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Doing Business in Asia Pacific

IBA Asia Pacific Regional Forum

2025

The International Bar Association (IBA), established in 1947, is the world's leading international organisation of legal practitioners, bar associations, law societies, law firms and in-house legal teams. The IBA influences the development of international law reform and shapes the future of the legal profession throughout the world. It has a membership of more than 80,000 lawyers, 190 bar associations and law societies and 200 group member law firms, spanning over 170 countries. The IBA is headquartered in London, with offices in São Paulo, Seoul, The Hague and Washington, DC.

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The Asia Pacific Forum offers fantastic opportunities to establish contact with legal experts in and outside of the region, practising in many different areas of law, and to keep abreast of legal business developments in the region.

In addition to offering an unrivalled opportunity to establish contact among lawyers within and outside the region, and with acknowledged experts on different areas of law, specialist Forum activities provide an unparalleled opportunity to keep abreast of legal business developments in the region. Members also benefit from excellent working relations with national Bars, the Inter-Pacific Bar Association and LAWASIA.

Acknowledgments

The IBA Asia Pacific Regional Forum is proud to present the second edition of *Doing Business in Asia Pacific*, which covers the main topics for 13 jurisdictions in the region.

We are thankful for the contributions from all participants, who made a tremendous effort not only to cover the legal aspects but also to work together in the best interest of our legal community.

We believe that this publication is an important tool for both investors and the legal profession when approaching certain critical aspects in our jurisdictions.

We also thank the International Bar Association for its continuing support of this initiative, and encourage all members of the Asia Pacific Regional Forum to contribute to future editions.

Disclaimer

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Contributing law firms

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Preface

It is with great pleasure that we introduce the second edition of Doing Business in Asia Pacific, a publication that continues to build on the strong foundations laid by its first edition. The initial release was warmly received and has become a trusted reference for International Bar Association (IBA) members and legal practitioners across the world. Its success is a testament to the collective expertise and dedication of our colleagues in the IBA Asia Pacific Regional Forum.

The Asia Pacific region stands at the forefront of global economic dynamism. Home to a significant portion of the world's population and some of the fastest-growing markets, the region presents both remarkable opportunities and intricate challenges for investors and businesses alike. Rapid economic development, evolving regulatory landscapes and cultural diversity all contribute to an environment where the role of legal professionals is more critical than ever. This publication reflects our commitment to helping businesses navigate these complexities with informed and practical legal guidance.

In this second edition, we have expanded and updated our coverage to address the latest developments in the region's legal and commercial arenas. Expert lawyers from across the Asia Pacific region have contributed fresh insights and analyses, ensuring that the content remains both current and comprehensive. This edition revisits key topics – ranging from corporate structures and foreign investment to dispute resolution and regulatory compliance – while also exploring emerging trends that are reshaping the business environment.

Our work in bringing together a wealth of knowledge from 13 diverse jurisdictions has once again underscored the strength of our regional network. The contributions of our colleagues have enriched this guide, making it an indispensable tool for those who seek not only to understand the legal landscape of the Asia Pacific region but also to leverage its opportunities for sustained growth.

We extend our heartfelt gratitude to all the contributors and supporters who have made this publication possible. Their efforts, particularly in times of rapid change and unforeseen challenges, have been truly commendable. As we continue to evolve alongside the region we serve, we welcome feedback and suggestions that will help us further refine this resource in future editions.

May this second edition of Doing Business in Asia Pacific serve as an enduring guide for legal professionals and investors alike, fostering deeper understanding and greater success in one of the world's most vibrant markets.

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Australia

Chapter 1: Introduction

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Australia is a stable parliamentary democracy, offering international investors a cost-effective, low-risk and innovative business environment.

Australia's economy is underpinned by strong institutions, an exceptional services sector and an ability to respond to global changes. Australia offers significant opportunities for foreign investment in a range of growth sectors, including:

- agribusiness;
- education;
- tourism;
- mining;
- renewable energy;
- healthcare;
- software and analytics; and
- wealth management.

Investors regard Australia as an excellent place to invest because of its strategic location, population growth, highly skilled workforce, strong record of economic growth, and stable governance and regulatory environment.

Australia's economy is primarily services based, complemented by a strong resources sector. Australia is a major global commodity producer of natural resources such as steelmaking coal, iron ore, uranium, gold and natural gas. The five biggest industries in Australia are:

- financial and insurance services;
- mining;
- construction;
- manufacturing; and
- scientific and technical services.

Other significant industries include healthcare, oil and gas, education, agriculture, forestry and fishing.

Chapter 2: The business environment

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2.1 Government structure

The Commonwealth of Australia is a federation of six states (New South Wales, Victoria, Queensland, South Australia, Western Australia and Tasmania), two internal territories (the Northern Territory and the Australian Capital Territory (ACT)) and a number of minor external territories.

A written constitution divides power between the central Federal Parliament, located in Canberra in the ACT, and the eight State and Territory Parliaments. The Australian Constitution gives the Federal Parliament the power to make laws relating to foreign investment, including legislation concerning corporations, taxation, trade and commerce, communications, banking, insurance, bankruptcy and insolvency, intellectual property, immigration and industrial disputes.

Each state has legislative power to make any laws it desires, except in relation to a few matters reserved to the Federal Parliament. Federal law prevails over state or territory law to the extent of any inconsistency.

Any foreign investment proposal must comply with both federal law and the law of the state or territory in which the investment is located. In some cases, local government law is also relevant, especially in relation to planning and building approvals.

2.2 Legal system

There are two primary sources of law in Australia: statute law and common law.

Statute law is the body of legislation enacted by the various levels of government, and includes subordinate legislation such as regulations, rules and by-laws. Common law is the body of law arising out of decisions of the various federal, state and territory courts.

Each state and territory has its own court system, consisting of a Supreme Court and a number of minor courts. The Federal Government has its own court system consisting of the High Court, the Federal Court, and the Federal Circuit and Family Court. The High Court hears appeals (if leave is granted) in civil and criminal matters from the Federal Court and the State and Territory Supreme Courts. In addition, there are numerous panels and tribunals administering particular areas of law. The High Court also functions as Australia's superior constitutional court. Both the High Court and the Federal Courts may hear matters requiring the interpretation of the Australian Constitution.

Australia is also a party to various international treaties and conventions. However, these do not create rights or obligations for individuals in Australia unless they are given effect by an Australian statute. International law may be used by an Australian court as an interpretative aid should the court find a statute ambiguous.

Chapter 3: Business and corporate structures

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3.1 Common forms of legal entities

The range of legal structures in Australia include:

- companies incorporated in Australia, including Australian subsidiaries of foreign companies;
- registered foreign companies;
- partnerships and limited partnerships;
- joint ventures;
- trusts;
- sole proprietors; and
- associations.

3.2 Incorporation process

3.2.1 Companies

The Corporations Act 2001 (Cth) ('Corporations Act') and the Corporations Regulation 2001 (Cth) are the primary sources of company regulation in Australia. They are administered by the Australian Securities & Investments Commission (ASIC) in tandem with the powers granted to ASIC under the Australian Securities and Investments Commission Act 2001 (Cth).

The following sets out how business is conducted in Australia via a company structure – either incorporated in Australia or overseas. We also consider some of the alternative structures.

Companies incorporated in Australia

Companies have separate legal personalities under the law of Australia, assume the rights and liabilities of their members, and can hold property. They can sue and be sued in their own name. Generally, the liability of the members is limited to the amount unpaid on their shares (if any) and any liability or obligation expressly provided for in the company's constitution or shareholders' agreement. This is in contrast to companies limited by guarantee and no liability companies, which are not as common in the Australian market as they mainly operate in the not-for-profit and mining sectors respectively.

Actual management and control of a company is vested in the board of directors. Directors are usually appointed by the members but may also be appointed by the other directors of the company (subject to the company's constitution). Companies must appoint a public officer if they are carrying on a business or deriving income for the purposes of income tax legislation. The public officer is responsible for doing everything the company is required to do for income tax purposes. This person is liable to the same penalties which may be imposed on the company for any default, but is not personally liable for payment of the company's taxes. The Commissioner of Taxation may exempt a company from the requirement to appoint a public officer.

There are various types of companies, but by far the most common is a company limited by shares, being either a proprietary company (called a private company in many other countries) or a public company. A proprietary company must have at least one member but may not have more than 50 non-employee members, whereas a public company has no limits on membership. Public companies may be listed on the Australian Securities Exchange (ASX), in which case they must also comply with the ASX Listing Rules.

Relative to public companies, proprietary companies are somewhat less tightly regulated and subject to less onerous reporting requirements. Areas in which this more relaxed regulatory approach is evident include:

- the regulations and restrictions in relation to meetings;
- the appointment, qualification and removal of directors;
- the giving of financial benefits to directors and related parties;
- the power to allot shares; and
- the required contents of annual reports.

A proprietary company is further classified under the Corporations Act as being either 'small' or 'large'. Generally, large proprietary companies have more onerous reporting obligations than small proprietary companies. A proprietary company will be 'large' for the purposes of the Corporations Act if it (together with its controlled entities) satisfies any two of the following criteria:

- the consolidated revenue for the financial year of the company and any entities it controls is AU$50m or more;
- the value of the consolidated gross assets at the end of the financial year of the company and any entities it controls is AU$25m or more; and
- the company and any entities it controls have 100 or more employees at the end of the financial year.

Large proprietary companies must prepare and lodge a financial report and a director's report for each financial year. The accounts must be audited unless ASIC grants relief. Certain businesses and entities, including large proprietary companies which meet specific criteria, must also prepare a sustainability report on climate-related financial disclosures as of 1 January 2025. This requirement is following a staged roll-out lasting until 1 July 2027, at which time all large proprietary companies

together with certain other entities and businesses will be required to prepare and lodge a sustainability report in addition to the existing financial reporting obligations.

If the company does not meet at least two of the above criteria, it is 'small'. In some circumstances, small proprietary companies may also have to lodge financial reports.

A company limited by shares must have the word 'Limited' or 'Ltd' at the end of its name (to indicate the limited liability of the company's members), while a proprietary company limited by shares must also have the word 'Proprietary' or 'Pty' as the second last word in its name. In addition, all companies must state their Australian Company Number (ACN) or Australian Business Number (ABN) on all their public documents.

Companies that are residents of Australia for taxation purposes will be taxed on income and gains from sources both in and outside Australia, reduced by any allowable deductions. Conversely, companies that are non-residents of Australia will generally only be taxed on income with sources in Australia and gains arising from dealing with certain assets that have the 'necessary connection' with Australia.

Company groups are not regulated as groups and are treated as individual companies. However, some company groups may be treated as a single entity for income tax purposes.

Registered Foreign Companies

Companies that are incorporated outside of Australia that wish to carry on business in Australia must be registered with ASIC. Unincorporated bodies that do not have their head office or principal place of business in Australia must also register with ASIC if they wish to carry on business in Australia. A foreign company applying for registration must lodge an application accompanied by certain prescribed documentation, including a copy of its constitution or equivalent (if any) and a list of its directors, with ASIC.

A determination of whether a foreign company is 'carrying on a business' in Australia requires an examination of all the circumstances of the company's activities in Australia in light of several provisions of the Corporations Act and a body of common law principles. Specific advice should be sought in each case.

A registered foreign company is given the power to hold land in Australia under the Corporations Act. Under common law, a foreign company may sue and be sued in its own name; however, a failure to register under the Corporations Act as a foreign company when required to do so may inhibit that company's right to sue.

Some of the more important obligations imposed upon foreign companies registered to carry on business in Australia are set out below.

3.2.2 Partnerships

A partnership consists of two or more partners (to a maximum of 20 except in the case of certain professional partnerships) carrying on business in common with a view to profit. Partners may be individuals or companies. A partnership is not a separate legal entity from the partners themselves.

Partners are jointly and severally liable for all liabilities of the partnership, and this liability is unlimited. Each state and territory has its own partnership legislation which, together with the terms of any partnership agreement and the principles of equity and common law, governs the relationship of the partners.

3.2.3 Limited partnerships

Legislation in all states provides for limited partnerships, which are partnerships consisting of at least one general partner and at least one limited partner. Limited partners contribute to the capital of the partnership and share in its profits but do not take part in its management. They cannot bind the firm, and their liability to contribute to the debts or obligations of the partnership is limited to their capital contributions as recorded in the relevant register for each state or territory. The obligations of general partners are similar to those in an ordinary partnership and their liability remains unlimited.

Limited partnerships are formed upon registration as a limited partnership and they are generally taxed as if they are companies. Since 1 July 2002, certain classes of non-resident investors (eg, certain tax-exempt entities and taxable foreign residents of specified jurisdictions) investing in eligible venture capital investments through a limited partnership have been able to access the existing exemption for capital gains on venture capital investments.

Joint ventures

In Australian commercial circles, the term 'joint venture' is a label for a variety of forms of legal association between investors. Generally speaking, a joint venture is an agreement between two or more parties for the purposes of carrying on a business or undertaking. There is no settled statutory or common law definition of what constitutes a joint venture.

Three relatively common variations exist in Australia:

- An incorporated joint venture, where a separate legal entity is incorporated to pursue the interests of the joint venturers, who are shareholders in the company, in a specific project. The taxation implications of this form of joint venture (assuming it to be resident in Australia for tax purposes) are the same as for an Australian company.
- A unit trust, where the beneficial interest in the trust property is divided into units which can reflect the percentage of equity held by each participant and may be independently dealt with. Unit trusts normally have a corporate trustee.
- An unincorporated joint venture, where the investors have a contractual association which lacks both corporate form and equity capital, and which may or may not be a partnership for taxation purposes or under partnership legislation. If it is not a partnership at law or for taxation purposes, no partnership tax return is required; each joint venturer must lodge a separate tax return and may adopt a differing tax treatment for the income and expenses referable to its share of the joint venture.

Joint ventures are a common form of business association, especially in the energy and resources industries. For example, unincorporated mining joint ventures have been developed by the mining and petroleum industry in which several companies contract with one another to operate a mine or well but they each separately sell their share of the resources mined.

3.2.4 Trusts

A trust is a legal relationship whereby a trustee, being the legal owner of trust property, deals with that property for the benefit of some other person or persons (the beneficiaries) or for some object permitted by law, such as a charitable object. A trust is not a separate legal entity and does not enjoy limited liability, although it is common to use a company as the trustee and thereby limit the potential liability of the trustee.

A trustee owes a high standard of care to beneficiaries and is subject to a number of duties. These include the duty to act in good faith, to avoid conflicts of interest, to make full disclosure to beneficiaries and not to make a secret profit or gain.

Trusts commonly used to carry on businesses are unit trusts or discretionary trusts. In a unit trust, the beneficial interests in the trust are divided into units, which may be transferred in similar fashion to shares in a company. The holder of a unit is entitled to a fixed share of the profit of the trust. In a discretionary trust, the identity or interest of the beneficiary is not determined at the time the trust is created.

Trust income is usually taxed in the hands of beneficiaries according to their respective share of the net trust income; the trustee is not normally taxed on it. It should be noted, however, that:

- depending on the ownership and business activities of the trust or the business activities of entities controlled by the trust, a unit trust may be taxed as if it is a company;
- the trustee of a trust can be liable for tax in a variety of situations (eg, where there are non-resident beneficiaries); and
- tax losses are generally trapped within the trust and their future use is subject to satisfying certain complicated tests.

3.2.5 Associations

When a group of people agree to act together as an organisation, club or group they form an association. An association can either be incorporated or incorporated. Associations are regulated at a state and territory level with each jurisdiction having slightly different legislation. Below the basic principles of unincorporated associations and incorporated associations are set out.

Unincorporated associations

An unincorporated association is not recognised as a separate legal entity to the members associated with it. It is a group of people who agree to act together as an organisation and form

an association. The group can remain informal, and its members make their own rules on how the group is managed. The rules may also be referred to as a constitution. An unincorporated association is however an entity under tax law and treated as a company for income tax purposes.

Incorporated associations

An incorporated association is a legal entity separate from its individual members. Associations are incorporated under the state or territory legislation in which they operate. An incorporated association may operate outside the state and territory in which it is incorporated if the entity is registered as a registrable Australian body under the Corporations Act.

An incorporated association can continue regardless of changes to membership. It also provides financial protection by usually limiting personal liability to outstanding membership and subscription fees, or to a guarantee.

3.3 Ongoing reporting and disclosure obligations

3.3.1 Companies

Financial and sustainability reporting

All companies must keep appropriate and adequate financial records but only some need to produce a financial report. Financial reports and directors' reports must be prepared for each financial year by:

- all disclosing entities incorporated or formed in Australia;
- all public companies;
- all large proprietary companies; and
- all registered schemes.

Financial reports must comply with accounting standards and regulations set out in the Corporations Act. There are some exceptions for small proprietary companies and small companies limited by guarantee.

As of 1 January 2025, certain large entities are required to comply with climate-related sustainability reporting requirements under the Corporations Act as well as accompanying sustainability record-keeping requirements. The regime applies progressively from 1 January 2025 to entities meeting certain specific thresholds above the base criteria; from the financial year commencing 1 July 2027, all entities that meet the base criteria must prepare and lodge a sustainability report in addition to their other reporting obligations.

Continuous disclosure obligations

Continuous disclosure is the obligation imposed on companies under Chapter 6CA of the Corporations Act and, in the case of listed companies, by Chapter 3 of the ASX Listing Rules. The Corporations Act imposes strict continuous reporting obligations on disclosing entities. Disclosing entities carry continuous reporting obligations, which arise when certain material events occur in relation to the company's operational or financial position. The information that must be disclosed is that which is likely to affect the price or value of the entity's securities.

The nature and scope of these obligations depend on whether the entities are listed or unlisted disclosing entities. As a general rule, listed disclosing entities must disclose price-sensitive information 'immediately' once the entity becomes aware of it, whereas unlisted disclosing entities must disclose the information 'as soon as practicable'.

Registered foreign companies

Subject to certain exemptions, registered foreign companies must annually lodge with ASIC a copy of their balance sheet, profit and loss statement and cash flow statement for the previous financial year, which must be prepared in accordance with the laws of the company's place of incorporation. These financial reports must be accompanied by any other documents that the company is required to prepare under the laws applicable in its place of incorporation.

ASIC may require registered foreign companies to provide further information if the accounts provided do not sufficiently disclose the company's financial position.

A small proprietary company controlled by a foreign company must prepare a financial report and directors' report only if it was controlled by a foreign company for all or part of the year, and it is not consolidated for that period in the financial statements for that year lodged with ASIC by a registered foreign company.

3.3.2 Partnerships

Partnerships are not required to file any financial information concerning the partnership on any public register. Accordingly, partnerships and partners (except corporate partners) can keep their financial performance confidential. A partnership need not be audited, but partners are bound to render true accounts and full information regarding all things affecting the partnership to all other partners or their legal representatives.

3.4 Management structures

3.4.1 Company directors

Directors are elected to guide and monitor the management of a company. A public company must have at least three directors. At least two directors of a public company must ordinarily reside

in Australia. A proprietary company must have at least one director. At least one director of a proprietary company must ordinarily reside in Australia.

All directors of Australian companies, registered Australian bodies and registered foreign companies must have an existing 'director ID' at the time of their appointment or have applied for a 'director ID' by the time they are appointed. A 'director ID' is a unique identifier number given to each director after applying to the relevant regulator (Australian Business Registry Services) and complying with the necessary formalities.

Only an individual (ie, a natural person) who is at least 18 years of age may be appointed as a director. A person must give written consent to act as a director of a company before being appointed.

Directors may usually be appointed by the members of the company in general meeting or by the other directors. Directors leave office if they resign, retire, are removed in accordance with the Corporations Act or the company's constitution, or are disqualified from managing companies.

3.5 Director, officer and shareholder liability

3.5.1 Directors and officers

In performing their role, directors are subject to a range of duties and obligations under the Corporations Act, the common law and the company's constitution (if it has one).

The key duties of directors are to:

- act in good faith in the best interests of the company;
- exercise their powers for the purposes for which they were conferred;
- act with reasonable care and diligence;
- avoid conflicts of interest; and
- not improperly use company information or their position to gain an advantage for themselves or someone else or to cause detriment to the company.

Similar duties (except for the duty to avoid conflicts of interest) apply to all company officers, including secretaries.

A director may rely on certain information or advice given by certain people, provided the reliance was made in good faith and after making an independent assessment of the information or advice.

Unless the company's constitution provides otherwise, the directors may delegate any of their powers to others, and are in the first instance responsible for the exercise of the power by the delegate as if the power had been exercised by the director themselves, unless the director satisfies a test of reasonableness in which case they will not be responsible for a delegate's exercise of power.

A director who breaches any of their duties is liable to civil penalties. If the breach is reckless or dishonest the director may also incur criminal penalties.

If a company which acts as trustee (1) incurs a liability which it cannot discharge; and (2) is not entitled to be indemnified by the trust against that liability due to the terms of the trust or because the company committed a breach of trust or acted outside the scope of the trust, the directors are jointly and severally liable to discharge the trustee company's liability (unless any particular director is held responsible).

3.5.2 Member liability

Members are not liable (in their capacity as a member) for the company's debts. Their only financial obligation, subject to the company's constitution and shareholders' agreement (if any), is to pay the company any amount unpaid on their shares if called on to do so. If the company is not a company limited by shares, in some circumstances members may have to contribute to the costs of winding up the company (and any incidental costs).

Chapter 4: Takeovers (friendly M&A)

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4.1 Takeovers and schemes of arrangement

Takeovers in Australia are highly regulated and based on a broad prohibition against increasing a bidder's voting power in public entities above 20 per cent. The takeovers rules are in the Corporations Act, and specifically regulate acquisitions of substantial interests in companies or trusts listed on the ASX and unlisted Australian companies with more than 50 members.

4.1.1 The 20 per cent rule

The takeovers rules limit the ability of a person from acquiring a 'relevant interest' in voting shares of a regulated entity where a person's voting power increases from:

- 20 per cent or below to more than 20 per cent; or
- a starting point that is above 20 per cent and below 90 per cent.

Where the listed entity is not the subject of a takeover bid, disclosure is required within two business days of a party acquiring a five per cent interest and every increase or decrease of one per cent or more above this five per cent level. Disclosure must be made in a prescribed format that includes details of the number of shares and all parties with a relevant interest in the shares, including 'associates', and details of any 'relevant agreement' (formal or informal, in writing or oral, and whether or not it has legal or equitable force) through which the relevant interest arises.

The Takeovers Panel expects that where there is a control transaction and a bidder holds or acquires a long equity derivative position (such as a holding in cash-settled derivatives), it should be disclosed to the ASX unless it is under the notional five per cent level.

4.1.2 Off-market bids

There are a number of ways in which relevant interests in voting shares exceeding 20 per cent may be acquired, but an off-market bid is the most commonly used takeover method.

In an off-market bid, the bidder prepares an offer document or bidder's statement which is sent to the target for two weeks and then to shareholders by mail (unless the target consents to early despatch). Shareholders have at least a month to consider the offer.

The target prepares a target's statement, which is also mailed to shareholders and includes the target directors' recommendation. If the directors do not recommend the bid, the bid is considered hostile. The offers are accepted by shareholders completing and returning acceptance forms prior to the offer expiry date.

Once a bidder decides to make an off-market bid, the bidder must serve a bidder's statement on ASIC and the target, and dispatch it to shareholders between 14 and 28 days later (in a friendly bid, early dispatch is often granted by the target).

Where an offer includes scrip (ie, consideration by way of an issue of shares), the bidder's statement must comply with the prospectus requirements of the Corporations Act. This requires inclusion of all the information that investors and their professional advisers would reasonably expect to enable them to make an informed assessment of the rights and liabilities of the securities being offered and assets and liabilities, financial position and performance, profits, losses and prospects of the company issuing the securities. The position is somewhat more fluid when the issue of scrip is in a proprietary company; however, ASIC has released guidance to the effect that the prospectus requirements should apply in these instances anyway. Reduced disclosure rules may apply if the shares offered have been continuously quoted on ASX during the previous 12 months.

An off-market bid can be subject to a wide variety of 'defeating conditions' that prevent a binding contract from being formed if not satisfied or waived. Common conditions include:

- a minimum acceptance condition, often set at 90 per cent, allowing offers to be withdrawn unless the bidder can proceed to compulsory acquisition and outright control. The condition may be fixed at 50 per cent or less if the bidder is satisfied with less than complete control;
- regulatory considerations including the Foreign Investment Review Board (FIRB) where the bidder is a foreign person and the Australian Competition and Consumer Commission (ACCC) where there are competition (anti-trust) concerns; and
- negative conditions relating to certain events not occurring during the bid period, such as the target altering its share capital, disposing of all or a substantial part of its business or assets or an insolvency event.

4.1.3 Market bids

A market bid must be an unconditional cash offer for securities quoted on ASX and is carried out by purchasing the target's securities on market. Because of the unconditional nature of this bid (among other considerations), this is a far less common method of takeover than an off-market bid.

The major steps of a market bid are as follows:

- the bidder arranges a broker to make an announcement to stand in the market and purchase all shares offered at the offer price for a minimum of one month. The market bid commences 14 days later, although the bidder may start acquiring shares shortly after the announcement;
- the bidder gives its bidders statement to the target, ASX and ASIC on the day of the announcement and to target shareholders within 14 days. Disclosure requirements are similar to an off-market bid; and
- to accept, each shareholder must arrange for the sale of their shares on the stock market. The sale is subject to the normal three-day trade settlement process.

4.1.4 Schemes of arrangement

Schemes are commonly used as an alternate to 'friendly' off-market takeovers, but particularly used in complex, large-scale mergers that would be difficult through a takeover bid. A detailed explanatory memorandum is required to accompany the notice of scheme meeting to be sent to shareholders. An independent expert's report to advise whether the offer terms are fair and reasonable for shareholders may also be required. Unlike takeover bids, schemes require the involvement of the court.

Shareholders' meetings are convened by court order. After shareholders approve the scheme by the requisite majorities (75 per cent of the votes cast on the scheme resolution and over 50 per cent in number of the shareholders present and voting at the scheme meeting), the court is asked to grant orders to implement the scheme. As part of the approval process, ASIC reviews the scheme documents and, if satisfied with them, gives a 'no objection' statement to the court.

The flexible structure of a scheme of arrangement is a key advantage over the relatively prescriptive regime for takeover bids, and allows a bidder not only to pay any combination of cash or scrip as consideration for an acquisition (eg, having a maximum cash pool available). It also enables an acquisition simultaneously to incorporate additional complexities such as the transfer or demerger of specified assets or liabilities.

Chapter 5: Foreign investment

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5.1 Foreign investment control/restriction

5.1.1 Background

In Australia, foreign investment is generally encouraged; however, notification and approval is required for certain types of investments.

Foreign investment in Australia is regulated by a framework which includes:

- the Foreign Acquisitions and Takeovers Act 1975 (Cth) (FATA);
- the Foreign Acquisitions and Takeovers Regulation 2015 (Cth) ('the Regulations') and;
- the Federal Government's Foreign Investment Policy.

Foreign investors in certain industries may also be subject to requirements under the recently enacted Security of Critical Infrastructure Act 2018 (Cth). The Australian Tax Office (ATO) now also keeps a record of all foreign persons who hold agricultural land and registrable water entitlements in accordance with the Register of Foreign Ownership of Water or Agricultural Land Act 2015 (Cth).

The Foreign Investment Review Board (FIRB) examines foreign investment proposals and makes recommendations to the Australian government on those proposals.[1] The Australian government minister responsible for foreign investment decisions is the Australian Treasurer.

5.1.2 National interest considerations

The Treasurer (or their delegate) reviews foreign investment proposals against the 'national interest' on a case-by-case basis. The national interest is not defined and is given a flexible meaning having regard to all relevant circumstances, but the Treasurer will typically consider national security, impact on competition, Australian government policies (including tax revenue and environmental objectives), impact on the Australian economy and community and the character of the investor. Additional considerations apply to investments in the agriculture sector and those made by foreign governments and foreign government investors.

For significant decisions, the Treasurer consults broadly with its consult agencies, which include the Australian government and its instrumentalities, state and territory governments and their instrumentalities, national security agencies, and authorities with responsibilities relevant to the proposed action.

1 Further information about FIRB and Australia's foreign investment framework is available at https://firb.gov.au.

The Treasurer can block foreign investment proposals that are contrary to the national interest or apply conditions to the way these proposals are implemented to ensure they are not contrary to the national interest.

5.1.3 Foreign persons

Australia's foreign investment legislation applies to investment proposals by foreign persons. A foreign person is defined to mean:

1. an individual who is not ordinarily resident in Australia
2. a foreign government or foreign government investor,[2] or
3. any corporation, trustee of a trust or general partner of a limited partnership in which:
    i. a foreigner (ie, an individual not ordinarily resident in Australia, a foreign corporation or a foreign government) has a 20 per cent or more interest; or
    ii. two or more foreigners have a 40 per cent or more interest in aggregate.

