay tax at the following rates:

Tax rates for the 2015-2016 tax year

Taxable income (NZ\$)	Tax rate (%)
Up to \$14,000	10.5
Over \$14,000 and up to \$48,000	17.5

Taxable income (NZ\$)	Tax rate (%)
Over \$48,000 and up to \$70,000	30
Remaining income over \$70,000	33

The amount of tax to be paid on New Zealand sourced income by a non-resident will vary depending on the country where they are tax resident. This is due to the double tax treaties which New Zealand has with many other countries.

Capital gains tax

Traditionally there has been no capital gains tax on sale of land. However, a new tax was introduced in October 2015 aimed at cooling down the Auckland property market. This provides that if a property is purchased and then sold within two years then capital gains will be taxable (this does not apply to the main home of a seller). In addition, foreign investors in property are required to register with the Inland Revenue Department and obtain an official tax number (a New Zealand bank account is required to obtain one).

While not a capital gains tax, it is worth noting that there may need to be an account for profit made on the sale of assets – in other countries these might be taxed as capital gains. Specific advice should be sought on this in light of the detailed rules in the Income Tax Act 2007.

Goods and services tax (GST)

The GST rate is 15 per cent and it is payable on the supply of goods and services in New Zealand.

Employer obligations

PAYE tax: Employers must deduct 'pay as you earn' tax from wages or salaries paid to employees.

ACC: The Accident Compensation Corporation levy must be paid by employers to help cover cost of accidental injuries.

Fringe Benefit Tax: Employers may have to pay fringe benefit tax where they provide employees with certain benefits such as using company cars or discounted goods or services. This tax is payable quarterly and is deductible from assessable income

Superannuation: Employers are required to contribute to 'Kiwisaver' which is a superannuation scheme for workers. The amount that must be contributed is currently set at three per cent of the employee's salary.

Stamp duty

In contrast to other jurisdictions like Australia, there is no stamp duty applicable in New Zealand.

Workplace relations

General

The Employment Relations Act 2000 is the main legislation which governs employment law in New Zealand. Employees are protected by a minimum standard of statutory rights. This Act provides that

all parties to an employment relationship owe a duty of good faith to the other party in that employment relationship.

Annual leave

An employee is entitled to four weeks' paid annual leave at the end of each year of employment with any one employer.

Employees can ask (in writing) to cash-in up to one week of their annual holidays each year.

Casual employees and fixed term employees can usually agree to receive holiday pay on a regular basis as opposed to taking leave.

Bereavement leave

After six months, employees are entitled to paid bereavement leave of:

- three days on the death of a spouse/partner, parent, child, sibling, grandparent, grandchild, or spouse/partner's parent
- one day if their employer accepts they've suffered a bereavement involving another person not included above

Parental leave

A primary carer may be entitled to take up to 18 weeks parental leave and receive parental leave payments during this period.

Unpaid parental leave

Employees who have worked for the same employer for an average of at least 10 hours a week for 12 months before their baby's due date may take up to 52 weeks extended leave.

Employees who have worked for the same employer for an average of at least 10 hours a week for six months before their baby's due date may take up to 26 weeks extended leave.

Right to request flexible working hours

All employees have a statutory right to request flexible working arrangements and all employers have a duty to consider seriously any requests.

Public holidays

Employees are entitled to 11 public holidays off work on pay if they are days when the employee would normally work.

Employers and employees can agree to transfer the observance of a public holiday to another working day to meet the needs of the business or individual employees.

Minimum rates of pay

There are three minimum wage rates in New Zealand:

- Adult minimum wage - all employees aged 16 years and over must be paid at least the adult minimum wage rate, unless they are starting-out workers or trainees. From 1 April 2016 the adult minimum wage is NZ\$15.25/hour

- Starting-out wage – starting-out workers are:
 - 16 and 17 year old employees who have not yet completed six months of continuous employment with their current employer
 - 18 and 19 year old employees who have been paid a specified social security benefit for six months or more and who have not yet completed six months continuous employment with any employer since they started being paid a benefit
 - 16 to 19 year old employees who are required by their employment agreement to undertake industry training for at least 40 credits a year in order to become qualified
 - the starting-out minimum wage rate is NZ\$12.20/hour from 1 April 2016
- training minimum wage – all employees aged 20 years or over who are doing recognised industry training involving at least 60 credits a year as part of their employment agreement, in order to become qualified. The training hourly minimum wage rates are NZ\$12.20/hour from 1 April 2016

There is no minimum wage for employees aged under 16.

Kiwisaver

It is not compulsory to participate in a superannuation scheme in New Zealand. Kiwisaver is a voluntary superannuation scheme that all employers must offer to their employees. The scheme is governed by the Kiwisaver Act 2006. Currently an employee can choose to contribute three per cent, four per cent or eight per cent of their pay. If an employee contributes to a Kiwisaver scheme an employer must make a contribution which is equal to three per cent of the employees' pay.

Notice of termination or redundancy

The employment relationship can be ended in several ways such as resignation, retirement, dismissal or redundancy.

- **dismissal:** there must be a good reason for the dismissal and the dismissal must be carried out fairly. If an employment agreement does not have a notice period, then reasonable notice must be given
- **redundancy:** generally there is no right to redundancy compensation unless employers and employees and/or their union have agreed to it
- **resignation:** employees can resign at any time provided they give reasonable notice. The employment agreement should be checked to confirm notice periods
- **retirement** – employers cannot require employees to retire just because of their age unless the parties have a written employment agreement that was in force on 1 April 1992 and remains in force

Trial periods

Employers can make an offer of employment that includes a trial period of up to 90 days. This trial period must be agreed in writing and negotiated in good faith as part of the employment agreement.

An employee who is dismissed before the end of a trial period can't raise a personal grievance on grounds of unjustified dismissal. An employee can raise a personal grievance on other grounds such as discrimination, harassment or unjustified action by the employer.

Termination of employment

The Employment Relations Act gives all employees the right to pursue a personal grievance if they have any of the following complaints:

- unjustifiable dismissal
- unjustifiable action which disadvantaged the employee
- discrimination
- sexual harassment
- racial harassment
- duress over membership of a union or other employee organisation
- employer's failure to comply with obligations relating to continuity of employment for employees affected by restructuring

Unions

Employees have the right to decide whether they would like to join a union. It is illegal for an employer to put unreasonable pressure on an employee to join or not join a union.

Employers must, if asked, enter into bargaining for a collective agreement with that union.

Accident compensation

There is no workers' compensation scheme in New Zealand. Instead, workplace accidents are covered by the Accident Compensation Act 2001. Both employers and employees contribute towards the cost of this scheme through levies.

Health and Safety at Work Act 2015

The Health and Safety at Work Act 2015 came into force on 4 April 2016 (replacing older health and safety legislation). This Act places a primary duty of care on a 'Person Conducting a Business or Undertaking' (**PCBU**). A PCBU has the primary duty of care for the health and safety of their workers.

An officer is a person who holds a very senior leadership position and has the ability to significantly influence the management of a PCBU. Every officer must exercise due diligence to ensure that the PCBU complies with their duties or obligations under the Act. Workers must also take reasonable care for their own health and safety as well as take reasonable care that their acts or

omissions do not adversely affect the health and safety of other persons.

Dispute resolution

Courts

New Zealand's legal system is based on the common law English system.

There are a number of general courts in New Zealand including the District Court, the High Court, the Court of Appeal and the Supreme Court. Most cases are dealt with by the District Court with the High Court handling more serious cases. The Court of Appeal and the Supreme Court are appellate courts. There are other more specialist courts in New Zealand including the Environment Court and the Employment Court.

Arbitration

Arbitration is a common form of dispute resolution in New Zealand. It is an alternative to court-based litigation. The process is usually quicker and more cost effective than going to court. In New Zealand, arbitration is governed by the Arbitration Act 1996. An arbitrator is appointed to hear and settle the dispute. An arbitrator's decision is final and binding on both parties.

Many commercial contracts in New Zealand contain a clause providing for the referral of any dispute arising from the contract to arbitration.

Disputes Tribunal

The Disputes Tribunal is an informal forum that can be used to resolve a wide range of disputes. The Disputes Tribunal is governed by the Disputes Tribunals Act 1988. The Disputes Tribunal is more cost effective, quicker and informal than court. There are no lawyers or judges in the Disputes Tribunal and disputes are heard by a trained referee.

Philippines

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Contributed by SyCip Salazar Hernandez & Gatmaitan

Philippines

The Philippines is a sovereign state in Southeast Asia, with more than 7,100 islands spanning more than 300,000 square kilometres of territory. It is divided into three island groups: Luzon, Visayas, and Mindanao.

The Philippines is a democratic and republican state. It has a unitary presidential system of government, where the President is both head of state and head of government. However, the powers of government are divided among three branches – executive, legislative and judicial. Together with the system of separation of powers, the 1987 Philippine Constitution also provides for a system of checks and balances.

The Philippines, greatly influenced by the Spanish legal system, is characterised as a civil law jurisdiction. However, numerous Philippine statutes embody American common law principles.

The economic system is primarily a free enterprise system. As an open economy, the Philippines trades with other economies around the world. It is a founding member of both the United Nations (**UN**), and the Association of Southeast Asian Nations (**ASEAN**).

The Philippines has one of the best performing economies in East and Southeast Asia at present, having experienced sustained growth in a region marked by economic downturn. At an estimated 101.2 million in 2014, the Philippines is the 12th most populous country in the world and the 7th in Asia. The Philippines has one of the youngest demographic profiles in the world.

Visas and work permits

Visas and work permits

The Philippines' Bureau of Immigration (**BI**) regulates the entry of foreign nationals in the Philippines and, in general, handles the issuance of work visas. Admission to the country is governed by Commonwealth Act No. 613, as amended, or the Immigration Act of 1940.

Visas that may be issued to foreign nationals may be classified into non-immigrant visas or immigrant visas.

Non-immigrant visas

The standard work visa for expatriates is a Pre-Arranged Employment Visa under Section 9(g) of the Immigration Act of 1940, which is commonly known as a 9(g) Visa. The 9(g) Visa is ordinarily required for expatriates seeking admission into the Philippines for purposes of employment. It is generally co-terminus with the period of the expatriate's employment. The expatriate's employer is required to file the application with the BI and is required to establish that no person can be found in the Philippines willing and competent to perform the services for which the expatriate has been recruited to work in the Philippines, and that the expatriate's admission would be beneficial to the public interest.

Other types of non-immigrant visas are the following:

- Treaty Trader or Investor Visa under Sections 9(d) of the Immigration Act of 1940
- Special Non-Immigrant Visa under 47(a)(2) of the Immigration Act of 1940
- Special Visa for Employment Generation (**SVEG**) under 47(a)(2) of the Immigration Act of 1940 and Executive Order No. 758

A Treaty Trader or Investor Visa is granted to a foreign national who seeks to enter the Philippines solely for the purpose of developing and directing the operations of an enterprise in the Philippines in which he or his employer, who is of the same nationality, has invested or is actively in the process of investing a substantial amount of capital. At present, the BI issues Treaty Trader or Investor Visas only to foreigners from the United States of America, Germany, and Japan.

A Special Non-Immigrant Visa may be issued to expatriates who work for foreign companies with subsisting contracts with the Philippine Government or its agencies; or Philippine companies that are registered either with the Philippine Economic Zone Authority (**PEZA**) or the Philippine Board of Investments (**BOI**).

A SVEG Visa is issued to a foreign national who will actually employ at least 10 Filipinos in a lawful and sustainable enterprise, trade, or industry in the Philippines.

Immigrant visas

Under Section 13 of the Immigration Act of 1940, a foreign national may be admitted into the Philippines as a permanent resident and issued an Immigrant Visa. Immigrant Visas may be classified into Quota Immigrant Visas and Non-Quota Immigrant Visas. A Quota Immigrant Visa is issued to nationals of countries which have diplomatic relations with the Philippines and which grants Filipinos the same immigration privileges under the principle of reciprocity. A Non-Quota Immigrant Visa is issued to foreign nationals without limitations, such as those issued by reason of the foreign nationals' marriage to Philippine nationals.

Special working permit

A Special Working Permit (**SWP**) may be issued to a foreign national who will be employed in the Philippines for short-term engagements not exceeding six months. SWP applications are likewise processed by the BI.

Provisional working permit

A Provisional Working Permit may be issued to a foreign national during the waiting period on an application for a pre-arranged employment visa.

Alien employment permit

In addition to the work visa, expatriates applying for a 9(g) Visa or a SVEG Visa are also required to obtain an alien employment permit (**AEP**) from the

Department of Labor and Employment (**DOLE**) unless the expatriate is exempt from securing an AEP.

Under the rules promulgated by the DOLE, the following are excluded from the requirement of securing an AEP:

- members of the governing board with voting rights only and who do not intervene in the management or day to day operation of the enterprise
- corporate officers
- consultancy service providers who do not have employers in the Philippines
- intra-corporate transferee who is a manager, executive or specialist and must have been employed by a foreign service supplier for at least one year prior to deployment
- contractual service supplier who is a manager, executive or specialist and an employee of a foreign service supplier which has no commercial presence in the Philippines

An AEP may be issued by the DOLE after determining the non-availability of a person in the Philippines who is competent, able, and willing at the time of application to perform the services for which the alien will be hired. Subject to renewal, the AEP is valid for period of one year, unless the contract of employment or other modes of engagement provides otherwise, but in no case should it exceed three years.

Business entities

In the Philippines, the following are the common types of investment vehicles that a foreign entity may establish should it opt to do business in the Philippines: subsidiary; branch office; representative office; regional or area headquarters (**RHQ**); regional operating headquarters (**ROHQ**); and partnership.

Subsidiary

A subsidiary is a domestic entity incorporated in the Philippines. Consequently, the rules and regulations regarding its creation, formation, and organisation are governed by Philippine law. It can exist for 50 years but its term may be extended for another period not exceeding 50 years in any single instance.

Subject to any minimum paid-up capital requirements imposed by law or regulations, the paid-up capital of a subsidiary cannot be less than PhP5,000. If foreign equity therein will exceed 40 per cent, the subsidiary is required to have a minimum paid-in capital of USD200,000 or its Philippine peso equivalent. However, if the business activity of the subsidiary involves advanced technology, as determined by the Department of Science and Technology, or if it employs at least 50 employees, as certified by the Department of Labor and Employment, the minimum paid-in capital is reduced to USD100,000

or its Philippine peso equivalent. If the contemplated business qualifies as an export enterprise, the minimum paid-up capital requirement of PhP5,000 will apply.

A subsidiary may engage in such line or lines of activities as may be allowed by the Securities and Exchange Commission (**SEC**). Since the subsidiary is recognised as having a separate juridical existence from its parent, a claim or judgment obtained against the subsidiary may be satisfied only from the assets of the subsidiary. Thus, its shareholders are liable only to the extent of the shares subscribed by them.

Branch

A branch office carries out the business activities of its parent corporation and derives income from within the Philippines. It may carry out any business activity except those reserved by the Constitution or by Philippine law to Filipino citizens or corporations. Generally, the branch office is bound by laws, rules and regulations applicable to domestic corporations of the same class, except with regard to the creation, formation, organisation, and dissolution of corporations or such laws that fix the relations or duties of stockholders or officers of the corporation to each other or to the corporation. It is considered an extension of the parent corporation and its liabilities are the direct liabilities of the parent corporation.

The minimum capital required for a branch is USD200,000 or its Philippine peso equivalent, unless any of the conditions for the reduction of the capitalisation requirement discussed above in relation to a subsidiary applies.

Representative office

A representative or liaison office deals directly with the clients of the parent corporation but does not derive income from the Philippines and is fully subsidised by its head office. It undertakes activities such as but not limited to information dissemination and promotion of the company's products as well as quality control of products. This is distinguished from a branch office which carries out the business activities of the head office and derives income from the host country. A representative office cannot generate income and carry out the business activities of the head office from within the Philippines.

The minimum capital requirement for a representative office is USD30,000 or its Philippine peso equivalent.

RHQ

An RHQ is a branch of a multinational company whose purpose is to act as an administrative branch of a multinational company engaged in international trade. It principally serves as a supervision, communications and coordination centre for its subsidiaries, branches or affiliates in the Asia-Pacific Region and other foreign markets. It may not earn or derive income in the Philippines

The minimum capital requirement for an RHQ is USD50,000 or its Philippine peso equivalent.

ROHQ

An ROHQ is a branch of a multinational company which is allowed to derive income solely by providing qualifying services to its affiliates in the Philippines, in the Asia-Pacific Region and in other foreign markets. ROHQs are allowed to derive income by performing any or all of the following qualifying services: general administration and planning; business planning and coordination; sourcing/ procurement of raw materials and components; corporate finance advisory services; marketing control and sales promotion; training and personnel management; logistics services; research and development services, and product development; technical support and maintenance; data processing and communication; or business development.

ROHQs are prohibited from offering qualifying services to entities other than their affiliates, branches or subsidiaries, and from directly and indirectly soliciting or marketing goods and services whether on behalf of their mother company, branches, affiliates, subsidiaries or any other company. ROHQs cannot directly or indirectly engage in the sale and distribution of goods and services of its mother company, branches, affiliates, subsidiaries or any other company.

To establish an ROHQ, the applicant must be a multinational company (i.e., a foreign company or a group of foreign companies with business establishments in two or more countries).

The minimum capital requirement for an ROHQ is USD200,000 or its Philippine peso equivalent.

Partnership

A partnership has a juridical personality of its own distinct and separate from that of the partners. While there is no prohibition against a partnership being partner in another partnership, for a corporation to be a partner, a specific statute or its charter must authorise such corporation to enter into a contract of partnership. Furthermore, a foreign corporation will not be allowed to act as general partner in a Philippine partnership unless it establishes either a branch office or subsidiary in the Philippines and then have the latter act as general partner.

A partnership is required to have a minimum paid-in capital of USD200,000 or its Philippine peso equivalent if foreign equity therein will exceed 40 per cent, unless any of the conditions for the reduction of the capitalisation requirement discussed above in relation to a subsidiary applies.