5.1.4 Notification of transactions to FIRB

Whether notification of an investment by a foreign person is required is determined by reference to the type of investor, the type of investment, the industry sector in which the investment will be made and the value of the proposed investment.

A 'notifiable action' is an investment by a foreign person in respect of which notification of the proposed action to the Treasurer is compulsory before that action can be taken. An offence may be committed and civil penalties may apply if notice is not given. An action is only notifiable if it meets certain threshold tests.

Certain other transactions referred to as 'significant actions' do not require prior notification or approval of the Treasurer, but as the Treasurer has power to make a variety of orders in relation to a significant action, including prohibiting the transaction because it is contrary to Australia's national interest, it is common practice to notify the Treasurer voluntarily that a significant action is proposed.

Parties may enter into agreements relating to a significant action or a notifiable action prior to the Treasurer's decision; however, such agreements must be conditional upon the Treasurer not prohibiting the transaction.

Foreign investment applications involve submitting an online form and certain additional information via the FIRB application portal. Application fees are due to the Australian government in respect of foreign investment notifications.

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2 Foreign government investors include not only a foreign government but also any corporation, trustee of a trust or a limited partnership (the general partner of which is treated as a foreign person) in which a foreign government has a 20 per cent or more interest or in which two or more foreign governments have a 40 per cent or more interest in aggregate.

Civil and criminal penalties may be imposed on foreign persons for failing to notify an investment that is subject to Australia's foreign investment laws and for other breaches of these laws.

5.1.5 Monetary thresholds

In most cases, a foreign person will only need to notify the Treasurer of their investment if the investment meets certain monetary thresholds. The thresholds depend on the type of investor and the action proposed to be taken by that investor. As the thresholds change from time to time, please visit the FIRB website for the most up-to-date information.[3]

5.1.6 Special industry sectors

Specific additional restrictions on foreign investment apply to the following industry sectors:

- media;
- telecommunications;
- transport;
- defence and military-related industries and activities;
- encryption and securities technologies and communications systems; and
- the extraction of uranium or plutonium or the operation of nuclear facilities.

Where a transaction involves a foreign person acquiring an interest in agricultural land that will be used for a primary production business or residential development, the applicant will be required to demonstrate that Australian investors had an opportunity to acquire the land in question. Generally, advertising widely and providing equal opportunity for bids to be made will suffice.

5.1.7 Exemption certificates

Exemption certificates can be applied for certain acquisitions in relation to Australian land, and in relation to acquisitions of interests in either, or both of, the assets of an Australian business and the securities in an Australian entity (including interests acquired through the business of underwriting).[4]

An exemption certificate is usually granted to foreign persons (usually not individuals) with a high volume of acquisitions in relation to land, where the administrative burden of a number of applications outweighs the granting of the exemption certificate. A certificate will generally specify the maximum value of interests that can be acquired and the period during which acquisitions can be made.

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3 See https://firb.gov.au/exemptions-thresholds/monetary-thresholds.

4 Further details in relation to exemption certificates and other exemptions are available at https://firb.gov.au/investment/land-exemption-certificates and https://firb.gov.au/guidance-resources/guidance-notes/gn26 and https://firb.gov.au/exemptions-thresholds/exemptions.

5.1.8 Timeframe for decisions

Under FATA, the Treasurer has 30 days to consider a formal notification and make a decision for both significant actions voluntarily notified and notifiable actions for which notification is compulsory. The 30-day period starts when the correct filing fee has been received by the Australian government (the 'statutory deadline').[5]

In routine cases, a decision is usually made within 30 days of lodgement of a notification. In circumstances where notifications relate to sensitive sectors or involve investors with broader political or strategic objectives that may be contrary to Australia's national interest, then the timeframe to obtain a decision is likely to exceed 30 days. In such circumstances the FIRB will contact the applicant inviting the applicant to request an extension to the statutory deadline. It is common practice that an applicant will voluntarily make such an extension request when FIRB indicates that it will not be able to meet the 30-day statutory deadline, as the alternative would be the imposition of an interim order which is not desirable.

On 29 March 2020, the Treasurer of Australia announced that the timeframes were immediately extended to six months, to accommodate the reduction in all thresholds to AU$0.00 as a consequence of the Covid-19 outbreak.

5.1.9 Conditions placed on foreign investment

Approval of the transaction may be subject to conditions imposed to satisfy the Treasurer that the transaction is not contrary to the national interest. Compliance with these conditions is compulsory.

Standard tax conditions are now routinely imposed for most transactions. Examples of the standard conditions include providing documents or information to the ATO and the payment of outstanding tax debts.

Conditions also apply to transactions involving vacant non-agricultural land, with approval generally conditional on the foreign investor commencing construction of a proposed development within five years of approval, and retaining the land until construction is complete.

5.2 Foreign exchange control

There are various anti-money laundering and counter-terrorism financing reporting requirements associated with bringing physical currency into and out of Australia, and for international electronic funds transfers.

However, Australia does not have foreign exchange controls which restrict currency inflows or outflows.

5 The Treasurer may make an interim order if a proposal is complicated or further information is required, which extends the timeframe for the making of a decision by a maximum of 90 days. Once they do so, no further voluntary extensions are permitted.

5.3 Applicable tax incentive or grant

The Australian government offers a range of tax incentives to encourage investment in Australia. Some common incentives include:

- a research and development (R&D) tax incentive. This provides eligible entities with an aggregated turnover of less than AU$20m per annum a 43.5 per cent refundable tax offset for expenditure on eligible R&D activities. A 38.5 per cent non-refundable tax offset is available for all other eligible entities on eligible R&D activities;
- an early stage innovation company (ESIC) tax incentive. This provides eligible investors who purchase shares in an ESIC with a non-refundable carry forward tax offset equal to 20 per cent of the amount paid for their newly issued shares in the ESIC and a concessional capital gains tax treatment for all interest in the Australian ESIC in certain circumstances; and
- a range of venture capital tax concessions.

In addition, the Federal Government has various grant programmes, and the state and territory governments also offer various incentives and grants to local and foreign companies.

Australia's tax system is highly complex and continually evolving. It is important to stay updated on the latest tax policies as incentives and grants programs are amended frequently.

Chapter 6: Restructuring and insolvency

Stephanie Daveson, Clayton Utz, Brisbane

6.1 The significance of insolvency in Australia

A company is considered insolvent in Australia if it is unable to pay all its debts as and when they fall due. Solvency is assessed primarily on a cash flow basis but the company's balance sheet may also be considered. Australian law seeks to protect creditors and third parties dealing with insolvent companies.

Directors and officers who trade a company while it is insolvent potentially expose themselves to civil and criminal liability under Australian law. Civil liability is more common and, if established, typically requires the directors to compensate the company (by then in liquidation) for the trading debts incurred during the period of insolvency. However, insolvent trading laws have recently been reformed to include a 'safe harbour' carve-out for directors from personal liability.

Under Australian law, insolvent companies may be subject to one of several forms of external administration, which aim to protect and maximise value for creditors. In all these forms of external administration, the external administrator appointed to the company or its assets will be an independent third party – typically a specialised insolvency accountant – with official accreditation to hold such a role. The external administrator's remuneration, costs and expenses will usually be a first-ranking priority from company's assets protected by a lien.

If a company is under external administration, that status will appear in company records maintained by ASIC. The Corporations Act also requires that the company state that status after its name in all communications.

6.2 Restructuring in Australia

Most modern international restructuring techniques used in the United Kingdom and the United States are available in a similar form under Australian law. Although there is no Australian equivalent of Chapter 11 of the United States Bankruptcy Code, which involves the proposal and adoption of a plan of re-organisation, many of the benefits of that system can be achieved in Australia (including via creditor enforcement moratoriums and priority lending).

Restructuring can occur as part of, or separate to, external administration in Australia. Certain forms of external administration may be required to implement a restructuring plan. This will depend on the company's solvency, and whether the company wishes to take advantage of statutory protections or rights available in certain forms of external administration to implement the restructure. Examples of protections or rights include a moratorium on creditor enforcement, a mechanism to extinguish creditor claims, and the suspension of the powers of directors in favour of an external administrator.

A company may also engage a chief restructuring officer or turnaround manager to assist with, manage or implement a restructuring plan. External legal and accounting advisers will typically be engaged to advise on the preparation and implementation of the restructuring plan.

6.3 Types of external administration

6.3.1 Receivership

A receivership is a form of external administration in which a receiver, or a receiver and manager (also referred to as a controller), is appointed by a secured creditor or the court to administer certain or all of a company's property.

The most common form of appointment is made by a secured creditor pursuant to a contractual right within a security instrument granted in its favour by the company. The court may also appoint a receiver where it considers it appropriate (typically where the security instrument does not contain a power to appoint a receiver), but this is not common.

The role of the receiver is to take possession of and sell the company's property subject to the security and to apply sale proceeds to the amount owed to the secured creditor. The receiver is required by law to take all reasonable care to sell the property for its market value or the best price obtainable in the circumstances.

The powers of a company's directors are limited during a receivership. A receiver has all the rights and powers to deal with the assets that are the subject of their appointment, to the exclusion of the directors.

A receivership ends when the appointing secured creditor is paid in full or all the secured assets have been realised, or on order of the court.

6.3.2 Voluntary administration

Voluntary administration is a form of external administration in which a qualified insolvency accountant is appointed to take control of a company to investigate its financial affairs and report to creditors. The voluntary administrator has a statutory timeframe for investigations, reporting to creditors, and convening and holding meetings of creditors. The whole process typically takes 25–30 days unless extended by court order (which, in the case of complex corporate structures, is common).

To assist in this process, the administrator has all the powers of the company's directors (which are suspended during that period) and the benefit of a statutory moratorium preventing creditors or third parties taking action against the company or its property without the consent of the administrator or the leave of the court.

The administrator must ultimately recommend to, and have creditors vote on, the future direction of the company, namely whether the company should:

1. be returned to its directors;
2. enter into a deed of company arrangement (see below); or
3. be placed in liquidation.

A secured creditor, with security over the whole (or substantially the whole) of a company's assets, may appoint a receiver or controller to the company's property within 13 business days of the appointment of a voluntary administrator (or otherwise with the consent of the administrator or by court order). The receiver's rights and powers in relation to that property will be superior to those of the voluntary administrator.

6.3.3 Deed of company arrangement

A deed of company arrangement (DOCA) is a form of external administration in which a deed administrator manages a contractual compromise between a company and its creditors. As noted above, a DOCA is one the potential outcomes of a voluntary administration.

A voluntary administrator will seek DOCA proposals prior to convening the second meeting of creditors in the administration, with the aim of tabling a proposal for creditors to vote on at that meeting. For a DOCA proposal to succeed, it usually needs to demonstrate to creditors that they will receive a greater return under the DOCA than they would in a liquidation scenario.

The typical objective of a DOCA is for the deed administrator to generate a monetary fund from the company's assets or through a contribution from a third party (often the directors or their associates) to be distributed to admitted creditors in full and final satisfaction of their claims (which will then be extinguished). The company would then be returned to its existing or new directors free from debt.

There is no standard form for a DOCA. The Corporations Act provides significant flexibility for a DOCA to be tailored to suit most restructuring situations. These may involve selling or transferring assets, issuing shares, compromising debts and agreeing priority payments to creditors outside the usual statutory order in a liquidation scenario.

6.3.4 Liquidation

Liquidation is a terminal process by which an appointed specialist insolvency accountant winds up a company's affairs, realises its assets, distributes the proceeds to admitted creditors in accordance with statutory priorities under the Corporations Act and ultimately deregisters the company. A company can be placed in liquidation in one of three ways:

1. by resolution of its members;
2. by resolution of its creditors; or
3. by order of the court.

Liquidation most commonly occurs where the company is insolvent. The liquidator will control the company during liquidation, and the powers of the directors and other office holders will cease.

In producing a fund for distributing to admitted creditors, a liquidator is also empowered to apply to the court to seek orders:

1. requiring a director to compensate the company where that director has traded the company while it was insolvent; and
2. to have certain company transactions declared void – such as unfair preferences, uncommercial transactions, unfair loans and unreasonable directed related transactions.

A liquidator will call for proofs of debt from potential creditors and formally adjudicate each proof to determine whether each party is a creditor. The liquidator also determines if creditors should be afforded any priority for payment under the Corporations Act, and the total amount of each creditor's admitted debt. There will be no return to shareholders unless all claims of admitted creditors are satisfied in full.

A secured creditor may appoint a receiver or controller to all or some of a company's property during a liquidation. The receiver's rights and powers to that property will be superior to those of the liquidator.

6.4 Recent reforms in Australian insolvency law

6.4.1 Safe harbour

Often, directors prematurely appoint a voluntary administrator to viable companies due to the risk of personal liability for potential insolvent trading and the uncertainty associated with determining whether a company is insolvent. Following amendments to the Corporations Act, in 2017 safe

harbour provisions took effect to encourage directors to remain in control and take steps to restructure and turn around the company.

To take advantage of the safe harbour carve-out, a director must, at the time the debts are incurred, suspect that the company is or may become insolvent, and must be developing or implementing one or more courses of action that are reasonably likely to lead to a better outcome for the company than an immediate voluntary administration or liquidation. A director seeking safe harbour protection must also ensure that financial records are adequately maintained, and payments for employee entitlements and tax liabilities are up to date.

6.4.2 Ipso facto

An *ipso facto* clause in a contract allows one party to terminate the contract or exercise other rights as a result of certain events, including the insolvency of the counterparty. Such a clause allows termination or other steps despite the counterparty otherwise not being in default and being able to perform all obligations under the contract.

These provisions are 'grandfathered' so that a party to a contract entered into after 1 July 2018 is prohibited from enforcing any rights in a contract that are enlivened due to a voluntary administrator or a managing controller being appointed, or the company being subject to a scheme of arrangement (proposed to avoid an insolvent winding-up). If one of these appointments occurs, the *ipso facto* stay will also apply if, a counterparty enforces a right for a reason that:

- relates to the financial position of the company;
- is prescribed by the regulations; or
- is in substance contrary to *ipso facto* provisions of the Corporations Act.

Amendments to the Corporation Regulations and Ministerial Regulations exclude a significant number of contracts and types of rights from the operation of the ipso facto stay. Excluded contracts include certain debt capital markets arrangements, government licences and permits.

6.4.3 Covid-19 temporary relief

On 25 March 2020, a new temporary safe harbour from liability for insolvent trading was introduced in the context of the Covid-19 outbreak, for debts incurred by the company in the ordinary course of its business on or after 25 March 2020 and for a period of at least six months.

Chapter 7: Employment, industrial relations, and work health and safety

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7.1 Employees' rights and protection

Australia's industrial relations system is regulated by the Fair Work Act 2009 (Cth) ('the Fair Work Act'). Most employers in Australia are subject to its requirements, regardless of whether their employees are employed in accordance with an award set by an industrial body, a collective agreement or an individual employment contract. The Fair Work Act covers basic minimum conditions of employment and specifies the right to claim against an employer for unfair dismissal.

Employers must also comply with legal requirements regarding taxation, superannuation, and work health and safety.

7.1.1 Basic minimum conditions

Qualifying employees are entitled to the minimum conditions of the National Employment Standards set out in the Fair Work Act. These include:

- a maximum of 38 ordinary hours per week plus 'reasonable additional hours';
- four weeks of paid annual leave per year (while an employee classified as a shift worker is entitled to five weeks' paid annual leave per year);
- ten days of paid personal/carer's leave (including sick leave) per year, together with an additional two days of unpaid carer's leave and a further two days of paid compassionate leave;
- Fifty-two weeks of unpaid parental leave for both parents at the time of birth or adoption of a child, with the option for one parent to request an additional 52 weeks;
- the ability to request flexible working arrangements as parents or carers of children under school age or under 18 with a disability; the employee must have at least 12 months' continuous service and the request may be refused on reasonable business grounds;
- long service leave based on relevant federal or state law;
- unpaid community service leave of a reasonable period for an employee engaged in an 'eligible community service activity' such as jury service or voluntary emergency management; and
- severance pay where termination of employment is for redundancy and the employee has at least 12 months' continuous service.

These rights and entitlements can be supplemented by, but cannot be undercut, by a contract of employment, modern award or enterprise agreement.

Employers and employees can enter into negotiations for an enterprise agreement and can take protected industrial action in support of the bargaining claims. Industrial action taken other than in support of bargaining will not be protected under the law.

7.1.2 Unfair dismissal and general protections

The Fair Work Act gives eligible employees the right to make a claim against their employer for unfair dismissal if a termination can be demonstrated to be harsh, unjust or unreasonable.

Small businesses that employ 15 or fewer employees and comply with a code for dismissals also are exempt from unfair dismissal laws. Equally, employees are not protected if they have:

- not served the 'minimum employment period' (12 months for a small business employer or six months otherwise);
- been engaged on a fixed-term contract or for a specified task;
- been engaged as short-term casual employees;
- been engaged as trainees for a specified time period; or
- been engaged as seasonal employees.

Employees are also not protected if their dismissal was due to a 'genuine redundancy' or if they earn more than the high-income threshold (AU$175,000 after 1 July 2024) unless they are covered by an award or enterprise agreement. This threshold is adjusted every year on 1 July.

The Fair Work Act also contains protections for persons against certain 'adverse action'. The 'general protections' protect a person from adverse action because of attributes such as race, religion, sexual preference, pregnancy or age, or because an employee sought to exercise their legal rights.

7.1.3 Work health and safety

Work health and safety is governed by legislation at the state level and imposes obligations on all employers to ensure the safety of their employees while at work. Laws have largely been harmonised in most jurisdictions apart from Victoria and Western Australia (although there are a number of state-based differences).

7.2 Statutory contributions and minimum wage

7.2.1 Minimum wages

Basic rates of pay, loadings, penalty rates and other entitlements are set by the national minimum wage and modern awards. Minimum wages, penalties and allowances can be supplemented by enterprise agreements and contracts of employment but they cannot be undercut.

While there is a single national minimum wage, the actual minimum wage applicable to a particular employee will vary depending upon their industry and occupation, and whether one of the industrial instruments set out above apply.

7.2.2 Superannuation

Federal legislation requires employers to contribute a prescribed minimum level of superannuation for each employee. This is currently set at 11.5 per cent of an employee's ordinary time earnings, generally what they earn in normal working hours. This rate is set to rise to reach 12 per cent by the 2025/2026 financial year. There are limited exceptions to this requirement.

Employers who provide less than that statutory minimum are liable to pay a non-deductible charge called the Superannuation Guarantee Charge. There are also limits on the maximum amount of superannuation contributions made for the benefit of an employee that an employer can claim as a tax deduction.

7.3 Work permits

There are a number of temporary and permanent visa options available for people who are considering working in Australia. The permanent arrangements offer longer-term options and include:

- employer-sponsored work visas under which an employer can sponsor an employee, which gives them access to permanent residency; and
- skilled independent visas, which do not require sponsorship but are governed by the particular occupation and a number of other requirements.

In all cases there are strict requirements that apply to working visas that will need to be closely considered in the application. Obtaining specialist advice from a migration agent is recommended.

Chapter 8: Tax law

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8.1 Taxes applicable to individuals (employees)

8.1.1 Income tax

Australian residents are taxed on their income and capital gains on a worldwide basis. Non-residents are generally only taxed on their Australian-sourced income excluding dividends, royalties and interest, which are subject to withholding tax. Similar treatment applies to temporary residents.

8.1.2 Capital gains tax (CGT)

Assets acquired after 20 September 1985 are subject to capital gains tax on the happening of certain events (CGT events). Examples of such events include the disposal of CGT assets as well as the ending (loss, destruction, cancellation, surrender, expiry, etc) of CGT assets. Capital gains are offset against any capital losses (current or prior year) and the net capital gain for the year is included in assessable income subject to any available CGT discount.

Capital gains (and losses) of foreign and temporary residents are only recognised for certain Australian assets, including real property, indirect interests in Australian real property, the business assets of an Australian permanent establishment, and any options or rights to acquire such assets.

8.1.3 Dividends paid by a company

Under the imputation system of taxation, dividends that are paid to shareholders by an Australian resident company may be franked with an imputation credit that reflects the amount of corporate tax already paid on the company's profits. Individual shareholders who receive franked dividends are entitled to a tax offset equal to the franking credit that reduces or eliminates the tax payable by them on the dividend. Non-resident shareholders are unable to use these credits to offset any tax liability. Withholding tax is imposed at a rate of 30 per cent on the gross amount of the unfranked dividend, but this may be less for double tax treaty countries.

8.2 Taxes applicable to businesses

8.2.1 Income tax

Companies are generally taxed on their income and capital gains at a rate of 30 per cent. A lower rate is available (currently 25 per cent) for small businesses that meet certain requirements. Where a foreign enterprise has a permanent establishment in Australia and a double taxation agreement applies, the foreign enterprise is taxed in relation to the profits of its permanent establishment at the general corporate rate.

Australia's tax consolidation regime allows companies, partnerships and trusts that are 100 per cent Australian-owned to choose to be taxed as a single consolidated entity. Consolidation is available for groups that are wholly owned by foreign parents where there is no single Australian resident holding company (known as multiple entry consolidated groups). Where an election is made, all wholly owned entities must be included in the consolidated group and the head company becomes liable for all group tax liabilities.

8.2.2 Interest withholding tax (IWT)

Interest withholding tax is imposed on interest paid by an Australian resident as an expense of an Australian business to a non-resident lender. It also applies to interest paid by a non-resident

borrower where it is an expense of their Australian branch. A flat rate of ten per cent applies on the gross amount of the interest paid.

8.2.3 Goods & services tax (GST)

GST is a broad-based consumption tax imposed at the standard rate of ten per cent on most supplies that are made for consideration and which have a relevant connection with the indirect tax zone (ITZ). It is similar to VAT in other jurisdictions. Supplies include goods, services, information, rights and real property. Special rules extend the application of GST to digital products or other intangible supplies made by foreign suppliers to Australian consumers, as well as to the supply of low-value goods from offshore.

No GST is payable on GST-free supplies – including certain health, food and education supplies, exports, and sales of businesses as going concerns. GST is not payable on input taxed supplies, such as those relating to financial services and the sale or leasing of existing residential property. Finally, an entity will make a taxable importation and be liable to pay GST where it imports goods into the ITZ for home consumption.

GST will only be payable on supplies where the entity making the 'taxable supply' is registered or required to be registered for GST purposes. Generally, this is if its annual turnover for the previous 12 months or projected annual turnover for the next 12 months in relation to supplies that are connected with the ITZ exceeds AU$75,000 (AU$150,000 for non-profit entities). GST liability on a taxable supply generally falls on the supplier. Exceptions include supplies that are reverse charged (including voluntary reverse charging) and supplies made by non-residents through resident agents.

In certain cases, a GST-registered entity that acquires a taxable supply may be entitled to an input tax credit for the GST included in the price of that acquisition. A GST-registered entity may also be entitled to claim an input tax credit where it makes a taxable importation.

8.2.4 Payroll tax

Payroll tax is a state or territory tax that is levied at specified rates by reference to wages and salaries (and other benefits) provided to employees that exceed prescribed threshold amounts in each state or territory. Top rates in each jurisdiction vary and currently range from 4.85 per cent to 6.85 per cent. Broad rules apply to payments to contractors and the grouping of employers for aggregating wages and salaries.

8.2.5 Fringe benefits tax (FBT)

FBT is imposed on employers on the taxable amount of certain benefits, which is grossed-up under a formula to produce a level of tax that equates with the cash equivalent of the fringe benefit. The FBT rate is currently 47 per cent. Employers are generally entitled to income tax deductions for the cost of providing fringe benefits and FBT paid. The FBT year is from 1 April to 31 March of the following calendar year.

8.3 Other taxes

8.3.1 Taxation of trusts

Trust income normally forms part of the assessable income of the beneficiary to the extent that they have been made 'presently entitled' to such amounts. Where there is some amount to which a beneficiary is not so entitled, that income is taxed at a rate of 45 per cent. Although a trust income tax return is required, distributions of trust income are taxed in the hands of the respective beneficiary at their individual tax rate.

The tax laws also have specialised taxing regimes in respect of specialised investment vehicles such as managed investment trusts (MIT) and attribution managed investment trusts (AMIT).

8.3.2 Taxation of partnerships

Partnerships are subject to pass-through taxation treatment (the shares of partnership profit or loss are taxed at the rate of each respective partners). Capital gains and losses relating to partnership interests and CGT assets of a partnership are made by the partners individually. Certain partnerships, such as the corporate limited partnership, are not subject to pass-through taxation and are instead taxed as companies.

8.3.3 Stamp duty

Stamp duty is charged in all Australian states and territories on the transfer of real property and other types of property. The rates vary by jurisdiction and are applied on a sliding scale to the greater of the consideration paid for the property and the value of the property. As at 1 February 2025, the maximum rate varies from 4.5 per cent to 6.5 per cent depending on the jurisdiction. Further duty (as at 1 February 2025, at a rate ranging from seven to nine per cent) applies to foreign purchasers of certain property in certain jurisdictions.

8.3.4 Land tax

Land tax is a tax which is levied annually in all states and territories (other than the Northern Territory) on the unimproved value of taxable property that is above the relevant land tax threshold. Rates (as at 1 February 2025, generally a top rate ranging from 1.5 per cent to 2.75 per cent) and thresholds vary in each jurisdiction. Surcharge land tax (as at 1 February 2025, ranging from 0.75 per cent to five per cent) can also be imposed on foreign owners of certain land in some jurisdictions. Exemptions and concessions may be available for certain types of land in certain jurisdictions (eg, primary production land).

8.3.5 Other specific taxes

Customs duty is payable at the time goods enter Australia and generally levied on the customs value of goods as determined in accordance with Australian law.

Excise duty is imposed on certain goods (eg, alcohol, tobacco, fuel and petroleum products) that are produced or manufactured in Australia. If these products are imported into Australia rather than produced or manufactured in Australia, customs duty applies.

Chapter 9: Intellectual property

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9.1 Patents

A standard patent confers on the patentee the exclusive right to exploit commercially the patented invention for a term of 20 years. Australia's criteria of patentability for standard patents is closely aligned with international standards.

Alternatively, a patentee may apply for an innovation patent which provides protection for a term of eight years. An innovating patent is designed to protect inventions that do not meet the inventive threshold required for standard patents. Following an inquiry into intellectual property, the Australian government has begun phasing out this type of patent. This means:

- The last day you can file a new innovation patent will be 25 August 2021.
- Existing innovation patents that were filed on or before 25 August 2021 will continue in force until their expiry. This will ensure current rights holders are not disadvantaged.

For both types of patents, the invention must be detailed in a specification (which may be provisional, later followed by a complete specification) describing the invention and concluding with claims that determine the ambit of the monopoly afforded by the patent.

The invention must be novel and amount to a manner of manufacture as that phrase is understood. The invention must also involve either an inventive step (for a standard patent) or an innovative step (for an innovation patent). The specification must be clear and not ambiguous and the claims fully supported by the information disclosed in the specification.

9.2 Trademarks

Australia protects reputation and goodwill in names through passing off law and consumer protection laws that prohibit misleading commercial conduct.

In addition, Australia has a registered trademark system for names, logos, devices, sounds, smells, colours and shapes that distinguish the goods or services of an owner from those of other owners.

Registering a trademark provides the owner with the exclusive right to use and commercialise that mark in relation to specified classes of goods and services.

Trademark registration usually lasts for an initial term of ten years and can be renewed on an ongoing basis. If the owner of a registered trademark does not use their mark, it may be removed from the register for non-use.

Australia follows the international system of classification of goods and services. Early trademark registration is desirable for those seeking to enter the Australian market. Australia also has a federal system for registering business names for persons carrying on business under a name other than their own name or company name.

9.3 Copyright

Copyright is the exclusive right to reproduce, publish, perform, communicate and adapt original literary (including computer programs), artistic, dramatic and musical works, together with other protected subject matter such as films and sound recordings. Australia's copyright laws also provide for the protection of moral rights, which give authors the right of attribution, the right to prevent false attribution and the right to have copyrighted works treated with integrity.

Copyright arises automatically on creation of a work and generally continues for 70 years after the death of the author. Australia is a member of the various international conventions on copyright and so affords reciprocal protection for copyright recognised in other member countries.

The Copyright Act 1968 (Cth) ('the Copyright Act') has been through a number of reforms to address copyright issues arising in the 'internet age' and as a result:

- protects copyright owners from the unauthorised digitisation of their works and unauthorised communication of their works over the internet and other electronic means;
- limits the liability of internet service providers and software manufacturers for copyright infringement by users of their facilities and software; and
- prohibits the making, sale, distribution and use of circumvention devices for the purpose of circumventing a technological protection measure.

Prohibition of unauthorised imports is subject to significant exceptions. The Copyright Act permits the parallel importation of overseas published books and sound recordings, as well as, more recently, electronic literary and music items and computer software.

9.4 Designs

The Designs Act 2003 (Cth) (the 'Design Act') provides for the registration and protection, for a period of up to ten years, of any design that is both 'new' and 'distinctive'. A design is the 'overall appearance of a product resulting from one or more visual features of a product', including shape, configuration, pattern and ornamentation.

Registration in Australia requires that the design be novel and not have been publicly used in Australia or published in a document anywhere in the world prior to applying for registration in Australia.

A person infringes a registered design if they deal in certain ways with a product that embodies the design or a substantially similar design. A defence applies for spare parts, allowing third parties to manufacture legitimate spare parts for complex products without infringing the registered design in the complex product.

9.5 Other

9.5.1 Domain names

Various classes of domain names ending in .au may be registered. Domain names ending in .com.au and .com are the most popular as addresses for commercial entities operating in Australia. For a .com.au domain name, a substantial and close connection must exist between the commercial entity and that entity's domain name, which can be demonstrated by reference to the trademarks, 'nicknames' or acronyms of an entity, not just its company or business name.

Registration of a .com.au domain name does not create any proprietary rights in the name. Australian courts will, however, recognise rights in domain names where there is a reputation or goodwill in the name.

9.5.2 Trade secrets and confidential information

Both through contract and where information is imparted in confidential circumstances for a limited purpose, effective protection can be provided for technical know-how, customer lists and other confidential information against disclosure and use for an unauthorised purpose.

9.5.3 Plant breeders' rights

The plant breeders' rights scheme allows certain varieties of plant species to be registered, granting the breeder exclusive commercial rights with respect to that variety of plant.

Registration requires that the variety be distinct, and for propagations to be uniform and stable, and gives the breeder a series of exclusive rights including producing, selling and exporting the plant material. Protection may last for up to 25 years depending on the plant species.

9.5.4 Circuit layouts

Circuit layouts are automatically conferred protection under the Circuit Layouts Act 1989 (Cth), so there is no requirement to register the layout in order to be granted the exclusive right to copy, commercially exploit in Australia, or make an integrated circuit of the layout. Circuit layouts may be protected for a term of up to 20 years.

Chapter 10: Financing

Alberto Colla, Minter Ellison, Melbourne

10.1 Licensing requirements for banks

The principal licensing obligations for banking in Australian arise under the Banking Act 1959 (Cth), National Consumer Credit Protection Act 2009 (Cth) and the Corporations Act. A Bank seeking to provide customers with the full ambit of banking services will have licensing requirements and associated obligations under each piece of legislation.

The obligations will vary depending on who is receiving the banking service (ie, retail or wholesale client) and what type of banking service being offered (eg, credit and home loans, deposit or investments products, payment products or products to manage risk such as derivatives).

10.2 Banking business – ADI licence

An entity must be authorised as an authorised deposit-taking institution (ADI) by the Australian Prudential Regulation Authority (APRA) before it can carry on banking business in Australia. A 'banking business' includes the taking of money on deposit, the making of advances of money or any other financial activities prescribed under the Banking Act. It is an offence to conduct banking business without a proper authority.

Only corporations can obtain an ADI licence. APRA will not consider applications from partnerships, associations or other types of unincorporated entities. APRA expects that all applicants will be able to comply with the various prudential standards from the commencement of its banking operations. Applicants must satisfy the following:

- capital requirements;
- shareholding ownership rules;
- governance standards;
- adequate risk management and internal control systems;
- compliance mechanisms;,
- information and accounting systems; and
- have external and internal audit arrangements.

Foreign banks which are authorised to carry on a banking business in an overseas jurisdiction can apply to APRA to conduct a banking business through an Australian branch. Deposits in foreign ADIs do not receive the benefit of Australia's financial claims scheme and foreign ADIs are usually restricted to conditions relating to the opening of deposit account (requiring a minimum balance) that in practice effectively restrict them to the wholesale market.

Foreign banks merely opening a representative office in Australia (not a full branch) are also regulated under the Banking Act and are required to obtain the written consent of APRA. Consent is required for foreign banks to use the word 'bank' or its equivalent as part of the bank's corporate name in connection with maintaining a representative office.

10.3 Australian Financial Services Licence (AFSL)

Any entity intending to run a financial services business in Australia is required to hold an AFSL unless an exemption applies. Most Australian Banks will hold an AFSL. Those who hold an AFSL are subject to regulation by ASIC.

Under the Corporations Act, financial services include:

- providing advice in relation to financial products;
- dealing in a financial product'
- making a market for a financial product;
- operating a registered managed investment scheme;
- providing a custodial or depository service; and
- providing traditional trustee company services.

Financial products broadly fall into three categories:

1. products through which a person makes an investment;
2. products through which a person manages a risk; and
3. non-cash payment products.

Banking services that are financial products include derivatives, debentures, foreign exchange contract and contracts of insurance (see further section 764A, Corporations Act). Importantly, consumer credit is not regulated under the Corporations Act.

An AFSL identifies whether the holder is authorised to provide services to retail and/or wholesale clients. There are additional protections which apply to retail clients (eg, provision of a Financial Services Guide) which do not apply to wholesale clients. Wholesale customers are customers like larger corporations but can include high net worth individuals with an assumed level of business sophistication. The AFSL will also identify the particular products or services which the holder is authorised to provide. This may mean that when a financial institution engages in a new type of business it must seek a variation to its licence to include new areas of business not previously covered by its AFSL.

10.4 Australian Credit Licence (ACL)

Since 1 July 2010, a national licensing scheme has applied to entities who engage in credit activities (including the provision of leases) in relation to consumers under the National Consumer Credit

Protection Act 2009 (Cth) (NCCP). Most of the specific requirements are contained in the National Credit Code (Schedule 1 to the Act) (NCC). ASIC is responsible for administering the NCCP.

Generally, the NCC applies to credit that is provided to a natural person or strata corporation and it is provided wholly or predominately for personal, household or domestic purposes or residential property investment (see section 5 of NCC for a full definition). Common examples of regulated products are home loans, credit cards and personal loans. Loans for business purposes are not regulated under NCCP.

Australian financiers who lend to consumers must hold an ACL and are subject to the responsible lending obligations under the NCCP. Responsible lending requires the licensee to make reasonable inquiries about the consumer's requirements and objectives and to take reasonable steps to verify the consumer's financial situation to ensure that a loan is not unsuitable.

A bank engaged in consumer credit activities would need to hold both an AFSL and an ACL.

10.5 Compliance with the Anti-Money Laundering and Counter Terrorism Financing Act (AML/CTF)

The purpose of the AML/CTF regime is to identify and track money that is either the proceeds of criminal behaviour or that is to be used for the funding or terrorist activities. The current Anti-Money Laundering and Counter-Terrorism Financing Act 2006 (Cth) and the Anti-Money Laundering and Counter-Terrorism Financing Rules Instrument 2007 (No 1) (Cth) was passed by Parliament in 2006; it replaced the earlier regime, known as the Financial Transactions Reports Act, which dated back to 1988.

An organisation may be caught by the AML/CTF regime if it provides a 'designated service' which may fall within one of three broad categories: financial services, bullion services or gambling services. Banking services such as the provision of deposit accounts, loans and remittance services are included in the definition of designated services. If an entity provides a 'designated service' then it will be considered a 'reporting entity' under the AML/CTF Act and will have to register with the Australian Transaction Reports and Analysis Centre (AUSTRAC).

Reporting entities must have an AML/CTF compliance programme and, amongst other obligations, are expected to verify the identity of each customer (ie, Know Your Customer requirements), conduct ongoing monitoring obligations and observe mandatory reporting obligations (triggered by cash transactions above a specified threshold and international funds transfer and suspicious matters).

10.6 Unfair contract terms (UCT) for small business and consumer lending

The Australian Securities and Investments Commission Act 2001 (Cth) (the 'ASIC Act') contains a number of basic protections for consumers and small businesses in relation to the provision of financial products and credit. These include protections from unfair contract terms in standard form contracts. ASIC is the relevant regulator for financial products and services offered to consumers and small businesses.

Following the 2018 Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry there has been significant activity by ASIC in the banking sector to ensure that banks are not imposing unfair contract terms on their consumers and small businesses.

Chapter 11: Privacy laws and data protection

Alberto Colla, Minter Ellison, Melbourne

The Privacy Act 1988 (Cth) is the primary means of privacy protection in Australia. It applies to the handling of personal information and also has specific requirements for handling credit and tax file number information. Compliance with the Privacy Act is regulated by the Australian Information Commissioner (Commissioner) and their office (the OAIC).

Australian privacy laws are principles based. The Privacy Act contains 13 Australian Privacy Principles (APPs) that set out how both private sector organisations and public sector agencies must collect, use, disclose and store personal information.

The APPs also give individuals certain information privacy rights:

- a right to access the personal information an entity holds about them;
- a right to correct that information; and
- a right to make a complaint and have it dealt with.

There are restrictions on using personal information for direct marketing purposes and other laws will apply if direct electronic marketing (eg, emails, texts) or telemarketing is being conducted. While personal information may be disclosed overseas, certain steps must first be taken and entities generally remain accountable for the handling of the information by the overseas recipient. Employers' handling of personal information about their current or former employees is exempt from the Privacy Act.

The Privacy Act gives the Commissioner functions and powers, including the power to receive and investigate privacy complaints, make determinations (including payment of compensation), conduct own motion investigations, seek enforceable undertakings from an entity, and apply to court for civil penalties.

The Privacy Act also includes a notifiable data breach scheme, which requires regulated entities to notify eligible data breaches (ie, where a person is likely to suffer serious harm from a privacy data breach) to the Commissioner and affected individuals. Entities must also assess suspected eligible data breaches.

11.1 The consumer data right

In 2019 the Australian government begun implementing new laws that create a consumer data right for consumers (individuals and businesses) in Australia. The purpose of the right is to:

- give consumers greater control over access to, and direct sharing of, their consumer data; and
- increase competition in a sector by making it easier for consumers to compare product offerings.

The consumer data right regime currently applies to the banking and energy sectors and will be implemented on a sector-by-sector basis with more to follow.

Chapter 12: Competition law

Alberto Colla, Minter Ellison, Melbourne

The Australian Competition and Consumer Act 2010 (Cth) (CCA) (formerly known as the Trade Practices Act) regulates competition and consumer protection law in Australia.

The competition provisions of the CCA are based on anti-trust legislation in the US and are not dissimilar to the anti-trust provisions of the European Community's Treaty of Rome. The CCA prohibits:

- cartels;
- resale price maintenance;
- anti-competitive concerted practices;
- misuse of market power;
- exclusive dealing;
- anti-competitive mergers; and
- a range of unfair business practices, including when dealing with consumers and small businesses.

It also imposes obligations on businesses designed to protect consumers, provides an access regime for essential facilities and provides a specific access and competition regime for the telecommunications industry.

The Australian Competition and Consumer Commission (ACCC) is responsible for administering and enforcing the CCA. It has the power to authorise, on public benefit grounds, conduct that may otherwise breach the CCA.

There are significant consequences for contraventions of the CCA, including potential imprisonment, fines, compensation, corrective action and other orders.

12.1 Cartels and retail price maintenance

The CCA prohibits anti-competitive behaviour, such as agreements between competitors to:

- fix, maintain or control prices;
- split up a market or customers;

- restrict or limit supply, production, capacity or acquisition;
- rig bids; and
- imposing a minimum resale price or inducing resellers to not sell products below a specified price.

12.2 Concerted practices and other anti-competitive agreements

The CCA also prohibits 'concerted practices', being coordination between corporations which may otherwise fall short of an agreement, arrangement or understanding that has the purpose, effect or likely effect of substantially lessening competition in a market.

The CCA also prohibits agreements, arrangements or understandings that have the purpose, effect or likely effect of substantially lessening competition in a market.

12.3 Misuse of market power

It is illegal for a corporation with a substantial degree of market power to engage in conduct which has the purpose, effect or likely effect of substantially lessening competition.

12.4 Exclusive dealing

Various forms of exclusive dealing (including restrictions on acquiring or supplying) are illegal if they have the purpose, effect or likely effect of substantially lessening competition in a market.

12.5 Mergers and acquisitions

The CCA prohibits the acquisition of shares or assets of a company if the acquisition is likely to have the effect of substantially lessening competition in a market in Australia.

The acquisition of a foreign company by another foreign company may be subject to the CCA if, as a consequence, a controlling interest in a company in Australia is acquired.

The ACCC undertakes reviews of mergers and acquisitions which raise (or may raise) competition concerns.

Chapter 13: Dispute resolution

Alberto Colla, Minter Ellison, Melbourne

13.1 Structure of the courts

Under Australia's Constitution and the doctrine of 'separation of powers', the judiciary is independent from the executive and legislative arms of government.

The High Court stands atop both the federal and state courts in Australia. It has jurisdiction over constitutional matters, international law cases and all final appeals from lower courts.

The Federal Court of Australia has jurisdiction over civil matters arising under federal laws, as well as criminal cases involving federal crimes. There are federal courts located in all states and territories. Taxation, consumer law, bankruptcy, industrial relations and corporations law are examples of the types of matters heard in the federal jurisdiction. The Federal Circuit Court of Australia sits at the bottom of the federal court hierarchy, hearing less complex disputes involving federal laws.

The state court systems are similar across all states and territories. There is generally a superior court (the Supreme Court), an intermediate court (known as the District Court in NSW, and the County Court in Victoria) and a lower court (known as the Local Court in NSW, and the Magistrates' Court in Victoria). The majority of civil and criminal offences in Australia are state offences, and the state courts hear the vast majority of cases. Courts atop the state court hierarchy hear cases with large potential financial penalties and custodial sentences, while lower courts hear smaller civil matters, less serious indictable offences, and summary offences.

13.2 Use of arbitration

International commercial arbitration in Australia is governed by the International Arbitration Act 1974 (Cth) which is based on the United Nations Commission on International Trade Law (UNCITRAL) Model Law. This provides for various matters, including the staying of court proceedings capable of settlement by arbitration and the enforcement of awards under various arbitration conventions.

By the operation of this act, arbitration is very much in use in Australia. Courts are required to refer parties to arbitration when presented with an unresolved matter covered by an arbitration agreement, and arbitration agreements are often interpreted approvingly by the courts. Australian courts have also held that arbitration awards are consensual and private, therefore not subject to challenge on the basis of constitutional invalidity.

Domestic arbitration is also frequent and consistent across states and territories, with uniform legislation across each domestic jurisdiction.

13.3 Other forms of dispute resolution

Alternative dispute resolution (ADR) is extremely common in Australia. Courts are considered a last resort and parties are often required to engage in alternative dispute resolution mechanisms before they may proceed with litigation in court.

The most common ADR process is mediation. This typically involves a meeting between two parties in a disagreement, moderated by a third-party mediator. The mediator has no authority to impose a settlement, and the process is strictly voluntary. However, by identifying issues and assessing options, mediation is highly successful in helping parties reach a compromise and arrive at a settlement.

The ADR process is broader than just mediation, extending to expert appraisals, private judgments and online dispute resolution. It is cheaper than litigation, faster, involves flexible settlements, enables the private resolution of disputes and can leave both parties highly satisfied.

China

Chapter 1: Introduction

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1.1 General legal framework

The legal system of the People's Republic of China (PRC or China; for the purpose of this guidebook, referring only to Mainland China) is a civil law system influenced by both German law as well as the former Soviet Union's legal system. The sources of law mainly include the Constitution of the PRC; national laws enacted by the National People's Congress (NPC) and its Standing Committee; administrative regulations promulgated by the State Council; and regulations and rules promulgated by the ministries and local legislative bodies. Legal practice in the PRC exhibits distinctive regional patterns at the provincial level. Major cities and special economic zones, as local legislative bodies, enjoy a certain degree of local legislative power.

The judiciary is organised into a hierarchical structure with the Supreme People's Court (SPC) at its apex, followed by higher, intermediate and basic people's courts. On 1 January 2019, the Intellectual Property Court of the SPC was established. At present, China has established four local intellectual property (IP) courts and 27 intellectual property tribunals. Foreign enterprises often choose to settle IP disputes in these IP courts.

Although China does not acknowledge binding case precedents, judicial practice still draws on the experience of common law in crafting decisions. The SPC began releasing 'guiding cases' in 2011 and, to date, the number has risen to over 200 cases. While not a formal source of law, 'guiding cases' are a form of judicial interpretation used to harmonise judicial standards and adjudication. To decrease discrepancies resulting from similar cases, the SPC issued Implementing Measures for the Uniform Application of Laws on 1 December 2021. According to these measures, all courts must apply to the SPC for resolutions if they find that any pending case may conflict with the SPC's effective judgments.

1.2 Recent legal developments

After 40 years of rapid economic development, China has entered a new economic phase with the goal of high-quality growth, necessitating continuous legal reforms to keep pace with social and economic changes. Since joining the World Trade Organization, China has developed a comprehensive legal system. As of March 2023, the PRC has adopted its Constitution, enacted 294 laws, and promulgated approximately 599 administrative rules and 13,000 local regulations. Significant efforts have been made since 2012 to revise and harmonise existing laws to meet contemporary needs.

A landmark achievement in China's legislative history is the enactment of its first Civil Code on 28 May 2020. This legislation, effective from 1 January 2021, consolidates various laws into a cohesive framework, covering general provisions, real rights, contracts, personality rights, marriage and family, inheritance, and tort liability. Additionally, the revised Securities Law,

effective from 1 March 2020, aims to establish a multi-tier capital market system with stringent supervision and risk control, promoting a registration system for securities issuance, increasing penalties for violations and enhancing investor protection.

For international investors, a significant change is the Foreign Investment Law of the PRC, effective from 1 January 2020, which replaces three foreign investment laws dating back to their original adoption between 1979 and 1988 and revised from time to time. The unification of the three laws into one aims to facilitate foreign investment into China.

As China moves towards becoming an innovation-driven economy, it has strengthened intellectual property protection to safeguard both foreign and domestic creators. The E-Commerce Law, effective from 1 January 2019, imposes obligations on e-commerce platforms to protect intellectual property. The revised Trademark Law, implemented in late 2019, and the updated Patent Law, revised in 2020, further promote patent utilisation and protection. In 2024, a draft amendment to the Anti-Money Laundering Law was submitted to the Standing Committee of the NPC for deliberation, aiming to prevent and control emerging money-laundering risks. The newly revised Law on Guarding State Secrets, also updated in 2024, enhances the classification and declassification system.

Lastly, the amended Company Law, effective from 1 July 2024, aims to improve the business environment, strengthen property rights protection and support the development of the capital market. This revision addresses the corporate capital regime, corporate governance and shareholder protection.

This handbook briefly covers China's business environment, legal framework and business operations in the following chapters.

Chapter 2: Business environment

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Since the initiation of economic reforms in the late 1970s, China has experienced an economic growth averaging nine per cent annually, which is far higher than the world's economic growth rate during the same period. China has become the world's second-largest economy since 2010, accounting for about 18 per cent of the world economy, and is now one of the top trade and foreign direct investment (FDI) inflow countries.

A comprehensive industrial system has been established. In recent years, China has been seeking economic growth pattern transformation from the traditional investment-driven industries to technology and innovation-driven and environmentally friendly industries. The government has promulgated relevant documents, such as the Guidance Catalogue of Industrial Structure Adjustment by the National Development and Reform Commission (NDRC) on 30 October 2019 and last amended on 27 December 2023, and the Catalogue of Encouraged Industries for Foreign Investment by the NDRC and Ministry of Commerce of the PRC (MOFCOM) on 30 June 2019 and

last amended on 26 October 2022, to encourage investment in new industries. Meanwhile, market size and diversity across the country also offer diverse investment opportunities.

Laws and policies are constantly evolving to keep up with the rapid economic development of the past four decades, recording or guiding the changes and developments in the business field. China's centrally controlled political system has enabled the NPC and central government to promulgate legislation that is universally applied across the whole nation. On the other hand, the ministries and the local congresses and governments may issue industry or locality-specific legislative documents or policies with more guidance to bridge the gap and reduce ambiguity in laws. It is thus important for investors to keep track of changes in laws and their subordinate regulations and rules, and understand the practical differences in different localities.

The business environment has been continuously improving, especially in recent years. According to the *World Investment Report 2023* released by UN Conference on Trade and Development, the amount of foreign direct investment attracted by China in 2022 increased byfive per cent, reaching a record high of US$189.1bn. This chapter presents a snapshot of China's business environment.

2.1 Starting a business

China implements a unified negative list of market entry. In areas other than those listed on the negative list, entry is equally open to all kinds of market entities. For foreign investors, a negative list of foreign investment is also applicable and the principle of the national treatment for foreign-invested enterprises (FIEs) is adopted.

Except for a few businesses which should obtain licences in advance as required by law, investors can go directly to register the business entity with the State Administration for Market Regulation (SAMR) or its local branches. The SAMR is now actively promoting the use of an online 'one-stop' application procedure, that is, completing all formalities required for starting a business via an online centralised platform, including obtaining the business licence, the company chops (seal/stamp) and taxation registration. Nowadays, the timeline for the SAMR to deal with formalities for starting a business is shortened to within five working days. Many local governments have promised a shorter timeline, for instance, the local branches of the SAMR in Beijing and Shanghai have promised that all formalities will be completed within one day if the application materials are in order.

2.2 Enforcing contracts

Investors can enforce a contract via litigation at court or arbitration (if arbitration is chosen by the parties). China's courts adopt the two-instance trial system, and judgments and orders of the second instance court are final and enforceable in general, except that, under exceptional circumstances, the parties can apply for a retrial of the case. Summary procedure is also available for simple cases. The court's decisions are published online with limited exceptions of, for instance, divorces cases and cases involving state secrets. Arbitration is also an effective and well-recognised way to resolve disputes. Courts generally recognise and enforce effective arbitration awards, including foreign arbitration awards, because China is a party to the Convention on the Recognition and Enforcement of Foreign Arbitration Awards (the 'New York Convention').

2.3 Registering property

Land in China is owned by the state or, in rural areas, by collective organisations. A private party can obtain the land use right and the ownership of houses built on the land. The land use right and house ownership can, and should, be registered with the real estate administration authority so that the land use right and house ownership are formally established. In the same way, the mortgage on the land use right or house ownership should be registered. The registration is carried out using the centralised, electronic and computer-based registration system managed by the real estate administration authority of each city. The rights holder and interested party may access the information maintained in the registration system.

2.4 Obtaining credit

Commercial banks consist of large-scale state-owned banks, medium-sized joint-stock banks, small-scale urban commercial banks and rural credit cooperatives. All commercial entities have access to financing from a bank, subject to the bank's review of the borrower's credit. A commercial loan provided by a bank is mainly priced by reference to the loan prime rate (LPR). Generally, banks are willing to accept the borrower's real estate and movable property as collateral. Laws also permit the use of certain kinds of rights as collateral, such as shares or equity interests in companies, patents, copyrighted content, trademarks, accounts receivable, bonds, deposit certificates, warehouse receipts and bills of lading. Generally, the perfection of a mortgage and pledge is accomplished by registration with the relevant registration authorities in charge; and the perfection of a pledge over a tangible movable property is accomplished through the transfer of possession of the property by the pledgor to the pledgee. The secured party enjoys the priority of being repaid from the proceeds of the disposal of the collateral.

2.5 Obtaining electricity

Generally, obtaining electricity requires the submission of a request for electricity demand, an application for a signing contract and power connection construction. In Shanghai, the local government has promised that the process of power supply for low-voltage projects will take ten days. In Guangzhou, for low-voltage non-residential users, it will take no more than three days to complete the process if the construction of external lines is not required, and no more than eight days if the construction of external lines is required.

2.6 Dealing with construction permits

China has established a comprehensive system covering the whole process from the granting of a land use right and issuance of a construction permit to the completion, acceptance and registration of real property. The government makes an effort to streamline the process and requires a reduction of the time required to within 120 working days, including by simplifying the requirements for low-risk construction projects, reducing the time to receive water and drainage connections, and promoting the integration of multiple verifications and joint acceptance. In Shanghai, the local

government has implemented an online and offline 'one-stop centre' process for low-risk industrial projects in order to reduce the approval process to within 23 days.

2.7 Trading across borders

Enterprises may carry out independent cross-border trade (goods and technology) after filing with the commercial authority and registering with customs. The import and export of goods and technologies are subject to a list of prohibited or restricted goods and technologies issued by the state. Customs are piloting a 'two-step declaration' customs clearance model by which the enterprise may take delivery of goods after a summary declaration upon the consent of customs, and complete the entire declaration within a specified time.

The general trend for cross-border technology trade is that conditions for technical cooperation are primarily determined by the parties involved through consultation in accordance with the principle of fairness. Notably, some relevant regulations have been amended. For instance, the statutory provisions in relation to guarantee obligations by the transferor and entitlement to the improvement of intellectual property rights were removed from the Regulations on the Administration of Technology Import and Export (promulgated by the State Council on 10 December 2001 and the latest amended on 29 November 2020), which used to be a subject of consultation between the transferor (licensor) and transferee (licensee).

2.8 Protecting minority investors

For a limited liability company, laws provide for the protection of the rights and interests of minority shareholders in certain circumstances. For instance, the Company Law (promulgated by the Standing Committee of the NPC on 29 December 1993 and last amended on 29 December 2023) provides that if a company has been profitable for five consecutive years and meets the conditions for profit distribution but fails to make dividends for five consecutive years, the shareholder who votes against such a shareholders' resolution has the right to request that the company purchases its equity at a reasonable price. Company Law also provides that the shareholder may launch litigation in the case of damage to the shareholder's interests caused by misbehaviour from directors or senior managers, or in the case of damage to the company's interests. In addition, protective provisions that are prevalent in international markets can also be commonly seen in China's investment cases, especially those with private equity funds, for example, veto rights, the supermajority voting requirement, pre-emptive rights, redemption rights, liquidation preferences, and tag-along and drag-along rights.

For a public company, laws and regulator's rules provide some additional protections to minority shareholders, such as cumulative voting; restrictions on the amount of and time for controlling shareholders to sell stock; and a more stringent approval procedure for the company to provide security for the shareholders or *de facto* controller of the company. Chinese companies have the option to list publicly in domestic and/or overseas stock markets. For those that are listed overseas, directly or indirectly, the interests of minority shareholders are protected by local applicable rules.

2.9 Improving the business environment

The Chinese government has made significant efforts to improve the business environment in recent years. To this end, in addition to the promulgation of the new Foreign Investment Law in 2019, a series of regulations have been issued. The State Council issued the Regulations on Optimizing the Business Environment on 22 October 2019. Subsequently, the Ministry of Finance, SAMR, State Intellectual Property Office, Ministry of Natural Resources and other ministries/commissions have issued circulars on the implementation of the Regulations on Optimizing the Business Environment. Major cities, such as Beijing, Guangzhou, Shanghai and Shenzhen, have also issued local regulations on optimising the business environment. All of these have created a positive influence on the investment convenience for investors.

Chapter 3: Business and corporate structures

Liu Ning, JunHe, Shanghai

3.1 Structures for doing business in China and relevant laws

3.1.1 Structures for doing business

Companies and partnerships

Companies and partnerships are two major ways for foreign investors to structure a business in China. Companies are independent legal persons, whose liability shall be limited to the companies' assets.

Partnerships do not operate as independent legal persons; investors or founders shall bear unlimited liability if the assets of partnerships are insufficient to pay off the debts. Most FIEs take the form of companies, and partnerships are more often seen and used in foreign investment in the venture capital and private equity fields.

Limited liability company and companies limited by shares

Companies in the PRC include limited liability companies and companies limited by shares. Compared with limited liability companies, there are stricter requirements for forming and operating companies limited by shares in terms of corporate governance, public disclosure and so on. Most foreign investors choose the form of limited liability companies for new investment. Businesses aiming at a public listing in a stock exchange in the PRC may consider choosing the form of a company limited by shares from the beginning, as it is the only acceptable form of organisation for a public listing in the PRC.

3.1.2 Legal requirements under relevant PRC law

The major law governing PRC companies is the PRC Company Law, which was initially promulgated by the Standing Committee of the NPC in 1993 and subsequently amended in 1999, 2004, 2005, 2013, 2018 and 2023.

General requirements for a limited liability company

Pursuant to the Company Law, a limited liability company (the most commonly used form by foreign investors) shall have less than 50 shareholders, and its registered capital shall be the amount of capital contribution subscribed by all shareholders registered with the company registration authority. Capital contributions may be in cash or in-kind (eg, intellectual property, land use rights and other non-cash properties that can be valued and transferred in accordance with the law). Except certain special industry and business as specifically required under relevant laws, there is no requirement for a minimum amount of capital contribution. Unless otherwise stipulated by law, the amount of capital contributions subscribed by all shareholders shall, according to the articles of association of the company, be fully paid up by the shareholders within five years as of the date of establishment of the company.