Business environment

Competition law

The Philippine Competition Act (Republic Act No. 10667) (**Competition Act**) was recently enacted and took effect on August 8, 2015. The Competition Act defines, prohibits and penalises

three types of anti-competitive conduct: anti-competitive agreements, abuse of dominant position, and anti-competitive mergers and acquisitions. It also creates the Philippine Competition Commission (**PCC**) which will have the primary and exclusive authority to conduct inquiries or investigations and to hear and decide cases involving violations of the Competition Act. The Competition Act seeks to:

- enhance economic efficiency and promote free and fair competition in trade, industry and all commercial activities
- prevent economic concentration that will control production, distribution or trade, which will unduly stifle competition or lessen, manipulate or construct the discipline of free markets
- penalise all forms of anti-competitive conduct with the object of protecting consumer welfare and advancing domestic and international trade and economic development

The Competition Act covers any person or entity engaged in trade, industry and commerce in the Philippines. The Competition Act also applies to international trade having direct, substantial, and reasonably foreseeable effects in the Philippine trade industry or commerce, including those resulting from acts done outside of the Philippines. The Competition Act, however, excludes combinations or activities of workers or employees as well as agreements or arrangements with employers when designed solely to facilitate collective bargaining in respect of conditions of employment.

It prohibits the following:

- anti-competitive agreements. The Competition Act covers agreements between and among competitors and include both; (a) agreements that are *per se* violative of the Competition Act, i.e., agreements between competitors that: (1) restrict competition, as to the price or components thereof, or as to other terms of trade; or (2) fix the price at an auction or in any form of bidding, including cover bidding, bid suppression, bid rotation, market allocation and other analogous practices of bid manipulations; and (b) agreements that are prohibited if shown to have the object or effect of substantially preventing, restricting or restricting competition, e.g., setting, limiting or controlling production, markets, technical development, or investment, dividing or sharing the market (whether by volume of sales or purchases, territory, type of goods and services, buyers or sellers or any other means). For this purpose, entities that have control over or are under common control with another entity are not deemed competitors. Control is defined under the Competition Act as the ability to substantially influence or direct the actions or decisions of an entity
- abuse of dominant position. This refers to conduct that would substantially prevent, restrict or lessen competition and includes, among

others, predatory pricing, imposing barriers to entry, discrimination in price or other terms, tying and bundling. An entity is presumed to be in a "market dominant position" if the market share of the entity in the relevant market is at least 50 per cent, unless the PCC determines a new market share threshold for a particular sector

- anti-competitive mergers and acquisitions. These refer to mergers and acquisitions that substantially prevent, restrict or lessen competition. By way of exception, the PCC may exempt mergers and acquisitions if the parties are able to prove that: (a) the concentration has brought about or is likely to bring about gains in efficiencies that are greater than the effect of any limitation on competition that result or likely to result from the merger or acquisition; or (b) a party thereto is faced with actual or imminent financial failure and the agreement represents the least anti-competitive alternative among the known alternative uses for the failing entity's assets. Further, under the Competition Act, parties to mergers or acquisitions, the transaction value of which exceeds Php1 billion are prohibited from consummating the transaction until 30 days after the PCC has been notified thereof in the form and containing the information specified in the regulations to be issued by the PCC. Failure to comply with such notification requirement renders the merger or acquisition void and the parties thereto liable to pay an administrative fine equivalent to one per cent - five per cent of the transaction value

Intellectual property protection

Intellectual property rights are protected in the Philippines. Under the 1987 Philippine Constitution, the state is mandated to protect and secure the exclusive rights of scientists, inventors, artists, and other gifted citizens to their intellectual property and creations. Pursuant to this mandate, the Philippines has entered into and ratified a number of international treaties concerning intellectual property rights.

Under the Intellectual Property Code of the Philippines (Republic Act No. 8293, as amended) (**Intellectual Property Code**), "intellectual property rights" consists of: copyright and related rights; trademarks and service marks; geographic indications; industrial designs; patents; layout-designs (topographies) of integrated circuits; and trade secrets.

Copyright and related rights

Copyright covers literary and artistic works which are original intellectual creations in the literary and artistic domain. Such works are protected from the moment of their creation. Copyright or economic rights consist of the exclusive rights to carry out, authorise or prevent certain acts such as the reproduction of the work or a substantial portion thereof; dramatisation, translation, adaptation, abridgment, arrangement or other transformation of the work; first public distribution, rental, or public

display of the original work; and public performance, among others.

Related rights, which are separate and independent of copyright or economic rights, refer to moral rights which include the right of the author to require that the authorship of the works be attributed to the author, the right to make any alterations of the work prior to, or to withhold it from publication, the right to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the work which would be prejudicial to the author's honour or reputation, and the right to restrain the use of the author's name with respect to any work not of the author's own creation or in a distorted version of the work; follow-up rights and neighbouring rights that also include rights of performers, producers of sound recording and broadcasting organisations.

Generally, a copyright is protected during the lifetime of the author and for fifty years after the author's death. The right of the author to require that the authorship of the works be attributed to the author shall last during the lifetime of the author and in perpetuity after the author's death while the other moral rights are coterminous with the economic rights.

Trademarks and service marks

A mark means any visible sign capable of distinguishing the goods or services of an enterprise and shall include a stamped or marked container of goods. A trademark or service mark is acquired through registration as provided under the Intellectual Property Code. The registration is valid for 10 years, but may be renewed for periods of 10 years at its expiration upon payment of the prescribed fee and filing of a request.

Patents

Patentable inventions are technical solutions of a problem in any field of human activity which are new, involve an inventive step and are industrially applicable. It may relate to a product, process, or an improvement of a product or process. Patents are protected for 20 years from the filing date of the application. After such term, the invention becomes part of the public domain.

Utility models are inventions which are new and industrially applicable. They are similar to patentable inventions, except that utility models do not require an inventive step as a condition for protection. Utility models are protected for seven years after the date of filing of the application. No renewal is allowed after the end of said term.

Industrial designs and layout-designs

An industrial design is any composition of lines or colours or any three-dimensional form, whether or not associated with lines or colours, which gives a special appearance to and can serve as pattern for an industrial product or handicraft. The law protects industrial designs which are new and ornamental. The term of protection is five years from the filing date of the application for registration, but may be

renewed for not more than two consecutive periods of five years each upon payment of a renewal fee.

Layout-design means the three-dimensional disposition, however expressed, of the elements, at least one of which is an active element, and of some or all of the interconnections of an integrated circuit, or such a three-dimensional disposition prepared for an integrated circuit intended for manufacture. The protection applies only if the layout-designs of integrated circuits are original. A layout-design is considered original if it is the result of its creator's own intellectual effort and is not commonplace among creators of layout-designs and manufacturers of integrated circuits at the time of its creation. The term of protection is 10 years, without renewal.

Protection of undisclosed information

Undisclosed Information or trade secret refers to information which is not generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question. It has commercial value because it is secret and the person lawfully in control of the information has taken reasonable steps to maintain its confidentiality.

Trade secrets are given protection because they derive economic value from being generally unknown and not readily ascertainable by the public.

Banking sector

The Philippines has enacted a law that allows the full entry of foreign banks into the Philippines. Under this law, Republic Act No. 10641, foreign banks may operate in the Philippine banking system through any one of the following modes of entry: (1) by acquiring, purchasing or owning up to 100 per cent of the voting stock of an existing bank; (2) by investing in up to 100 per cent of the voting stock of a new banking subsidiary incorporated under the laws of the Philippines; or (3) by establishing branches with full banking authority.

Previously, foreign banks were limited to one of the following modes of entry: (1) acquiring, purchasing or owning up to 60 per cent of the voting stock of an existing bank; (2) investing in up to 60 per cent of the voting stock of a new banking subsidiary incorporated under the laws of the Philippines; or (3) establishing branches with full banking authority. The third mode was available only for a period of five years from the effectivity of Republic Act No. 7721 or until May 1999, during which period a maximum of ten foreign banks could be allowed to establish branches in the Philippines. Meanwhile, the General Banking Law of 2000 expanded the first mode and allowed foreign banks to acquire up to 100 per cent of one already existing bank, but only for a period of seven years from the effectivity of the General Banking Law or until June 2007.

The lifting of foreign ownership restrictions was in anticipation of the implementation of the ASEAN Banking Integration Framework. It is also intended to further strengthen the Philippine financial system

by providing opportunities for weak banks to exit the system through sale of their voting stock to foreign banks that possess sufficient resources. Finally, it was intended to augment the financial resources available in the Philippine economy, which can be tapped to support infrastructure projects and rehabilitation programs.

Fuel regulation

The Philippine downstream oil industry is governed primarily by the Republic Act No. 8479, otherwise known as the Downstream Oil Industry Deregulation Act of 1998 (**Deregulation Law**). The term "downstream oil industry" refers to the business of importing, exporting, re-exporting, shipping, transporting, processing, refining, storing, distributing, marketing and/or selling crude oil, gasoline, diesel, liquefied petroleum gas, kerosene, and other petroleum products.

The Deregulation Law liberalised and deregulated the downstream oil industry, and encourages the entry of new participants therein, in order to ensure a competitive market. Pursuant to the said law, any person or entity may (1) import or purchase any quantity of crude oil and petroleum products from a foreign or domestic source; (2) lease or own and operate refineries and other downstream oil facilities; and (3) market such crude oil and petroleum products either in a generic name or his or its own trade name, or use the same for his or its own requirement, subject only to the following conditions:

- any person or entity who will engage in any such activity must give prior notice to the Department of Energy (**DOE**) for monitoring purposes
- such person or entity must secure the appropriate certificates of quality, health and safety and environmental clearance from the proper governmental agencies
- such person or entity must, for monitoring purposes, report to the DOE his or its every importation or exportation
- all oil importations must be in accordance with the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal

The Deregulation Law does not impose any foreign equity restrictions on participants in the downstream oil industry. However, another piece of legislation, the Retail Trade Liberalisation Act (Republic Act No. 8762), would be relevant with respect to the retail aspect of the business. Retail trade is defined under that law as any act, occupation or calling of habitually selling direct to the general public merchandise, commodities or goods for consumption. Essentially, a sale would be considered as retail if made to the end-consumer. Therefore, operating a gasoline station would be considered as retail trade.

Under the Retail Trade Liberalisation Act, enterprises engaged in retail trade whose paid-up

capital is less than the Philippine Peso equivalent of USD2,500,000 are reserved exclusively for Filipino citizens and corporations wholly owned by Filipino citizens. On the other hand, enterprises engaged in retail trade whose paid-up capital in Philippine Pesos is equivalent to at least USD2,500,000 may be wholly owned by foreigners. A foreign retailer may open branches, but the investment per branch must not be less than the Philippine Peso equivalent of USD830,000.

Another important piece of legislation governing the downstream oil industry is the Clean Air Act (Republic Act No. 8749). Under the Clean Air Act, the DOE has set the specifications for all types of fuel and fuel-related products to improve fuel composition for increased efficiency and reduced emissions, and the Bureau of Product Standards has promulgated Philippine National Standards to implement the same.

Funds management

Funds in the Philippines primarily take the form of mutual funds and unit investment trust funds (**UITF**).

Mutual funds are typically organised as investment companies. An investment company is an issuer which is or holds itself out as being engaged primarily, or proposes to engage primarily, in the business of investing, reinvesting, or trading in securities.

UITF refers to an open-ended pooled trust fund denominated in pesos or any acceptable currency, which are operated and administered by a trust entity and made available by participation.

Regulatory bodies

Mutual funds are regulated by the SEC, and are subject to the provisions of the Investment Company Act (Republic Act No. 2629, as amended) and other rules and regulations issued by the SEC.

UITFs are regulated by the Bangko Sentral ng Pilipinas or the Central Bank of the Philippines (**BSP**), and are subject to the provisions of the Manual of Regulations for Banks and other rules and regulations issued by the BSP.

Licensing of fund operators

Any person designated, or who intends to act as investment manager or investment adviser for an investment company, must, before acting as such, file an application and register with the SEC.

On the other hand, any trust entity authorised to perform trust functions may establish, administer and maintain UITFs.

Registration of funds

Under the Securities Regulation Code (Republic Act No. 8799), no securities may be sold, offered for sale, or distributed in the Philippines unless the same have been registered with the SEC, and the registration statement has been declared effective by the SEC. Similarly, under the Investment Company Act, any investment company organised under Philippine law may register for the purposes

of the law by filing with the SEC a registration statement, in such form as the SEC may prescribe as necessary or appropriate in the public interest or for the protection of investors.

On the other hand, a UITF is established in accordance with a written trust agreement drawn by the trustee, which must be approved by the board of directors of the trustee and submitted to the BSP for approval. Being issued by a bank, UITFs are considered exempt securities and, therefore, not subject to the requirement of registration under the Securities Regulation Code (Republic Act No. 8799).

Foreign investment policy

It is the policy of the Philippines to attract, promote and welcome productive investments from foreign individuals, partnerships, corporations, and governments in activities which significantly contribute to national industrialisation and socio-economic development to the extent that foreign investment is allowed in such activity by the 1987 Philippine Constitution and relevant laws. Foreign investments are encouraged in enterprises that significantly expand livelihood and employment opportunities for Filipinos; enhance economic value of farm products; promote the welfare of Filipino consumers; expand the scope, quality and volume of exports and their access to foreign markets; or transfer relevant technologies in agriculture, industry and support services. Foreign investments are welcome as a supplement to Filipino capital and technology in those enterprises serving mainly the domestic market.

A foreign company may do business in the Philippines subject to the provisions of:

- the Corporation Code of the Philippines (**Corporation Code**)
- the Omnibus Investments Code, as amended (**Investments Code**)
- the Foreign Investments Act, as amended (**FIA**)

The Corporation Code requires an entity doing business in the Philippines to establish a legal presence by obtaining a license to do business from the SEC, done through the formation of any of the recognised investment vehicles discussed earlier.

The Investments Code provides a comprehensive set of incentives for enterprises engaged in high priority projects (as listed in the Investments Priority Plan (**IPP**) drawn up annually by the BOI), and enterprises which export a minimum percentage of their production.

The FIA is intended to attract and promote foreign investments. Hence, as a general rule, export and domestic market enterprises are open to foreign investments to the full extent of their equity. An export enterprise is an enterprise which exports 60 per cent or more of its output. On the other hand, a domestic market enterprise is an enterprise which produces goods for sale, or renders services to the domestic market entirely or if exporting a portion of its output fails to consistently export at least 60 per

cent thereof. However, foreign investments are prohibited or limited in areas reserved to Philippine nationals by the Constitution, special laws and the provisions of the FIA.

The list of investment areas reserved to Philippine nationals is called the "Foreign Investment Negative List" (**Negative List**). The Negative List is divided into two parts: List A (activities where foreign ownership is limited by mandate of the Philippine Constitution or law); and List B (activities where foreign ownership is limited for reasons of security, defence, risk to health and morals, and protection of small- and medium-scale enterprises). List A may be amended at any time to reflect changes made in specific laws, while List B may not be amended more often than once every two years.

The most recent Negative List, the 10th Foreign Investments Negative List, was issued on May 29, 2015.

Under List A of the 10th Foreign Investments Negative List, no foreign equity is allowed in: mass media except recording; practice of professions; retail trade enterprises with paid-up capital of less than USD2,500,000; cooperatives; private security agencies; small-scale mining; utilisation of marine resources; ownership, operation and management of cockpits; manufacture, repair, stockpiling and/or distribution of nuclear weapons, as well as biological, chemical, and radiological weapons and anti-personnel mines; and manufacture of firecrackers and other pyrotechnic devices.

Foreign investment in private radio communications network is limited to 20 per cent. Foreign nationals may invest up to 25 per cent in: private recruitment, whether for local or overseas employment; contracts for the construction and repair of locally-funded public works; and contracts for the construction of defence-related structures. In advertising, the foreign ownership limit is 30 per cent.

Up to 40 per cent foreign equity is allowed in these activities: exploration, development and utilisation of natural resources; ownership of private lands; operation of public utilities; educational institutions other than those established by religious groups and mission boards; culture, production, milling, processing, trading except retailing, of rice and corn and acquiring, by barter, purchase or otherwise, rice and corn and by-products thereof; contracts for the supply of materials, goods and commodities to government-owned or controlled corporation, company, agency or municipal corporation; facility operator of an infrastructure or a development facility requiring a public utility franchise; operation of deep sea commercial fishing vessels; adjustment companies; and ownership of condominium units.

Under List B, foreign equity is capped at 40 per cent in: the manufacture, repair, storage, and/or distribution of products and/or ingredients requiring Philippine National Police clearance such as firearms, gunpowder, and dynamite, and Department of National Defence clearance such as guns and ammunition for warfare, guided missiles,

and combat vessels; manufacture and distribution of dangerous drugs; sauna and steam bathhouses and other like activities regulated by law because of risks to public health and morals; all forms of gambling except those covered by investment agreements with the Philippine Amusement and Gaming Corporation; and domestic market enterprises with paid-in equity capital of less than the equivalent of USD200,000, or which involve advanced technology or employ at least 50 direct employees with paid-in equity capital of less than the equivalent of USD100,000.

Government initiatives and incentives

To attract investors, the Philippines has enacted a number of laws providing fiscal and non-fiscal incentives to investors.

Under the Investments Code, all registered enterprises may be granted incentives such as tax exemptions, tax credits, and additional deductions from taxable income. Non-fiscal incentives include employment of foreign nationals, access to bonded manufacturing/trading system, and unrestricted use of consigned equipment. The industries entitled to incentives under the Investments Code are listed in the IPP. The IPP is prepared by the BOI annually, and contains the categories of economic activities in which investments are encouraged and allows for the registration of those activities on "pioneer" or "non-pioneer" status. An enterprise entitled to "pioneer" status is one which, among others, is engaged in the manufacture, processing or production, and not merely in the assembly or packaging of goods, products, commodities or raw materials that have not been or are not being produced in the Philippines on a commercial scale; or uses a design or formula, scheme, method, process or system of production or transformation of any element, substance or raw materials into another raw material or finished goods with the use of superior technology that is new and untried in the Philippines. Activities that do not meet the pioneer criteria are classified as "non-pioneer."