Unless otherwise provided in the articles of association, the shareholders are entitled to profit sharing in accordance with the ratio of their capital contribution. In the event that a shareholder proposes to transfer its equity interests to a non-shareholder, other shareholders shall have the right of first refusal under equivalent conditions. The legal representative of the company who represents the company in civil activities shall be the director or manager of the company who represents the company to execute corporate affairs. In addition, the legal representative shall be registered with the company registration authority, and all such information is available to the public in China through a public search.

Governance structure of a limited liability company

The governance structure of a limited liability company under the PRC Company Law consists of: (1) the shareholders' meeting; (2) the board of directors (exception: companies with a small scale or a small number of shareholders may choose to appoint a sole director instead of the board of directors); (3) the board of supervisors (exception: (i) the audit committee, which is a specialised committee under the board of directors and composed of directors; (ii) companies with a small scale or a small number of shareholders may choose to appoint a sole supervisor instead of the board of supervisors; furthermore, with the unanimous consent of all shareholders, the company may decide not to have a supervisor at all); and (4) the managerial staff (optional; not mandatorily required to have), usually including a manager and other board-appointed officers, such as a deputy manager and a chief financial officer.

If a limited liability company has 300 or more employees, the board of directors shall include the employee representative(s) of the company unless the board of supervisors has been established and includes employee representative(s) of the company according to law. Specifically, the board of supervisors shall have at least three members, with the proportion of the employee representative(s)

not less than one-third of the total number of the members. The employee representative(s) in the board of directors (or the board of supervisors, if applicable) shall be democratically elected by the employees through the employee representative assembly, employee general assembly, or other forms of democratic elections.

The shareholders' meeting is the authority of the company, which shall decide the most important matters of the company. The board of directors is the executive organ of the shareholders' meeting, which shall have at least three board members (in the case of companies with a small scale or a small number of shareholders, the board of directors can be replaced with one sole director). The board of supervisors (or the audit committee, or the sole supervisor) shall exercise supervisory functions over the company. The manager is responsible to the board of directors. The manager exercises his/her rights and duties pursuant to the Company Law and the articles of association of the company.

3.2 Statistics on newly established foreign investment enterprises

Pursuant to the official statistics of the National Bureau of Statistics of the PRC, from January 2023 to December 2023, the newly established FIEs in China totalled 53,766, up by 39.7 per cent year-on-year. Actual use of foreign investment reached US$163.3bn, down by 13.7 per cent year-on-year; among which 13,649 FIEs are invested in by investors from Belt and Road countries, up by 82.7 per cent year on year.

3.3 Free trade zones

Free trade zones (FTZs) in China are a specific class of special economic zones where goods can be landed, handled and re-exported without the intervention of customs authorities. China's opening-up policy has driven the establishment of FTZs in major cities and regions over the past several years. The first FTZ was launched in Shanghai in 2013 as a milestone in doing business in China. To date, FTZs have been launched in 22 cities/regions in China: Chongqing, Fujian, Guangdong, Guangxi, Hainan, Hebei, Henan, Heilongjiang, Hubei, Jiangsu, Liaoning, Shandong, Shanghai, Shanxi, Sichuan, Tianjin, Yunnan, Zhejiang, Beijing, Hunan, Anhui and Xinjiang.

The common goal of FTZs is to implement new models and innovative and preferential policies to improve the business environment, attract investment and offer geographical advantages for trade, administrative services, flow of capital, openness of transportation, taxation and so on. Each FTZ may have its own development priorities, for example, among the six new FTZs launched in August 2019, the Guangxi FTZ seeks to tap cooperation potential with Association of Southeast Asian Nations (ASEAN) members, build a land-sea corridor for international trade and develop border areas. The Shandong FTZ, launched at the same time, regards institutional reform as its priority. It aims to carry out reforms on 16 administrative service items and release more than 20 guidelines on optimising administrative services to be provided by the local government.

Based on the Foreign Investment Law which came into effect on 1 January 2020, as well as other related PRC laws and regulations, FTZs in China have been continuously implementing institutional reforms and innovative measures to further optimise the business environment.

3.4 Legal risks and challenges

3.4.1 Requirement for licences or permits

Besides a business licence, if an FIE is engaged in a certain specific business sector, it may need to apply for specific licences or permits from the particular government authority that supervises that sector. Most of these licences and permits are the same as those of domestic enterprises. For example, an FIE that intends to engage in the sale of pharmaceuticals shall obtain an operating permit from the relevant drug administration bureau. If an FIE intends to engage in the value-added telecommunication business, it shall obtain an operating permit from the relevant industry and information technology bureau. The time for obtaining licences and permits may vary due to the different requirements of different government authorities.

In recent years China has gradually promoted decentralisation and the transformation of government functions. As a result of such reform, many licences or permits that were in the past obtained before registration with the market supervision authority for a business licence have either been cancelled or changed, so that they are obtained after the issuance of the business licence. The central and local governments publish a list of permits or licences that shall be obtained before registration for business licences; permits or licences not included in such a list can be obtained after the issuance of the business licence and before relevant business is carried out by FIEs.

3.4.2 Foreign Investment Law

Pursuant to the Foreign Investment Law of the PRC, the organisation form, structure and operating rules of FIEs are subject to the provisions of the Company Law, the Partnership Enterprise Law and other applicable laws. FIEs established in accordance with the three old foreign investment laws before the Foreign Investment Law of the PRC came into effect may keep their original organisational forms for five years after 1 January 2020; that is, existing FIEs established in accordance with the three old foreign investment laws shall take action to change their organisation forms within five years and shall operate in accordance with PRC Company Law or other applicable laws from 1 January 2020.

3.4.3 Compliance with environmental laws

In recent years the PRC government has increasingly emphasised environmental protection. This requires foreign investors to pay more attention to compliance with environmental laws, especially with respect to the establishment of manufacturing enterprises.

3.4.4 Labour costs

Labour costs in China continue to rise, especially in the form of wages and welfare across urban areas, which is another factor that needs to be taken into account by foreign investors.

Chapter 4: Takeovers (friendly M&A)

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4.1 Takeovers of non-listed companies

4.1.1 Regulatory framework for the acquisition of non-listed companies

There is various legislation governing M&A (mergers and acquisitions) in China, which, to a certain extent, makes it challenging for foreign investors that do not have much experience in foreign investment in China via M&A.

Generally, in terms of non-listed companies, both the target and acquiring companies are required to comply with, among other things, the primary laws and regulations, including the Company Law of the PRC and the Foreign Investment Law of the PRC.

More specifically, foreign investors may also need to follow the detailed requirements contained in the Provisions on Merger and Acquisition of Domestic Enterprises by Foreign Investors (the 'M&A Rules'), which was first released by the State Administration for Industry and Commerce and nine other governmental authorities in 2006 and was last revised in 2009. The M&A Rules have been important rules in China for M&A by foreign investors for many years. The M&A Rules require, among other things, that: (1) the purchase price be determined based on the valuation of the target by a qualified Chinese appraisal firm; (2) domestic enterprises or individuals' acquisition of affiliated companies through controlled overseas companies be approved by the MOFCOM; and (3) an acquisition be filed with the MOFCOM if such an acquisition will cause a change of control over a domestic company owning any renowned trademark or China's time-honoured brands.

The promulgation of the Foreign Investment Law has aroused fierce discussions in the market over the validity of the M&A Rules, partly because certain provisions of the M&A Rules may conflict with the new Foreign Investment Law. However, as of the end of June 2024, the M&A Rules are still in effect, without being invalidated.

4.1.2 M&A statistics for non-listed companies

Based on the statistics sourced from MOFCOM, M&As in China by foreign investors became more and more active in 2015. Particularly, in 2015, 1,466 new FIEs were established in China by way of M&A, up 14.4 per cent year-on-year, with the actual use of foreign investment amounting to US$17.77bn, up 137.1 per cent year-on-year. The share of M&A in the total amount of actual foreign investment increased from 6.3 per cent in 2014 to 14.1 per cent in 2015.

In addition, from January to November 2016, the actual use of foreign investment contributed by foreign investor's M&As maintained steady growth. In particular, 1,466 new FIEs were established

in China through M&A, with the actual use of foreign investment amounting to RMB 123.5bn, up 15.6 per cent year-on-year, accounting for 4.5 per cent and 16.9 per cent of the total number of newly established FIEs and the total amount of actual use of foreign investment, respectively.

4.1.3 Typical methods of acquisitions for non-listed companies

Under PRC laws, typically, a foreign investor could take over a domestic company by either: (1) equity acquisition by which a foreign investor will purchase equities in the target from its original shareholder(s); or (2) asset acquisition, by which a foreign investor may set up a new FIE in China to purchase the target's assets, or purchase the target's assets first and then invest such assets in the establishment of a new FIE to operate such assets.

A typical M&A transaction involves, *inter alia*, target search and approach, negotiations with the target, valuation, deal structuring, due diligence, closing and post-acquisition integration. Taking equity acquisition as an example, the acquisition of a domestic company by a foreign investor typically and primarily involves, among other things, the following steps:

- reaching a term sheet with the target company and its shareholder(s) on the key commercial terms;
- conducting due diligence investigations (financial, legal, compliance, intellectual property, human resources, etc) into the target company;
- preparing and executing an equity purchase agreement, an investment agreement/ shareholders agreement, the amended and restated articles of association of the target company, and other transaction documents (if applicable);
- upon the satisfaction of all other conditions precedent, the target company applying to various governmental authorities for changing relevant registration/filing information so as to properly register/record the foreign investor as a shareholder of the target company; and
- the foreign investor paying transaction consideration, the payment timeline of which may be adjusted based on the deal structure.

4.1.4 Other considerations in the acquisition of a PRC non-listed company

China has a sophisticated regulatory regime for M&A by foreign investors. Apart from the primary legislation mentioned above (ie, the Company Law, the Foreign Investment Law and the M&A Rules), there are other considerations to consider regarding M&A transactions in China, such as those illustrated, but not limited to, the below.

Merger control review

Pursuant to the Anti-Monopoly Law of the PRC, if an M&A transaction constitutes the 'concentration of undertakings' as provided in the Anti-Monopoly Law, and if such concentration has reached the threshold of notification set forth by the State Council of China, then such an M&A transaction will be subject to a merger control review, and the parties to such concentration shall make an anti-

monopoly notification to the competent anti-monopoly authority; otherwise, such concentration may not be implemented. Where the parties fail to seek the clearance of a merger control review, they may be penalised by the anti-monopoly authority, such as being ordered to cease the concentration and being fined.

National security review

China has established a security review system to conduct a security review of foreign investment that impacts or may impact national security. A national security review may come into play if foreign investors are trying to acquire domestic enterprises:

- that have a bearing on national defence security; or
- that are engaged in key industries concerning national security

(eg, important agricultural products, important energy and resources, and key technologies), and the acquisitions of which may enable the foreign investors to acquire an effective control over such enterprises.

If a proposed takeover is likely to fall into the scope of a national security review, the foreign investor may make the national security review notification on a voluntary basis. Failing to do so may expose the deal to uncertainty because the authority in charge has the power to initiate the national security review procedures at its discretion or based on complaints made by any third parties, without regard to whether the deal has been closed.

Special procedures for the acquisition of state-owned enterprises

Another factor that foreign investors should take into account is whether the target company is considered as a state-owned enterprise (SOE). Under PRC laws, the acquisition of a SOE is subject to special procedures, which may lengthen the time required for such an acquisition or cause uncertainty. These special procedures include but are not limited to:

- governmental approval: where the proposed acquisition upon closing would result in the state no longer having control of the target SOE, the parties shall seek prior approval from the competent People's government;
- asset appraisal: in general terms, the consideration for the acquired equities in a SOE should not be lower than the price appraised by a qualified Chinese appraisal firm; and
- acquisition through property right exchanges: PRC laws generally require that the sale of equities in a SOE should be conducted in public through a property right exchange, which is a quasi-government agency.

Data privacy, cybersecurity and personal information protection

Following the release of an array of new laws, regulations and rules in the field of data privacy, cybersecurity and personal information protection, data protection has become one of the primary

considerations for M&A deals in the past few years. PRC laws have imposed various requirements on cross-border transfers of data, use and storage of consumers' personal information and so on. Hence, potential exposure in respect of data privacy, cybersecurity and personal information protection are important due diligence matters in M&A, especially when the M&A transactions take place in internet-based industries.

Compliance risk

For M&A transactions in China, increasing emphasis has been placed by multinational corporations and United States companies on potential compliance risks, in part due to the increasingly stringent enforcement of the US Foreign Corrupt Practices Act. As certain long-established business practices in China may not be improved within a short period of time, the compliance risk in undertaking M&A transactions in China may remain high. Against this backdrop, foreign acquirers should consider special anti-bribery and anti-corruption due diligence for M&A in China.

4.2 Takeovers of listed companies

4.2.1 Regulatory framework for the acquisition of a listed company

As China's capital market, in particular the A-share securities market, is not currently fully open, the acquisition of a listed company by a foreign investor is subject to requirements of special laws and regulations, in addition to legislation that is generally applicable to M&A in China. These include:

- regulations governing QFII/RQFII:
  - Administrative Measures for Securities and Futures Investment Made in China by Qualified Foreign Institutional Investors and RMB Qualified Foreign Institutional Investors, as jointly promulgated by the China Securities and Regulatory Commission (CSRC), the State Administration of Foreign Exchange (SAFE) and the People's Bank of China (PBOC) on 25 September 2020 ('Measures on QFII and RQFII');
- legislation on securities regulation:
  - Measures for the Administration of the Takeover of Listed Companies, as promulgated by the CSRC on 20 March 2020, and its subsequent implementation opinions ('Measures on Takeover of Listed Companies'); and
  - Administrative Measures on the Strategic Investment in Listed Companies by Foreign Investors, as revised and promulgated by MOFCOM, CSRC, SAFE and other ministries on 28 October 2015 ('Measures on Strategic Investment'); and

- a series of rules and measures in connection with Northbound Trading of Shanghai-Hong Kong Stock Connect and Shenzhen-Hong Kong Stock Connect as respectively promulgated by the CSRC, Shanghai Stock Exchange (SSE) and Shenzhen Stock Exchange (SZSE).

4.2.2 Typical acquisition methods for listed companies

Under the PRC legal regime, a foreign investor may elect either method as set out below to acquire the shares of a PRC listed company.

Apply to be licensed as a QFII/RQFII or trade A-shares through an existing QFII/RQFII

Any foreign investor that meets certain criteria as provided in the Measures on QFII and RQFII (eg, financial capacity, qualified and experienced experts, and well-rounded internal control) can apply for a QFII/RQFII licence and thereafter can use the RMB settled from foreign currency to invest in RMB financial instruments (including trading A-shares listed on SSE or SZSE) within the quota as approved by CSRC on a case-by-case basis. If a foreign investor does not apply for a QFII/RQFII licence, as an alternative, it can entrust any existing QFII/RQFII to invest in an A-share listed company.

Participating in the acquisition of a listed company as a strategic investor

The Measures on Strategic Investment stipulate that where a foreign investor meets several thresholds as outlined thereunder (eg, possession of overseas assets exceeding US$100m or managing overseas assets worth more than US$500m), it can acquire the shares of an A-share-listed company as a qualified strategic investor.

Under the current legal regime, and in typical practice, a qualified strategic investor may conduct a strategic investment in an A-share-listed company by:

- participating in the listed company's private placement;
- transferring shares of the listed company by agreement;
- making a tender offer; or
- making an indirect acquisition through other intermediary vehicles.

Making an investment in A-share-listed companies via the Northbound Trading link of Shanghai-Hong Kong Stock Connect and Shenzhen-Hong Kong Stock Connect

Foreign investors may engage a Hong Kong broker and apply to the SSE or SZSE to transact shares of A-share-listed companies through a securities trading service company formed by the Stock Exchange of Hong Kong Limited in Shanghai or Shenzhen. Further, SSE and SZSE have adopted different standards on the A-shares available for trading to foreign investors.

4.2.3 Other considerations in the acquisition of a PRC-listed company by a foreign investor

Apart from the universal concerns arising out of a foreign investor's M&A transactions in China, which have been addressed in the foregoing (eg, market entry for foreign investors, merger control review and national security review), there are additional considerations for a foreign investor to weigh up in the acquisition of a PRC-listed company, including, among other things:

Exemption of tender offer

According to the Takeover of Listed Companies, if the acquirer elects to proceed with the acquisition at the point when the shares in which they are interested reach 30 per cent of the issued shares of the listed company, the acquirer shall issue a general or partial offer to the shareholders of the listed company in accordance with the law; unless the acquirer meets the requirements of the Takeover of Listed Companies and is exempt from issuing a tender offer. In order to protect the legitimate rights and interests of all investors, only a few particular scenarios can give rise to the possibility for the acquirer to meet such requirements for an exemption of tender offer, which shall be deliberately leveraged by the acquirer.

Horizontal competition and connected transactions

Pursuant to the Measures on Takeover of Listed Companies, in connection with the investment by a foreign investor in an A-share-listed company, such an investor shall specify in the disclosure documents: (1) that it has prepared and announced whether there is horizontal competition or potential horizontal competition between the business of the investor, and any of its party acting in concert, controlling shareholder and actual controller; and (2) the business of the listed company, and whether there is an ongoing connected transaction. If there is any horizontal competition or ongoing connected transaction, relevant arrangements shall be made to avoid horizontal competition between the investor and related parties in order to maintain the independence of the listed company.

Chapter 5: Foreign investment

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According to statistics published by MOFCOM, foreign investment in China has grown steadily in recent years. From 1979 to 2022, China received a total of US$2,809.89bn in foreign investment and 1,126,357 FIEs were established. Further, against a background of slowing global economic growth, sluggish cross-border investment and intensified competition, foreign investment in China in recent years maintained growth, placing it among the top ten countries/regions in the world for the amount of foreign direct investment (FDI). According to the statistics of the MOFCOM, throughout the year of 2023, 53,766 new FIEs were established, making a 39.7 per cent year-on-year increase, while the scale of realised FDI amounted to RMB 1,133.91bn, remaining at historically high level. From January to April in 2024, the total amount of newly established FIEs has reached

a peak of 16,805 and the amount of realised FDI was RMB 369.2bn. Benefiting from a stable business environment and a large domestic market, China has consistently remained a hotspot for global multinational investment, with the scale of actual use of foreign capital continuously hitting historical highs.

5.1 History of the foreign investment regime in China

5.1.1 Establishment of the foreign investment regime

China began to implement its policy of reform and opening up in 1978. Attracting foreign investment and learning from advanced foreign industries became China's national strategy. Consequently, the Sino-Foreign Equity Joint Venture Enterprise Law of the PRC (the 'EJV Law') was promulgated in 1979 and the Implementing Regulations for the EJV Law was promulgated in 1983. In 1986, 1988, 1990 and 1995, the Wholly Foreign-Owned Enterprise Law of the PRC (the 'WFOE Law'), the Sino-Foreign Cooperative Joint Venture Enterprise Law of the PRC (the 'CJV Law'), the Implementing Rules for the WFOE Law, and the Implementing Rules for the CJV Law were also promulgated, respectively. The promulgation of these three laws and their implementing regulations (collectively the 'FIE Laws') marked the establishment of the foreign investment regime in China.

5.1.2 Reform of the foreign investment regime

In the decades that followed promulgation of the FIE Laws, with the change of China's domestic and international presence, it became increasingly difficult for the FIE Laws to meet China's expanding reform and opening up needs. In 2019, the NPC passed the Foreign Investment Law to replace the FIE Laws, and made significant changes to the foreign investment regime. Subsequently, the State Council enacted the Implementing Regulations for the Foreign Investment Law (the 'Implementing Regulations'). The FIE Laws have fulfilled their purpose for nearly 40 years but have been replaced and are no longer applicable.

5.2 Types of foreign investment

Under the new foreign investment regime, foreign investment in China is taking the following forms:

- newly established FIEs: foreign investors establish FIEs solely or jointly with other investors;
- M&A: foreign investors acquire shares, equity, property shares, or other similar rights or interests in domestic enterprises;
- new projects: foreign investors invest in new projects solely or jointly with other investors; and
- other forms of investment: foreign investors make other types of investment permitted by laws, administrative regulations or provisions of the State Council.

5.3 Features of the Foreign Investment Law

The Foreign Investment Law and its Implementing Regulations comprise the fundamental laws and regulations for foreign investors doing business in China. Foreign investment promotion, protection and administration are the key principles of the Foreign Investment Law and its Implementing Regulations.

5.3.1 Foreign investment promotion

The key principles for foreign investment legislation in China are to actively expand opening up, promote foreign investment and create a first-class international business environment. China's key policies to promote foreign investment include 'equal treatment to both foreign and domestic investors', 'improvements to the transparency of foreign investment policies' and 'preferential treatment to foreign investment in accordance with the law'.

Equal treatment to foreign and domestic investors

Under China's new foreign investment regime, government policies to support the development of enterprises apply equally to domestic enterprises and FIEs in accordance with the law. These policies include, but are not limited to, government funding arrangements, land supply, tax deductions, qualifications and licenses, standard setting, project applications and human resource policies. In particular, FIEs may participate in government procurement through fair competition in accordance with the law. Products produced and services provided by FIEs in China will be treated equally in the process of government procurement.

Improvements to the transparency of foreign investment policies

One of the key purposes of China's foreign investment regime reform is to create an open, transparent, predictable and fair investment environment. For example, when formulating regulatory documents, competent authorities will solicit the opinions of FIEs to improve the predictability and transparency of foreign investment policies. When formulating standards, including national and industrial standards, FIEs have the right to participate equally in accordance with the law. The government and its departments shall formulate foreign investment guidelines and provide services to foreign investors and FIEs.

Provinces and municipalities such as Beijing, Fujian, Guangdong, Guangxi, Guizhou, Jiangsu, Jiangxi, Shanghai, Tianjin and Yunnan have established comprehensive service entities and supporting websites to promote foreign investment. Taking the online platform 'Invest Shanghai'[1] as an example, the website displays Shanghai's investment environment, investment policies, industrial distribution and various available investment promotion services.

Additionally, recent years have witnessed the issuance of several regulations and measures especially for foreign investors. The State Council successively issued Regulation on Optimizing the Business

1 'Invest Shanghai' is the investment service platform of Shanghai.

Environment in 2020, Further Optimizing the Foreign Investment Environment and Intensifying Efforts to Attract Foreign Investments in 2023 and Action Plan for Further Attracting and Utilizing Foreign Investment in early 2024. These regulations aim to establish a more friendly investment environment for foreign investors.

Preferential treatment to foreign investment in accordance with the law

To promote foreign investment and further opening up, in accordance with the needs of the national economy and social development, China encourages foreign investors to invest in specific industries, fields and regions, and offers preferential treatment according to applicable laws and regulations for doing so. The preferential treatment includes, but is not limited to, the following:

- *Establishment of specific regions (including 22 FTZs) with more vigorous opening up policies*
  Among the preferential opening up policies, for pilot policies implemented in certain special economic regions, once such pilot policies are deemed feasible, they may be promoted in other regions or nationwide.[2] For example, the value-added telecommunication service industry used to be a restricted industry. Before 2014, foreign investors in the value-added tele-communication service industry could not hold more than 50 per cent of the shares in a company. Since 2014, Shanghai Free Trade Zone (FTZ) has relaxed the restrictions on the shareholding of foreign investors in some value-added telecommunication services, including storage and transfer services, call center services, domestic multi-party communication services and internet access services for internet users.[3] This relaxation of the shareholding requirement by foreign investors was extended to all pilot FTZs in 2018.[4] Later, in 2019, the shareholding restriction on the storage and transfer services, call center services and domestic multi-party communication services were relaxed nationwide.[5]

- *Formulation of the Catalogue of Industries for Encouraging Foreign Investment*
  The Catalogue of Industries for Encouraging Foreign Investment (the 'Encouraging FI Catalogue') is one of China's most important mechanisms for promoting foreign investment. The latest revision was updated in 2022 with 239 terms added. Foreign investment projects listed in the Encouraging FI Catalogue enjoy preferential treatment in areas such as tariff, income tax, the preferential usage of lands and so on in accordance with laws, administrative regulations or the provisions of the State Council. For example, FIEs who invest in Hainan Province and Western China could further enjoy a reduced enterprise income tax rate of 15 per cent.[6] Also, for foreign investment within the scope of the Encouraging FI Catalogue, the tariff exemption policy shall apply to the self-use equipment imported within the total investment amount.[7]

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2 See art 13 of the Foreign Investment Law and art 10 of the Implementing Regulations.

3 See art 2 of the Opinions on Further Opening up Value-Added Telecommunication Business to Foreign Investments in China (Shanghai) Pilot FTZ promulgated by the Ministry of Industry and Information Technology and Shanghai Municipal Government on 6 January 2014 and effective from the same date.

4 See the Special Administrative Measures for the Market Entry of Foreign Investment in Pilot FTZ (Negative List) (2018 Version), which was jointly released by the NDRC and MOFCOM on 30 June 2018 and became effective on 30 July 2018.

5 See the Special Administrative Measures for the Market Entry of Foreign Investment (Negative List) (2019 Version), which was released by the NDRC and MOFCOM on 30 June 2019 and became effective on 30 July 2019.

6 See 'Press Conferences of the Ministry of Commerce on Catalogue of Industries for Encouraging Foreign Investment' (2022 Version).

7 See art 7 of the Notice on Further Deepening Reform and Properly Handling Foreign-invested Projects to Fight the Epidemic promulgated by NDRC on 9 March 2020.

5.3.2 Foreign investment protection

The legitimate rights and interests of foreign investors and FIEs in China will be protected through a series of measures, the most important of which are discussed below.

Arrangements to allow free transfer of technology

The Chinese government and its officials shall not compel foreign investors and FIEs to transfer technology through administrative licensing, inspection, punishment or any other administrative actions[8] to eliminate any perceived improper influence of the government on commercial arrangements between Chinese and foreign parties. In addition, Chinese and foreign parties now enjoy more freedom to negotiate technology cooperation. For example, the Regulations of the PRC on the Administration over Technology Import and Export (the 'Regulations on Technology Import and Export') promulgated by the State Council on 8 January 2011 stipulated that a technology import agreement is prohibited from restricting the transferee from improving the technology provided by the transferor or using the improved technology and so on.[9] The revised Regulations on Technology Import and Export promulgated by the State Council on 2 March 2019 removed such a prohibition and the current effective Regulations on Technology Import and Export promulgated by the State Council on 29 November 2020 keeps such amendments.

Government requirements to fulfil its contractual obligations

To better protect foreign investors, local governments and their departments must fulfil policy commitments and perform the contracts concluded with foreign investors and FIEs pursuant to the laws. Local governments and their departments cannot breach contracts on the ground of administrative division adjustment, change in government, organisation or job function or replacement of responsible persons, among others. Policy commitments made by local governments and their departments are written commitments made pursuant to the statutory authority on the support policies, preferential treatment and convenience applicable to the investment of foreign investors and FIEs in the region.[10]

No expropriation except in special circumstances and fair compensation

The government cannot expropriate a foreign investor's investment. Under special circumstances in which a foreign investor's investment is expropriated pursuant to law due to public interest needs, such an expropriation must be conducted according to statutory procedures. In addition, the foreign investor must be compensated in a timely, fair and reasonable manner.[11]

Protection of trade secrets

8 See art 24 of the Implementing Regulations.

9 See art 29 of the Regulations on Technology Import and Export.

10 See art 25 of the Foreign Investment Law and art 27 of the Implementing Regulations.

11 See art 20 of the Foreign Investment Law.

The government and its officials must keep confidential the trade secrets of foreign investors and FIEs that come to their knowledge during the performance of duties, and shall not divulge or illegally provide such trade secrets to third parties.[12]

Free repatriation of lawful income outside of China

Foreign investors may, according to applicable laws, freely remit their capital contributions, profits, capital gains, income from asset disposal, intellectual property royalties, lawfully acquired compensation, indemnity or liquidation income and other types of lawfully earned income into or outside of China, in RMB or any foreign currency. These policies are intended to alleviate some investors' concerns about foreign exchange controls and capital requirement regulations in China.[13]

5.3.3 Foreign investment administration

Depending on its form and features, the foreign investment may be subject to a series of administrative measures, including but not limited to: (1) the foreign investment negative list; (2) foreign investment information reporting system; (3) national security review; (4) approval by or record-filing with the NDRC; (5) antitrust review; and (6) industry-specific approval requirements for certain industries. The foreign investment negative list, foreign investment information reporting system and national security review are expanded upon below.

Foreign investment negative list

For the first time in 2013, China adopted a pilot negative list approach to foreign investment in the Shanghai FTZ. After the negative list was tested and adjusted in the Shanghai FTZ, the Special Administrative Measures for the Market Entry of Foreign Investment (Negative List) (2018 Version)[14] was released and implemented nationwide. The negative list includes prohibited and restricted industries. Foreign investors are not entitled to invest in any prohibited industry. For restricted industries, foreign investors must meet certain conditions prescribed in the negative list. For industries not listed in the negative list, foreign investors are treated equally to domestic investors and enjoy national treatment prior to and after the investment.