Meanwhile, Republic Act No. 7916, as amended, otherwise known as the Special Economic Zone Act of 1995 was passed in 1995 to encourage economic growth through the development of special economic zones called ecozones. These are areas earmarked by government for development into balanced agricultural, industrial, commercial and tourist/recreational regions. Ecozones are selected areas with highly developed or which have the potential to be developed into agri-industrial, industrial, tourist, recreational, commercial, banking, investment and financial centres whose metes and bounds are fixed by Presidential Proclamations. Ecozones are administered by the Philippine Economic Zone Authority (**PEZA**). Ecozone locators may be entitled to fiscal incentives such as income tax holiday, preferential tax rate of five per cent of gross income earned, zero-rated value-added tax on local purchases, and exemption from taxes and duties on its importation of machinery and equipment, and non-fiscal incentives such as special non-immigrant visa and multiple entry privileges for non-resident

foreign investors, officers and employees in supervisory, technical, advisory position.

Aside from ecozones, two other attractive investment sites in the Philippines are the Subic Bay Freeport and Special Economic Zone (SBF) and Clark Special Economic Zone (CSEZ), former U.S. military facilities converted into civilian use and administered respectively by the Subic Bay Metropolitan Authority (SBMA) and the Clark Development Corporation (CDC). The SBMA and CDC grant incentives to registered enterprises located at the SBF and CSEZ, respectively. The incentives granted by SBMA and CDC are essentially the same and include:

- tax- and duty-free importation of machineries, equipment, raw materials, supplies, and all other articles including finished goods
- no local and national taxes. In lieu thereof, SBF and CSEZ enterprises pay a tax of five per cent of gross income earned, which refers to gross sales or revenue derived from any business activity within the zones, less cost of production or direct cost of services as well as other costs specifically determined in regulations to be material in the operations of the business

On the other hand, Republic Act No. 8756, grants incentives to RHQs and ROHQs of multinational companies. RHQs are exempt from income tax and value-added tax. Meanwhile, ROHQs enjoy a preferential income tax rate of 10 per cent. Both RHQs and ROHQs are exempt from all kinds of local taxes, fees or charges imposed by a local government unit except real property tax on land improvements and equipment. They also enjoy tax and duty free importation of equipment and materials for training and conferences which are needed and used solely for their functions and which are not locally available subject to the prior approval of the BOI.

Taxation

Taxes in the Philippines are imposed by the national government and the local government. A foreign corporation is subject to income tax in the Philippines on Philippine-sourced income. Special laws provide for tax incentives depending on the type of business of the entity. Foreign corporations may also avail of preferential tax treatment with respect to income tax under an applicable tax treaty.

General corporate income tax

A domestic corporation (i.e., one that is established under Philippine law) is taxable on all income derived from sources within and without the Philippines. The rate of corporate income tax is generally 30 per cent of its taxable net income. In some instances, a minimum corporate income tax of 2 per cent of the gross income as of the end of the taxable year of the corporation is payable if the amount is higher than the corporate income tax at 30 per cent of net taxable income.

Philippine subsidiary

A Philippine subsidiary of a foreign corporation is a domestic corporation that has a juridical personality that is separate and distinct from its foreign parent company.

Dividends remitted by a Philippine subsidiary to its foreign parent company are generally taxed at 30 per cent on the gross amount of dividends remitted, which tax is required to be withheld by the Philippine subsidiary. The final withholding tax rate imposed on the amount of cash dividends may be reduced to 15 per cent if the country where the parent company is domiciled either:

- allows a credit equivalent to 15 per cent against the tax due from the parent company taxes deemed to have been paid in the Philippines, or
- does not impose any income tax on such dividends received

A tax treaty may also offer a preferential tax rate on dividends.

Branch office

The Philippine branch office of a foreign corporation is considered an extension of the juridical personality of the head office of the foreign company.

Branch profits remittance tax

Branch profits connected with the branch office's conduct of trade or business in the Philippines which are remitted to the head office of the foreign company are generally subject to the branch profit remittance tax at the rate of 15 per cent of the total profits applied or earmarked for remittance without any deduction for the tax component thereof. The 15 per cent tax will be withheld by the branch and paid to the Philippine Bureau of Internal Revenue.

Local business tax

A local government unit may be a province, a city, a municipality, or a barangay, and each one has been granted authority to impose certain taxes and fees on entities that operate within its jurisdiction. One of the restrictions on the taxing power of a local government unit, however, is that it cannot levy taxes that are already imposed by the national government such as the corporate income tax.

A usual tax imposed by a city or municipality is the local business tax. This has to be paid yearly by the subsidiary or branch to secure a business permit which is needed to conduct business within the jurisdiction of the local government unit.

Tax incentives

Special laws provide tax incentives to certain corporations depending on their business activities and subject to registration with the appropriate government agency.

The Investments Code may provide for income tax holiday to a registered entity. This incentive exempts the registered company from corporate income tax for six years and four years from the

start of commercial operations to a pioneer enterprise and a non-pioneer enterprise, respectively. Other incentives under this law may include:

- exemption from taxes and duties on imported spare parts
- exemption from wharfage dues (that is, charges assessed against the cargo of a vessel engaged in foreign or domestic trade based on quantity, weight, or measure received and/or discharged by vessel) and export tax, duty, impost and fees
- reduction of the rates of duty on capital equipment, spare parts and accessories
- tax exemption on breeding stocks and genetic materials

Registration with the BOI is needed to avail of the foregoing incentives under the Investments Code. Most BOI-registered companies are engaged in the manufacture of goods for export.

The Special Economic Zone Act of 1995 provides tax incentives to entities registered with PEZA. Companies registered with PEZA are usually manufacturers of goods for export and business process outsourcing corporations that export services. To register with PEZA, the company has to operate within an economic zone under the jurisdiction of PEZA.

A PEZA-registered enterprise may qualify for incentives such as income tax holiday for six or four years, and a five per cent special tax on gross income in lieu of all national and local taxes upon expiry of the income tax holiday period. Tax and duty-free importation of equipment and parts, exemption from wharfage dues on import shipments of equipment, and zero-rating of value-added tax of local purchases of goods and services may also be granted.

A branch office of a foreign corporation may also be exempt from branch profit remittance tax on profits earned from PEZA-registered activities.

Tax treaties

The Philippines is a party to double taxation treaties with 39 countries around the world. Depending on the type of Philippine-sourced income derived by a foreign corporation and the conditions under a particular treaty, a foreign company may claim exemption or partial relief from Philippine income taxes. Availing of the benefit under a tax treaty may, however, require the filing of an application for tax treaty relief by the foreign corporation with the Philippine Bureau of Internal Revenue and the issuance by the latter of a confirmatory ruling.

Workplace relations

Workplace relations in the Philippines is primarily governed by the Presidential Decree No. 442, as amended, or the Labor Code of the Philippines. While labour courts, in deciding labour issues, are mandated to equally respect the rights of the workers and management, labour laws and

jurisprudence provide that any doubt in the implementation and interpretation of labour laws are resolved in favour of labour.

Employment contracts

Under Philippine laws, parties to employment contracts may establish such terms and conditions as they may deem convenient, provided such terms and conditions are not contrary to law and public policy. Labour contracts are deemed impressed with public interest and so the minimum employment conditions set out in the Labour Code and other labour laws may not be contracted out by the parties.

Types of employees

There are several types of employees in the Philippines, including regular, probationary, casual, project, seasonal, fixed-term, managerial, and rank-and-file employees. The employment status of a person is defined and prescribed by law taking into account the factual circumstances surrounding the engagement, and not by how the parties characterise their relationship. Likewise, the status of an employee dictates the minimum standards which shall govern the employment relationship, as well as the conditions with respect to security of tenure and the termination procedure.

Minimum pay

Pursuant to the Minimum Wage Law, applicable minimum wage rates for employees are prescribed in each region in the Philippines. Compliance with the minimum wage rate is determined by referring to the basic cash wage of employees without deducting any benefits, supplements, or allowances which the employees enjoy free of charge aside from their basic pay. Pursuant to Presidential Decree No. 851, covered employers are also required to pay their employees their 13th month pay not later than December 24 of every year.

Wages must be paid at least once every two weeks, or twice a month, at intervals not exceeding 16 days, except for certain justifiable circumstances.

Employers are generally prohibited from making deductions in wages, whether in his own behalf or in behalf of any person, except in cases where:

- the worker is insured with his consent by the employer, and the deduction is to recompense the employer for the amount paid by him as premium on the insurance
- the right of the worker or his union to check off union dues has been recognised by the employer or authorised in writing by the individual worker concerned
- the employer is authorised by law or regulations issued by the Secretary of Labour to make such deductions

Employment conditions

The Labour Code provides the minimum employment conditions which must be complied with and which may not be contracted out by the

parties. These minimum employment conditions are specific to each type of employee. Thus, the minimum employment conditions for rank-and-file employees may differ from those for managerial employees, government employees, field personnel, members of the family of the employer who are dependent on him for support, domestic helpers, persons in the personal service of another, and workers who are paid by result.

Working hours, overtime pay, nightshift differential pay

The regular hours of work of employees in the Philippines should not exceed eight hours per day, or 40 hours per week for a five-day work week, or 48 hours per week for a six-day work week.

Work performed beyond eight hours per day will entitle the employee to overtime pay equivalent to an additional 25 per cent of the employee's regular wage during ordinary working days. The overtime rate is increased to 30 per cent if the overtime is performed on a holiday or rest day. The additional 25 per cent or 30 per cent is based on the wage rate of the employee for the particular day worked, e.g., ordinary working day, regular holiday, special holiday, or rest day rate, as the case may be.

The employer is required to pay a night shift differential pay equivalent to a 10 per cent premium on the employee's regular wage for each hour of work performed during a night shift, or between 10:00 p.m. to 6:00 a.m.

Rest days and public holidays

Every employee in the Philippines is entitled to a weekly rest day, which is 24 consecutive hours of rest after every six consecutive normal work days. No particular days of work are specified by law as rest days so that an employer may require an employee to work on Sundays and holidays. However, the request of an employee to have a particular day as his preferred weekly rest day based on religious grounds should generally be respected.

In addition to rest days, employees are not required to work during regular holidays and special non-working holidays observed in the country.

The Philippines currently observes 12 regular holidays, which are: New Year's Day (January 1), Maundy Thursday (March 24), Good Friday (March 25), *Araw ng Kagitingan* (April 9), Labour Day (May 1), Independence Day (June 12), National Heroes Day (movable date, last Monday of August), Bonifacio Day (November 30), Christmas Day (December 25), Rizal Day (December 30), Eid'l Fitr (movable date, to be determined in accordance with the Islamic Calendar), and Eidul Adha (movable date, to be determined in accordance with the Islamic Calendar).

The President of the Philippines may also declare certain days as special non-working holidays.

Any work performed by employees during their scheduled weekly rest days or public holidays should be voluntary, but the employee may be

compelled to work during emergencies and other exceptional conditions. Any work performed on these days entitles the employee to an additional compensation of at least 30 per cent of their regular wage.

Leave benefits

There are currently three kinds of leaves that are available to both male and female employees: service incentive leave, solo parent leave, and sickness benefit under the Social Security System Law (**SSS**). Leave benefits that are exclusive to female employees are: maternity leave, leave for victims of violence against women and children, and special leave benefit for those undergoing surgery for a gynaecological disorder. Paternal leave benefit is available exclusively to male employees.

Under the Labour Code, a yearly service incentive leave of five days with pay is given to every employee who has rendered at least one year of service. This benefit is not available in establishments regularly employing less than 10 employees, as well as to employees already enjoying the benefit and those enjoying vacation leave with pay of at least five days, since the benefit is not intended as a grant over and above similar benefits obtaining in an establishment.

Solo parent leave is a parental leave for not more than seven work days every year, with full pay given to a solo parent. Maternity leave is granted to every pregnant employee in the private sector, whether married or unmarried, which is equivalent to 100 per cent of the average daily salary credit of the employee for 60 days for normal delivery, and 78 days for caesarean section delivery. Paternity leave is granted to every married male employee in the private and public sectors for the first four deliveries of the legitimate spouse with whom he is cohabiting, which is equivalent to seven days with full pay.

Retirement benefits

Any employee may avail himself of retirement upon reaching the retirement age established under a collective bargaining agreement or an employment contract. In case of retirement, the employee will receive such retirement benefits as he may have earned under existing laws, collective bargaining, and other agreements. The employee's retirement benefits, however, may not be less than those provided by law, which is equivalent to at least 1/2 month salary for every year of service, a fraction of at least six months being considered as one whole year.

Termination of employment

An employer may not terminate its employees at will. Employees in the Philippines are entitled to security of tenure, which essentially means the right of an employee to be secured in his employment until it is terminated by a just or authorised cause provided by law, and only with strict compliance of the due process requirements prescribed by law.

The just causes for the termination of an employment are as follows:

- serious misconduct or wilful disobedience by the employee of the lawful orders of his employer or representative in connection with his work
- gross and habitual neglect by the employee of his duties
- fraud or wilful breach by the employee of the trust reposed in him by his employer or duly authorised representative
- commission of a crime or offense by the employee against the person of his employer or any immediate member of his family or his duly authorised representative
- other causes analogous to the foregoing

The authorised causes for the termination of an employment are as follows:

- installation of labour-saving devices, which includes the institution of new methods, more efficient machinery, or automation
- redundancy
- retrenchment to prevent losses
- closure or cessation of operation of the establishment or undertaking
- disease that renders the employee's continued employment unlawful or prejudicial to his health as well as to the health of his co-employees

Statutory contributions

Philippine social security laws specifically, the SSS, National Health Insurance Act, and the Home Development Mutual Fund Law require registration and mandatory coverage of employers and their employees in their respective systems or programs.

The SSS is compulsory on all employees not over 60 years of age and their employers. All SSS members are automatically made members of the National Health Insurance Program.

The National Health Insurance Program is administered by the Philippine Health Insurance Corporation (**PhilHealth**). Private sector employers are required to register with PhilHealth and a permanent PhilHealth Employment Number will be issued for each employer.

Coverage in the Home Development Mutual Fund Law Fund (**Pag-ibig Fund**) is also mandatory on all employees covered by the SSS and their respective employers.

The employer is required to deduct and withhold the employee's contribution from the employee's compensation and to remit the same to the SSS, PhilHealth, or Pag-ibig Fund. The employer is also required to pay the employer's contribution to these Government agencies.

Failure to remit the contributions will subject the employer to administrative and criminal liabilities.

Occupational health and safety

The Labour Code requires the employer to provide certain medical, dental, and first aid services, depending on whether the activity is hazardous or non-hazardous, and depending on the number of employees in the workplace, to ensure the workers welfare and protection in reducing or eliminating occupational accidents and illnesses. Current laws have likewise required the formulation and implementation of policies relating to drug abuse, Hepatitis, and HIV/AIDS prevention and control programs.

Dispute resolution

Legal system and the courts

The Philippines essentially has a civil law system, with the Constitution as the fundamental law of the country. Judicial decisions, which apply and interpret the Constitution and other laws, form part of the laws of the country. The statutes of the Philippines are found in the various enactments of the Philippine legislature.

The judicial system of the Philippines consists of a hierarchy of courts with the Supreme Court at the apex. Based on *Batas Pambansa Bilang 129*, or the Judicial Reorganisation Act, the other courts comprise of the Court of Appeals, the Regional Trial Courts, and the Metropolitan Trial Courts, the Municipal Trial Courts in Cities, the Municipal Trial Courts, and the Municipal Circuit Trial Courts. There is no trial by jury in the Philippines and only the judge determines all questions of fact and law of a case brought before the courts.

Recognition of foreign judgment

Foreign judgments or final orders are recognised under Philippine law and have the following effects: if upon a specific thing, the judgment or final order is conclusive upon the title to the thing; and if against a person, the judgment or final order is only presumptive evidence of a right as between the parties and their successors in interest by a subsequent title. An action must be filed with Philippine courts for the enforcement of a foreign judgment. The judgment or final order may be set aside by evidence of the foreign tribunal's want of jurisdiction, want of notice to the party, collusion, fraud, or clear mistake of law or fact. Otherwise, the Philippine court shall render judgment based on the foreign judgment or final order, which shall then be executed like any other judgment of a Philippine court.

Arbitration and enforcement of arbitral awards

Arbitration is recognised in the Philippines as an alternative method for settling disputes. The general rules on voluntary arbitration are found in Articles 2028 to 2046 of the Civil Code. Republic Act No. 9285, or the Alternative Dispute Resolution Act of 2004, promotes and encourages arbitration and other methods of dispute resolution, including mediation, conciliation, early neutral evaluation, mini-trial, or any combination thereof.

Under the Alternative Dispute Resolution Act of 2004, domestic arbitration is primarily governed by Republic Act No. 876, or the Arbitration Law. However, there are some provisions of the Alternative Dispute Resolution Act of 2004, as well as the 1985 United Nations Commission on International Trade Law Model Law on International Commercial Arbitration (**UNCITRAL Model Law**), which were made to apply to domestic arbitration. On the other hand, under the Alternative Dispute Resolution Act of 2004, international commercial arbitration is primarily governed by the UNCITRAL Model Law, although there are some provisions of the Alternative Dispute Resolution Act of 2004 which were also made applicable to international commercial arbitration.

Under the Alternative Dispute Resolution Act of 2004, construction arbitration is governed by Executive Order No. 1008 (1985), which created the Construction Industry Arbitration Commission (**CIAC**), and provides for an arbitration machinery specifically for the construction industry in the Philippines. The CIAC has original and exclusive jurisdiction over disputes arising from, or connected with, contracts entered into by parties involved in construction in the Philippines, whether the dispute arises before or after the completion of the contract, or after the abandonment or breach thereof, provided that the parties had agreed to submit such dispute to voluntary arbitration, regardless of the arbitration institution or arbitral body agreed upon.

The Philippine Chamber of Commerce and Industry, a private national business and industrial organisation in the Philippines, has established a Committee on Conciliation and Arbitration to assist its members in commercial disputes. Out of that committee, the Philippine Dispute Resolution Centre Inc. was incorporated as a non-stock, non-profit organisation to provide dispute resolution services to the business community, and presently is the most important commercial arbitration institution based in the Philippines.

Also, from the Philippine Chapter of the East Asia Region Branch of the Chartered Institute of Arbitrators, the Philippine Institute of Arbitrators was established. It is a learned society which endeavours to promote and develop commercial arbitration practice in the Philippines.

The Philippines is a party to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, or the New York Convention. The recognition and enforcement of a foreign arbitral award shall be governed by the New York Convention and by the Special Rules of Court on Alternative Dispute Resolution (A.M. No. 07-11-08-SC). The courts may, upon grounds of comity and reciprocity, recognise and enforce a foreign arbitral award made in a country that is not a signatory to the New York Convention as if it were a Convention Award.