There are two negative lists now in effect: the Special Administrative Measures for the Market Entry of Foreign Investment (Negative List) (2021 Version) (the 'National Negative List')[15] and the Special Administrative Measures for the Market Entry of Foreign Investment in Pilot FTZs (Negative List) (2021 Version)[16] (the 'FTZ Negative List'). The National Negative List applies to FIEs established nationwide (excluding FTZs). The FTZ Negative List applies to FIEs established in FTZs.

12 See art 23 of the Foreign Investment Law.

13 See art 21 of the Foreign Investment Law.

14 The Special Administrative Measures for the Market Entry of Foreign Investment (Negative List) (2018 Version) was jointly released by the NDRC and MOFCOM on 28 June 2018 and became effective on 28 July 2018. This version is now superseded.

15 The National Negative List was jointly released by the NDRC and MOFCOM on 27 December 2021 and became effective on 1 January 2022.

16 The FTZ Negative List was jointly released by the NDRC and MOFCOM on 27 December 2021 and became effective on 1 January 2022.

Compared with the National Negative List, the FTZ Negative List is less restrictive, as it includes fewer prohibited and restricted industries. The National Negative List includes 31 prohibited and restricted industries. The FTZ Negative List includes only 27 industries. For example, foreign investment in fishing for aquatic products in China's waters and inland waters is prohibited by the National Negative List, but it is not prohibited by the FTZ Negative List. Also, the restrictions imposed on restricted industries are more relaxed in the FTZ Negative List. For example, the National Negative List prohibits foreign investment in artistic performance groups. The FTZ Negative List only requires that the investment in artistic performance groups shall be controlled by the Chinese party.

Foreign investment information reporting system

The foreign investment information reporting system has been formally in place since 1 January 2020. Under the information reporting system, foreign investors or FIEs must submit investment information to MOFCOM or its provincial counterpart based on the principle of necessity. This replaced the previous approval or filing procedures with MOFCOM or its provincial counterpart.

According to the Measures for Foreign Investment Information Reporting,[17] foreign investors or FIEs must submit investment information to MOFCOM or its provincial counterpart by providing an initial report, change report, deregistration report or annual report, depending on the form of foreign investment. The investment information sought includes information about the enterprise information, the investors and their actual controllers, investment transactions, enterprise operations, and enterprise assets and liabilities. For enterprises subject to special administrative measures, the applicable industry licence must also be submitted.

National security review system

Foreign investment that affects, or is likely to affect, national security is subject to a national security review.[18] A national security review of foreign investment focuses on the security review related to M&A. Where a merger or acquisition causes, or is likely to cause, a significant impact on national security, the foreign investors may be required to terminate the transaction or take other effective measures to eliminate the influence of the transaction on national security.[19]

It is also worth noting that the rules on national security review of foreign investment in FTZs differ slightly from national rules. In FTZs, foreign investment in 'important culture' and 'important information technology products and services' is also subject to a national security review. In addition, the scope of a national security review in FTZs also includes foreign investment in the forms of new projects and a subscription of convertible bonds.[20]

17 The Measures for Foreign Investment Information Reporting was released by MOFCOM and SAMR on 30 December 2019 and became effective on 1 January 2020.

18 See art 35 of the Foreign Investment Law.

19 See art 4 of the Notice of the General Office of the State Council on Launching the Security Review System for Mergers and Acquisitions of Domestic Enterprises by Foreign Investors (released by the General Office of the State Council on 3 February 2011 and effective on 3 March 2011).

20 See art 1 of the Notice of the General Office of the State Council on Printing and Distributing the Trial Measures for the National Security Review of Foreign Investment in Pilot Free Trade Zones (released by the General Office of the State Council on 8 April 2015 and effective on 8 May 2015).

5.4 Adjustments for existing foreign investment enterprises according to the Foreign Investment Law

Before the Foreign Investment Law was implemented, in terms of organisation form and corporate governance structure, the special provisions of the FIE Laws prevailed for FIEs. Only where the FIE Laws were silent did the Company Law[21] and other laws apply to FIEs. However, since the Foreign Investment Law no longer prescribes the organisation form and corporate governance structure of FIEs, FIEs established before the Foreign Investment Law was implemented must adjust their organisation forms and corporate governance structures to comply with the Company Law, the Partnership Enterprise Law of the PRC[22] and other applicable laws[23] within five years of the implementation of the Foreign Investment Law (the 'Transition Period').[24] If any FIEs fail to do so within the Transition Period, the Administration for Market Regulation, the agency that administers company registrations formerly known as the Administration of Industry and Commerce or the AIC, will not process the registration matters and will make this public.

Notably, on 29 December 2023, the newly revised PRC Company Law (the 'New Company Law') was officially released and came into effect on 1 July 2024.

Compared to the Company Law previously in force, the New Company Law adopts comprehensive amendments related to capital contribution rules, corporate governance structure, shareholders' rights, responsibilities of directors, supervisors and senior management, etc. The Transition Period required by the Foreign Investment Law will end on 31 December 2024, and the release and implementation of the New Company Law coincide towards the end of this Transition Period. Therefore, whether FIEs have already completed the adjustments according to the previous Company Law or not, they will need to re-examine and update their existing articles of association, shareholder agreements, or joint venture contracts, and other legal documents in order to comply with the New Company Law.

With respect to the organisation form, FIEs established as limited liability companies or partnerships are not required to register a change of organisation forms, and FIEs without a legal personality may apply to be restructured into partnerships during the Transition Period.[25]

With respect to the corporate governance structure, equity joint ventures (EJVs) must make corresponding adjustments, which may involve equity transfer rules and profit distribution rules, among others. To illustrate some of the adjustments required under the new foreign investment regime, the adjustments required for EJVs that were established before the Foreign Investment Law was implemented are discussed below.

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21 The previous effective Company Law of the PRC was revised by the Standing Committee of the NPC on 26 October 2018.

22 The Partnership Enterprise Law of the PRC was revised and passed by the Standing Committee of the NPC on 27 August 2006 and implemented on 1 June 2007.

23 See art 31 of the Foreign Investment Law.

24 See art 42 of the Foreign Investment Law.

25 See the Notice of the State Administration of Market Regulation on Implementation of the Foreign Investment Law for Proper Handling of Foreign Investment Enterprise Registration (released by State Administration of Market Regulation on 28 December 2019).

5.4.1 Corporate governance structures

Shareholders' meeting

The now-abolished EJV Law provided different corporate governance rules than those provided in the New Company Law. For example, under the now-abolished EJV Law, EJVs did not have shareholders' meetings. The highest authority of an EJV was the board of directors. Under the New Company Law, the highest authority of a limited liability company is the shareholders' meeting. Therefore, EJVs established before the implementation of the Foreign Investment Law must incorporate a procedure for holding shareholders' meetings, and shareholders' meetings must be the highest authority of the company. The corresponding rules of procedure and voting mechanisms of such shareholders' meeting must also be formulated.

Board of directors

As discussed above and according to the New Company Law, the power of the board of directors has been changed. Hence EJVs shall revise the articles of association, the joint venture contract and other legal documents to adjust the governance structure.

Additionally, the New Company Law requires limited liability companies with 300 or more employees to include an employee representative on the board of directors unless a board of supervisors is established with employee representatives. Thus, if FIEs in the form of limited liability company have 300 or more employees, such FIEs shall either have at least one employee representative director on the board or have a board of supervisors where at least one-third of the members are employee representative supervisor(s) according to the New Company Law.

Board of supervisors

Article 76 of the New Company Law provides that the board of supervisors of a limited liability company shall have no less than three members, which shall include shareholders' representatives and an appropriate proportion of employee representatives; among them, employee representatives shall not be less than one-third of the members of the board of supervisors.

The New Company Law also provides that, in the following two situations, the board of supervisors or supervisor is not required: (1) the company has set up an audit committee composed of directors on its board to exercise the functions and powers of the board of supervisors; (2) the company is small scale or has a small number of shareholders, in such case, the company may opt to have one supervisor in lieu of the supervisory board or have no supervisor upon unanimously agreed by all shareholders.

Audit committee

As discussed above, companies could choose to establish an audit committee instead of the board of supervisors to perform the functions of the board of supervisors. The audit committee shall be composed of directors, and the employee representative of the board of directors could also be included.

5.4.2 Equity transfer rules

Under the now-abolished EJV Law, to transfer equity interest in an EJV to a third party, the transferring party must obtain the consent of the other party to the EJV. Under the New Company Law, which applies to FIEs in the form of limited liability company, unless otherwise agreed by the shareholders, a party must inform the other shareholders in writing before transferring its equity interest to a third party. If any other shareholder does not reply to such written notice within 30 days upon receiving the notice, the shareholder will be deemed to waive its right of first refusal.

5.4.3 Profit distribution

Under the now-abolished EJV Law, the parties to the EJV must share profits in proportion to their registered capital contributions. By contrast, under the New Company Law, limited liability companies may distribute profits in the manner as agreed by all shareholders. Therefore, EJVs in the form of limited liability company may adjust their profit distribution method based on their agreement.

5.4.4 Adjustment of capital contribution period

According to the requirements of the New Company Law, the subscribed capital contributions of shareholders in a limited liability company must be fully paid within five years of the establishment date of the company. Additionally, as provided by the New Company Law, existing companies (including EJVs) with excessively long capital contribution periods must gradually adjust their contribution periods to comply with the time limit set in the New Company Law. Therefore, EJVs must comply with the above regulations and adjust their capital contribution periods.

5.5 Conclusion

The expansion of the opening up and promotion of foreign investment dominate China's current foreign investment legislation. The promulgation and implementation of foreign investment laws and regulations, including but not limited to the Foreign Investment Law, its Implementing Regulations, the supporting measures especially for foreign investors, demonstrate China's desire to create a fair, convenient and open business environment. Under the foreign investment supervision and protection system, foreign investors will be treated equally as domestic investors, and their investment will be better protected in China. Foreign investors will also have opportunities to invest in more industries and regions. With the further opening up of China, foreign investors should proactively assess the Foreign Investment Law's influence, and keep a close eye on the relevant legislation, regulations, local administrative approvals and even 'window guidance' of relevant bureaus in charge.

Chapter 6: Legislation and practice of China's bankruptcy regime

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6.1 Statutory framework of China's bankruptcy regime

China's bankruptcy system mainly consists of laws, relevant judicial interpretations and normative documents formulated by the courts.

6.1.1 The Bankruptcy Law

The Enterprise Bankruptcy Law of the PRC (the 'Bankruptcy Law'), issued by the Standing Committee of the NPC and effective as of 1 June 2007, is the main legislation that governs Mainland China's bankruptcy regime. The Bankruptcy Law applies to all legal entities in China, including state-owned, private and foreign-invested companies in the form of limited liability companies or joint-stock limited companies. The Bankruptcy Law does not apply to individuals.

6.1.2 Judicial interpretations and normative documents of the courts

The judicial interpretations of the SPC on the Bankruptcy Law mainly include Provisions on Appointing Administrators for Hearing Enterprise Bankruptcy Cases and Provisions on Determining Administrators' Compensation for Hearing Enterprise Bankruptcy Cases effective in 2007, as well as Provisions (I), (II) and (III) on Several Issues Concerning Application of the Bankruptcy Law effective in 2011, 2013 and 2019, respectively.

Some local high courts and intermediate courts have also formulated guidelines applicable to their jurisdictions, such as Guidelines for Trials of Bankruptcy Cases (Trial) formulated by Shanghai High People's Court on 31 August 2018 and Guidelines for Trials of Reorganization Cases (Trial) by Shenzhen Intermediate People's Court on 25 March 2019. In addition, some normative documents of the SPC, such as Minutes of the National Court's Work Meeting on Bankruptcy Trials and Minutes of the Conference on Civil and Commercial Trials Heard by Courts in China issued in March 2018 and September 2019 respectively, also play an important role in guiding China's bankruptcy practice.

6.2 Bankruptcy procedures in China

Bankruptcy procedures in China include liquidation, reorganisation and settlement. Liquidation is a straightforward process of the disposal of debtor's property in a short space of time, and the debtor shall be deregistered after the procedure. Reorganisation and settlement may regenerate a company, but with a different emphasis and applying different situations.

6.2.1 Commencement of bankruptcy procedures

The statutory circumstances triggering bankruptcy procedures are: (1) the debtor is unable to pay debts due and its assets are insufficient to pay off debts; (2) there is clear lack of ability for the debtor to pay off debts; or (3) there is a possibility of the debtor losing its ability to pay off debts. Under the first or second circumstance, the debtor may initiate a proceeding of either liquidation, reorganisation or settlement, but under the third circumstance, the debtor may only apply for a reorganisation proceeding. Where a debtor is unable to repay debts due, the creditor may also apply for reorganisation or liquidation of the debtor.

If a company is found not to have sufficient assets to pay off debts during liquidation of a voluntary dissolution or is dissolved before the completion of liquidation, the liquidation committee shall apply to the court for bankruptcy liquidation.

6.2.2 Control of bankruptcy procedures

Bankruptcy procedures are judicial proceedings subject to the direction and supervision of the court. In a liquidation or settlement procedure, the administrator takes over the debtor, while in a reorganisation procedure, upon the application of the debtor and approval of the court, the debtor may manage its own assets and operate its business under the supervision of the administrator. The administrator is appointed by and reports to the court, and performs its duties in accordance with law under the supervision of the creditors' meeting and creditor committee. Creditors may exercise their rights via the creditors' meeting or creditor committee.

6.2.3 Special regimes for financial institutions and cross-border bankruptcy

Special regime for financial institutions

The bankruptcy of commercial banks, securities companies, insurance companies and other financial institutions has special features under the Bankruptcy Law. Where either of the statutory circumstances for bankruptcy occurs to a financial institution, the financial supervision and administration authority of the State Council may choose to apply the takeover and custody procedures or apply to the court for reorganisation or liquidation.

Cross-border bankruptcy: recognition and enforcement of foreign court judgments

The Bankruptcy Law has set forth the principle of cross-border bankruptcy by providing that the bankruptcy proceeding initiated pursuant to the Bankruptcy Law shall be binding on the debtor's property outside China; and for the bankruptcy proceedings conducted in foreign courts involving debtor's property located within the territory of China, the Chinese court shall review the valid judgment or ruling of the foreign court and decide whether to recognise and enforce it in accordance with international treaties concluded or acceded to by China, or on the basis of the principle of reciprocity.

The bankruptcy of financial institutions and cross-border bankruptcy cases were relatively rare for some time after the implementation of the Enterprise Bankruptcy Law. However, in recent years, due to the increase of judicial practice cases in these areas, significant progress has been made in, as detailed in paragraphs 6.3.3 and 6.3.4 below.

6.3 Overview of bankruptcy practice

6.3.1 A growing number of bankruptcy cases

After the Bankruptcy Law came into force in 2007, the number of bankruptcy cases did not increase for several years. In fact, it retrogressed. However, since 2015 the number of cases accepted and concluded by the courts has risen rapidly, which might be linked to vigorously promoted reform measures and the policy of 'optimizing the business environment and building a modern economic system' by the Chinese government. In this context, a series of influential cases have emerged, of which the reorganisation of HNA Group, involving a debt of RMB 1.1tn (approximately US$154bn), is so far the largest bankruptcy case in China.

According to the work reports of the SPC from 2007 through 2023 and other public data, the number of bankruptcy cases concluded by China's courts has increased rapidly from between 2,000–4,000 cases before 2015 to exceeding 10,000 cases each year since 2020, with 47,000 cases being concluded in 2022.

It is worth noting that the number of reorganisation cases of listed companies has also significantly increased in recent years, rising from two to four cases per year between 2012 and 2018 to over ten cases per year between 2020–2023. In addition, the prepackaged reorganisation procedure has increasingly become an important prerequisite tool for listed companies to address financial difficulties. Given the administrative and judicial approval processes involved in the reorganisation of listed companies, the timely initiation of prepackaged reorganisation procedures can advance various reorganisation tasks and largely improve the efficiency of the reorganisation process. According to our statistics based on public data, 16 listed companies underwent bankruptcy reorganisation in 2023, 15 of which had opted for the prepackaged reorganisation procedure.

6.3.2 Bankruptcy procedures adopted by financial institutions

From 2021 to 2023, numerous financial institutions have successively initiated bankruptcy procedures, and the people's courts have handled bankruptcy cases of various financial institutions such as Wangxin Securities Co Ltd, Liaoyang Rural Commercial Bank Co Ltd, New China Trust Co Ltd and E An Property & Casualty Insurance Co Ltd. These cases involve a range of financial institutions such as trust companies, local regional banks, insurance companies, and finance companies. The applicable procedures include liquidation and reorganisation. At the same time, the capabilities of pressure bearing and risk prevention of the financial institutions (trust companies, large wealth companies, local regional banks and local debt platforms) have received continuous attention.

In order to coordinate and improve the legal system for bankruptcy of financial institutions, the Standing Committee of the 14th NPC added the formulation of the Financial Stability Law to its legislative agenda in September 2023, and is also considering to address the bankruptcy system of financial institutions in its plan to revise the Bankruptcy Law. With the continuous deepening of China's reform measures in preventing systemic financial risks, it is expected that China will establish a sound basic legal framework for financial risk prevention, resolution and disposal mechanism through legislation and judicial practice, and thus form an institutional arrangement that is properly connected with the bankruptcy legal system.

6.3.3 Further improvement of cross-border bankruptcy procedures

On 14 May 2021, the SPC and the Hong Kong SAR Government signed the Meeting Minutes between the SPC and the Hong Kong SAR Government on Mutual Recognition and Assistance in Bankruptcy Proceedings by Courts of the Mainland and Hong Kong SAR, and issued the Opinions of the SPC on the Pilot Program for Recognition and Assistance in Bankruptcy Proceedings of Hong Kong SAR. Pursuant the two documents, the SPC designated the people's courts of Shanghai, Xiamen, and Shenzhen to carry out the pilot work in relation to the recognition and assistance of bankruptcy procedures with Hong Kong SAR. This is the first time that the mainland China and the Hong Kong SAR have jointly issued special documents on the cross-border bankruptcy assistance, opening a new chapter in the judicial recognition and assistance of bankruptcy between both regions.

In July 2021, Shenzhen Intermediate People's Court issued a ruling to recognise the liquidation decision and appointment of the liquidator in relation to the winding up of *Samson Paper Company Limited*, marking the first mainland court acknowledgment of foreign court liquidation procedures. Subsequently, judicial practice in cross-border bankruptcy cases has continued to develop. In 2023, the people's courts also recognised the bankruptcy proceedings conducted in Germany and Japan for the first time, by applying Article 5 of the Bankruptcy Law, the principle of legal reciprocity. As a result, the bankruptcy administrators involved were recognised and were allowed to perform their duties in the mainland China under certain conditions of China law. With the wide application of Article 5 of the Bankruptcy Law by mainland courts for the recognition and assistance involving extraterritorial bankruptcy proceedings, the mainland China is expected to engage in more international cross-border bankruptcy cooperation with a wider range of countries and jurisdictions around the world in the future.

6.3.4 Exploring individual bankruptcy system

Although the Bankruptcy Law does not apply to individuals, there is a growing demand for individual bankruptcy in judicial practice. In 2018, Zhejiang Province started a centralised clearing of individual debts in its judicial practice, and four other provinces of Jiangsu, Shandong, Guangdong and Sichuan have followed suit. On 26 August 2020, the Standing Committee of Shenzhen MPC passed the Regulation on Individual Bankruptcy in Shenzhen Special Economic Zone, which is the first individual bankruptcy regulation in mainland China. The proceedings for the first actual individual bankruptcy cases involving respectively reorganisation, liquidation and settlement procedures were concluded by the people's courts from July to November 2021.

As of 31 December 2023, Shenzhen Intermediate People's Court has received more than 2,200 individual bankruptcy applications, over 800 of them were accepted by the courts through review and 116 reorganisation plans were approved. Of these reorganisation plans, most plans have been successfully executed and only four plans failed due to heavy loss of the debtor's income. Given the gradual emerging of the individual bankruptcy system, many provinces have issued rules to address the individual bankruptcy in their jurisdiction and the centralised debt clearance. The relevant rules regarding individual bankruptcy are expected to be further refined, and more consensus from all circles to be reached in relation to the development of individual bankruptcy system.

6.4 Development trends for bankruptcy practice

It is to be expected that the number of bankruptcy cases will continue to rise and that the bankruptcy regimes in China expand. The current Bankruptcy Law has been implemented for more than 17 years and has lagged behind growing bankruptcy practice in the country. Given China' s current economic work guideline of 'seeking progress while maintaining stability and promoting stability through progress', the role of the bankruptcy trial system in the facilitating of market competition and the maintaining of the economic and social stability has been further and widely recognised. China is continuing to explore and develop a coordinated system of bankruptcy of financial institutions and individuals, as well as cross-border bankruptcy.

Chapter 7: Employment law

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7.1 Major laws and regulations

China's modern employment regulatory regime was developed in the 1980s, reflecting historic changes to the employment market. Centred on contractual employment relationships, the regulatory regime is comprehensive, mature, complex and location-dependent. The NPC and its standing committee adopt employment legislation prescribing nationally basic principles and rules for employment issues. Administrative agencies under the central government promulgate detailed administrative regulations and departmental rules implementing employment legislation. To accommodate local conditions, legislative bodies and administrative agencies at local levels promulgate their own regulations and rules.

7.2 Key issues in employment law practice

7.2.1 Regional differences

There are regional differences in the execution and performance of employment contracts, settlement of work-related injuries, standard of social insurance payments and approaches to

disputes. For example, minimum wage is higher in developed cities and provinces. A comparison chart of minimum wages for four developed cities and cities is below.

City/Province	Beijing	Shanghai	Jiangsu	Guangdong
2024 minimum wages (RMB)	2,420	2,690	2,010–2490	1,620–2,300

Regional differences are also reflected in the conditions for signing an open-ended term employment contract. In Beijing and most local jurisdictions, an employer must renew employment for the employee with an open-ended term contract when the second fixed-term contract expires. On the other hand, the employee may choose to end the employment relationship or enter into another fixed-term contract. While in Shanghai, the employer has the choice of renewal or termination of the employment relationship after the second fixed-term contract expires.

7.2.2 Dismissal and termination of employment contracts by employers

China has relatively strict protections against dismissal, which is conceptually different from termination. As set out in Articles 36 and 39–41 of the Labor Contract Law,[26] an employer cannot dismiss an employee without mutual consent or without statutory grounds for dismissal. Some of the statutory grounds provided by the Labor Contract Law are material breach of company rules and serious dereliction causing substantial loss to the employer. As for termination, according to Article 44 of the Labor Contract Law, termination only occurs upon expiration of the employment contract or satisfaction of termination conditions provided in the laws and regulations.

7.2.3 Expatriate employees

Expatriates can fill posts in China with special requirements that have no available domestic candidates. Before obtaining work and residence permits, an expatriate employee must enter into an employment contract with the employer. Only the employer may submit applications for relevant permits for the expatriate employee.

Subject to compulsory Chinese laws and regulations, employers and expatriate employees may negotiate the terms of wages, working hours, rest and vacation, and health and safety protections. Employers, however, must pay social insurance for expatriate employees in China. In the case where an expatriate employee is a citizen of a country that has entered into a bilateral or multilateral treaty with China on social insurance, the provisions of the treaty prevail.

7.3 Recent trends

The procedure for employment dispute resolution in China includes negotiation, mediation, arbitration and litigation. Note that arbitration is a prerequisite for employment dispute litigation. In recent years, employers and employees have been increasingly willing to choose ADR methods.

26 Labor Contract Law of the PRC, effective on 1 January 2008 and revised by the NPC Standing Committee on 28 December 2012.

According to data published by the Ministry of Human Resources and Social Security, nationwide mediation organisations for employment disputes in 2023 dealt with 3,850,000 cases, 98.1 per cent of which were closed. The average rate for successful mediation in recent years is about 75 per cent.

Major claims in employment dispute cases revolve around remuneration, employment relationship recognition, work-related injury insurance and so on. Remuneration claims account for over 50 per cent of employment dispute cases. Many of these claims occur in more developed cities and provinces with larger populations of migrant workers (eg, Beijung, Guangdong, Jiangsu and Shanghai). Data suggests that more claims are pursued by employees working in developed regions.

7.4 Conclusion

As new technology – like the Internet Plus model, which integrates mobile internet, cloud networking, big data and the Internet of Things – develop and facilitate the emergence of new types of work under the sharing economy, future society and employment relationships will change. In the future, employment legislation will need to protect the rights of employees while adapting to changes in the marketplace. Employment law is expected to achieve a balance between the rights and obligations of employers and employees. We also expect the SPC and the Ministry of Human Resources and Social Security to work more closely to resolve regional differences in the field.

Chapter 8: Tax law

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8.1 Tax overview

Chinese tax law stems from five sources: legislation passed by the NPC (or its standing committee), regulations passed by the State Council, bilateral tax treaties agreed between China and other countries, circulars and announcements made by the State Administration of Taxation (SAT) and judicial interpretations issued by the People's Supreme Court (PSC).

Legislation is passed by the NPC; it is then supplemented by regulations passed by the State Council, such as implementation regulations. The SAT and other state organs may then produce circulars and announcements regarding practice and procedure. These publications have the force of law. Most tax disputes are resolved through negotiations with the relevant tax authority or by using the relevant tax authority's own internal review mechanism.

In addition to domestic sources of law, China also has a network of over 100 bilateral tax treaties governing taxation methods and, in some cases, the maximum rates to be applied to cross-border transactions. In cases of conflict between these sources, Chinese law is clear that relevant treaty provisions should prevail. The exercise of amending this network in accordance with the OECD's

Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting has begun with China ratifying selected parts of the Convention in September 2022.

8.1.1 Corporate income tax and other taxes affecting enterprises (non-exhaustive)

In the early 1990s China passed a series of laws wherein the worldwide profits of domestically resident enterprises were subject to corporate income tax (CIT) in China. The last major overhaul of CIT took place in 2008 with the passing of the Enterprise Income Tax Law. Since that date, both China- registered enterprises and overseas enterprises resident in China have been taxed equally on their worldwide corporate income and at a standard rate of 25 per cent (see 8.2 below for exceptions) with tax credits given for tax paid overseas.

While the Chinese approach to taxation of worldwide income is unusual, its approach to taxation of domestically sourced income follows the international standard, as both foreign registered resident companies and Chinese registered resident companies are subject to tax.

The determinative factor in the assessment of whether an enterprise is subject to CIT on its worldwide income in China is whether the enterprise is regarded as resident in China. Resident enterprises are defined as those enterprises that are either incorporated in China and also those foreign- registered enterprises that have their place of effective management in China. The place of effective management is regarded as the place where the implementing substantive and comprehensive management and control over the production and business operations, staff, accounts and property and so on of an enterprise takes place. Consequently, an enterprise registered in a foreign jurisdiction may be regarded as resident in China if, for example, the directors are resident in China and key decisions relating to the management and control of the enterprise take place within China. In such cases, a foreign-registered enterprise will be required to adhere to all the relevant provisions of domestic Chinese tax law and pay tax on its worldwide income in China.

Capital gains tax

No separate CGT regime exists. Capital gains are instead rolled into the operating profits and taxed using normal CIT principles.

Dividends

A tax credit is available if the Chinese enterprise either holds directly or indirectly at least 20 per cent of shares in the underlying profit-making overseas enterprise, provided relevant criteria are met. The concept of indirect holding is limited to five tiers. Such dividends are regarded as corporate income. Domestic dividends are exempt from CIT.

Withholding tax (WHT)

Outbound China-sourced income, such as dividends, interest, rental income, royalties and gains from the sale or transfer of shares in a China-resident enterprise, are subject to WHT at ten per

cent. This figure may be lowered by a tax treaty. A temporary WHT deferral is available for dividends distributed to foreign investors that are reinvested into China, provided relevant criteria are met. In addition to WHT, VAT is also levied on some types of income.

8.1.2 Individual income tax

Chinese residents are subject to tax on their worldwide income. Non-residents are only taxed on their China-sourced income. An exemption on overseas income exists for non-domiciled Chinese residents who have not been present in China for more than 183 days for six consecutive tax years, commonly referred to as the 'six-year rule'. If an individual is absent for more than 30 consecutive days in a calendar year, then the six-year counter is reset to zero.

8.1.3 VAT

The Chinese VAT system for larger enterprises follows the international norm, with enterprises being able to offset their input and output VAT. In general, the VAT rate for most goods is currently 13 per cent whilst the VAT rate for most services is six per cent.