Singapore

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Singapore

Singapore is consistently ranked as one of the world's easiest places to do business (Doing Business 2016 Report²) with its global connectivity, multicultural and cosmopolitan environment. Like other countries in the region, the economy of Singapore faces new challenges including the uneven recovery from the Eurozone, Brexit, ongoing reforms in China which could slow down China's economy, and an unanticipated quickening of the normalisation of monetary conditions in the US (which could result in regional countries facing large capital outflows, thereby leading to increased pressures on currencies and asset markets). Nonetheless, in Q1 of 2016 the Singapore economy expanded by 1.8 per cent on a year-on-year basis. GDP in 2016 is expected to be between one per cent to three per cent.³

Despite the uncertain 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 serves more than 100 airlines flying to roughly 330 cities in 80 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 2015-2016, Singapore maintained its second overall position for the fifth year in a row behind only Switzerland for top spot, and ranked first for overall efficiency of markets, and in the top three in goods, labour, and financial market efficiency.⁴ Singapore has a per capita GDP of approximately US\$52,887, comparable to Denmark, Ireland, Australia and Iceland and enjoys a relatively low unemployment rate of approximately two per cent (as at March 2016).⁵

A leading provider of international banking, trade finance, maritime finance, insurance, treasury operations and asset and wealth management within Asia, Singapore is the third-largest foreign exchange trading centre in the world and the second largest over-the-counter derivatives trading centre in Asia.⁶ 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

² <http://www.doingbusiness.org/data/exploreeconomies/singapore>

³ http://www.singstat.gov.sg/docs/default-source/default-document-library/news/press_releases/gdp1q2016.pdf

⁴ http://www3.weforum.org/docs/gcr/2015-2016/Global_Competitiveness_Report_2015-2016.pdf

⁵ <http://stats.mom.gov.sg/Pages/Unemployment-Summary-Table.aspx>

⁶ <http://www.mas.gov.sg/~media/resource/publications/fsr/FSR%202015.pdf>

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 four million residents in Singapore,⁷ approximately 13.5 per cent are foreign nationals.

Members of Parliament in Singapore are elected by general election every five years. At the last election in 2015, the People's Action Party (which has governed Singapore since its independence in 1965) secured 83 seats, with the Worker's Party winning six seats and the remaining opposition parties failing to win any.⁸

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, 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 or 90 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

⁷ http://www.singstat.gov.sg/docs/default-source/default-document-library/publications/publications_and_papers/population_and_population_structure/population2015.pdf

⁸ http://www.eld.gov.sg/elections_past_parliamentary2015.html

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 or 90 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 up to a maximum of 89 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**)⁹
- 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.

⁹

<https://www.edb.gov.sg/content/dam/edb/en/why%20singapore/entering-singapore/GIP-Global-Investor-Programme-Factsheet-EN.pdf>

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. Candidates must earn a fixed monthly salary of at least S\$3,300 (more experienced candidates require higher salaries) and have acceptable qualifications (usually a good university degree, professional qualifications or specialist skills). With effect from 1 January 2017, candidates must earn a fixed monthly salary of at least S\$3,600.

The S pass is available for mid-level skilled foreigners earning a minimum fixed monthly salary of S\$2,200¹⁰ who possess recognised qualifications.

Apart from obtaining an employment pass, foreigners can also apply for dependant's passes and/or long term visit passes for their immediate family members.

The personalised employment pass (**PEP**) is available for employment pass holders who have worked in Singapore for some time and earn a fixed monthly salary of at least S\$12,000 or overseas foreign professionals whose last drawn fixed monthly salary overseas was at least S\$18,000.¹¹ The PEP is valid for three years once issued and is not renewable. 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,¹² Approval-in-Principle for Permanent Residence Scheme (for Hong Kong applicants), the Foreign Artistic Talent Scheme, the Financial Investor Scheme¹³ and the Global Investor Programme.

Permanent residence applications can be lodged either in Singapore with the ICA or, if the applicant

¹⁰ <http://www.mom.gov.sg/passes-and-permits/s-pass>

¹¹ <http://www.mom.gov.sg/passes-and-permits/personalised-employment-pass/eligibility-and-requirements>

¹² <http://www.workpermit.com/singapore/immigration-to-singapore.htm>

¹³ <http://www.rikvin.com/immigration-work-visas/singapore-permanent-residence-singapore-business-guide/overview-singapore-permanent-residence-schemes/>; <http://www.financialinvestorscheme.com/>

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
- trusts.

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.

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 branch accrued in or derived from Singapore. The current applicable corporate tax rate 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".

Since 2010, a corporate tax rate of 17 per cent 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.

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 31A), 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.

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 2016 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 2016 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 the Association of Southeast Asian Nations (**ASEAN**) countries, 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.

Research and development

The Singapore government committed S\$16 billion (approximately US\$12 billion) on R&D activities in the period 2011-15 (a 26 per cent increase from the previous five-year period). The government has re-affirmed its commitment to investments in R&D by allocating S\$19 billion (approximately US\$14 billion) for 2016 to 2020, an 18% increase from its previous plan.¹⁴ 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.

¹⁴ <http://www.nrf.gov.sg/research/overview>

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**)¹⁵ 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 Trademarks¹⁶ 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.

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.

¹⁵ <http://www.ipos.gov.sg/topNav/abo>

¹⁶ <http://www.ipos.gov.sg/topNav/abo>

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

Work type	Copyright protection
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 web servers 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 trademarks 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 53.¹⁷

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 trademarks 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.

Layout designs of integrated circuits

The original layout design of integrated circuits is protected under the Layout-Designs of Integrated Circuits Act (Cap 159A).¹⁸ 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 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 of two years within which all claims must be filed.

Franchising in Singapore

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

¹⁷ LawNet.

¹⁸

<http://www.ipos.gov.sg/leftNav/Layout+Designs+of+Integrated+Circuits.htm>.

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 2015-2016 by the WEF, Singapore is ranked the second most competitive economy in the world.¹⁹ 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.

Funds management

Regulatory bodies

The Monetary Authority of Singapore (**MAS**) regulates the financial services sector in Singapore. The MAS administers the various statutes pertaining to money, banking, insurance, securities and the financial sector in general.

Licensing

A person wishing to carry on a financial services business in Singapore will generally require a capital markets services licence (**CMS Licence**) issued by the MAS, unless they are able to invoke an exemption from the applicable licensing obligation. A CMS Licence may be sought (or an equivalent exemption may be applicable) with respect to the following types of regulated financial services activities, amongst others:

- dealing in securities (which includes the offer of units in a collective investment scheme);
- fund management;
- real estate investment trust management;
- providing custodial services for securities.

Establishing or operating a market also requires formal approval or recognition from the MAS.

The provision of financial advisory services (including, amongst others, advising others concerning any investment product and marketing collective investment schemes) is also a regulated

activity and requires a financial adviser's (unless an applicable exemption from the licensing obligation may be invoked).

Registration

Funds are subject to different requirements depending on the characterisation of the fund under the Securities and Futures Act (Chapter 289 of Singapore).

For example, a collective investment scheme that is offered to Singaporean retail client investors will be subject to different requirements depending on whether it is constituted in or outside Singapore. The manager of the scheme must hold a CMS Licence for fund management (or be exempted from the licensing requirement) and be fit and proper, or be licensed and regulated in the jurisdiction of its principal place of business if the scheme is constituted outside Singapore.

The scheme, the manager and the trustee must all comply with the applicable requirements under the Securities and Futures Act (Chapter 289 of Singapore) and any applicable subsidiary legislation.

Prospectus requirements

The offer of interests in a fund to retail client investors in Singapore will need to be made in or accompanied by a prospectus that complies with the prospectus requirements under the Securities and Futures Act (Chapter 289 of Singapore), which include amongst others prospectus lodgement and prospectus registration requirements, unless the offer complies with applicable requirements for an exemption from the prospectus requirements.

Operator compliance obligations

A fund operator must put in place adequate arrangements for compliance with various requirements under the Securities and Futures Act (Chapter 289 of Singapore), including amongst others management of conflicts of interest and other ongoing regulatory requirements (including the requirement to notify the MAS in prescribed circumstances).

Market misconduct rules

Persons carrying on business in Singapore must comply with various market misconduct related legislation, including with respect to misleading or deceptive representations or other conduct, insider trading and market manipulation.

Fuel regulation

The oil industry is an important part of Singapore's economy and accounts for more than 5% of Singapore's gross domestic product.²⁰ With limited domestic energy resources, Singapore imports fuel to meet most of its energy requirements. Imported natural gas fuels most of Singapore's power generation, the balance being fueled by small amounts of coal and an increasing amount of renewable resources fueling the rest.

¹⁹ <http://reports.weforum.org/global-competitiveness-report-2015-2016/competitiveness-rankings/>.

²⁰ <https://www.edb.gov.sg>

Access to the sea and a strategic location near the Strait of Malacca has enabled Singapore to become one of Asia's main oil hubs and one of the world's top-three oil trading and refining centers. The center of oil and gas activities in Singapore is Jurong Island. Recent investments have put in place some of the world's most advanced refinery infrastructure and petrochemical plants. As a result, Singapore is the location of choice for energy and chemicals companies' headquarters and R&D activities.²¹

The import, export, transport and storage of oil is regulated in Singapore. There are also specific regulations regarding safety and environmental protection. These regulations are enforced by a number of ministries, including the Ministry of Health, Ministry of Environment and the Ministry of Labour. These ministries also empower a number of authorities to assist with enforcement.

Singapore is promoting sustainable growth for the energy industry, focusing on developing next-generation technology, capable of harnessing renewables.

Foreign investment policy

Foreign capital plays a key role in the development of Singapore's industries and resources. In the Global Enabling Trade Report 2014²² 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, multilevel 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.

²¹

https://www.contactsingapore.sg/Media/ContactSingapore/EN/Key%20Industries/Chemicals%20Oil%20and%20Gas/EDB_CS_Oil_Gas_Factsheet_Sept_2011.pdf

²²

http://www3.weforum.org/docs/WEF_GlobalEnablingTrade_Report_2014.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: <ul style="list-style-type: none"> • Manpower • Equipment and Materials • Professional Services • Intellectual Property Rights 	Singapore-registered business entities undertaking R&D activities
Training grants	Co-funding to support manpower development in the application of new technologies, industrial skills 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
Integrated 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 rate of 8% on income derived from qualifying activities WHT exemption on interest payments on loans from banks and network companies for FTC activities	Approved finance and treasury centre company
Approved Royalties Incentive	Tax exemption or a concessionary tax rate may be granted for approved royalties, fees or contributions to research and development costs made to a non-tax resident	Manufacturing
Approved Foreign Loan	Tax exemption or a concessionary tax rate may be granted on interest payments on loans taken to purchase productive equipment	Manufacturing
S19B writing-down allowances for IP acquisition	5-year write-down on capital expenditure in acquiring certain intellectual property rights	Manufacturing IP Hub

Source: <http://www.edb.gov.sg> and <http://www.iras.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 2015 will be assessed in the year of assessment 2016. 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 or other payment in connection with any loan or indebtedness
- royalties and other lump sum payments for the use of movable property

- know-how payments for the use of scientific, technical, industrial or commercial knowledge or information
- technical assistance or service fees
- management fees
- time, voyage and bareboat charter fees for the charter of ships
- distribution of real estate investment trust
- proceeds from sale of real property by a non-resident 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 a reduced rate of 15 per cent or ten per cent (or in some cases lower), 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 the taxable turnover of a business has exceeded S\$1million in the past four quarters or is expected to exceed S\$1 million in the next 12 months.

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. Generally, 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 2016, the maximum marginal tax rate is 20 per cent. From 2017 this will increase to 22 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 17 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 55 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 between zero per cent and 16 per cent for owner-occupied residential 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 April 2016. From 1 April 2016, all employers will be required to issue itemized pay slips and key employment terms (**KETs**) to employees covered under the Employment Act. From 1 April 2016, all employers must also maintain detailed employment records of employees covered under the Employment Act. Such records are to be kept for the two most recent years, and are to be

retained for one year after the employee leaves employment.

Since 2012, under the Retirement and Re-employment Act, employers have been required by law to offer re-employment to eligible workers from when they retire at age 62 to when they turn 65, or at the very least given them one-off payments if they cannot re-hire them. From 1 July 2017, employers must offer re-employment up to the age of 67.

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\$2,500 a month.

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 may not be enforceable.

For employees not covered by the Employment Act, legal relations are contractual, and governed by their employment contracts with the employer supplemented by 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\$2,500 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's date of birth occurs, or the estimated delivery date for the birth is, on or after 1 January 2013.
- The employee's child is a citizen of Singapore at the time of birth or, failing which, becomes a citizen of Singapore within 12 months commencing on the date of birth.
- The employee was lawfully married to the child's natural father at the time of conception or before the child's birth, or within a 12-month period after the date of the child's birth.
- The employee has, for at least 90 days in the aggregate during the 12 months preceding the day of her confinement, been employed by one or more employers or been self-employed or both.

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 any of the first three criteria set out above but who fall within the ambit of the Employment Act and satisfy the fourth 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'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 or, if self-employed, has been engaged in work for at least three continuous months and have lost income during the childcare leave period.

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 the first criteria set out above but is covered under the Employment Act and fulfils the second and third 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.

From 1 July 2016, employers must offer re-employment up to the age of 67.

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.

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

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South Korea

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.

South 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 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.

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: (a) those entertainers in tourist hotels and other entertainment venues; and (b) others. Those individuals in (a) require a performance recommendation letter from the Image Staff Classification committee Performance Project, proof of an HIV test, and a notarised personal reference letter. Those individuals that fall into (b) 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 one: individuals visiting family or relatives living in South Korea
- Class two: domestic helpers of diplomats in South Korea
- Class three: foreign students enrolled in elementary/ junior/high school

Individuals in:

- Class one 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 two require an official letter issued by the foreign embassy or consulate, an employment contract, and a copy of the employer diplomat’s identification
- Class three 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 (*ChusikHoesa*)
- limited company (*YuhanHoesa*)
- unlimited partnership (*HapmyungHoesa*)
- limited partnership (*HapjaHoesa*)
- domestic branch of foreign parent company

Two new forms of business entity, the limited liability company (*YuhanchaegimHoesa*) and the limited liability partnership (*HapjaJohap*) were introduced by amendments made to the Commercial Act in 2011 which took effect on 15 April 2012.

Joint stock company/corporation (*ChusikHoesa*)

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 manage 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 (*YuhanHoesa*)

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 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 (*ChusikHoesa*), the appointment of an auditor is optional for limited liability companies. The company's incorporation becomes effective upon registration.

Unlimited partnership (*HapmyungHoesa*)

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 (*HapjaHoesa*)

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 (*YuhanchaegimHoesa*)

The 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 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 (HapjaJohap)

The limited partnership was 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 must 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 South Korea have been substantially altered by the 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
- Paris Convention for the Protection of Industrial Property (1980)
- Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms (1987)
- Trademark Law Treaty (2003)
- Budapest Treaty on the International Recognition of the Deposit of Microorganisms for the Purpose of Patent Procedure (1988)
- Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks (2003)
- Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks (1999)
- Strasbourg Agreement Concerning the International Patent Classification (1999)
- Vienna Agreement Establishing an International Classification of the Figurative Elements of Marks (2011)
- Locarno Agreement Establishing an International Classification for Industrial Designs (2011)
- WIPO Performances and Phonograms Treaty (2009)
- International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (2009)
- Singapore Treaty on the Law of Trademarks (2016)

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 former President Lee Myung-Bak and the current President Park Geun-hye. President Park's term expires in December 2017.

President Park's administration has actively investigated and pursued Free Trade Agreements (FTAs) with a wide range of trading partners. So far, FTAs with total of 52 countries, i.e., Chile, India, EU, Peru, US, Turkey, Australia, and China, entered into force.

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 treaties (number in parentheses represent effective year):

- Marrakesh Agreement Establishing the Annex of the World Trade Organisation (WTO) Agreement on Trade Related Aspects of International Property Rights (TRIPS) Patent Cooperation Treaty (PCT) (1984)
- Berne Convention for the Protection of Literary and Artistic Works (1996)
- WIPO Copyright Treaty (2004)

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 20 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

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 17 banks operating in South Korea - six nationwide commercial banks (KB Kookmin Bank, Woori Bank, Shinhan Bank, KEB Hana Bank, Standard Chartered Bank, Citi Bank), six regional commercial banks (Daegu Bank, Busan Bank, Kwangju Bank, Kyongnam Bank, Jeonbuk Bank, Jeju Bank), and five specialised banks (NogHyup, SuhHyup, Korea Development Bank, Industrial Bank of Korea, The Export-Import Bank of Korea).

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 specialisation 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.

Funds management

Regulatory bodies

The primary regulator of fund trustees, managers and custodians is the Financial Services Commission (**FSC**). The FSC is a central government body responsible for financial policy and financial supervision. The FSC has statutory mandates to draft and amend financial laws and regulations; supervise, inspect and sanction financial institutions; issue regulatory licenses and approval to financial institutions; oversee capital markets; and supervise foreign exchange transactions conducted by financial institutions to ensure their financial soundness.

The Financial Supervisory Service (**FSS**) is South Korea's integrated supervisory authority. The FSS conducts prudential supervision of banks, nonbank financial companies, financial investment services providers, and insurance companies in order to ensure they comply with certain safety and soundness guidelines, standards, requirements, and safeguards. In addition, the FSS performs capital market supervision, consumer protection, and other supervision and enforcement activities as delegated or charged by the FSC.

The National Pension Service (**NPS**) regulates the pension fund to help secure the retirement benefits of Korean citizens with income security, thereby promoting national welfare in the case of retirement, disability or death.

Licensing of the fund operator

The Financial Investment Services and Capital Markets Act (**FSCMA**) provides for function-based supervision of securities and investment services collectively referred to as "financial investment services" by reclassifying previous service areas into six new categories of financial investment services. They are dealing, brokerage, collective investment schemes, investment advisory services, discretionary investment services, and trust services. Financial services firms may engage in one or more of any of the six financial investment services businesses with the appropriate regulatory authorisation/approval from the FSC/FSS. Financial investment services provider (**FISP**) refers to a financial services firm that is licensed to engage in any one or more of the aforementioned six financial investment services.