8.1.4 Other taxes (non-exhaustive)

Land value appreciation tax and real estate tax

Land value appreciation tax is applied every time an individual or enterprise realises a gain from the sale of a land use right, building or premises and its associated structures. The gain is taxed on a four-band progressive rate from 30 per cent to 60 per cent. Real estate tax is calculated on property in one of two ways: firstly, at 1.2 per cent of the residual value following the subtraction of between ten per cent and 30 per cent of the original value; or secondly, 12 per cent of the annual rental income.

Consumption tax

Manufacturers or importers of certain types of consumable or luxury goods, such as alcoholic beverages, tobacco, cars and motorcycles, must pay consumption tax at rates ranging from one per cent to 56 per cent. Certain goods are taxed at a fixed amount based on quantity.

Deed tax

The transferee or assignee of land use rights or real properties is subject to deed tax at a rate of between three per cent and five per cent, even where such a transfer is a gift or an exchange.

8.2 Preferential tax policies

Preferential tax policies are mostly aimed at technology enterprises or small enterprises. This is a non-exhaustive list:

- New/hi-tech enterprises may be eligible for a reduced CIT rate of 15 per cent Key software enterprises or key integrated circuit design enterprises may be eligible for an exemption or reduction of CIT for certain periods of time starting with the year the enterprise generates a profit. In both cases, the enterprise must be assessed and meet certain criteria.
- For enterprises in encouraged industries that meet the conditions and are established in Hainan Free Trade Port Pingtan area of the China (Fujian) Pilot Free Trade Zone Qianhai Shenzhen-Hong Kong Modern Service Industry Cooperation Zone Guangdong-Macao In-depth Cooperation Zone in Hengqin and Nansha Pilot Start-up Zone, a preferential CIT rate of 15 per cent will be levied. Qualified legal entities in the Lingang New Area of China (Shanghai) Pilot Free Trade Zone engaged in key technology areas such as integrated circuit, artificial intelligence (AI), biomedicine, civil aviation involving substantial production or research and development (R&D) activities shall be subject to corporate income tax at a reduced tax rate of 15 per cent for five years from the date of their establishment. Several further preferential tax policies of differing durations also exist within these zones.
- Until 31 December 2027, the portion of the annual taxable income of a low profit small enterprise, which does not exceed RMB 3m, shall be computed at a reduced rate of 25 per cent as taxable income amount, and be subject to CIT at a tax rate of 20 per cent.
- For the R&D expenses actually incurred by an enterprise in carrying out R&D activities, which have not formed intangible assets and have not been included in the current profits and losses, on the basis of actual deduction pursuant to the provisions, 100 per cent of the actually incurred amount are allowed for weighted pre-tax deduction as from 1 January 2023; where intangible assets are formed, pre-tax amortisation based on 200 per cent of the costs of the intangible assets are allowed as from 1 January 2023.

8.3 Legal risks and challenges

Enterprises incorporated outside China should carefully assess where their key decision makers are situated and where key decisions are made. If the SAT determines that a foreign incorporated enterprise has its place of effective management in China, then that enterprise will be taxed in China on its worldwide income.

China, like many other countries around the world, uses the General Anti-Avoidance Regulation (sometimes also called General Anti-Abuse Regulation) (GAAR) to both CIT and Individual Income Tax (IIT) assessments where they feel the main purpose of the transaction was to reduce, exempt or defer tax payments. Enterprises and individuals should be aware that regardless of whether their transactions are lawful in form the SAT may use the GAAR to make adjustments to the tax payable

Two recent developments give an indication of the increasing desire to develop consistency in tax matters. Firstly, Xiamen Siming District People's Court has set up a specialised tax court which will hear civil, criminal and administrative tax-related cases. Secondly, the Shanghai Tax Authority has announced a trial of an advanced ruling process in order to enhance the certainty of the application of tax policies.

Chapter 9: Intellectual property protection

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9.1 Main characteristics of intellectual property protection

The Chinese government regards the strengthening of intellectual property (IP) protection as the most crucial component of improving the property rights protection system and as the greatest incentive to enhance the competitiveness of China's economy. According to article 123 of the Civil Code of the PRC, 'intellectual property' refers to the exclusive rights that the rights holders enjoy in accordance with the law concerning their works, inventions, utility models, designs, trademarks, geographical indications, trade secrets, layout designs of integrated circuits, new plant varieties and other objects protected by law.

The Chinese legal system for IP protection is characterised by its comprehensiveness and multi-layered structure. The main laws and regulations currently in force for IP protection in China include the Civil Code, the Copyright Law, the Trademark Law, the Patent Law, the Anti-Unfair Competition Law, the Seed Law, as well as the Regulations on the Protection of Computer Software, the Regulations on the Protection of New Plant Varieties and the Regulations on the Protection of Layout Designs of Integrated Circuits. Additionally, relevant judicial interpretations by the Supreme People's Court on civil disputes regarding copyrights, patents, trademarks and unfair competition are important bases for IP protection in practice. Moreover, based on a series of international IP treaties and bilateral or multilateral agreements that China has acceded to, the rights of Chinese IP holders can receive corresponding protection in other contracting states, and foreign IP can receive reciprocal legal protection in China.

After thorough consideration of national conditions and legal standards, China adopted a 'dual-track system' of intellectual property rights protection, which consists of administrative protection and judicial protection, supplemented by arbitration and mediation.

Judicial protection of intellectual property rights protection is provided by courts at all levels, whose function is to safeguard lawful intellectual property rights and interests through civil, administrative and criminal adjudication. Administrative protection provides an efficient, simple and inexpensive approach to intellectual property rights protection, by seeking the assistance of administrative authorities to address issues of infringement and counterfeiting. Concurrently, China has implemented a mechanism where administrative enforcement and judicial protection operate in parallel, comprehensively advancing the reform of integrating civil, criminal and

administrative cases involving IP. This reform aims to enhance the efficiency of both administrative and judicial protection.

9.2 Legal development of intellectual property protection

China is continually reviewing and updating its IP laws. Updates between 2020 and 2024 include:

- *Amendment to the Patent Law and its Implementing Regulations:* In 2020, China amended the Patent Law to meet the needs of legal reform and social development. In December 2023, the State Council issued the Decision of the State Council on Amending the Detailed Rules for the Implementation of the Patent Law of the People's Republic of China, which was in force and enforced in January 2024. This amendment is an adaptive revision to the new Patent Law.
- *Issuance of the Patent Examination Guidelines:* In December 2023, the China National Intellectual Property Administration (CNIPA) released the Patent Examination Guidelines (2023), which was in force and enforced in January 2024, replacing the 2010 version. The new guidelines include modifications to the patent application and examination procedures to protect the rights of patent applicants and patent holders.
- *Issuance of Provisions on Regulating Patent Application Activities:* To regulate patent application activities, the CNIPA issued the Provisions on Regulating Patent Application Activities in December 2023, which was in force and enforced in January 2024.
- *Amendment to the Trademark Law and its Implementing Regulations:* In 2024, a comprehensive amendment to the Trademark Law and its implementing regulations is planned to further improve the IP legal system.
- *Amendment to the Regulation for the Implementation of the Copyright Law:* The revision of the Regulation for the Implementation of the Copyright Law is being expedited to meet the needs of new technologies and new industries.

9.3 Legal practice of intellectual property protection

9.3.1 Intellectual property registration and authorisation

In recent years, the number of intellectual property applications and authorisations in China has grown rapidly. In 2023, China granted 920,800 invention patents, a year-on-year increase of 15.3 per cent. As of the end of 2023, the total number of valid registered trademarks in China was 46.1464 million, a year-on-year increase of 8.1 per cent. Additionally, the total number of copyright registrations in China reached 8.9239m, a year-on-year increase of 40.46 per cent.

To process such a significant volume of applications, the application review time has been shortened substantially, which indicates that the authorisation process has become more efficient and convenient.

9.3.2 Administrative protection of intellectual property

Administrative departments at all levels in China have continuously improved administrative enforcement mechanisms and enhanced the effectiveness of administrative law enforcement, working in synergy to strengthen intellectual property protection. Recent notable achievements include the following.

Strengthening administrative protection for patents

On 1 June 2021, the 'Measures for Administrative Adjudication of Major Patent Infringement Disputes' promulgated by CNIPA officially came into effect. It specifies that major patent infringement disputes, which involve significant public interest, severely impact industry development, or span across provincial regions, should be handled by CNIPA. This is distinct from general patent infringement cases, which are managed by local intellectual property offices. In August 2022, CNIPA issued the first national administrative adjudication decision for a major patent infringement dispute since the implementation of these measures, with the Case Number of GUO ZHI BAO CAI ZI No 2021-1, represented by King & Wood Mallesons. By 2023, CNIPA has concluded the second batch of ten major patent infringement administrative adjudication cases.

Strengthening administrative protection for trademarks and copyrights

In 2023 alone, administrations for market regulation at all levels nationwide investigated and handled 39,400 trademark violation cases, with case values amounting to RMB 7.9bn. Copyright enforcement departments inspected 720,000 related entities in physical markets, handled 4,745 infringement and piracy cases, and referred 231 cases to judicial authorities involving a total of RMB 2.664bn.

Strengthening administrative protection against unfair competition and for online transactions and standard copyrights

In 2023 alone, administrations for market regulation at all levels nationwide investigated and handled 12,496 various unfair competition cases, with fines and confiscations amounting to RMB 580m. They mandated the removal of 160,000 illegal product listings from online trading platforms, ordered the rectification of 32,000 websites, investigated and punished 27,000 online violations, and referred 267 cases to public security authorities. Concurrently, online e-commerce platform standard infringement and piracy monitoring was conducted – monitoring 5,743 suspected infringing websites, deleting 323,467 infringing links and identifying and removing over 3,000 texts suspected of infringement.

9.3.3 Judicial protection of intellectual property

Establishment of specialised intellectual property courts in China

In China, cases related to patents, new varieties of plants, layout-design of ICs, technical secrets, computer software, monopoly and well-known trademarks are subject to a centralised jurisdiction. To accommodate the centralised jurisdiction of intellectual property disputes, China has established

four independent intellectual property courts in Beijing, Guangzhou, Shanghai and Hainan, and 27 intellectual property tribunals in intermediate people's courts, exercising jurisdiction over certain types of intellectual property cases across regions.

Further, in 2019 the SPC established an intellectual property court to hear nationwide appeals of cases involving patents and other technical expertise. China also established three independent internet courts in Beijing, Guangzhou and Hangzhou in 2017 and 2018 to hear online copyright disputes and other related online disputes. China also developed a new online trial mechanism to adjudicate intellectual property rights disputes. China is dedicated to improving the judicial protection of intellectual property rights and to protecting new types of intellectual property rights stemming from technological innovation.

Judicial protection of intellectual property

In recent years, the number of intellectual property cases accepted by Chinese courts has increased significantly. Concurrently, PRC courts have adopted a precedents system in rendering judgments and have taken measures to improve the quality of litigation proceedings in intellectual property rights cases.

By penalising intellectual property rights violations, the courts better safeguard the legitimate interests of intellectual property rights owners and increasingly deter intellectual property rights violations.

9.3.4 Development of Alternative Dispute Resolution (ADR) for intellectual property protection

Promotion of intellectual property dispute mediation

Administrative and judicial departments have collaborated to establish intellectual property dispute mediation organisations in qualified regions and industries. By the end of 2023, there were 1,944 mediation organisations under the guidance and management of the national intellectual property system, handling 134,000 cases. The nationwide 'General-to-General' online litigation-mediation docking work for intellectual property achieved full coverage scope across all 31 provinces (autonomous regions and municipalities), with over 100,000 cases handled through the online litigation-mediation docking platform.

Establish a robust mechanism for handling intellectual property arbitration cases

Some arbitration institutions have established Intellectual Property Arbitration Tribunals and Mediation Centres, continuously enhancing the specialisation of IP arbitration services. Efforts are being made to broaden the channels for selecting arbitrators, recruiting a group of domestic and international arbitrators with IP expertise and practical experience to strengthen talent support. The mechanism for linking IP arbitration, mediation, and litigation is continuously improving, fully leveraging the role of diversified dispute resolution mechanisms. In 2023, arbitration institutions across the country handled over 5,000 IP-related cases, with a total disputed amount of RMB 4.9bn,

mainly involving contract disputes in the fields of copyright transfer, trademarks, computer software development, technical cooperation development and technical services.

9.4 New trends in intellectual property protection

In recent years, the following trends have emerged in China's intellectual property protection:

- *Increasing judicial protection for innovation and creation:* Chinese courts are increasingly enforcing punitive damages to intensify the crackdown on malicious infringement and curb such behaviors. In 2023, Chinese courts applied punitive damages in 319 cases, a 117 per cent increase, with awarded compensation totaling RMB 1.16bn, a 3.5-fold increase.
- *Enhancing role of IP protection in emerging technology fields:* Chinese courts are refining adjudication rules for high-tech achievements and new business models, focusing on the protection of key technologies and emerging industries such as big data, AI, advanced chips and biotechnology.
- *Further developing of specialised IP judicial systems:* Coordination between administrative enforcement and judicial protection is being strengthened to enhance overall IP protection effectiveness. The reform of the 'three-in-one' trial mechanism for IP cases is progressing, maximising the specialised IP adjudication system's role in unifying judgment standards, optimising the legal environment for technological innovation, and supporting the construction of an IP powerhouse.
- *Strengthening cross-corder IP protection:* Chinese courts are actively participating in global IP governance under the framework of the World Intellectual Property Organization, promoting a more just and reasonable global IP governance system. Additionally, China is actively establishing cross-border IP protection cooperation mechanisms, enhancing cooperation with major trade partners to jointly combat cross-border infringement.

Chapter 10: Financing

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10.1 Banking and finance

10.1.1 Introduction

Financial regulatory framework

Under the current financial regulatory framework in China, the financial market is subject to the supervision of: (1) the Financial Committee of the State Council; (2) the PBOC; (3) the National Financial Regulatory Administration (NFRA) (whose former is the China Banking and Insurance Regulatory Commission); and (4) the CSRC.

The Financial Committee of the State Council, established in 2023, is mainly responsible for promulgating macroeconomic policies and maintaining economic stability. The PBOC, acting as the central bank of China, focuses on formulating and implementing monetary policies (including the interest rates of deposits and loans), and one of its most important subdivisions, SAFE, is mainly responsible for foreign exchange control. The NFRA is the direct regulator of both the banking industry and insurance industry. The CSRC is the direct regulator of the securities and futures industry.

Criteria for financial business

Currently, there are around 19 types of financial institutions in China subject to the supervision of the NFRA. For these institutions, the industry entry criteria are very strict and most such institutions must obtain a financial licence before conducting financial business.

Main bank financing regulations

The commercial loan is the most important business of banks. As the most fundamental regulation and guideline for regulating loan financing, the General Rules for Loans, implemented by the PBOC and published on 1 August 1996, set out the basic rules for loan transactions, that is, loan types, tenor and interest, the respective obligations and rights of the lenders and borrowers, the relevant supervisions and penalties, and so on.

In 2024, NFRA promulgated the new revision of three measures to regulate the three main types of commercial loans in China's market: the Measures on the Management of Working Capital Loans; the measures on the Management of Personal Loans; and the Measures on the Management of Fixed Assets Loans. All three are regarded as an important supplement to, and implementing rules of, the General Rules for Loans. Besides, the Guidelines on Syndicated Loans implemented in 2011 and the

Guidelines for Commercial Banks on the Risk Management of M&A Loans implemented in 2015, are also the significant rules to the loan transactions.

Loan interest rate

With the issuance of the PBOC's Notices [2019] 15 and 30 in the second half of 2019, a new rate mechanism, the LPR, came to the market. Since then, the facility interest rate must be quoted by reference to the LPR, which is calculated on the basis of the LPR quotations submitted by 18 quotation banks on the 20th of each month.

Security

In China, security is mainly regulated by the PRC Civil Code, its corresponding judicial interpretation, and relevant department rules and regulations.

An important feature of the security system in China is that the security contract will come into effect when it is duly signed, but the security right will only be created upon the completion of certain perfection formalities (ie, approval, registration and filing) with relevant government authorities.

Particularly, since the PRC Civil Code came into force, a noticeable change on China's security system is that the new design is more oriented towards the protection of commercial transactions, whereas the previous one is focused on the protection of the interests of the creditor.

FX matters

Cross-border bank financing transactions are highly supervised and controlled by SAFE in China. Such cross-border transactions can be mainly divided into: (1) cross-border debt financing; and (2) cross-border guarantee. Conducting any such transactions shall be subject to strict regulations and formalities (including registration, filing and reporting) by SAFE, NFRA, NDRC and other authorities.

10.1.2 Financial market in China

Financing scale

In recent years China's financing scale has increased at an annual growth rate of around ten per cent. Although the growth rate has slowed down as a result of the government's financial deleveraging policy, the trend of the financing scale is growing steadily. According to data published by the PBOC, the social financing scale was RMB 395.11tn at the end of June 2024, an increase of 8.1 per cent.

Cost of financing

Starting from 3.55 per cent on 20 June 2023, China's one-year loan LPR decreased to 3.45 per cent on 20 June 2024. The five-year LPR edged down by ten basis points (bps) as well to 3.95 per cent on 20 June 2024 from 4.20 per cent on 20 June 2023. In response to the difficulties and high costs of financing, the Chinese Government has reduced the required reserve ratios 25 times and applied a series of measures to ease funding shortages faced by small and micro enterprises since 2013.

10.1.3 Regional difference in practice

In China, when the central government authority issues an administrative regulation, local government authorities will usually issue corresponding implementing rules to provide details on the implementation and operation of these administrative regulations. Such local implementing rules are stipulated within the regime of the administrative regulation at the central level, but will differ in detail, as each will take into consideration their respective local practice and situation.

The complicated policy-making mechanism in China requires that the foreign investor or financial institutions pay attention not only to the central regulations but also local policies and practice when carrying on financial transactions in China.

10.1.4 Challenges with opportunities

Professionalism and internalisation

With China's 'Going Out' policy, more and more Chinese companies are investing abroad. Overseas or cross-border M&A financial transactions, therefore, occur frequently. PRC domestic banks play an important role in these financial transactions. However, because of a lack of practice, PRC domestic banks still need to gain more international financing experience and become more professional in the financing industry.

Marketisation of the interest rate

After five years of practice and development, the LPR, to some extent, reflects the actual funding costs and the loan price of the majority of financial institutions in China's market, although the pricing method of LPR poses higher requirements for financial institutions to identify risks and improve pricing capabilities, especially in the current economic environment where there are increasingly uncertain factors.

A more open and international financial market

Since 2017, the Chinese government has issued a series of regulations and policies to ease restrictions for foreign enterprises in finance. In particular, in June 2019 the Financial Committee of China's State Council published 11 measures to further promote the opening up of the financial market.

Since 2019, the Chinese government has promoted the construction of the Guangdong-Hong Kong-Macao Greater Bay Area, accelerated the Hainan Free Trade Port development and implemented the strategy to upgrade the various Pilot Free Trade Zones via introducing a range of preferential policies facilitating the cross-border finance, investment, trade, etc, aiming to work with all countries and all parties to share the opportunities from the institutional opening-up.

With the continuous economic growth and the government's efforts, the Chinese financial market is moving towards a more open and international market with more consistent rules. It is foreseeable that the Chinese government will implement more policies for the opening up and internationalisation of the financial market.

10.2 Equity financing

There are two main methods for a company to raise funds using equity financing: seeking a private equity investment or conducting an initial public offering (IPO). This section outlines the two financing tools.

10.2.1 Private equity investment

A booming market of private equity investment

China has emerged as one of the largest equity investment markets; its importance is globally recognised. According to data released by the Asset Management Association of China (AMAC), at the end of May 2024, China has 162 public fund managers and 20,860 private fund managers, managing assets with a total value in excess of RMB 51.13tn (approximately US$7.3tn).[27]

Typical structures of foreign investor's private equity deals

To become involved in China's private equity market, foreign investors typically use two structures: (1) FDI, whereby a foreign investor directly invests into a PRC target company in exchange for equity interest or shares; and (2) setting up a foreign-funded investment platform in China and using the foreign-funded investment platform to invest in a PRC target company. The regulatory framework for FDI has been discussed in other chapters and thus does not require elaboration here.

With respect to foreign-funded investment platforms, there are currently three types of platform that can be set up by a foreign investor: (1) a qualified foreign limited partnership (QFLP); (2) a foreign-funded investment company; or (3) a foreign-funded startup investment enterprise.

Qualified foreign limited partnership

A QFLP refers to a private equity investment fund that a foreign investor subscribes to for its capital commitment as a limited partner. A QFLP is generally established in the form of a limited

27 The exchange rate between the US dollar and RMB is approximately 7.1 (Oct 2024).

partnership, involving one or more foreign investors as its limited partners. The general partner of such a fund may be either a domestic or foreign resident. A QFLP's fund manager may be a foreign-funded equity investment management enterprise incorporated in China, provided it has been registered with AMAC as a private equity fund manager, for which a PRC legal counsel's due diligence report and legal opinion are required to be submitted to AMAC for filing.

In China, many local municipality governments have enacted and implemented rules governing thresholds for foreign investors of a QFLP, as well as established, compliance requirements on any preferential tax treatment entitled to the QFLP.

To set up a QFLP, the foreign investor must meet a threshold in terms of financial capacity, industrial experience, existing investment projects and personnel qualifications. For example, if a foreign investor elects to set up a QFLP in Shanghai, it shall self-own capital of at least US$500m or manage funds or assets of no less than US$1bn; the total subscribed capital commitment to a QFLP shall be no less than US$15m; and any sole limited partner's capital contribution to a QFLP shall be no less than US$1m.

Investment company

A foreign investor is allowed to set up an investment company, provided that it can meet the entry criteria to be an eligible promoter of such a company. An investment company can discretionarily use RMB sourced from the settlement of its capital fund in foreign currency to make an equity investment in a domestic company.

It is noteworthy that SAFE issued a circular in October 2019, according to which a non-investment FIE is permitted to legally make an equity investment in a domestic company with its capital funds under several compliance requirements. As such, the difference between an investment company and a non-investment FIE has been narrowed.

Startup investment enterprise

Foreign-funded investment enterprises incorporated for the purpose of engaging in an investment of startup enterprises and providing management services to the same will be categorised as a startup investment enterprise. Compared with the QFLP, the investment of a startup investment enterprise is subject to a smaller scope, namely a high-tech enterprise that has not been listed on a stock exchange.

10.2.2 Initial public offering in China

Overview of China's initial public offering market

China's IPO market is undergoing some complex and profound changes. Statistically speaking, a total of 412 Chinese companies completed their IPOs in 2023, raising RMB 404.7bn (approximately US$57.81bn) in total, a decrease of 34 per cent compared to 2022.

Introduction to China's stock markets and regulation framework

In development since the 1990s, China's stock market has formed a multi-level capital market system, which includes: (1) the 'floor market', consisting of the main board (the 'Main Board'),[28] the Growth Enterprise Market (GEM),the SSE Science and Technology Innovation Board (the 'STAR Board'), which was launched in June 2019, and the Beijing Stock Exchange (incorporated in September 2021); and (2) the 'over-the-counter market', comprised of the National Equities Exchange and Quotations and various regional equity trading markets.

Among these markets, the Main Board has the strictest listing thresholds on the issuer in terms of its operating period, capital size, profits (eg, the accumulative net profits for the last three fiscal years exceeds RMB 200m, approximately equivalent to US$28.57m), market value and other aspects, and thus many big players choose to be listed on the Main Board, while the enterprises listed on the GEM, the Beijing Stock Exchange and the National Equities Exchange Quotations have a relatively smaller scale and are less profitable. In addition, the listing rules of the STAR Board allow an overseas company with a 'variable interest entities' structure to list its stock or issue its depository receipts on the STAR Board, provided that such an issuer has fulfilled certain financial indications and compliance requirements. Therefore, the STAR Board may become more open and compatible to multinational high-tech companies.

Regulatory framework of IPOs

China has promulgated numerous laws governing the issue and trading of shares, as well as the disclosure of information of an issuer, which includes various guidelines from the security regulatory authority and stock exchanges. The CSRC is responsible for performing unified regulation and supervision of the securities industry, with strengthened oversight of the capital markets in accordance to laws and regulations; the formulation of policies relating to securities; drafting of securities laws and regulations; and supervision of the securities markets, market intermediaries and participants; as well as the supervision and regulation of securities transactions.

The primary laws, regulations and rules that lay the cornerstones of the current regulatory framework for IPO in China (including the STAR Board) are set out below:

- PRC Securities Law (2019 Revision) issued by the Standing Committee of the NPC on 28 December 2019 (the 'New Securities Law'), which became effective on 1 March 2020 and regulates, among other things, the issue and trading of securities, takeovers by listed companies, securities exchanges, securities companies, and the duties and responsibilities of the PRC State Council's securities regulatory authorities.
- Measures for the Administration of Registration of Initial Public Offerings of Stocks, promulgated by CSRC with the latest version issued on 17 February 2023.
- Listing Rules of the SSE, promulgated by the SSE, with the latest version revised on 30 April 2024, and Listing Rules of the SZSE, promulgated by the SZSE, with the latest version revised on 30 April 2024.

28 In April 2021, the Small and Medium-sized Enterprise Board (the 'SME Board') was incorporated into the SZSE Main Board.

- Rules Governing the Listing of Stocks on the STAR Market of the SSE, promulgated by SSE with the latest version revised on 30 April 2024.
- Rules Governing the Listing of Stocks on the GEM of the SZSE, promulgated by SZSE with the latest version revised on 30 April 2024.
- Rules Governing the Listing of Stocks on the Beijing Stock Exchange, promulgated by the Beijing Stock Exchange with the latest version revised on 30 April 2024.

Focus on issues in connection with the reform of China's IPO system

After several years of amendments and deliberations, the long-awaited New Securities Law came into effect on 1 March 2020. The New Securities Law showcased vast changes and reforming measures, including adopting a registration-based IPO system to replace the existing approval.

Chapter 11: Privacy laws and data protection

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11.1 General legal framework

11.1.1 Applicable laws and regulations

There is no single comprehensive privacy or data protection law in China. At present, the principal personal data protection legislation in China is the Cybersecurity Law of the PRC (CSL), which became effective on 1 June 2017. It sets out general data protection requirements for all network operators regarding personal data collection, use and sharing. When a foreign investment company owns or manages networks (including websites, internet platforms, local area networks and industrial control systems), or provides a network service within the territory of China, it is identified as a network operator and the CSL applies. Further, companies providing services to Chinese citizens/users via offshore entities, especially those involving data cross-border transfer, may also be subject to personal data protection rules established by the CSL.

To refine and supplement the general requirements in the CSL, the regulatory departments and national standard-formulating agencies have enacted a number of regulations and normative documents, including Provisions on the Cyber Protection of Children's Personal Information; Administrative Measures on Data Security (Draft for Comments); Measures for Security Assessment for Cross-border Transfer of Personal Information (Draft for Comments); Regulations for the Security Protection of Critical Information Infrastructure (Draft for Comments); and GB/T 35273-2017 Information Security Technology – Personal Information Security Specification (the 'Standard'). Although the Standard is not compulsory, it has been widely recognised as guidance

for good practice by both the competent authorities and companies. The Standard is designed to regulate personal data controllers' behaviour in collecting, storing, using, sharing, transferring or publicly disclosing information, or at other stages of data processing.

Some general regulations, such as the Criminal Law, the General Rules of the Civil Law and the Tort Liability Law, also have an impact on privacy and data protection in China. In addition, data protection requirements also exist in certain sector-specific legislation, especially the sectors of banking and finance, medical and health, e-commerce, telecommunications and so on.

11.1.2 Competent authorities

China has no single authority responsible for enforcing provisions relating to data protection. Under the CSL regime, the main competent authorities are the Cyberspace Administration of China (CAC), Ministry of Public Security, Ministry of Industry and Information Technology and SAMR. Certain sector-specific regulators, such as the PBOC and National Health Council, are also authorised to implement and enforce relevant sector-specific legislation.

11.1.3 Data protection obligations of network operators

Foreign companies, as network operators or data controllers, shall bear the data protection obligations during their operations in China, including but not limited to:

- abiding by the 'lawful, justifiable and necessary' principles to collect and use personal data;
- obtaining prior consent from the relevant data subjects when sharing or disclosing the collected personal data to a third party (including their affiliates);
- responding promptly to requests from data subjects to provide access to, rectify or delete their personal data;
- taking technical and other necessary measures to ensure the security of the collected data, and to establish and improve the system for data protection;
- taking immediate remedies and reporting to the competent authority and affected data subjects in case of actual or threatened disclosure, damage or loss of data collected; and
- appointing network security officer(s) to protect the security of the network, and, if necessary, appointing a data protection officer or setting up a data protection department.

11.2 Trends and development

The implementation of the CSL and its supporting measures show that Chinese legislators are gradually consolidating the laws to protect national cyberspace sovereignty and network security. The illegal processing of personal data and privacy policies has been the central concern for data protection regulators.

In 2019 the CAC, Ministry of Industry and Information Technology, Ministry of Public Security and SAMR jointly carried out their one-year 'special campaign' against apps unlawfully collecting and using personal data. The authorities aim to enhance the supervision and punishment of unlawful collection and use of personal data, requiring industrial associates to assess their privacy policies, as well as the collection and use of personal data by, in particular, apps that have a large user base and are frequently used in daily life.

According to published statistics in September 2019, more than 8,000 complaints have been accepted by the authorised working group of the campaign. The group has conducted security assessments of over 400 frequently used apps and sent out rectification suggestions to more than 100 app-operating entities.

Furthermore, in order to regulate the collection and use of user information by mobile apps, the CAC and SAMR launched the Implementation Rules on Security Certification for Mobile Internet Applications in March 2019, which encourages apps operators voluntarily to apply for app security certification.

11.3 Key compliance risks for foreign companies

11.3.1 Consent of the data subject

In general, if a foreign company wishes to collect, use or transfer personal data from data subjects (eg, registered users of an app) during operation, prior consent is required from the data subjects, just as it is for domestic companies.

Pursuant to Article 41 of the CSL, foreign companies (as network operators) shall abide by 'lawful, justifiable and necessary' principles to collect and use personal data by announcing their rules for collection and use, expressly notifying the subject of the purpose, methods and scope of such collection and use, and obtaining consent from the subject of such personal data. If the collected personal data includes sensitive personal data (eg, phone numbers, ID number and address), pursuant to section 5.5 of the Standard, foreign companies shall obtain explicit consent, meaning the specific and unambiguous expression of will freely made by fully informed data subjects.

In contrast to the CSL, section 5.4 of the Standard further provides certain exceptions to the requirements to obtain consent, including national security, public health and security necessary for executing or performing contracts, among others. Nonetheless, it is important to note that the Standard is not an enforceable legal document but a set of recommendations and guidelines. Therefore, it is recommended to obtain consent from the data subject whenever possible.

11.3.2 Sharing and disclosure of personal data

According to the Standard, when foreign companies intend to share or disclose the collected personal data to a third party (including their affiliates), they shall obtain prior consent from the

relevant subjects. To meet the consent requirements, foreign companies shall inform subjects, usually in the form of a privacy policy, of the purposes of the sharing, disclosure or transfer of the personal data, the scope of the transferred data and the data recipient. There is an exception when the personal data to be shared or transferred has been processed for de-identification purposes and the data recipient is unable to reidentify the data subjects.

Pursuant to section 8.2 of the Standard, foreign companies are also recommended to:

- assess the personal data security impact in advance and take effective measures to protect data subjects according to the assessment findings;
- maintain accurate records of the particulars of sharing and transferring personal data, including the date on which the data is shared or transferred, amount of data shared or transferred, purposes for sharing or transferring the data, and basic information of data recipients, and keep these records safe; and
- help data subjects to understand the particulars of the data recipients' storage and use of their personal data and learn about the rights of data subjects, such as accessing, modifying and deleting their own personal data and cancelling their own account.

11.3.3 Cross-border data transfer restrictions under the CSL

It is common practice for multinational companies to deploy unified and connected IT systems and office networks to realise global centralised management. When foreign companies transfer certain personal data or operation data collected within China to overseas affiliates or cooperative partners, the cross-border data transfer regulatory requirements apply.

Pursuant to Article 3 of Measures for Security Assessment for Cross-border Transfer of Personal Information (Draft for Comments), published by the CAC on 13 June 2019, before the cross-border transfer of personal data, foreign companies shall bear the data protection obligations below, including but not limited to:

- obtaining prior consent from the data subjects and informing them of the purposes of the sharing, disclosure or transfer of the personal data, the scope of the transferred data and the data recipient;
- conducting a security assessment for the cross-border transfer of personal data, and filing the assessment results with the local CAC office;
- executing data transfer agreements with overseas data recipients;
- maintaining a log of all cross-border transfers of personal data for at least five years; and
- submitting an annual report to the CAC on the status of cross-border transfers and the performance of data transfer agreements.

Note that, as outlined in sector-specific regulation, certain sensitive personal data, such as personal biometric information and credit information, can only be stored or processed within the

territory of China. In principle, it is prohibited for such sensitive personal data to be transferred to overseas entities.

11.3.4 Data security standard

The CSL implements a multi-level protection system for cybersecure network protection, which classifies networks into five grades and progressively imposes higher security requirements for each grade.

Foreign companies, as network operators, are responsible for taking technical and other necessary measures to ensure the security of data they collect and to prevent the data from being accidentally disclosed or destroyed. Companies shall evaluate and determine the grades of their operating networks, and companies with networks of Grade 2 or higher shall file such networks with the local public security bureau.

If a foreign company entrusts a third party to process personal data on its behalf, it shall ensure that such a processor provides an adequate level of protection to the personal data involved, as provided in section 8.1 of the Standard.

11.4 Conclusion

With the strict enforcement of the CSL, cybersecurity and data protection has become a priority of corporate compliance review. Although many multinational companies have established comprehensive data protection management systems based on a European or American standard, it is highly recommended to examine the above compliance risks and localise the management system to meet Chinese regulatory requirements.

Chapter 12: Competition law

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12.1 Legal framework of China's competition law

A competition law system is a synthesis of various laws and regulations that regulate the competition of market entities. It takes the competition relationship in market activities and the competition management relationship between managers and operators as the regulative object and, in the main, is intended to maintain the normal competition order, with anti-monopoly and anti-unfair competition as the core content.

12.1.1 Laws and administrative regulations

In addition to the Antitrust Law (released on 30 August 2007, revised on 1 August 2022) and Law Against Unfair Competition (revised on 23 April 2019), there are also other provisions in relation

to competition regulation in the current Chinese competition legal system, such as the Pricing Law (released on 29 December 1997), Law on the Protection of Rights and Interests of Consumers (revised on 25 October 2013), E-commerce Law (released on 31 August 2019) and Advertising Law (revised on 29 April 2018).

Administrative regulations also make up an important part of the competition legal system. On 26 January 2024, the State Council released Regulations on Filing Thresholds for Concentration of Undertakings, revising the declaration thresholds for concentrations of undertakings that have been unchanged for more than 15 years since 2008.

12.1.2 Judicial and other interpretations

In China, judicial interpretations have a unique function as an important component of the legal system. The most important judicial interpretation about competition law include Provisions of Supreme People's Court on Several Issues concerning the Application of Law in the Trial of Monopoly Civil Disputes (amended in 2020); Interpretation of the Supreme People's Court on Several Issues Concerning the Application of the Law of the People's Republic of China against Unfair Competition (amended in 2022).

12.1.3 Departmental Rules and Guidelines

Departmental rules, also known as ministerial rules, are released by the ministries and commissions under the State Council, the People's Bank of China and other departments with administrative responsibilities directly under the State Council. They constitute the primary legal resources complementing the amended Antitrust Law and have a significant impact on antitrust enforcement.

Following the revision of the Antitrust Law, a series of administrative regulations were released to facilitate the implementation and interpretation of the law. These include: Provisions on Review of Concentration of Undertakings, Provisions on Prohibition of Monopoly Agreements, Provisions on Prohibition of Abuse of Dominance, Provisions on Prohibition of Elimination and Restriction of Competition Through Abuse of Administrative Powers, Provisions on Prohibition of Elimination and Restriction of Competition Through Intellectual Property Rights. Recently, SAMR has promulgated Interim Provisions Against Unfair Competition in Cyberspace, which came into effect on 1 September 2024.

Guidelines, though not as mandatory as laws, regulations and departmental rules, function as important references for the interpretation and implementation of antitrust law. Prior to the release of the amended Antitrust Law, such guidelines include Guidelines of the Anti-monopoly Commission on the Definition of a Relevant Market, Anti-monopoly Declaration Guidelines for Mergers and Acquisitions of Domestic Enterprises by Foreign Investors, Guiding Opinions for the Declaration of Concentration of Undertakings (revised in 2018), Anti-monopoly Review Guides for Concentrations of Undertakings, Anti-monopoly Guidelines for the Field of Intellectual Property Rights, Anti-monopoly Guidelines for Automotive Industry, Guide to Application of the Leniency Program to Cases Involving Horizontal Monopoly Agreements, Guidelines on Anti-monopoly in the field of Active Pharmaceutical Ingredients, Anti-Monopoly

Guidelines for the Platform Economy Industries and the Guidelines for Overseas Anti-monopoly Compliance of Enterprises.

After the amendment of Antitrust Law, Anti-monopoly Compliance Guidance for Concentrations of Undertakings, Anti-monopoly Guidelines for Trade Associations, Guidelines for Implementation of Third-party Appraisal for Fair Competition Review, Guidelines for Regulatory Talks on Law Enforcement Against the Abuse of Administrative Power to Exclude or Restrict Competition, Rules for Fair Competition Review in the Field of Bid-invitation and Bidding were released.

12.1.4 Other rules and regulations

Other rules and regulates include the Regulation on Prohibiting Infringement upon Trade Secrets (1998), Certain Regulations on Prohibiting Unfair Competition Activity Concerning Imitating Specific Names, Packaging or Decoration of Well-known Commodities (1995), Interim Provisions on Prohibition of Commercial Bribery (1996) and Provisions on the Merger and Acquisition of Domestic Enterprises by Foreign Investors (2009). In addition, the provisions on competition in the international conventions of which China is a party also play a significant role in China's competition legal system.

To be noted, local governments have been taking an active role in releasing their legislation to tackle anti-competitive behaviour. Examples include Beijing Antitrust Compliance Guidelines (issued by Beijing Administration for Market Regulation) and Guidelines for Competition Compliance Evaluation of Internet Platform Enterprises (issued by Shanghai Administration for Market Regulation).

12.2 Competition enforcement practices in 2023

The SAMR, as well as the local authorities to which enforcement has been delegated, are in charge of the enforcement of the antitrust law. Among the 768 enforcement decisions published by SAMR, most cases focus on public utilities, pharmaceutical corporations, energy suppliers, construction material manufacturers and industry associations.

In 2023, SAMR released three batches of typical anti-monopoly cases involving livelihood issues, including 18 monopoly agreement cases and 11 abuse of dominant market position cases. Among these cases, eight cases involve the pharmaceutical industry and eight cases involve public utilities. Few antitrust cases concerning internet companies took place in 2023, a significant shift from that in 2022 and 2021. For instance, from 1 January 2021 to 14 December 2021, SAMR published a total of 118 antitrust cases, of which 89 involved internet companies, accounting for 75.42 per cent of the total.

In 2023, SAMR announced 21 cases of abuse of administrative power to exclude and restrict competition. Most of these cases concern designated transactions by local government departments, mainly involving the construction industry and public utilities.

12.3 Competition judicial practice in 2023

On 14 September 2023, the Supreme People's Court released the typical cases of anti-monopoly and anti-unfair competition of the People's Courts in 2023, including five typical anti-monopoly cases and five typical anti-unfair competition cases. Among the five typical anti-monopoly cases, three cases involve abuse of market dominance and two involve monopoly agreements. The industries involved include medicine, funerals, automobile sales and building materials, all of which are closely related to livelihood issues.

The five typical anti-unfair competition cases released by the Supreme People's Court concern confusion, false advertising, infringement of trade secrets and online unfair competition disputes. The cases mainly involve fields of daily consumption such as household appliances, short videos, online games, restaurant reviews, as well as high-tech industries such as diagnostic reagents.

12.4 Competition policy trends and hint for companies

Companies should keep an eye on the drafting and promulgation of the following laws, regulations and guidelines, including Anti-unfair Competition Law of the People's Republic of China (draft released on 22 November 2022), Provisions of the Supreme People's Court on Several Issues concerning the Application of Law in the Trial of Monopoly-related Civil Dispute Cases (draft released on 18 November 2022), Regulations on Fair Competition Review (draft released on 12 May 2023), Anti-monopoly Guidelines for the Field of Standard Essential Patents (draft released on 30 June 2023).

Judging from the exposure draft, major changes are expected to be made to the Anti-unfair Competition Law so that the law not only covers a broader range of unfair competition activities, but also enhanced penalties for certain anti-competitive behaviour. Of equal importance is the drafting of Provisions of the Supreme People's Court on Several Issues concerning the Application of Law in the Trial of Monopoly-related Civil Dispute Cases. This judicial interpretation, covering all aspects of the procedures and substance of antitrust civil litigation, is the largest judicial interpretation since the establishment of the Intellectual Property Court of the Supreme Court.

Additionally, it is obvious that the SAMR, as well as the Anti-monopoly and Anti-unfair Competition Commission of the State Council, is encouraging companies to develop internal anti-monopoly compliance mechanisms. The Anti-monopoly Compliance Guide for Undertakings, for example, includes a chapter on antitrust compliance incentives. This chapter outlines how anti-monopoly law enforcement agencies may consider the establishment and implementation of anti-monopoly compliance mechanism before and during law enforcement. Under such circumstances, companies are suggested to establish or improve their compliance mechanism, which is expected to be pragmatic, efficient and cover all aspects of business areas, departments and employees.

Finally, Interim Provisions Against Unfair Competition in Cyberspace became effective on 1 September 2024. It is recommended that relevant companies, including internet companies and their collaborators, take a close look at the provision and, if necessary, make changes to their business model in advance.

Chapter 13: Dispute resolution

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Similar to other legal systems around the world, mediation, arbitration and litigation are the three main mechanisms for resolving international commercial disputes in the PRC. According to a work report released by the SPC in 2024, a total of 24,000 foreign-related civil and commercial cases and 16,000 maritime cases were concluded. Compared to the previous year the average trial time was almost ten days shorter, representing an increase of 3.6 per cent and 5.3 per cent, respectively.[29] Arbitration institutions in China also saw an increase in the number of cases. For example, in 2023, the China International Economic and Trade Arbitration Commission (CIETAC)[30] and the Beijing Arbitration Commission/Beijing International Arbitration Center (BIAC) handled 5,237 cases and 12,222 arbitration cases respectively.[31]

There is no doubt that a large number of commercial disputes in China are now resolved through litigation and arbitration proceedings.

13.1 Commercial litigation

Judicial litigation is one of the most effective methods for resolving international commercial disputes in China. Preservation measures (ie, interim/provisional measures and/or injunctive relief) are available to parties in judicial litigation in China, which ensure the effective enforcement of successful cases and avoid irreparable damage. Therefore, disputing parties in China often choose judicial litigation. Adopting the 'second instance ruling being final' doctrine, the selection of the appropriate jurisdiction or forum for commercial litigation often depends on the amount of controversy and geographical locations in the case.

In this type of litigation system, prolonged trial time may sometimes occur. However, in contrast to arbitration-like proceedings, an extensive review by the appellate court (second instance) may provide more legal certainty and clarification.

In recent years the number of foreign-related cases resolved via litigation in China has increased drastically, which in turn has resulted in corresponding legal reforms initiated by both the legislative body and the judicial system. The Law on the Application of Laws to Foreign Related Civil Relations of the PRC, which came into effect in April 2011 has recently witnessed its second judicial interpretation. Since 1 January 2024, the responsibility for identifying foreign laws in the trial of foreign-related cases shall be ascertained by the court and supplemented by the parties in dispute. China has not yet provided for the means of identifying foreign laws at the legislative level, however, the new judicial interpretation concluded seven means for foreign laws to be ascertained by the court, including provision by the parties, provision by the central or competent authorities of

29 Ministry of Justice, Work Report of the Supreme People's Court, https://www.gov.cn/yaowen/liebiao/202403/content_6939583.htm accessed 17 February 2025

30 China International Economic and Trade Arbitration Commission, 'CIETAC 2023 Work Report': www.ccpit.org/a/20240127/2024012767fm.html accessed 17 October 2024.

31 Beijing International Arbitration Centre, '2023 Annual Report': www.bjac.org.cn/news/view?id=4714 accessed 17 October 2024.

the other party through the channel of mutual legal assistance, provision by the Supreme People's Court through its request to China's embassies and consulates in that country, or provision by that country's embassies and consulates in China, and provision by the Committee of Experts from the China International Commercial Court.[32]

With the drastically increasing number of international commercial disputes, the Supreme People's Court of the PRC (SPC) launched two international commercial courts (China International Commercial Court or CICC) in June 2018. These courts are based in Shenzhen and Xi'an, respectively. The International Commercial Expert Committee of CICC, as of 2024, comprises 61 members from 24 countries and regions. It plays a crucial role in mediating international commercial disputes and providing consultative opinions on foreign law clarification and application. Cases tried by the CICC shall be heard by a collegial panel consisting of three or more judges. The CICC practices the 'first instance being final' doctrine. All judgments and rulings made by the CICC are final and binding on the parties with legal effect.

The 'One Stop' Mechanism for Dispute Resolution effectively integrating litigation, mediation and arbitration has been continuously promoted by the SPC since 2018. On 29 December 2023, the Working Guidelines for the 'One-Stop' Diversified International Commercial Dispute Resolution of International Commercial Disputes (Trial) was issued, establishing a mechanism where the parties can reach different dispute resolution methods through the 'One-Stop' Online Platform with a single click. They can choose to file a lawsuit with the CICC, or to choose non-litigation dispute resolution methods such as mediation, arbitration or neutral evaluation. By pooling the resources of various dispute resolution services, the 'One-Stop' Online Platform further reduces the time and economic costs of dispute resolution in China.[33]

13.2 Commercial arbitration

Many foreign enterprises prefer arbitration as a way of dispute resolution in China. As of the end of 2023, a total of over five million arbitration cases were handled by 279 arbitration institutions nationwide, with a combined value exceeding RMB 80tn. Notably, between 2012 and 2023, the number of arbitration cases in China nearly quintupled, while the value of arbitration claims increased eightfold.[34] In 2023, CIETAC handled a total of 645 foreign-related cases, among which 93 cases were conducted in English or bilingual Chinese-English as the arbitration language. The top ten sources of foreign-related cases, in descending order, were Hong Kong SAR, the US, the British Virgin Islands, Germany, Singapore, South Korea, the Cayman Islands, Taiwan Region, the UK and Canada. As for the applicable laws, the involved parties agreed to apply various laws, including the United Nations Convention on Contracts for the International Sale of Goods

32 Supreme People's Court, Judicial Interpretation of the Law on the Legal Application of Foreign-related Civil Relations (II), https://www.court.gov.cn/zixun/xiangqing/419042.html accessed 5 June 2024. {See AQs}

33 CICC, Supreme People's Court Issues Guidelines for the 'One-Stop' Platform for Diversified Settlement of International Commercial Disputes (for Trial Implementation): https://cicc.court.gov.cn/html/1/218/149/192/2436.html accessed 17 October 2024.

34 Ministry of Justice, Promoting the Integration and Development of Hong Kong and the Mainland in the Field of Arbitration in a Complementary Manner: www.moj.gov.cn/pub/sfbgwapp/fzgzapp/ggfzfwapp/ggfzfwapp2/202405/t20240506_498312.html accessed 17 October 2024.

(CISG), laws of Hong Kong SAR, the UK, Pakistan, Mongolia, Russia, Brunei and Iraq, as well as international trade practices like Incoterms 2000.[35]

China is a member of the New York Convention (the Convention on the Recognition and Enforcement of Foreign Arbitral Awards), which means that an arbitral award rendered in China can be recognised and enforced in any other member countries of the Convention. According to the CIETAC 2023 Work Report, CIETAC's arbitral awards remained unrevoked by any courts and had been widely acknowledged and enforced by courts in countries and regions such as the US, Argentina, Russia, Hong Kong SAR, etc, enhancing the credibility of Chinese arbitration globally. Besides, CIETAC also provided essential auxiliary services in compliance with the legal requirements of enforcement jurisdictions like Indonesia, the US, Iran and Brazil, to aid parties in executing arbitral awards abroad. These services included issuing certificates of award validity, authenticity and registration for enforcement applications.

When it comes to enforcing foreign arbitral awards domestically, China adopts different standards of review for a domestic arbitral award and a foreign arbitral award. The court generally follows a stricter standard when reviewing a domestic arbitration award whereas it focuses mainly on procedural matters/issues with overseas arbitral awards. The most recent amendment to the Civil Procedure Law, which came into effect on 1 January 2024, heavily focuses on expanding China's courts' scope to accept arbitral awards made outside China's territory. For example, according to the new Article 304, even if the domicile or property of the foreign person subject to enforcement is not in China, the enforcement applicant in China can apply to the relevant people's court. The court, will then request assistance from an extraterritorial court to enforce the arbitral awards outside the territory of China based on international treaties, bilateral agreements, the principle of reciprocity, etc. This has enhanced the completeness and flexibility of China's rules relating to the recognition and enforcement of extraterritorial awards, making China's courts more popular for the settlement of foreign-related civil and commercial disputes.[36]

13.3 Mediation and alternative dispute resolution

Compared with arbitration proceedings, the process of mediation is considered by many to be more flexible, confidential and effective. It is sometimes much easier for parties involved in a commercial dispute to come to terms simply because of the less stressful atmosphere and flexibility provided in a mediation process.

Currently, judicial authorities in China recognise mediation agreements issued by the people's courts, arbitration institutions and People's Mediation Committees. A mediation agreement reached under the supervision of the People's Mediation Committee shall be enforced only with a confirmation made by the court. However, with respect to a settlement agreement resulting from a mediation proceeding abroad, there is no existing law addressing the process of application and/or enforcement of remedy to date.

35 China International Economic and Trade Arbitration Commission, 'CIETAC 2023 Work Report': /www.cietac.org/index.php?m=Article&a=show&id=20122 accessed 17 October 2024.

36 The State Council, Decision of the Standing Committee of the National People's Congress on Amending the Civil Procedure Law of the People's Republic of China, https://www.gov.cn/yaowen/liebiao/202309/content_6901570.htm accessed 5 June 2024.

As China continuously promotes a comprehensive and diversified mechanism for dispute resolution, the mediation platform of people's courts is used as a main vehicle. There are now 12 mediation cooperation units of the Supreme People's Court, among which, the Mediation Center of the China Council for the Promotion of International Trade (CCPIT) is one of the first mediation organisations to be included in the 'One-Stop' Centre for Dispute Resolution, and it has also established joint mediation mechanisms with renowned dispute resolution organisations in 22 countries and regions around the world. The number of commercial mediation cases received has increased from more than 1,800 in 2012 to more than 9,500 in 2022, with an average annual growth rate of 18 per cent and a subject matter of more than RMB 48bn.[37]

There is no uniform and strict legal concept of commercial mediation, which is a commercial dispute resolution mechanism consisting of a variety of systems, rules and practices. At present, China's domestic normative documents tend to define the scope of commercial disputes by positive enumeration, for example, the Regulations on the Diversified Resolution of Conflicts and Disputes in the Shenzhen Special Economic Zone consider commercial disputes to include 'conflicts and disputes occurring in the commercial fields of trade, investment, finance, transportation, real estate, intellectual property rights, technology transfer, and engineering and construction'. Any foreign-related commercial disputes falling within this scope may be selected for mediation within China.

13.4 New trends and challenges

With ever-increasing globalisation, dispute resolutions such as litigation, arbitration and mediation may function better when mutually beneficial and seamlessly integrated. For example, the idea and principle of mediation are effectively combined into both litigation and arbitration proceedings in China. On 30 July 2021, the Ministry of Justice issued the Arbitration Law (Revised) (Draft for Public Comments), updating the basic framework to more closely resemble the prevailing international practice as represented by the UNCITRAL Model Law on International Commercial Arbitration. Notably, the Draft allows, for the first time, parties with China as the seat of arbitration to submit their 'foreign-related commercial disputes' to arbitration by an ad-hoc arbitral tribunal (Article 91). Previously, arbitral awards made by foreign ad-hoc arbitral tribunals could only be enforced in China through the New York Convention, but the arbitration itself cannot be conducted in Mainland China. The adoption of the Draft would make it easier for commercial entities to resolve their disputes quickly and efficiently in China, and it will allow commercial transactions to return to their normal course.[38]

In the process of promoting the construction of the rule of law in relation to foreign affairs, China is still facing considerable challenges regarding the application of laws and the extraterritorial effects of legal rules for dispute resolution, the convergence and coordination of domestic and foreign legal rules, cyberlegal relations, the protection of personal information, the flow of cross-border data, intellectual property rights of emerging technologies, provisional measures of preservation and group litigation. It is necessary to learn from the advanced experience of extra-territorial dispute resolution organisations and further integrate with the international dispute resolution community to achieve better development.

37 BIAC, 'Annual Observations on Commercial Mediation in China' (2023): www.bjac.org.cn/news/view?id=4673 accessed 17 October 2024.

38 Public Consultation System, 'Arbitration Law of the People's Republic of China (Revisions) (Draft for Opinion)', https://zqyj.chinalaw.gov.cn/h5/readmore?listType=&id=4518 accessed 17 February 2025.

Chapter 14: Development and practice of wealth management legal business

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With the continuous development of the Chinese economy, the affluent class in China has grown rapidly in the past few decades. As of 2022 the number of high-net-worth individuals (HNWIs) with personal investable assets of more than RMB 10m (about US$1.43m) nationwide reached 3.16 million, and the overall size of investable assets held by individuals across the country reached RMB 101tn (about US$13.9tn).[39] The affluent class is paying more attention to the safety of its wealth. Wealth management for private client legal services, especially for HNWIs, has become an emerging area of legal services in China in recent years.

14.1 Main legal applications of wealth management services

A client's wealth management business involves comprehensive needs, such as marriage, inheritance, tax planning, immigration, family business governance and succession, involving multiple departmental laws, including non-litigation and litigation businesses, and domestic and foreign legal relationships recognising typical integrated legal practices. The main substantive laws are outlined below:

14.1.1 Application of the Marriage Law

The marriage risks of HNWIs directly affect their wealth security. Lawyers need to provide services based on client needs, such as drafting legal documents, including marital asset agreements, divorce agreements and marital asset division agreements, as well as representing clients in divorce proceedings. Therefore, the Marriage and Family Part of the Civil Code of the PRC[40] and related judicial interpretations are important laws applicable to the wealth management business.

14.1.2 Application of the Succession Law

In recent years more HNWIs have entrusted lawyers to take into consideration comprehensive factors with respect to the inheritance arrangements of wealth, before or even after life. Inheritance is done mainly through statutory succession, testamentary succession and legacy. The above arrangements and legal documents need to comply with the Succession Part of the Civil Code of the PRC,[41] the judicial interpretation and the guiding cases of the SPC.

39 'Private Wealth Report 2023' of China Merchants Bank – Bain & Company.

40 Promulgated and implemented on 28 May 2020, implemented on 1 January 2021.

41 Promulgated and implemented on 28 May 2020, implemented on 1 January 2021.

14.1.3 Application of the Company Law

The family wealth management business is always accompanied by issues such as the standardisation of family business governance and the delegation of business management rights. Clients usually entrust lawyers to design a complete plan for the inheritance of family businesses to optimise the governance structure of family businesses and plan the inheritance arrangements of equity ownership and operating rights. The validity of the aforementioned legal documents relates to the application of legal provisions, such as the Company Law of the PRC[42] and related judicial interpretations.

14.1.4 Application of the Trust Law

The Trust Law of the PRC[43] was promulgated and taken into effect in 2001, Notice on Standardizing the Classification of Trust Business of Trust Companies was promulgated and taken into effect in 2023.The trust system in China has yet to be improved. However, due to the unique advantages of trusts in wealth management and inheritance arrangements, more clients have begun to engage with lawyers to set up family asset trusts to arrange wealth.

14.1.5 Application of tax laws

In any wealth plan, the tax issues of clients, families and family businesses are involved. If clients or family members have already emigrated, overseas tax issues will also be involved. Chinese clients have begun to entrust lawyers to provide planning solutions for tax risks of family members or assets in accordance with domestic and overseas tax laws.

In addition to the above laws that are important for wealth management, there are other laws, such as the Insurance Law of the PRC[44] and the application of the Law of the PRC on Choice of Law for Foreign-Related Civil Relationships.[45] When serving clients in China, lawyers often need to help clients achieve their wealth management goals with laws of different disciplines in non-litigation plan formulation, as well as legal representation in litigation.

14.2 Development of China's wealth management services and demand status

In recent decades the scale of China's economic and social wealth has grown rapidly. In 2022, the total financial assets of Chinese private households are estimated to reach €32tn, accounting for 14.1 per cent of the global total financial assets.[46] The per capita income level and wealth of Chinese residents have increased significantly, and the accumulation of family assets has also brought about the rapid development of the wealth management industry. Chinese HNWIs have begun to pay attention to the long-term allocation of assets and the prevention of legal risks. Currently, more

42 Promulgated on 29 December 1993, second revised on 1 July 2024.

43 Promulgated on 28 April 2001, implemented on 1 October 2001.

44 Promulgated on 30 June 1995, amended for the third time on 24 April 2015.

45 Promulgated on 28 October 2010, and implemented on 1 April 2011.

46 The 2023 Global Wealth Report- Credit Suisse& UBS.

clients are actively commissioning lawyers for overall wealth management and planning, spawning the novel legal service field of wealth management.