Collective investment schemes (**CIS**) pool funds from investors and invest in transferable securities and other financial instruments. CIS operators are entities that assume the primary responsibility for investing the pooled assets for the benefit of the investors.

The FSCMA replaced the concept of "indirect investment" in previous securities laws with the concept of "collective investment" and expanded the legal forms in which a CIS may be established. Under Article 9 of the FSCMA, CIS may take on the following legal forms:

- a CIS in the form of a trust (an **investment trust**), in which a trust operator (a CIS operator) places assets under the management of a trust service provider;
- a CIS in the form of a company (an **investment company**), incorporated pursuant to the Commercial Act;
- a CIS in the form of a company with limited liability (a **limited liability investment company**), incorporated pursuant to the Commercial Act;
- a CIS in the form of a limited partnership company (a **limited partnership investment company**), established pursuant to the Commercial Act;

- a CIS in the form of an association (an **investment association**), established pursuant to the Commercial Act
- a CIS in the form of an undisclosed association (an **undisclosed investment association**), established pursuant to the Commercial Act

Registration of the fund and the fund operator

An investment fund that is offered to retail client investors will generally need to be registered as a registered CIS with the FSC. The requirements for registration of a CIS are as follows:

- No persons under the following items may be in a period of suspension of business
 - a collective investment business entity that handles the collective investment property
 - a trust business entity that keeps in custody and manages the collective investment property
 - an investment trader and the investment broker that is responsible for selling the collective investment securities
 - a general administration company (referring to a general administration company) with whom the affairs are entrusted by an investment company, in cases where an investment company is involved
- collective investment scheme has been created and established lawfully in compliance with this Act
- collective investment agreement does not contravene any Act and subordinate statute, nor explicitly impinge on investors' interests
- for an investment company:
 - a supervisory director is not a minor, incompetent, person declared bankrupt. A person who was once an executive or employee of a corporation or company whose business permission, authorisation or registration was revoked pursuant to this Act, other finance-related Acts and subordinate statutes, or finance-related Acts and subordinate statutes of a foreign country, etc
 - its capital at the time the application for registration is filed shall be at least 100 million won and the amount prescribed and publicly notified by the FSC

Fund disclosure document

An issuer of securities shall submit registration statement to the FSC. Also the issuer of securities shall file an investment prospectus and a simplified investment prospectus with the FSC on the day on which the relevant registration statement becomes effective. An issuer of securities issued under an effective registration statement shall file a report on the results of issuance of such securities with the FSC.

Special cases concerning foreign collective investment securities

If a foreign collective investment business entity of a foreign investment trust or a foreign undisclosed investment association, or a foreign investment company, etc. intends to sell foreign collective investment securities within South Korea, they shall register the relevant foreign collective investment scheme with the FSC.

To register a foreign collective investment scheme the foreign collective investment business entity should satisfy both the requirements of qualification for a foreign collective investment business entity and the requirements of qualification for sale of foreign collective investment securities as prescribed by Presidential Decree.

- Prerequisites of qualification for a foreign collective investment business entity:
 - the size of its assets under management as at the end of the latest business year shall not be less than one trillion won
 - its equity capital shall not be less than the minimum equity capital prescribed for each authorised business unit of collective investment business hereof according to the type of the foreign collective investment scheme that it seeks to sell in Korea
 - it shall have no record of having been subjected to an administrative disposition equivalent to or heavier than business suspension by the supervisory agency either in its home country or in Korea, or sentenced to a criminal punishment equivalent to or heavier than a fine, in connection with its business equivalent to a financial business during the latest three years
 - it shall have no record of having been subjected to a sanction prescribed and pronounced by the FSC imposed by the FSC or an Exchange due to violation of disclosure regulations in the latest three years;
- Prerequisites of qualification for sale of foreign collective investment securities:
 - such securities shall be issued or scheduled to be issued by a member state of the Organization for Economic Cooperation and Development, or under laws of Hong Kong, Singapore or states prescribed by Ordinance of the Prime Minister in consideration of protection of investors, etc.;
 - matters concerning expenses borne by investors, such as commissions and fees, shall be clearly stated, and price thereof shall not be set excessively high in light of international practice;
 - it shall be possible to recover the amount invested, in a manner of direct or indirect redemption or similar, depending on demand from investors;
 - other requirements specified and publicly notified by the Financial Services Commission, as necessary for protecting investors, shall be met.

In selling foreign collective investment securities, a foreign collective investment business entity of a foreign investment trust or a foreign undisclosed investment association, or a foreign investment company, etc. shall execute sales through an investment trader or investment broker.

Also a foreign collective investment business entity shall prepare an asset management report at least once every three months and furnish it to the investors of the relevant foreign collective investment scheme.

Fuel regulation

Petroleum industry opening

South Korea ranks world's fifth in petroleum importation and eighth in petroleum consumption, and it heavily depends on imported petroleum for consumption.

The Korean government has gradually developed the petroleum industry to a national key industry since the 1960s. After the mid-1990s, the government has promoted the following liberalisation and globalisation, for the purpose of developing competition and reinforcing international competitiveness in the petroleum industry.

- abolition of distance limits of gas stations (1995. 1.)
- price liberalisation (1997. 1.)
- conversion to a permit system to registration system for gas stations and agency (1997. 1.)
- conversion to an approval system to registration system of petroleum export-import business (1997. 1.)
- conversion to a permit system to registration system of petroleum refinery (1998. 10.)
- abolition of limits on foreigner investment in petroleum refinery (1998. 10.)

Petroleum refinery

Petroleum refinement process involves distillation of hydrocarbon mixtures, the main component of oil, based on different boiling points, removal of impurities in the distilled hydrocarbons, and transformation (decomposition, reforming) of hydrocarbons by adding catalyst.

Petroleum refiner must equip a petroleum refinery facility and a storage facility in accordance with registration requirements prescribed by Petroleum and Petroleum Substitute Fuel Business Act. Petroleum refinery must equip at least one of the following petroleum refinery facilities:

- Atmospheric Distillation Facility
- Decompression Distillation Facility
- Reforming Facility
- Desulfurization Facility
- Decomposition Facility

Petroleum refiner must equip a storage facility that is capable of storing the amount equivalent to 40 days' domestic sale plan of the year it commenced its business. At least one year after commencing the business, a registered refiner shall equip a storage facility that is capable of storing the amount equivalent to 40 days' domestic sales of the previous year.

Within the amount equivalent to 60 days' annual daily average domestic sales, petroleum refiner must store the amount of petroleum as notified by the Minister of Trade, Industry and Energy. In the case of a registered refiner operates petroleum export-import business, the registration may be exempted.

In the case of: (a) a petroleum-refiner transfers all of his/her petroleum refinery business, the transferee; (b) a petroleum refiner dies, his or her successor; and (c) a petroleum refiner that is a corporation merges with any other petroleum business, or a corporation incorporated by the said merger, a corporation that survives merger, shall succeed to the status of the relevant petroleum refiners.

Petroleum export-import business

Petroleum exporter or importer must equip a petroleum storage facility in accordance with the petroleum exporter-importer registration requirements prescribed by the Petroleum and Petroleum Substitute Fuel Business Act. Petroleum exporter-importer must equip a storage facility that is capable of storing whichever is larger between the following: the amount equivalent to 30 days' domestic sale plan of the year the business commenced, or 5000 kl.

At least one year after commencing his/her business, anyone who has registered for the petroleum export-import business shall equip a storage facility that is capable of storing whichever is larger: the amount equivalent to 30 days' domestic sales of the previous year, or 5000 kl.

Petroleum sales business

A petroleum distributor is categorised into a general distributor, and a solvent distributor. Registering for the general agent requires 700kl or more of storage facility, 20kl or more of transport equipment, and 50 million won or more of capital.

A distributor is categorised into a refiner's branch distributor, and a refiner's independent distributor. Although the refiner's branch distributor is a body corporate that is independent of oil refiners, it has an integrated function of wholesale with oil refiners through the financial and employee participation. On the other hand, the independent distributor is an independent agency equity, where directly procures supply from oil refiners and importing firms and sells it.

Anyone who intends to operate a gas station shall abide facility standards, which requires a storage facility and lubricators, in accordance with the registration requirements. Besides the facility standards, the Mayor/ Governor, or the head of Si/Gun/Gu may modify registration requirements for

gas stations, considering relevant local circumstances and conditions.

Conditional registration

Petroleum refiners, exporter or importer, and sellers must file an application for a conditional registration, on the condition that he/she will secure the facilities prescribed by the registration requirements within the following period:

- for petroleum refiners: three years
- for petroleum exporters or importers: two years
- for petroleum sellers: one year

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 10 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 10 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 10 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 183 days 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 over KRW150 million. For taxable income earned over KRW88 million to KRW150 million, the rate is 35 per cent, over KRW46 million to KRW88 million, 24 per cent, over KRW 12 million to KRW 46, 15 per cent, and below KRW 12 million, six per cent, respectively.

Corporate income tax

The corporate tax rate is 10 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 10 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 10 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.

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.

Taxes have been levied on houses with a value of over KRW600 million from 2006 and land with a value of over KRW500 million from 2008. 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 20 per cent withholding tax (in which a 10 per cent surtax also applies, for an effective tax rate of 22 per cent, which may be reduced under a tax treaty)
- profit distributions from branches are generally not subject to further taxes. Although branch profit tax rates of 20 per cent (in which a 10 per cent surtax also applies, for an effective tax rate of 22 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 10 per cent inhabitant surtax), and France (five 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 20 per cent tax on royalties (as well as interest) paid by a domestic company to a non-resident (where a 10 per cent surtax also applies, making an effective tax rate of 22 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 Association of Southeast Asian Nations (**ASEAN**) countries, India, Turkey, Australia, Canada, China, New Zealand, Vietnam, Columbia 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 came into force on 15 March 2012.

South Korea is currently negotiating FTAs with the Gulf Cooperation Council, Mexico, Japan, Indonesia, Israel, Ecuador, a group of central American countries (Panama, Costa Rica, Guatemala, Honduras, El Salvador, Nicaragua) and Rcep (Korea, China, Japan, Australia, New Zealand, ASEAN). South Korea is also conducting preparatory talks or joint research projects with MERCOSUR, Malaysia. 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.

Workplace 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 January through to 31 December. Late payment or a failure to pay wages is an actionable offence. In 2016, the minimum wage was set at KRW6,030 per hour and KRW48,240 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 be 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 employees who have worked for 80 per cent or more of a year, with the total days of annual leave increasing by one day every two years for employees who have worked for three years or more. Those who have worked continuously for less than one year or employees who worked less than 80 per cent of a 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 eight years old or in second grade or lower in 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 5-90-day leave period for women who miscarry is available (after 11 weeks of pregnancy, with the amount of leave to depend on the time of miscarriage). Fraternal leave is also available for three days or more but not exceeding five days (with the first three days being paid leave) 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 10.00 pm and 6.00 am 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

Since 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. Under the CPS, criminal trial by jury is held only if several conditions are satisfied. The type of case must be identified as a case adjudicated by a panel of judges pursuant to the Court Organization Act, 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 has amended its arbitration law (which is scheduled to come into effect as of November 30, 2016) that expands the scope of disputes that may be resolved through arbitration, eases the legal requirements for an arbitration agreement, and relaxes the requirement to have an arbitral award recognised and enforced.

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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Taiwan

As evidenced by its accession to the World Trade Organisation 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 46 countries, for stays between of 30 to 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\$ five 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 a limited company, a company limited by shares, or a closely held company. Each 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 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.

A limited company must have at least one shareholder (either individual or a legal entity). The number of directors may be from one to three, all of them can be foreign nationals if the foreign investor(s) obtains FIA approval. If there is more than one director, the articles of incorporation may stipulate for one of them to be the Chairman, who shall represent the company externally. In case none of the directors is stipulated in the articles of incorporation as the Chairman, then each of the directors may represent the company externally. Unless specifically stipulated in the articles of incorporation, the term of office of a director is indefinite. All important corporate matters of a limited company (e.g., amendment to its articles of incorporation) require the written consent of all shareholders.

A closely held company must be a company limited by shares, aiming to lift certain restrictions imposed on a traditional company limited by shares. While it must have a board of directors and the shareholders' meeting, a closely held company cannot go public and shall not have more than 50 shareholders. A closely held company may decide to issue shares with or without par value, and is allowed to issue preferred shares that may have multiple votes or are entitled to veto rights against certain matters as stipulated in its articles of incorporation. Unlike a traditional company limited by shares, a closely held company may restrict share transfer or distribute dividends every six months if its articles of incorporation so provide.

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\$ five million is required). However, the initial capital should be an amount sufficient to cover the expenditures of the subsidiary before it generates any revenue.

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 large 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 1950s 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. According to the "2015 IMD World Competitiveness Yearbook" of the Institute for Management Development (IMD), Taiwan was ranked No. 11 out of the 61 evaluated countries, improving by two positions as compared to the previous year. In the Asia-Pacific region, Taiwan was ranked No. three, following only Hong Kong and Singapore. Amongst the four main factors of the IMD competitiveness ranking, Taiwan's "Government Efficiency" in 2015 has attained the best ranking as the ninth in the world, improving by three positions as compared to the previous year.

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 Organisation (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 will 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, catalogues, 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 mislabelling, 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.

Funds management

Regulatory bodies

The primary regulator of fund trustees, managers and custodians is the Financial Supervisory Commission (**FSC**).

The Bureau of Labor Insurance, Ministry of Labor regulates the superannuation (pension fund).

The Investigation Bureau, Ministry of Justice (**MJIB**) is Taiwan's financial intelligence unit with regulatory responsibility for anti-money laundering and counter-terrorism financing, including with respect to proper identification of investors.

The MJIB is also the regulator responsible for managing the handling of personal information in accordance with privacy law.

Licensing of the fund operator

A person wishing to carry on a financial services business in Taiwan will generally require one or more special licences from the FSC, which may be sought with respect to the following types of financial services activities:

- financial product advice and product marketing
- dealing (including arranging or issuing) financial products
- acting as trustee or responsible entity of an investment fund
- providing investment management services in respect of financial products
- custodial or depository services
- market making activities
- margin lending facilities

Registration of the fund

An investment fund that is offered to Taiwan retail client investors will generally need to be approved by or registered with the FSC.

Registration of the fund operator

The operator of an investment fund (locally known as securities investment trust enterprise (**SITE**)) must be a Taiwan incorporated company limited by shares. A SITE must have a minimum paid-in capital of NT\$300 million and at least half of its business personnel must meet certain qualifications. Further, the SITE must have at least one institutional investor. If a foreign fund manager

will be the institutional investor, the foreign fund manager must meet certain conditions such as:

- it has been established for at least a full three years, and has not been sanctioned by the competent authority of its home country for any reason related to fund management during the most recent three years
- the total value of fund assets of mutual funds, unit trusts and investment trusts that are raised by it and/or its affiliates through public offering for pooled investment in securities shall be no less than NT\$65 billion
- it will hold at least 20 per cent of the SITE's initial paid-in capital.

The internal structure for operating a SITE must, at a minimum, contain the following departments:

- investment research
- financial and accounting
- internal compliance

In order to become an operating entity, the SITE must apply for a preliminary approval from the FSC, complete its incorporation and business registration, and obtain an operation licence from the FSC. Within six months after obtaining the operation license, the SITE must raise an open-ended fund of not less than NT\$ three billion and a close-ended fund of not less than NT\$ two billion.

Fund disclosure document

The offer of interests in a fund to retail client investors in Taiwan will need to be offered by way of a prospectus and a risk disclosure statement (**RDS**). The content of the prospectus and the RDS must comply with legislative content requirements. A SITE is required to apply for a prior approval from the FSC for any fund to be offered by it to retail client investors.

Operator compliance obligations

A fund operator must put in place adequate arrangements for the management of conflicts of interest, for example, conflicts between its duty to investors and its duty to shareholders of the SITE.

The operator of an investment fund (made available to retail client investors in Taiwan) and any provider of financial product advice to retail clients (locally known as securities investment consulting enterprise (**SICE**)) are required to meeting certain ongoing requirements such as reporting obligations in relation to significant breaches, notification of material adverse changes to the financial position of the company and lodgement of audited financial statements.

Market misconduct rules

Persons carrying on business in Taiwan must comply with various market misconduct related

legislations, including with respect to misleading or deceptive representations or other conduct, insider trading, market manipulation and hawking.

Foreign licensed firms

As its long-standing policy, the FSC has not provided a statutory exemption for foreign financial services companies to do business in Taiwan (other than establishing a local SITE or SICE), nor has the FSC provided a channel for official approval or registration of foreign securities, except for offshore funds, or how a foreign financial services company may legitimately disseminate information or solicit clients in Taiwan. Offshore funds to be offered in Taiwan by foreign fund managers are governed by the Rules Governing Offshore Funds (the **Rules**), which was promulgated by the FSC pursuant to the Securities Investment Trust and Consulting Law (the **SITC Law**). The Rules and the SITC Law include benchmarks that an offshore fund and its fund manager must meet in order for the offshore fund to be publicly offered in Taiwan.

Fuel Regulation

Overview

According to the Petroleum Administration Act and the Negative List for Investment by Overseas Chinese and Foreign Nationals, foreign investors are permitted to invest in gas supply industries and operate gasoline stations; provided that foreign investors must first establish a company limited by shares in Taiwan (which can be wholly-owned by foreigners), and then apply for a special permit from the Bureau of Energy, Ministry of Economic Affairs and a construction permit from the city/county government where each gasoline station is to be located. The foregoing fuel regulations do not impose additional restrictions on foreign nationals, and apply equally to all investors, foreigners or local Taiwanese alike.

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 nitro-glycerine (used in gunpowder) to the extent that nitro-glycerine 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 Six (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 favourably 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
Austria	10	10	10
Belgium	10	10	10
Denmark	10	10	10
France	10	10	10
Gambia	10	10	10
Germany	10	10,15	10
Hungary	10	10	10
India	12.5	10	10
Indonesia	10	10	10
Israel	10	7,10	10
Luxembourg	10,15	10,15	10
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

Countries Income Items	Dividends	Interest	Royalties
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 per cent 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
Thailand	5,10	10,15,10	
UK	10	10	10
Vietnam	15	10	15

Profit-seeking enterprise income tax is calculated against the net income of the profit-seeking enterprise (i.e., 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 10 per cent advance tax. Payment of the 10 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" (e.g., 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 government-assessed value price for the land at the time of acquisition and the government- assessed value price for the land at the time of disposition.

Real property transfer tax

The new real property transfer tax is levied on the income derived from transfer of real property which (i) is acquired after 1 January 2014 and sold or transferred within a period of two years, or (ii) is acquired after 1 January 2016. Such taxable income shall be the selling price minus (i) the original acquiring value, (ii) the costs incurred in the transfer and improvement of the real estate, and (iii) LVIT (Gain).

The tax rates applicable to the Gain of an individual seller/transferor:

Period between acquisition and disposition of the real property	Less than 1 year (%)	1-2 years (%)	2-10 years (%)	More than 10 years (%)
Taiwan residents	45	35	20	15
Non-Taiwan residents	45	35	35	35

Where a real property is transferred between family members and such real property has been continuously used as residence for more than six years, the applicable tax rate is 10 per cent; provided that no income tax will be assessed if the Gain is less than NT\$ four million.

The tax rate applicable to the Gain of a domestic company is 17 per cent. As to a foreign company, the tax rate is 45 per cent where the real property is disposed within one year after acquisition; or 35 per cent if the real property is disposed longer than one year after acquisition.

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. 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 three 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.

Workplace 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 must 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; and
- 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, i.e., 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.

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 24 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 6 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.

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Contributed by Norton Rose Fulbright

Thailand

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 Hong Kong and the Netherlands. Thailand's largest export markets in 2016 were Association of Southeast Asian Nations (**ASEAN**) countries (24.28 per cent), the European Union (10.85 per cent), Japan (10.12 per cent) and the United States (9.79 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 (94.7 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” (e.g., 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 THB two 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 10 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.

Funds management

Regulatory bodies

The primary regulator of fund, trustees, managers and custodians is the Thai Securities and Exchange Commission (**SEC**).

The Thai Anti – Money Laundering Office (**AMLO**) is the Thai regulatory responsibility for the prevention of anti-money laundering and counter-terrorism financing, including with respect to setting requirements on relevant entities including financial institutions and securities companies to conduct proper identification of investors.

Licensing of the fund operator

A person wishing to carry on a securities business in Thailand will generally require an appropriate securities licence (**Securities Licence**) issued by the SEC. A Securities Licence may be sought with respect to the following types of activities:

- securities brokerage
- securities dealing
- investment advisory service
- securities underwriting
- mutual fund management
- private fund management
- securities borrowing and lending
- venture capital management

Registration of the fund

An investment fund that is offered to retail or institutional investors will generally need to be registered as a registered mutual fund with a specific investment scheme with the SEC. Registered mutual funds are, generally, established as juristic persons, and operated by a fund management company. The fund management

company is responsible for making the application to the SEC to register the fund. Such application must contain the information required under the relevant notifications issued by the SEC, which includes details of the scheme management plans, draft prospectus, draft agreements among unit holders, the management company and custodians. The operator of the fund must obtain a Securities Licence for fund management activities and must appoint and assign an individual fund manager who is qualified and approved under the relevant notification of the SEC to operate the fund.

Registration of the fund management company

The operator of a registered investment fund (i.e., the fund management company) must be incorporated in Thailand. There is no restriction on foreign shareholding or nationality of the directors of the fund management company. However, the directors and major shareholders of the company must not have any disqualifying characteristics prescribed under the relevant notification of the SEC.

Fund disclosure document

The offer of units in a mutual fund to investors in Thailand (retail or institutional) will need to be offered by way of a public offering via a prospectus setting out details of the investment scheme. The content of a prospectus must comply with legislative content requirements. Prior to the initial offering of the units in the fund, the fund management company is required to submit to the SEC a summary of the prospectus to be distributed to the public. There is also an ongoing requirement to report to the public the financial status and performance of the fund. The fund management company must submit application to the SET and comply with additional requirements if the units in the qualified fund are to be listed on the SET.

Operator compliance obligations

A fund management company must put in place adequate arrangements for the management of conflicts of interest, for example, conflicts between its duty to investors in a scheme and its duty to shareholders of the funds management company.

The fund management company is required to comply with requirements prescribed by the SEC, including the requirements on confidentiality, outsourcing rules, minimum workforce, business continuity plans, conduct of customer identification process, internal control and risk assessment. In addition, the company is required to maintain relevant operational indemnity insurance arrangements.

The fund management company must comply with financial regulatory capital requirements set out in notifications issued by the SEC, including the requirement to maintain minimum monthly equity and sufficient liquidity ratio as prescribed by the SEC. The company is also required to have paid-up registered capital of at least THB 100 million.

Other ongoing requirements include reporting obligations such as in relation to significant

breaches, notification of material adverse changes to the financial position of the company and lodgement of audited financial statements.

Market misconduct rules

Persons carrying on securities business in Thailand must comply with various market misconduct related legislation, including with respect to misleading or deceptive representations or other conduct, insider trading, market manipulation and dissemination of false statements.

Passport arrangements for foreign licensed firms

There is no scheme under Thai law that allows foreign licensed firms to directly operate a securities business in Thailand. Foreign firms must incorporate a Thai subsidiary to apply and obtain a relevant Securities Licence prior to providing securities-related services in Thailand.

Fuel regulation

Generally, an entity wishing to carry out the business of fuel trading in Thailand requires a fuel trading licence under the Fuel Trading Act B.E. 2543 (**FTA**) and is required to obtain a fuel storage licence and comply with safety measures prescribed under the Fuel Oil Control Act B.E. 2542 (**FOC**). The authority responsible for enforcement of the FTA and FOC is the Department of Energy Business, under the Ministry of Energy.

Where the fuel trading business falls with the definition of a “controlled business” in respect of a “hazardous substance” as both are defined in the Hazardous Substance Act B.E. 2535 (**HSA**), compliance under the HAS will be required.

For foreign players, implications under the Foreign Business Act B.E. 2542 (**FBA**) will also have to be considered as the business of fuel trading could fall within at least one if not more of the restricted activities under the FBA. A restricted activity under the FBA can only be carried out by a Thai national or a majority foreign-owned company licensed under the FBA.

Fuel Trading Act

Following is a summary of the licensing and registration regime under the FTA:

- a full license under the FTA issued by the Department of Energy Business (**Full Licence**) is required for annual: (a) fuel (all types combined) trading volume of 100,000 metric tons or more; or (b) LPG trading volume of 50,000 metric tons or more;
- registration under the FTA with the Director General of the Department of Energy Business is required: (a) for annual fuel (all types combined) trading volume of between more than 30,000 to less than 100,000 metric tons; or (b) for annual LPG volume of between more than 30,000 to less than 50,000 metric tons; or (c) any oil tank with a capacity in excess of 200,000 litres;

- registration under the FTA with the Director General of the Department of Energy Business is required to operate a petrol station or LPG station;
- notification under the FTA to the Director General of the Department of Energy Business is required to be an oil transport contractor with the capacity of 3,000 litres or more;
- a license under the Ministerial Regulation is required to conduct fuel trading that only deals with import and export of oil out of Thailand within or between tax free zones..

Hazard Substance Act

The manufacture, import, export and possession of a hazardous substance (each a “**controlled business**” under the HSA) in Thailand is mainly regulated through the HSA. Six government agencies, including the Department of Energy Business, oversee the control of their respective hazardous substances and each has the authority to issue regulations under the HAS. Hazardous substances in Thailand are principally chemicals and are categorized into four types (Type 1, 2, 3 and 4) according to their control requirements. Type 1 hazardous substances subjected to the least stringent regulations and type 4 hazardous substances subjected to the most stringent regulations.

Natural gas and LPG fall within type 3 hazardous products and the manufacture, import, export and possession thereof requires compliance with any safety measures under the HSA.

Foreign Business Act

Operation of a petrol station and/or the sale of fuel in Thailand, including crude oil and oil products, is likely to constitute a wholesale or retail business, both of which are restricted businesses under the FBA. Accordingly, foreign operators will require a licence under the FBA to carry on a wholesale and/or retail business (in addition to licences under the FTA and/or HAS), unless the operator has registered capital of at least Baht 100 million for each business. All other activities of the operator will also need to be examined to ensure that no other intended activities fall within the list of restricted businesses under the FBA.

Foreign investment policy

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 One lists the businesses reserved for Thai nationals for “special reasons” and there is a total prohibition on “foreigners” engaging in those businesses
- Schedule Two 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 Three 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) (**iEAT Act**), 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 - in other words, Thais must hold at least 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, or to enhance the Insurer’s operations or to enhance the insurance sector.

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 (iEAT)

The iEAT administers the 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 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 10 per cent. However, as at 31 December 2011, a concession rate of seven per cent still applies.

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 35 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. 2545 (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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Vietnam

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', i.e., renovation. 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 11 years old, and at the time it was introduced, it was considered a legislative revolution.

The National Assembly is the national legislature.

During its five-year term of office, 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 (elected by the National Assembly from among its delegates) 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 (elected by the National Assembly from among its delegates) 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 17 ministries and four equivalent authorities, including the State Bank of Vietnam.

Ministries and the Prime Minister regularly issue decrees and circulars providing detailed 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 council and the latter's executive organ, 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 of the laws by the 63 provinces and cities.

The People's Court including the Supreme Court, Superior People's Courts, Provincial-level People's Courts and District-level People's Courts, and the People's Procuracy including the Supreme Procuracy, Superior Procuracy, Provincial-level Procuracy and District-level Procuracy, of which the

Chief Judge of the Supreme Court and the Chief Procurator of Supreme Procuracy (elected by the National Assembly among its delegates), 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 or enjoying Vietnam's unilateral visa exemption decisions.

There are two ways of obtaining an entry visa to Vietnam as follows:

- visas issued by a Vietnam's foreign affairs or consular agency outside Vietnam - foreigners may apply and collect the entry visa at a Vietnam's foreign affairs or consular agency in the country in which the foreigner resides
- visas on arrival - in certain cases, foreigners may collect the entry visa upon arrival at an international border-gate in Vietnam. A notice 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 following the new law of 2014. At the time of writing, visas of DT category will be issued to foreign investors and foreign lawyers practicing in Vietnam; those of DN category will be granted to persons entering to work with enterprises in Vietnam; those of NN1 category will be issued to chief representatives or managers of projects of international organisations and foreign non-governmental organisations (**NGOs**) in Vietnam; those of NN2 category will be issued to chief representatives and heads of branches of foreign traders, and chief representatives of other foreign economic, cultural, professional organisations in Vietnam; those of NN3 category will be issued to people who come to work with foreign NGOs, representative. LC Offices or branches of foreign traders, and Rep. LC Offices of other foreign economic, cultural, professional organisations in Vietnam; those of LD category will be issued to people coming to work; and those of TT category will be issued to foreigners that are parents, spouse, children under 18 years of age of the foreigners issued with DT, NN1, NN2 or LD visas, or foreigners that are parents, spouse, children of Vietnamese citizens.

The LC validity term will be up to five years for visas of DT category; up to two years for those of LD category; and up to 12 months for those of NN1, NN2, NN3 and TT categories. The grant of new visa may be considered upon the expiry of visa. However, as the purpose of a visa may not change, it is necessary to leave Vietnam to get a new visa for the purpose of the initial grant.

People with work permits or who are exempt (considered below) can obtain temporary residency

cards (**TRC**) for up to two years according to the term of such work permits. Applications for TRCs are relatively straightforward.

Work permits

Virtually all foreigners working in Vietnam are required to obtain a work permit. Exceptions exist, including for foreigners:

- entering Vietnam to hold the positions of experts, managers, chief executive officers or technicians for a period of less than 30 days and an accumulated working period of under 90 days per year
- who are the capital contribution members or owners of limited liability companies established in Vietnam
- who are members of the Board of Management of joint stock companies established in Vietnam;
- entering Vietnam for a period of less than three months to offer services
- entering Vietnam to resolve an incident/ breakdown or technically or technologically complex situation arising and affecting, or with the risk of affecting production or business with which Vietnamese experts or foreign experts currently in Vietnam are unable to deal 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 organisations
- transferred internally within an enterprise and within 11 service industries under the Vietnam's WTO Commitments on Services, 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
- who are appointed by foreign agencies or organisations to teach or do research in international schools under the management of foreign diplomatic missions or international organisations in Vietnam or the workers are permitted to teach or do research in educational and training institutions in Vietnam by the Ministry of Education and Training
- 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 laws

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 two 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 2014 (**EL**). The EL governs all domestic enterprises and foreign-invested enterprises (**FIEs**).

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 50. 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 send notice for change of the scope of business for registration. The application must state precisely the proposed scope.

Investment Law 2014 (IL)

The IL governs the investment activities in Vietnam of foreign and local individuals and legal entities. The Vietnam's WTO Commitments (considered below) and other multilateral or bilateral free trade agreements (FTAs) and investment treaties (BITs) are also important for foreign investment. Under the IL, investors can invest in all types of business that are not specifically prohibited or restricted. The IL provides for the following types of 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 restrictions under the Schedule of Specific Commitments in Services annexed to the Protocol of Accession of the Socialist Republic of Viet Nam to the World Trade Organisation (the Vietnam's WTO Commitments). 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).

Contribution of capital or Purchase of shares

Investors are permitted to contribute capital to or purchase shares in an economic entity operating in Vietnam at the rates stipulated by the Government.

Investment under contracts

Investors are permitted to sign contracts in the form of business cooperation contracts (BCC) among foreign and/or local investors for cooperation in

production, sharing profits and sharing products and other forms of cooperation.

Investors or their project enterprise may also sign a Public-Private Partnership (PPP) contract with the competent State agency for implementation of an investment project for new construction, or renovation, upgrading, expansion, management and operation of infrastructure facilities or provision of public services.

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

Sectors in which investment is conditional, Special preferential industries & trade, and Preferential industries & trade.

There are 267 sectors in which investment is conditional as defined in Appendix 4 to the LI.

While Appendix One to Decree No. 118/2015/ND-CP dated 12 November 2015, providing guidelines for the LI (**Decree 118**) defines:

- seven sectors in the fields of high-tech, information technology, and support industries; six sectors in the field of agriculture; five sectors in the fields of Environmental protection and infrastructure construction; and nine sectors in the fields of Culture, socialisation, sport and medical health are special preferential industries and trade
- 11 sectors in the fields of science and technology, electronics, mechanical engineering, production of IT and IT materials; six sectors in the field of agriculture; four sectors in the fields of environmental protection and infrastructure construction; eight sectors in the fields of education, culture, socialisation, sport and medical health; and one sector in other fields are preferential industries and trade

Geographical areas entitled to investment incentives

The list of geographical areas entitled to investment incentives may be found in Appendix Two to Decree 118.

Prohibited investment business activities

The following investment activities are prohibited:

- business in drugs prescribed in Appendix One to the LI
- business in chemicals or minerals of types prescribed in Appendix Two to the LI
- business in specimens of wild fauna or flora included in Schedule One of the Convention on International Trade in Endangered Species and specimens of species of endangered and rare

wild fauna or flora in Category One with the natural origin as prescribed in Appendix Three to the LI

- business in prostitution
- purchase or sale of humans, tissues or parts of the human body
- activities relating to asexual reproduction

Recognised forms of doing business in Vietnam

The most common business structures used by foreign investors in Vietnam include:

- wholly owned companies
- joint venture companies
- public-private partnership contracts
- business co-operation contracts
- foreign contractors

Alternatively, foreign investors may also operate by establishing:

- representative offices
- branches (in limited sectors)

Foreign investors may also invest indirectly in Vietnam, in the following ways:

- purchase of listed 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, unless otherwise decided by the listed companies and subject to registration with the State Securities Commission (**SSC**)
- banking
- petroleum
- aviation
- health insurance
- publishing
- secondary education
- medi
- telecommunications;
- advertising
- services incidental to mining

Vietnam's International Commitments

Vietnam's WTO Commitments set 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.

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.

More favourable provisions on market access and percentage ownership may be found in FTAs or BITS, especially those signed within the Association of South East Asian Nations (**ASEAN**) framework and those signed or negotiated with ASEAN partners. Besides, over the last 23 years, at least 48 out of the 62 BITs concluded by Vietnam have entered into force and the Vietnamese government is negotiating agreements with a further 37 countries. Also, Vietnam is a member of Asia-Pacific Economic Cooperation (**APEC**) and a party to the Convention Establishing the Multilateral Investment Guarantee Agency (**MIGA**); signed a FTA with the Eurasian Economic Union (ex URSS countries); has completed negotiations on a FTA with the EU and on Trans-Pacific Strategic Economic Partnership (**TPP**) Agreement with 11 other Asia Pacific countries.

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 (**DPI**) of the local provincial or city People's Committee (**PC**) or Management Board of Industrial Zones, Export Processing Zones, Hi-tech Zones and Economic Zones, subject to the location where the investment project is implemented. For certain important projects, an Approval on Investment Policy from the PC, the Prime Minister (**PM**), even the National Assembly (**NA**) shall be required. If the application is successful, the DPI issues an Investment Registration Certificate (**IRC**) for the project. The IRC also serves as the basis for foreign investor to establish its FIE in Vietnam, by way of further applying for the Enterprise Registration Certificate (**ERC**) in accordance with the EL.

Regardless of whether the FIE locates inside or outside an IZ, the ERC for the establishment of

FOE will be issued only by the Business Registration Office (**BR**O) under the DPI of the city or province where the FIE registers its head office.

BCCs

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 IRC. 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 parties to a BCC contract shall establish a co-ordinating board to perform the BCC contract. The functions, duties and powers of the co-ordinating board shall be agreed by the parties.

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.

PPPs

Under Vietnamese legislation, PPP contracts may take one of the following forms: Build - Operate - Transfer (**BOT**) contract, Build - Transfer - Operate (**BTO**) contract, Build - Transfer (**BT**) contract, Build - Own - Operate (**BOO**) contract, Build - Transfer - Lease (**BTL**) contract, Build - Lease - Transfer (**BLT**) contract, and Operation & Management (**O&M**) contract.

Except for minor projects having total investment capital of under VND 120 billion and being carried out in certain specific fields, which are not required to prepare FS report, obtain IRC and establish project enterprise; PPP projects will be carried out under the following procedures: (a) formulate, evaluate, approve and announce the projects; (b) prepare, evaluate, and approve the feasibility study (**FS**) reports; (c) select investors; negotiate and sign the investment agreement, project contracts; (d) follow the procedures for the issuance of IRC and set up the project management enterprises; (e) carry out the projects; and (f) complete the financial reporting and transfer of the project.

Ministries, regulatory bodies and provincial-level PCs have the authority to sign the project contracts within their functions, tasks, powers, and adhere to their rights and obligations agreed upon in the project contract with investors.

Investors shall be responsible for contributing their equity capital and mobilise other capital to execute the project as agreed upon in the project contract. The equity capital of the investor shall account for at least 15 per cent of the project's total investment capital. With regard to the projects having total investment capital of over VND 1,500 billion, the percentage of the investor's equity capital is

calculated according to the partial progression method as follows:

- for the investment capital that amounts to VND 1,500 billion, the equity capital shall account for at least 15 per cent of such financing portion
- for the investment capital that exceeds VND 1,500 billion, the equity capital shall account for at least 10 per cent of such financing portion

The State funding for the project shall not be included in the project's total investment capital for the identification of the equity capital percentage.

Other projects carried out by the investors to recover the investment in a BT project have to meet the statutory requirements on the equity capital (if any).

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 provincial-level Department of Construction directly under the provincial-level PC, 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, services under Vietnam's WTO Commitments, has a duration of five years. According to Vietnam's WTO Commitments, in some specific areas, including legal, banking, non-life insurance, securities (asset management; settlement and clearing; information provision and transfer; advisory, intermediation, and other auxiliary services) managerial consultancy, commercial mediation, construction, commercial franchising, computer and related services, branches are permitted under the relevant law and generally the head of branch must be a permanent resident in Vietnam. However, in practice, branches are not allowed in most of areas, except, for example banking and securities, etc.

Investment in Vietnamese companies

With limited exceptions (e.g., 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 operating in sectors where ratio of foreign investor ownership is not yet provided for.

Further, with certain exceptions, foreign investors may invest in or acquire the whole or a part of the equity interest in listed (if the opening room for foreign ownership was decided by relevant company and has been approved by the SSC) and 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. Vietnam also entered into several bilateral or multilateral FTAs with China, India, Australia, New Zealand, Japan, South Korea, Russia, Belarus and Kazakhstan. In 2015, Vietnam completed negotiations on the Trans-Pacific Partnership Agreement with other 11 participating countries, and on an FTA with the EU.

All the end of 2015, there are approximately 20,070 active foreign investment projects with total capital of around US\$ 281.9 billion licensed in Vietnam, and despite the global financial crisis, Vietnam's GDP has grown in recent years. Growth in 2015 was 6.68 per cent and expected to be 6.7 per cent for 2016. Over two past decades, Vietnam has

averaged GDP growth of over seven per cent a year, constantly topped the global growth chart.

Vietnam is an attractive investment destination to foreign companies for many reasons. It has a substantial population (over 94.1 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. Its geological location is another advantage (neighbouring China, a huge market and workshop of the world).

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. Additionally, the wages and salaries of local employees are still quite modest compared with the ASEAN's old member countries or China.

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 five 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 old EL 2005, SOEs were obliged to be equitised by 1 July 2010. In practice, only 340 from 1,309 SOEs have now been equitised.

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 PM or competent authority authorised by the PM

Intellectual property

Vietnam promulgated the Intellectual Property Law 2005 on 12 December 2005, which was amended in 2009 (**IP Law**). 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 IP Law also protects copyright with respect to certain literature, art or 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 Industrial 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 12 months for registration under Paris Convention, and 31 months for registration under PCT from the priority date.

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.

Under the Paris Convention, priority registration may be claimed in respect of industrial designs registered in other countries within the previous six months. 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:

- 10 years from the date of filing
- 10 years from the date that person or his/her licensee permits first commercial exploitation of the design anywhere in the world
- 15 years from the date of creating 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

Industrial property rights to a trade secret can be established on the basis of their lawful acquisition and maintaining confidentiality in respect of the trade secret.

Geographical indication

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 legally used in connection with an on-going business.

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. Industrial property 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 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, as amended by Decree No. 120/2011/ND-CP dated 16 December 2011 (Decree 35), 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 Vietnam's WTO Commitments as described above.

Franchisors

Under Decree 35, 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 Decree 35, 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 Decree 35, franchising agreements must be registered, except for domestic franchising activities and franchising activities from Vietnam to overseas. 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 exempt from registration with the MoIT must report to the provincial-level Department of Industry and Trade (**DOIT**) where the proposed franchisor registers its operations.

Funds management

Regulatory bodies

The primary regulator of fund trustees, managers and custodians is the SSC directly under the Ministry of Finance (**MoF**).

The MoF regulates entities that are involved in the superannuation (pension fund) industry.

The Ministry of Public Security (**MOPS**) through its counterterrorism force, one Security General Department, and provincial-level Departments of Public Security (**DOPS**), and the State Bank of Vietnam (**SBV**) through its functional unit, in coordination with the Ministry of Foreign Affairs (**MoFA**), Ministry of National Defence (**MOND**), and relevant Ministries and agencies have regulatory responsibility for anti-money laundering and counter-terrorism financing, including with respect to proper identification of investors.

The Ministry of Information and Communications (**MOIC**) through its Inspectorate and specialised Departments and the MoPS through its specialised Departments are the regulators responsible for managing the handling of personal information in accordance with privacy law.

Types of fund

Under Vietnamese laws, securities investment funds comprise public funds and members' funds. Public funds are classified into closed-end funds and open-end funds; and mainly include exchange-traded fund (**ETF**), real estate investment funds, bond funds, index funds, venture funds in the development of new technologies and high technologies, and public investment companies.

Licensing of the fund operator

An entity wishing to carry out the management of a securities investment fund in Vietnam must obtain an Establishment and Operation Licence (**EO Licence**) issued by the SSC, which is concurrently its ERC. An EO Licence may be sought with respect to the following types of financial services activities:

- management of securities investment funds;
- management of securities portfolios; and
- provision of securities investment consultancy.

Fund operators are also permitted to raise capital and to manage foreign investment funds which have the objective of investment in Vietnam.

Registration of the fund

The establishment of a public fund and the initial public offer (**IPO**) of its fund certificates to Vietnamese retail client investors and the establishment of a members' fund shall be conducted by the fund operator and will need to be registered with the SSC.

The application file for registration of IPO of a public fund's certificates will need to have a charter prepared by the fund operator and approved by the general meeting of the fund's investors, prospectus stating fund certificate issue plan and summary prospectus, in-principle agreements signed with relevant service providers in accordance with Law on Securities 2006, as amended and supplemented in 2010 (**Securities Law**) and its guiding documents. Raising capital of a public fund shall be implemented by the fund operator within a time-limit of 90 days from the effective date of the SSC's acceptance certificate of registration of the IPO of the fund's certificates (**Acceptance Certificate**). A public fund shall be permitted to be established if it has a minimum of 100 investors excluding institutional professional securities investors who purchase fund certificates, and if the total value of fund certificates sold is at least VND 50 billion. A public fund shall have a representative committee elected by the general meeting of investors to represent the interests of investors, which have from three to 11 members, of whom two-thirds must be independent members and not affiliated persons in the fund management company or custodian bank. The committee and its members have the rights and obligations of as stipulated in the fund's charter. Within ten days after the completion date of the IPO or the expiry date of the Acceptance Certificate, the fund operator must submit to the SSC registration dossier for fund establishment, and within 10 days from the date of receiving complete and valid dossier, the SSC shall issue the certificate of fund establishment registration. In case of refusal, the SSC shall reply in writing, clearly stating the reason.

While the establishment of a members' fund shall be subject to capital contributions from members on the basis of a capital contribution contract and the fund's charter and must satisfy the following conditions: (a) having a minimum capital contribution of VND 50 billion; (b) having a maximum of 30 capital contributing members all of which must be legal entities; (c) being managed by a fund operator; and (d) its assets must be deposited at a depository bank which is independent from the fund operator. On the establishment of the members' fund, it must have a document dossier comprising a charter, prospectus, asset depository contract, minutes of capital contribution agreement and a list of capital contributors. Within 15 days from the date of receiving complete and valid dossier, the SSC notifies in writing to confirm that the fund operator has reported on the establishment of members'

fund. In case of refusal, the SSC shall reply in writing, and clearly state the reason.

Registration of the fund operator

The fund operator must be a LLC or JSC incorporated in Vietnam and meeting the following conditions:

- having office headquarters and having material and technical facilities and equipment for securities business, in which the right to use the company's head office must be for a minimum period of one year from the complete and valid date of the application dossier for establishment of the company
- having the actually-contributed charter capital at least equal to the level of legal capital of VND 25 billion
- having a director or general director, deputy director or deputy general director in charge of professional operations and skills, and at least five professional staff for its financial services activities who have fund management practicing certificates. To be licensed, these people are required to have a university degree and pass an examination held by the SSC, however a foreign individual with a certificate of expertise in securities and the securities market, or an individual who has legally conducted securities business overseas shall only have to pass an examination on the Vietnamese law on securities
- having structure of shareholders or capital contributing members suitable with the law

Fund disclosure document

The offer of interests in a fund to retail client investors in Vietnam will need to be offered by way of a regulated prospectus (**Prospectus**). A Prospectus must be prepared by the fund operator on standard form, updated when arising the important information or updated periodically at a frequency specified in the fund's charter, posted on the fund operator's website, and provided on a free of charge basis to the investors upon request. The prospectus for a public offer of fund certificates must be signed by the chairman of the board of directors or of the member's council or the company chairman, the director or general director of the fund operator and the legal representative of the underwriter (if any).

Operator compliance obligations

A fund operator must comply with the law and its charter, implement the entrusted asset management as stipulated in the fund's charter, its charter, investment management contract in an honest and careful manner; comply with the rules of professional ethics, voluntariness, fairness, honesty and for entrusting customers' sake of the best interests.

When making transactions of assets for entrusting customers, the fund operator ensures that:

- for the organisations being public funds or public securities investment companies:
 - the volume or value of the transactions during the year through a securities company shall not exceed 50 per cent of the total volume or value of transactions in the year of the organisation
 - the volume or value of the transactions during the year through a securities company to be the relevant persons of the fund management company shall not exceed 20 per cent of the total volume or value of transactions in the year of the organisation
- for other entrusting customers, the fund operator must comply with the above restrictions, unless it has provided full information about its interests in related securities company and entrusting customers have written consent to waive the application of such restrictions

In business, the fund operator must put in place adequate arrangements for the management of conflicts of interest, for example: no loan, or transfer of the company's capital to relevant persons and other organisations and individuals in any form, except for deposit at the credit institutions in accordance with the banking law, investment in bonds issued under the law; economic contracts and transactions (if any) between the company and shareholders or capital contributing members from 35 per cent of charter capital or more, members of the board of directors or members' council, members of the executive board, members of the supervisory board, staffs of the internal audit department; related persons of the above subjects; are made only after there are number of shareholders or capital contributing members representing 65 per cent or more of total remaining number of votes agree or owner agrees in writing, identification of customers.

The fund operator is responsible for compensation for the losses caused to the entrusting customers due to the employee's fault, malfunction or error of its technical system and professional process or because the fund operator fails to comply with its obligations under the law, the fund's charter, securities investment company' charter and investment management contract; must purchase professional liability insurance for its professional staff (when necessary), or set up a risk reserve fund as prescribed by law to compensate for entrusting customers.

Other ongoing requirements include obligations of report on ownership and disclosure of information about transactions on securities markets when: (i) number of shares owned by the fund operator (if any) and the entrusting customers (if any) reaches five per cent or more of the total number of outstanding shares of an issuer, or (ii) fund operator (if any) is the one who knows internal information under the securities law; lodgement of audited or reviewed periodical financial statements and explanation on reason for material adverse changes to the financial position of the company, disclosure

of irregular information or information requested by the SSC or SE upon the occurrence of events that may affect the investor's lawful interests.

Market misconduct rules

Persons carrying on business in Vietnam must comply with various market misconduct related legislation, including with respect to misleading or deceptive representations or other conduct, insider trading, market manipulation and hawking.

Foreign licensed firms

A branch of a foreign fund operator carrying on business in Vietnam must meet the above-mentioned requirement on legal capital, and obtain an OE Licence from the SSC. This branch is only permitted to manage assets mobilised abroad, including also those formed in Vietnam from capital raised abroad; and may not (i) raise capital in Vietnam for management in any form, (ii) borrow capital, use trusted or owned assets as security for loans in any form in Vietnam, (iii) offer and issue securities to raise capital in Vietnam. Foreign fund operators are also permitted to establish a Rep. Office in Vietnam after they have registered its operation with the SSC.

Fuel regulation

Market participation

According to Vietnam's WTO Commitments, trading in gasoline and oils, except for waste oils containing polychlorinated biphenyls (PCBs), polychlorinated terphenyls (PCTs) or polybrominated biphenyls (PBBs), is exclusive right of State trading companies, in which Vietnam Air Petrol Company Limited (VINAPCO, now named SKYPEC) is the exclusive re-exporter of aviation gasoline. However, such exclusive rights of State trading companies are not retained in Vietnam Commitment Schedule under ASEAN Framework Agreement on Services, as amended by Protocols from time to time (AFAS), and the Framework Agreement on Comprehensive Economic Cooperation between India and ASEAN (ASEAN – India CECA). Then, investors from ASEAN countries and India, and subject to State authorities' decision, certain investors from other countries who are involved in petroleum refinery projects, may engage in trading in oils originated from petroleum oils and bituminous minerals, except for crude oil and processed oil.

Specifically, regarding distribution services, according to AFAS and ASEAN – India CECA, cross-border distribution of goods (except products for personal use) by offshore companies in ASEAN member countries and India is unbound by Vietnam, i.e., subject to provisions of Vietnam's national law, under which foreign traders without presence in Vietnam may:

- perform the import right and export right after being granted a certificate of registration of the right to import or export goods permitted for import or export under Vietnamese law and Vietnam's commitments on the market-opening schedule (i.e., exclusion of crude oil and processed oil)

- directly purchase goods from Vietnamese traders with business registration or export right or distribution of goods for export only; not organise a network to purchase goods in Vietnam for export, including open a place to purchase goods for export
- directly sale import goods for only Vietnamese traders with business registration or right to distribute such goods; not organise or participate in network to distribute goods in Vietnam

unless otherwise prescribed by Vietnamese law or international treaties of which Vietnam is a member.

Also according to AFAS and ASEAN – India CECA, an offshore entity in any ASEAN member country or India intending to perform fuel trading in Vietnam may:

- establish its commercial presence in Vietnam, which may be a joint-venture with Vietnamese partner(s) or 100 per cent FIE to be issued with ERC registering fuel trading as its business line, trading or specialised licences, permits and certificates. FIEs engaging in distribution services are permitted to engage in the commission agents', wholesale and retail business of all legally imported and domestically produced products (excluding crude oil and processed oil). The establishment of outlets for retail services (beyond the first one) shall be allowed on the basis of an Economic Needs Test (ENT)
- contribute capital to or acquire equity in a Vietnamese enterprise, which is conducting fuel trading business

Regarding franchising services, cross-border provision of these services and branching of offshore franchisers are allowed by AFAS and ASEAN – India CECA.

Trading licensing

For existing investors, the PC of the province or centrally-run city where the FIE's headquarters is located shall grant business licence for goods purchase and sale activities or goods purchase and sale directly-related activities to the FIE already granted with IRC after obtaining the MoIT's written approval.

For new comers, a foreign investor that invests in goods purchase and sale activities or goods purchase and sale directly-related activities in Vietnam for the first time must submit the application dossier for issuance of IRC. The investment licensing authority shall consult the MoIT and grant IRC for goods purchase and sale activities or goods purchase and sale directly-related activities only after obtaining the MoIT's written approval. In this case, the IRC is as valid as the business license.

When a new foreign investor invests in import or export activities only or when a FIE applies for additional import or export activities only but not for goods distribution or goods purchase and sale

activities or goods purchase and sale directly-related activities, the investment licensing authority shall, based on the market-opening roadmap committed in treaties to which Vietnam is a contracting party, grant or supplement the IRC without having to obtain the MoIT's approval.

A FIE, which already has the right to distribution, may set up the first retail establishment without having to carry out the application procedures for issuance of a permit for setting up a retail establishment. The setting up of additional retail establishments must be approved by the provincial-level PC in accordance with the MoIT's guidance.

The enterprise, which has become FOE resulting from foreign investors' activities of contributing capital to or acquiring equity in Vietnamese enterprise to carry out goods purchase and sale or goods purchase and sale directly-related activities, must comply with the above-mentioned requirements on IRC, business licence and permit for setting up retail establishment.

Specialised licensing

In addition, under Vietnamese law, gasoline, oil and fuel gas of all kinds are goods subject to conditional business. Vietnam-based enterprises must satisfy the material conditions (specialised wharf, warehouse, tanks, laboratory, plant, network of retail outlets, means of transport, etc.) and personnel conditions (certificates of training on professional knowledge and skills, fire prevention and fighting, environmental protection, etc.) set out in Decree No. 83/2014/ND-CP dated 3 September 2014 of the Government on Gasoline and oils trading (**Decree 83**) and obtain:

- an IRC for its gasoline and oils producing facility to conduct the activity of production and processing of gasoline and oils, processing, or export processing of gasoline, oils and raw materials
- a business licence from the Ministry of Industry and Trade conduct export (of domestically produced gasoline, oils and raw materials and imported gasoline, oils and raw materials), import, temporary import for re-export, and border-gate transfer of gasoline, oils and raw materials; in which only key traders may be exporter
- a certificates of eligibility from the MoIT for distribution of gasoline and oils (as general agent, retail agent or retail franchisee) on the domestic market
- a business licence from Vietnam Maritime Administration for maritime transportation, a business licence issued by the Minister of Ministry of Transport (**MoT**) after a consent has been given by the PM and a certificate of eligibility for transportation of dangerous goods by air issued by Air Transportation Office under Civil Aviation Authority of Vietnam (**CAAV**) for air transportation, a business licence from provincial-level Department of Transport (**DoT**) and a licence for transportation of dangerous

goods issued by the MoPS for road transportation, of gasoline and oils

While no licence other than ERC is required for providers of services of warehouse and port leasing and receipt, preservation of gasoline and oils.

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 2013 (**Land Law**) 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-level PC 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 (one time for the whole life of investment project or on an annual basis for the investor's selection).

Land lease by FIEs

Under the prevailing legislation on land mainly relied on the Land Law and its guiding documents, FIEs, including JVs and 100 per cent FIEs, can:

- be allocated land in Vietnam with land use fee payment under a land allocation decision of the State to implement investment projects for the construction of houses for sale or for a combination of sale and lease
- lease land in Vietnam from the State, lease/sublease land accompanied by infrastructure from an IZ developer under a lease contract to implement investment projects, especially those on houses for lease

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 allocation or lease.

Subject to their investment project, JVs and 100 per cent FIEs may be allocated or lease land from the State for the term set out in the land allocation decision or lease contract, which is usually also for the term set out in their IRC. Upon expiry of the term of the allocation or lease, if extension of the allocation or lease 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 an allocation or lease if a foreign owned company wants to continue to be allocated with land or to renew the lease.

Foreign companies (as distinct from JVs and 100 per cent FIEs) 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

According to the Law on Residential Housing 2014:

- foreign investors may own residential housing through investment in construction of residential housing under projects in Vietnam and exercise the rights of residential house owners, except in the case of construction of residential houses on leased land, they may only lease out such residential houses;
- foreign organisations, including FIEs, foreign enterprises' branches or representative offices, foreign investment funds, and foreign banks' branches operating in Vietnam, may own

residential housing in Vietnam through purchase, hire purchase, receipt of donation or inheritance of commercial residential housing comprising apartments and individual residential houses under investment projects for construction of residential housing, except for the zones reserved for ensuring national defence and security as regulated by the Government. They have the same rights of residential house owners as Vietnamese citizens, but being subject to certain restrictions:

- to purchase, hire purchase, receive donation of, inherit and own no more than 30 per cent of the number of apartments in one apartment building; or to purchase, hire purchase, receive donation of, inherit and own no more than 250 individual residential houses, comprising villas and terraced houses, in one area with the population size equivalent to that of an administrative unit at the ward level

In the case there are multiple apartment buildings in one area with the population size equivalent to that of an administrative unit at the ward level, or in respect of individual residential houses on one street, the Government makes detailed provisions for the number of apartments or the number of individual residential houses each foreign organisation or individual may purchase, hire purchase, receive donation of, inherit and own. In the case of receipt of donation or inheritance of a residential house not permitted or exceeding the number of residential houses prescribed, the relevant foreign organisation or individual will obtain the benefit of the permitted residencies only;

- a foreign organisation may own a residential house as agreed in transactions involving a contract for sale and purchase of the residential house, but not for more than the duration stated in the investment certificate issued to such organisation including any extension. The period of residential house ownership is calculated from the date of issuance of a single land certificate and is specified in such single land certificate;
- prior to the expiry of the period of residential house ownership in accordance with this Law, an owner may donate or sell such residential house to eligible entities to own residential houses in Vietnam; or such residential house shall belong to the State if the owner does not donate or sell it by the expiry of the period of residential house ownership;
- foreign organisations may only use residential houses as accommodation for people currently working for them and may not use them for lease, as offices, or for any other purpose;
- 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

- Payments to purchase or hire purchase residential housing are made through credit institutions currently operating in Vietnam

The Law on Real Estate Business 2014 was passed on 25 November 2014 and came into force as of 1 July 2015. Based on this Law, FIEs are permitted to conduct real estate business in the following forms:

- to lease houses and buildings for sub-leasing out
- in the case of land leased from the State, to invest in the construction of residential houses for the purpose of lease out; and to invest in the construction of houses and buildings other than residential houses for the purpose of sale, lease out or grant of hire purchase
- to receive transfer of a part of or entire real estate projects from investors in order to construct houses and buildings for the purpose of sale, lease out or grant of hire purchase
- to invest in the construction of residential houses on land allocated by the State for the purpose of sale, lease out or grant of hire purchase
- to invest in the construction of houses and buildings on the leased land in industrial zones, industrial clusters, export processing zones, high tech zones or economic zones for trading in strict accordance with the land use purposes
- provision of real estate business services, such as real estate:
 - brokerage services
 - trading floor services
 - consultancy 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 rental, 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 especially 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, which is not applicable to projects on exploitation of natural minerals, includes:

- exemption from land rental for the whole life of:
 - (a) Investment projects in areas where investment is especially encouraged, and which are carried out in geographical areas facing exceptional socio-economic difficulties; and (b) 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; (c) 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; (d) projects involving the use of land for construction of facilities providing airline services other than those doing airline service business; (e) projects involving the use of land for construction of maintenance and repair stations, parking lots (including the ticket counters, executive areas, public service areas) providing services for the public transportation; (f) projects involving the use of land for construction of water supply building works, including: water extraction and water treatment constructions, pipelines, constructions in the water supply pipeline system and constructions facilitating the management and operation of the water supply system (administrative offices, executive offices, factories, sheds); (vii) projects involving the use of land for construction of infrastructure in the industrial zones, industrial clusters, export processing zones according to the planning which is approved by the competent authorities
- the land rentals shall be exempted during the capital construction period according to the projects approved by the competent authorities for most three years from the effective date of the land lease contracts
- after the land rental exemption of the capital construction period:
 - 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; and
- 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 rental is payable, the annual land rental rate is between 0.5 and three per cent of the land price based on the location 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 land price, which has been determined by the methods of direct comparison, deduction, income, surplus, or land price adjustment coefficients for the land rent duration.

For cases where annual land rental is payable, the land rental rate applicable to each project was to be kept unchanged for five years. At the end of this period, the Directors of the provincial-level Tax Departments will adjust the unit price of land rental and notify the lessee of annual rental amount payable for the subsequent stabilisation period.

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 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, which have neither MFN status nor 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 10 per cent. Exports are subject to zero per cent VAT, while essential goods and services are subject to five per cent VAT (e.g., fertilisers, medicine).

Corporate income tax (CIT)

Recently, the Vietnamese government adopted a new taxation system for all economic sectors.

The standard CIT rate is 20 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 10 per cent, 15 per cent and 17 per cent are available where certain criteria are met. These incentive rates are available for a period of 10 years and 15 years respectively, starting from the first year in which the enterprise has turnover, or from the date of certification for hi-tech enterprises, hi-tech agricultural enterprises and hi-tech application projects. 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 FIE, which has investment projects in the fields or localities eligible for CIT incentives, establishes a new production line, expanding its business scale, renewing its technology, will also be entitled to certain CIT incentives for that part of its increased profit resulting from such additional investment upon satisfying one of the following criteria:

- the cost of additional fixed assets reaches at least VND20 billion when the investment project on expansion is completed and commenced, or at least VND10 billion, applicable to expanding investments in localities facing socio-economic difficulties or localities facing extreme socio-economic difficulties
- the proportion of cost of additional fixed assets reaches at least 20 per cent of the total cost of fixed assets before investment in expansion
- the designed production increases by at least 20 per cent of the design production before investment in expansion

Business establishments are entitled to exemption from CIT payable on a portion of income in the following circumstances, among others:

- income earned from products of cultivation, husbandry, cultivation, and processing of agriculture and aquaculture products in disadvantaged areas by companies; income from marine fisheries
- 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 that have at least 30 per cent of the employees are disabled persons, reformed addicts and people infected with HIV, and have

at least 20 employees, except for enterprises engaged in finance and real estate business

- 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
- incomes from the transfer of Certified Emissions Reductions (CERs) of enterprises issued with CERs
- undistributed incomes of private organisations, which make investment in education, health, and other fields, that are kept to serve their development in accordance with the laws on education, health, and other fields
- incomes from transfer of technologies that are prioritised to be to organisations and individuals in localities facing extreme socio-economic difficulties

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 per cent of turnover
Services, machinery and equipment leasing business, and insurance	5
Construction and assembly and installation without supply of materials and/or machines and equipment in the construction work	5

Types of activities	Income as per cent of turnover
Production, transportation, services attached to goods	3
Construction and assembly and installation with supply of materials and/or machines and equipment in the construction work	3
Other business and production activities	2

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:

Type of activities	Income as per cent of turnover
Commercial (including distribution or supply of goods, raw materials, supplies, machinery and equipment without or with services in Vietnam)	1
Services, leasing of machinery and equipment, Insurance	5
Restaurant, hotel, casino management services	10
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
Derivative financial services	10
Lease of aircraft, aircraft engines, parts of aircrafts and ships	10
Construction, installation, whether or not inclusive of raw materials, machinery and equipment	10
Other business activities, transport (including sea transport and air transport)	10
Assignment/transfer of securities, certificates of deposit, ceding reinsurance abroad, reinsurance commission	0.1
Loan interests	5
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 per cent of turnover x VAT rate + income as a per cent 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 20 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 VND 9 million/month (VND108 year) for the tax payer and of VND3.6 million/month each of his or her dependent is allowed.

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 fee

Foreign invested enterprises must pay business registration fee based on their registered capital as follows in the table over:

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 2012 (**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 main contents of employment contract, employment term, probationary period, minimum salary, working hours, rest breaks, overtime, annual and other statutory leave entitlements, special benefits for female employees, social, health and unemployment insurance contributions, application of labour discipline measures, internal labour regulations, collective labour agreements, trade union, and safety and hygiene.

Employment relations

The Labour 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. A copy of signed labour contracts for foreign employees must be sent to the provincial-level Departments of Labour, War Invalids and Social Affairs (**DOLISAs**) issuing their work permits.

Collective bargaining and agreements

Periodical collective bargaining shall be conducted at least once a year.

Resulting from the collective bargaining results, 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 on working conditions, including: wages, bonuses, allowances and pay rises; working hours and rest breaks (holidays or leave), overtime and rest breaks between shifts; job security for employees; ensuring occupational safety and hygiene, implementation of internal labour regulations; other matters in which the parties are interested.

The terms of a collective labour agreement must be accepted by more than 50 per cent of the

employees and then approved by the provincial-level DOLISA.

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 provincial-level DOLISA. Internal labour regulations stipulate the working hours and rest breaks; order in workplace; occupational safety and hygiene in workplace, protection of assets, business secrets and confidentiality of technology and of intellectual property of the employer; conduct by employees constituting a breach of labour discipline and penalties imposed for those breaches, and liability for damage. Specific forms of disciplinary measures must be included in the internal labour regulations.

Recruitment

FIEs are entitled to recruit Vietnamese employees directly or through employment services providers or use those recruited and supplied by labour outsourcing service providers. Foreign or international organisations and agencies which are permitted by competent authorities to operate in Vietnam must employ Vietnamese employees through agencies assigned or authorised by the Ministry of Foreign Affairs (**MOFA**) or employment services providers licensed by the Minister of MOLISA or Chairpersons of the provincial-level PCs. 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. Within seven working days after signing, the labour contract must be sent to the agency or service provider managing Vietnamese employee. 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.

The employer other than foreign contractors shall determine the demand for foreign workers for every job position in which Vietnamese workers are not suitably qualified (with certain exceptions) and send reports to the Chairperson of the provincial-level PC where the planned working place of foreign workers is located. The Chairperson of the PC shall issue a written approval to the employer for the employment of foreign workers in each job position. The employer must send a report to such Chairperson if the demand for foreign workers is changed in the course of execution.

Before recruiting foreign workers, the foreign contractor must specify the quantity, qualifications, professional capacity and experience of the foreign workers that are needed for executing the contract in Vietnam and must also send a written request for the recruitment of Vietnamese workers for these positions (enclosed with the investor's certification) to the Chairperson of the provincial-level PC where the contract is to be executed.

The Chairperson of the PC shall direct local agencies and organisations to introduce and supply

Vietnamese workers to the contractor. If Vietnamese workers are not introduced or supplied to the contractor within two months from the day on which the written request for 500 Vietnamese workers or more is received, or within one month from the day on which the request for fewer than 500 Vietnamese workers is received, the Chairperson of the PC shall consider allowing the contractor to recruit foreign workers to hold the job positions in which Vietnamese recruit are not suitably qualified. If the contractor wishes to change or increase the declared number of workers, the plan for changing or increasing the demand for workers of the foreign contractor must be certified by the investor.

Within 30 days of the commencement of operations of a project the employer must provide details of the use of labour, and biannually and annually, the employers must report the changes on labour to the district-level Labour Office, or provincial-level DOLISA for the employers in industrial zones, where their head offices, branches, representative offices are located.

Probation

Probationary period, which is only once for a work and not applicable to seasonal labour contracts, whether governed by a probation agreement or included in a labour contract, should not exceed 60 days for working in a position requiring high level specialised or technical expertise, 30 days for working in a position requiring intermediate level specialised or technical expertise or for technical workers and professional staff, and six working days for other work. Advance notice and compensation is not required for either party to terminate a labour contract during a probationary period. The salary paid during a probationary period may not be less than 85 per cent of the standard salary for that position. Within three days before the end of the probationary period, the employer must notify the employee of the probation results.

Dismissal

It is very difficult to dismiss employees in Vietnam, even for serious breaches.

The Labour Code provides for limited term contracts for 12 months and up to 36 months. 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.

The third must be indefinite term employment contract after two successive definite term ones. And definite term contracts will 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 and unemployment insurances

Vietnamese employees, and foreign ones after 1 January 2018, 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 18 per cent of the monthly wage or salary and allowances (if any) as specified in their employment contracts, and the employee must contribute eight per cent. The contribution is capped at 20 times the minimum basic wage or salary equivalent to VND1,210,000 (around USD50)/month.

There is also a compulsory contribution to an unemployment fund. Vietnamese 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. The contribution is capped at 20 times the minimum regional wage or salary varying from VND2,400,000 (around USD100/month) to VND3,500,000 (around USD150/month) subject to the locality where the employee's workplace is located.

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, as the case may be.

Medical insurance

Medical insurance is compulsory and is applicable to Vietnamese and foreign employees employed by and working for FIEs, and foreign and international organisations operating in Vietnam under employment contracts of a duration of three months or more or for an indefinite term.

Premiums paid to the medical insurance fund for such Vietnamese and foreign employees are equal to 4.5 per cent of their monthly wages or salaries and allowances (if any) as specified in their employment contracts, 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 basic wage or salary like social insurance.

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 union members must pay membership fees to the grass-roots trade union; trade union funding is paid by the employer, regardless of whether grassroots trade-union has been established therein or not, at two per cent of the payroll, which is used to provide a basis for payment of social insurance premiums for employees. The employer shall pay

to the collecting unit assigned and notified by the provincial-level Labour Federation trade union funding every month at the same time of paying compulsory social insurance premiums for employees.

Trade unions are established and regulated pursuant to the Law on Trade Unions 2012 issued by the National Assembly, dated 20 June 2012. 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, Federations of Labour at provincial and district levels, and grass-roots trade unions in general are charged principally with the responsibility of discussing and resolving issues related to labour relations. In particular, consultation with a trade union is required for formulation of internal labour regulations, wage or salary scales and payroll, labour usage plans in case of redundancy, and annual leave schedules; an agreement with the trade union is required for unilateral termination of an employment contract, transfer to other work, or dismissal by the employer of a part-time trade union officer; and a trade union presence is required for dealing with breaches of internal labour regulations. If the employment contract of a part-time trade union officer expires while such officer is still within the term of such office, such contract shall be extended until expiry of the period of such office.

Settlement and mediation proceedings

The Labour Code 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 a local labour conciliator to resolve the dispute.

For certain individual disputes such as those related to dismissal or unilateral termination of an employment contract, damages or allowances for termination of the employment contract, compulsory social insurance or medical insurance, either party may bring the dispute directly to the Labour Court. In the event of an unsuccessful conciliation, or if one of the parties fails to implement the agreement set out in the minutes of successful conciliation, or if on expiry of time-limit of five working days for conciliation, the local labour conciliator has not conduct the conciliation, either party may refer the dispute to the Labour Court.

In the case of a collective dispute, either party has the right to request a local labour conciliator designated by the district-level Labour Office to resolve the dispute. In the event of an unsuccessful conciliation, or if one of the parties fails to implement the agreement set out in the minutes of successful conciliation, either party may refer the dispute to the Chairperson of the district-level PC regarding a collective labour dispute about rights, or the provincial-level labour arbitration council

regarding a collective labour dispute about benefits for further settlement. While if on expiry of the time-limit of five working days the labour conciliator has not conducted a conciliation, the parties have the right to refer their dispute to the Chairperson of the district-level PC, who shall be responsible, within two working days from receipt of a petition, to determine whether the dispute is one about rights or one about benefits. In case of a collective labour dispute about rights, it shall be further resolved by the Chairperson of the district-level. In case of a collective labour dispute about benefits, the Chairperson of the district-level PC must immediately guide the parties to request the provincial-level labour arbitration council to resolve the dispute.

In the event that the parties to a collective labour dispute about rights disagree with the decision of the Chairperson of the district-level PC, or if such Chairperson has not resolved the matter on expiry of the time-limit of five working days, either party may refer the dispute to a Labour Court for final resolution. While if a collective dispute about benefits is not resolved by the provincial-level labour arbitration council within a time-limit of seven working days or either of the parties fails to implement the agreement reached, 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 may be enforceable in Vietnam on the basis of a bi-lateral agreement for mutual recognition or in the absence of such agreement, in the reciprocal principle. 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, North Korea, Algeria, Taiwan, Kazakhstan and Cambodia. However, Vietnam has not made any agreement on the judicial assistance in civil matters with the United States, Australia, and any other Asian or 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 dispute. 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 12 arbitration centres with 350 arbitrators, and it is generally considered that the most reputable arbitration centre is the Vietnam International Arbitration Centre at the Vietnam Chamber of Commerce and Industry (VIAC). During the period from 2011 to June 2015, they accepted for hearing 879 cases and issued 586 arbitral awards, of which 180 awards have been enforced.

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 1958 (**New York Convention**) but only a very limited number of foreign arbitral awards have been recognised and enforced in Vietnam to date.

Commercial mediation

At present, in Vietnam, commercial mediation is normally combined with arbitration proceedings or court proceedings. Accordingly the conciliation is mainly conducted by judges or arbitrators during relevant proceedings. In addition, the parties to a dispute may call for the mediation of experts who have experience and skills on conciliation or experts who have reputation in the fields of dispute. Professional commercial mediation centre has just been shaped with the issuance of Rules of Mediation by VIAC and commencement of its provision of this service since 2007.

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