14.3 Regional differences in China's wealth management services

As of the end of 2022, the number of 'high net worth households' with net assets of millions of RMB reached 2.11 million. Among them, the five cities with the most 'high net worth households' are 306,000 households in Beijing, 271,000 households in Shanghai, 215,000 households in Hong Kong, 80,000 households in Shenzhen and 73,000 households in Guangzhou;[47] therefore, judging from the distribution of wealth throughout China, the proportion of HNWIs in first-tier cities is relatively high, and their corresponding wealth management demands have also increased. At the same time, with the continuous development of second- and third-tier cities, demand for wealth management legal services in those regions has also gradually increased. However, holistically speaking, wealth management services and clients are mainly concentrated in first-tier cities with developed economies. Lawyers and wealth management agencies in this business are also mainly concentrated in large cities with developed economies.

14.4 Challenges in wealth management services

14.4.1 Inadequate risk awareness of HNWIs

Although family wealth security and inheritance have become a necessity for HNWIs, due to insufficient publicity and education around the legal risks of assets, clients have paid more attention to investment than security planning and lack the inclination to entrust lawyers to prevent risks.

14.4.2 Insufficient experience of wealth management professionals and service agencies

Although China's economy is well developed, the corresponding legal framework to meet the needs of HNWIs in respect of private wealth management has yet to mature. Compared with the wealth management industry in Western developed countries, Mainland China's wealth management services still have problems, lagging behind the clients' needs in terms of cultivating professionals and the experience of legal practices, which at the same time indicates the huge demand gap for wealth management legal services in the market and the vast space for it to develop.

14.4.3 A systematic service pattern of wealth management is needed

HNWIs have diverse asset types and relatively complex familial structures. They face global asset allocation requirements and the challenges of family business inheritance. Wealth management institutions are required to provide a professional service and to coordinate law, tax, finance, immigration, education and other fields to form a systematic service pattern. Generally speaking,

47 Hurun Baifu's 2023 'China High Net Worth Household Cash Flow Management Report'.

China's wealth management industry has not yet formed a systematic and collaborative service model. The main reasons for this include a lack of detail in the laws about wealth management, insufficient experience of professional institutions and practitioners in this field, non-existent systematic industry service standards and the immaturity of the localised legal service model.

14.4.4 Global cooperation ecology is needed

At present, China's wealth management industry has not yet established a global cooperation system. It is difficult to achieve clients' globally integrated wealth management and risk prevention goals. International professional cooperation is in urgent need of development.

From a holistic perspective, the size of China's wealth management market is considerable, and demand is increasing. In future, there will be a vast space for development of China's wealth management legal services, and the entire industry needs to promote the development of services in a coordinated way and pay more attention to international legal service cooperation.

Chapter 15: Environmental policy and law

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This is the final chapter, but perhaps the least attention grabbing yet the most important one. Before making investment decisions in Chinese Mainland, if enterprises in the Asia Pacific region do not carefully study the current ecological environment laws and policies in Chinese Mainland, or green transformation laws and policies, investment failure or low investment efficiency may be a high probability event.

Why? The following two analytical dimensions are available for reference: the comprehensive green transformation of China's economy and society; and how to demonstrate it in specific investment cases.

15.1 Comprehensive green transformation of China's economy and society

The constitution and its implementation have ultimate value for investment decisions in most countries. In 2018, the Constitution of the PRC was revised, which included the parallel of 'ecological civilization' and 'material civilization', as well as the parallel of 'beautiful China' and 'prosperous and strong China', and included the construction of 'ecological civilization' in the scope of the State Council's authority, which is equally important as 'economic affairs and urban-rural development'.

On the basis of the above basic policies, Article 16 of the Environmental Protection Law of the People's Republic of China stipulates that 'The local people's governments at various levels shall be responsible for the environment quality of areas under their jurisdiction'.

Therefore, since 2015, the Central Committee of the CPC has carried out patrol inspections of ecological environment protection in all provinces, and has so far conducted three rounds of

inspections in 31 provinces, municipalities and autonomous regions. During the inspection process, a special reporting telephone number and mailing address for environmental supervision and inspection materials were set up. The central ecological environment protection inspection team has publicly held accountable and punished the problem of inadequate supervision of ecological environment protection. Among them, the cases where the Secretary of the Communist Party of China Gansu Provincial Committee and the Secretary of the Communist Party of China Shaanxi Provincial Committee were held criminally responsible are the most typical. A clear signal is that local leaders should not only focus on the economy and development, but also on ecological environment protection, which will inevitably indirectly affect industrial development measures and corporate profit models.

In addition to the central ecological environment protection inspection, China has also implemented local air, water and soil environmental quality rankings. Local government leaders with lower rankings will be responsible for the results and held accountable by the central and higher-level governments. The forms of accountability include admonishment, administrative sanctions, disciplinary actions (such as expulsion from the party, revocation of position) and criminal responsibility. To this end, the Central Committee of the Communist Party of China and the State Council issued the Measures for Supervision of Ecological Environment Protection (for Trial Implementation), the Measures for Accountability of Party and Government Leading Cadres for Ecological Environment Damage (for Trial Implementation) and other documents, revised the Regulations of the CPC on Disciplinary Punishment, the Regulations on the Selection and Appointment of Party and Government Leading Cadres and other intra party laws and regulations.

In terms of direct impact on enterprises, in addition to amending the Environmental Protection Law, China has also introduced five supporting implementation measures. Relevant departments have the right to impose daily penalties, freeze and detain, production restriction and shutdown, disclose environmental information, and administrative detention on enterprises for ecological and environmental violations.

At present, the Chinese legislative body has completed the revision of special laws in the field of ecological environment, such as the Air Pollution Prevention and Control Law, the Water Pollution Prevention and Control Law, the Solid Waste Pollution Prevention and Control Law, the Forest Law, the Grassland Law, the Water Law, and the Mineral Resources Law. It has also formulated laws such as the Soil Pollution Prevention and Control Law, the Yangtze River Protection Law, the Yellow River Protection Law, and the Wetland Protection Law, and is currently formulating the Ecological Environment Code. For example, in the aforementioned laws, the amount of penalties has significantly increased, the number of penalty items has been added, and the maximum amount of administrative violation fines for a single violation can reach RMB 5m, and so on. The amendment to the Criminal Law of the People's Republic of China has made three revisions to Article 338, changing the crime of polluting the environment from a result crime to a behavior crime, and raising the statutory sentence for the crime of 'polluting the environment' to more than seven years. In theory, the maximum penalty for the crime of polluting the environment is the death penalty. At the same time, this charge also competes with the crimes of 'illegal business operations', 'endangering public safety by dangerous means', 'issuing false certification documents' and 'damaging computer information systems'. Among them, the statutory maximum

penalty for the crime of 'endangering public safety by dangerous means' is the death penalty. The judicial authorities have revised the 'Interpretation of the Supreme People's Procuratorate and the Supreme People's Procuratorate on Several Issues Concerning the Application of Law in Handling Criminal Cases of Environmental Pollution' three times, refining the forms of criminal liability and sentencing standards for enterprises and their directors, executives and responsible persons in the field of ecological environment.

Recently, The Resolution of the Central Committee of the CPC on Further Deepening Reform Comprehensively to Advance Chinese Modernization was adopted at the Third Plenary Session of the 20th Central Committee of the CPC. According to this decision, the Central Committee of the CPC and the State Council issued 'Opinions on Accelerating the Comprehensive Green Transformation of Economic and Social Development' on 31 July 2024 and the purpose is to comprehensively implement Xi Jinping's 'Economic Thought' and Xi Jinping's 'Thought on Eco-Civilization'. These two policy documents directly affect the investment decisions of enterprises in China. From a detail, it can be seen that the comprehensive green transformation of China's economic and social development is not a slogan, but an action with specific measures. This detail is that China also needs to learn from many developed countries and build bicycle lanes for urban residents. In the eyes of many developing countries that advocate the priority development of the automobile industry and particularly emphasise GDP, this suggests that China is undergoing a significant change in its economic development path (of course, this change is an inevitable choice for China's economic and social development to a certain extent).

The aspects that affect enterprises include both the requirement to achieve 'greenization' in the production process and the requirement to achieve greenization in the consumption end. The greenization of the production process includes the greenization of energy and raw materials, as well as the greenization of waste disposal and the greenization of the consumption end. The latter includes the greenization of citizens' daily consumption as well as government procurement and public consumption. The above policy proposes that by 2035, greening will reach the international advanced level, and measures for greening include carbon reduction, pollution reduction, green expansion and high-quality growth.

Therefore, when investing in China, greening is both a challenge and an opportunity The challenge comes from high energy consuming and high polluting industries that will not be able to invest in China. Existing investments will face pressure for green transformation and upgrading. The opportunity comes from low-carbon green industries and their industrial chain capital, which will receive strong support and relatively high long-term stable profit returns in China through various business models.

15.2 How to demonstrate in specific investment cases

A Guangdong enterprise with its investment source in the British Virgin Islands, which is also a subsidiary of a paper company listed in Hong Kong, had been investing in a certain location in Guangdong for more than ten years before the following incident. In 2021, the enterprise was designated as a coal ban zone, and its self-owned power plant for cogeneration was shut down, resulting in the company's shutdown and inability to operate normally. In 2024, the lawsuit between

the company and the local government was brought to the Supreme People's Court of the PRC, and currently the relevant lawsuit has returned to the local court.

The core cause of the serious consequences mentioned above lies in the air quality ranking of the city where the enterprise is located, which ranks among the bottom three in Guangdong Province. The leaders of the city's party committee and government have received negative evaluations on party discipline and government affairs, so they have taken radical measures to shut down all coal-fired power plants in the region and only allow the use of natural gas. But the local government does not provide subsidies for the 'coal to gas' project, nor does it actively provide administrative compensation for the withdrawal of self-owned coal-fired power plants.

Of course, the above case is just an extreme adverse case of China's comprehensive green transformation process, which occurred in an underdeveloped non-Pearl River Delta city in Guangdong. In cities in the Pearl River Delta, such as Dongguan, similar paper-making enterprises are still alive. These enterprises' coal-fired units only require ultra-low emission transformation, and the emissions of major pollutants need to reach the level of natural gas combustion. Obviously, supervision and management are strict. These enterprises are generally classified as national or provincial key pollutant control emission units, and online monitoring systems are installed at the emission outlets to automatically upload real-time monitoring data to the Ministry of Ecology and Environment or the Provincial Department of Ecology and Environment. Moreover, key legislation, law enforcement and severe penalties will be imposed on behaviours that disrupt, interfere with, or falsify monitoring data. In the past five years, several cases of damaging computer systems have been reported almost every year, and the vast majority of the criminal targets are ecological environment automatic monitoring systems. Every year, the Chinese Ministry of Ecology and Environment organises special inspections of state-owned and private environmental monitoring institutions and companies. Effective inspection measures include mutual inspection between institutions and companies, and institutions and companies that have not been found to have problems will become direct inspection targets. Such measures have made the effectiveness of special inspections very prominent. Therefore, the authenticity of China's ecological environment monitoring data has been greatly improved. When investing in physical enterprises with pollutant emissions in China, they try to reduce cost expenditures on pollution prevention and control facilities, including operating expenses, which greatly increases the risk. The practice risk of foreign shareholder representatives sent to China has greatly increased.

A Japanese owned chemical company located in Zhaoqing City, Guangdong Province, recently commissioned our legal team to conduct a third-party independent investigation. The investigation project is the sustainable third-party independent demonstration of the company's ecological environment compliance and safety environment investment. The reason is that China has issued strict management rules for hazardous chemical industrial enterprises. The construction, renovation and expansion of hazardous chemical production and manufacturing enterprises must enter specialised hazardous chemical industrial parks (some special areas, such as the Yangtze River Protection Law that came into effect in 2021, prohibit the construction or expansion of chemical parks and projects within one kilometer of the Yangtze River main and branch banks). At the same time, strict control is imposed on the volatile organic compounds (VOCs) of chemical enterprises. Based on the above changes, this Japanese chemical company has commissioned a lawyer to conduct

a third-party independent assessment of the legal and compliant environmental and safety measures for expanding its 1,000-ton production capacity. This assessment report will be directly reported to the Japanese headquarters as the basis for investment decisions.

Further, several companies investing in the chemical industrial park in northern Guangdong will be affected by the protection of the Xinfengjiang Reservoir, which serves as a drinking water source for Hong Kong, Shenzhen and eastern Guangzhou. But the chemical industrial park in a county in northern Guangdong is built more than 20 kilometers upstream of the Xinfeng River reservoir, and is only one kilometer away from the Xinfeng River. Moreover, the enterprise waste water is not zero discharge, and after treatment, it is discharged into the Xinfeng River. Due to significant risks and hidden dangers, an ecological environment protection public welfare organisation from Shenzhen has initiated a preventive civil public interest lawsuit against the relevant park, with the aim of preventing the expansion of the chemical park and preventing major and sensitive incidents of drinking water source pollution. This type of lawsuit was highly unlikely to be accepted by Chinese courts five years ago, but now it has occurred in many western provinces of China, including Yunnan Province.

In Yunnan Province, China, a large hydropower group's investment project was ordered by the court to stop construction only because it could lead to the flooding of large areas of forests and wetlands, seriously threatening the living environment of green peacocks – which are first-class protected animals in China. During the trial of the case, the court listened to the opinions of various experts, conducted on-site investigations and held multiple hearings. Environmental organisations have provided ample evidence to prove that the construction of hydropower stations will pose a serious threat to the survival of green peacocks. This is the most well-known preventive ecological environment civil public interest litigation case in China in recent years.

In Hainan Province, China, two real estate companies listed in Hong Kong failed to invest in real estate projects due to the destruction of the ecological environment. One company was forced to remove and restore the artificial island due to unauthorised land reclamation, resulting in a loss of reportedly RMB 20bn; another company was ordered to stop construction, demolish existing commercial housing and restore the original state due to unauthorised occupation of coastal mangrove growth areas, resulting in significant losses. At present, one of these two real estate companies is undergoing bankruptcy liquidation procedures, and the other has also planned bankruptcy reorganisation. Although the reasons for the difficulties faced by the two real estate companies are not limited to the aforementioned reasons, their failure to act after planning and their risky investments in violation of ecological and environmental regulations and policies remain important drivers.

The author emphasises that the current case is not limited to the traditional field of ecological environment protection. In response to the common challenge of climate change for all mankind, a company in Shenzhen was fined three times the corresponding monetary value of the unpaid carbon emission quota for failing to reform and clear it on time. The company filed an administrative lawsuit against the Shenzhen Ecology and Environment Bureau, but ultimately lost. In Guizhou Province, an energy company has been sued for ecological and environmental civil public interest litigation for failing to timely pay 800,000 tons of carbon emission quotas, which is considered to have damaged the environment. According to the Interpretation on Several Issues Concerning the Application of

Law in Handling Criminal Cases of Environmental Pollution issued by the Supreme People's Court and the Supreme People's Procuratorate of China in 2023, the falsification of carbon emission data has been included in the scope of criminal sanctions. This means that if a company or individual intentionally forges, alters, or provides false carbon emission data, they will face criminal liability, with a maximum sentence of ten years.

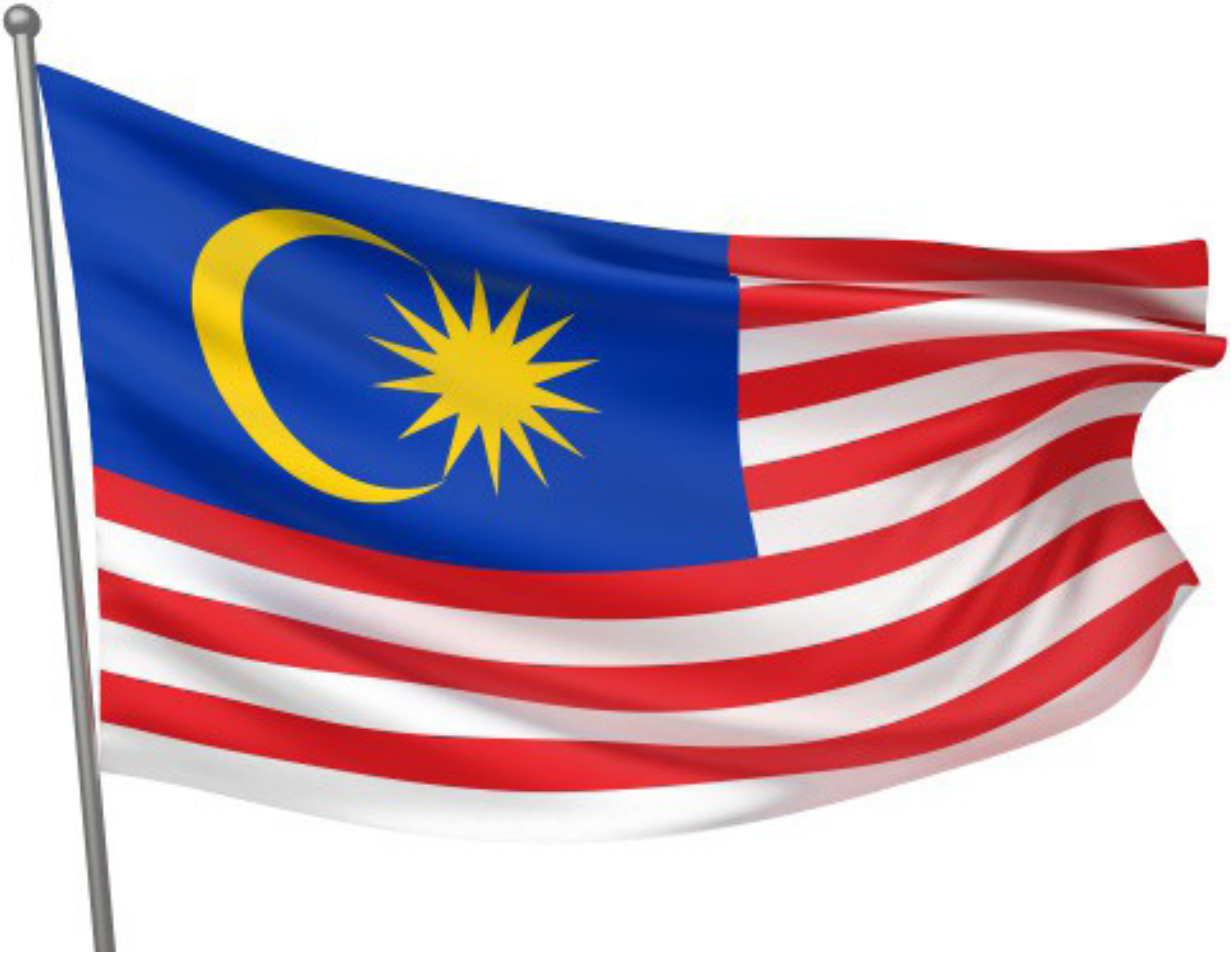
The above cases are listed from the perspective of challenges.

From an opportunity perspective, the most classic case is undoubtedly the miracle of Tesla's Shanghai Gigafactory, an electric car brand. This factory is not only Tesla's first super factory outside the US, but also the first foreign-owned automobile manufacturing project approved by China to encourage the development of new energy vehicles. Its miracle is evident to all, achieving the goal of 'starting construction, starting production, and delivering in the same year'.

Investment projects like Tesla, which comply with the legal policies of China's comprehensive green transformation of the economy and society, have been warmly welcomed and strongly supported by the central government and local governments at all levels in China. Taking the Chinese real estate industry, which is most likely to be underestimated, as an example, the green building market in China is not yet large, and the market space for high-quality and environmentally friendly residential and office buildings is actually quite large. Recently, the 25th Tsinghua University Environmental President Class in China visited Japan for inspection and learning. This is also the fifth time that the class has organised an exchange and mutual learning trip to Japan. Japan's ecological and environmental protection technology and related industries, including hydrogen battery technology, air purification technology, fine chemical technology, high-end material technology, forest health and medical care, biotechnology and other related industries, are all very popular in China and have great investment opportunities. There are many developed countries in the Asia Pacific region, and green and low-carbon technologies and related industries are correspondingly more developed. Therefore, investing in China by developed countries in the Asia Pacific region can anchor a new round of opportunities.

According to the Opinion on Accelerating the Comprehensive Green Transformation of Economic and Social Development issued by the Central Committee of the Communist Party of China and the State Council, the Opinion proposes quantitative work goals for different fields: by 2030, the scale of the energy-saving and environmental protection industry will reach about RMB 15tn; the proportion of non-fossil energy consumption has increased to around 25 per cent, and the installed capacity of pumped storage has exceeded 120 million kilowatts; the carbon emission intensity of operating transportation units converted to turnover has decreased by about 9.5 per cent compared to 2020, and so on. Obviously, it contains a lot of investment and profit opportunities.

Malaysia



Chapter 1: Introduction

Janet Looi, Skrine, Kuala Lumpur

Malaysia consists of 13 states and three federal territories, separated by the South China Sea into two regions: Peninsular Malaysia and Borneo's East Malaysia. Kuala Lumpur is the national capital and largest city, while Putrajaya is the seat of the federal government. With a population of over 30 million, Malaysia is the world's 44th most populous country.

The country is multi-ethnic and multi-cultural. About half the population is ethnically Malay, with large minorities of Chinese, Indians and indigenous peoples. While recognising Islam as the country's established religion, the Constitution grants freedom of religion to non-Muslims.

The official language of Malaysia is Bahasa Malaysia. English is the most common business language. Mandarin and local dialects are widely used forms of communication.

Malaysia is a member of the Association of Southeast Asian Nations (ASEAN), which is an intergovernmental organisation aimed primarily at promoting economic growth and regional stability among its members.

The overall infrastructure of Malaysia is one of the most developed in Asia. Malaysia is highly ranked for the quality of its roads, port infrastructure and air transport infrastructure. The country has seven international ports and five international airports (all with air cargo facilities). Its telecommunications network is served by digital and fibre optic technology.

Malaysia is a relatively open, state-orientated and newly industrialised market economy. Technological advancement has become an integral part of Malaysia's growth as an industrialised nation through the country's involvement in advanced electronics manufacturing, research and development (R&D), biotechnology, photonics, logistics, design, innovation and a highly automated manufacturing sector, to name a few. Industries in Malaysia are predominantly located in over 500 industrial estates and free zones throughout the country. These zones are categorised as export processing zones, which cater to the requirements of export-orientated industries. There are also specialised parks that have been developed to cater to the needs of specific industries. Malaysia's objective is to become a hub for other value chain activities, such as R&D, design and development, procurement, logistics, distribution and marketing, business support services and shared services.

According to the 2024 Index of Economic Freedom, which measures, among other things, investment freedom, trade freedom, judicial effectiveness, government spending and fiscal health, Malaysia's economic freedom score is at 65.7. This ranks Malaysia 45th in the world and ninth among 39 countries in the Asia Pacific region, above Indonesia, the Philippines, Thailand and several other ASEAN countries.

Chapter 2: The business environment

Yee Mei Ken, Shearn Delamore & Co, Kuala Lumpur

2.1 Government structure

Malaysia is a federation of 13 states. The Federation of Malaysia practises parliamentary democracy, with a federal constitutional monarch, the Yang di-Pertuan Agong (the 'King'). The King is the Supreme Head of the Federation and is commonly referred to as the head of state.

Based on the Federal Constitution, one of the characteristics of the parliamentary democracy practised in Malaysia is the separation of powers into three parts: legislative, judiciary and executive. The separation of powers also occurs at the federal and state levels, where the federal and state governments are accorded defined law-making powers based on the Federal List, State List and Concurrent List.

2.1.1 Legislature

At the federal level, the bicameral Parliament headed by the King is comprised of two houses: the Upper House (House of Senate or Dewan Negara) and the Lower House (House of Representatives or Dewan Rakyat). The Dewan Negara has 70 Senators, consisting of 44 members appointed by the King and 26 members elected by the State Legislative Assemblies. The Dewan Rakyat, on the other hand, is made up of 222 members elected through a general election every five years.

The political party or coalition that secures a simple majority of seats in the Dewan Rakyat forms the ruling government. However, in the 2022 general election, no political party or coalition achieved the required majority, resulting in a hung parliament. To resolve the impasse, extensive negotiations ensued among the major political parties and a unity government was formed under the leadership of Anwar Ibrahim, with his coalition, Pakatan Harapan (PH), joining forces with Barisan Nasional (BN), Gabungan Parti Sarawak (GPS) and other smaller parties. This unique arrangement marked a significant shift in Malaysia's political landscape, emphasising collaboration across traditional party lines.

Primarily, the Parliament enacts and approves federal laws, as well as amends and examines existing federal laws and government policies. The Dewan Rakyat also functions as a forum for its members to debate and question government policies and national issues.

Draft bills may originate from either house, except money bills, which are initiated in the Dewan Rakyat. All draft bills approved by either house are sent to the other house for approval. In each phase, a chamber of parliament must undergo four stages: the first reading; second reading; discussion at committee level; and third reading of the bills. If the bills are passed by both chambers, they are assented by the King through affixing the Public Seal. Thereafter, the bills become law and enforceable upon publication in the Government Gazette.

2.1.2 Executive

The executive authority of the federation is vested in and led by the King subject to the provisions and limitations enshrined in the Federal Constitution. The King appoints a Council of Ministers to form the Cabinet (Jemaah Menteri) to advise the King on the execution of his functions as the head of the executive authority. The ministers are appointed by the King on the advice of the Prime Minister and shall be members of either the Dewan Negara or Dewan Rakyat.

In governing the country, the King acts on the advice of the Prime Minister, who leads the Cabinet of Ministers. In short, the Prime Minister acts as the head of the government.

The Cabinet holds the highest administrative authority in the country and is responsible for forming government policy. Each minister is assigned different portfolios and is usually assisted by a deputy minister. The Cabinet is collectively accountable to Parliament for every decision it makes.

In appointing the Prime Minister, the paramount consideration of the King is that the Prime Minister shall be likely to command the confidence of the majority of the members of the Dewan Rakyat. As such, if the Prime Minister ceases to command the confidence of the majority of the members of the Dewan Rakyat, then, unless at his request the King dissolves parliament, the Prime Minister shall tender his/her resignation of the cabinet.

2.1.3 Judiciary

The judiciary refers to the Malaysian court system, which is made up of a body of judges. Judges interpret and implement laws enacted by the legislature, executive and state assemblies. The judiciary is also empowered to interpret the highest law of the land, the Federal Constitution and declare any written law to be unconstitutional or illegal.

The judiciary body and the court structure are enshrined under Article 121 of the Federal Constitution. The hierarchy of the courts is classified into subordinate courts and superior courts. Subordinate courts refer to the Magistrates' Court and the Sessions Court. The superior courts consist of the two High Courts (High Court in Malaya and High Court in Sabah and Sarawak) and two Appellate Courts, namely the Court of Appeal and the Federal Court, which is also the apex court in Malaysia.

In addition to the civil court system, Malaysia has a separate jurisdiction for Syariah (Islamic) courts. The establishment and powers of Syariah courts are governed by state laws, and their jurisdiction is limited to Muslims. These courts handle personal and family matters such as marriage, divorce, inheritance and apostasy, as well as certain criminal offences under Islamic law. The Syariah courts have their own hierarchy, starting from the Syariah Subordinate Courts to the Syariah High Courts, and culminating in the Syariah Appeal Courts.

2.2 Legal system

There are multiple sources of law in Malaysia. 'Law' is defined under Article 162(2) of the Federal Constitution to include any written law, common law operating in the federation and any custom or

usage having the force of law in the federation. Under the Civil Law Act 1956, the common law of England and the rules of equity of certain cut-off dates are also statutorily recognised as sources of law.

Therefore, Malaysian law can broadly be categorised into two groups: written and unwritten law.

2.2.1 Written law

The written law of Malaysia is made up largely of the following components:

- the Federal Constitution and the Constitutions of the 13 states of Malaysia;
- legislation enacted by Parliament and the state assemblies;
- subsidiary or delegated legislation by persons or bodies empowered by the Acts of Parliament or Enactments of the state assemblies;
- ordinances made by the King during a state of emergency; and
- the Islamic law or Syariah Enactments.

2.2.2 Unwritten law

The unwritten law of Malaysia consists mainly of the following:

- principles of english law applicable and permitted by the local circumstances and subject to such qualifications as local circumstances render necessary;
- judicial decisions or case law of the two High Courts, the Court of Appeal and the Federal Court;
- judicial decisions of the former superior courts, that is, the Supreme Court, the former Federal Court and the Privy Council;
- customary laws of local inhabitants, including native practices in Sabah and Sarawak; and
- the principles of Syariah in the form of judicial decisions.

Chapter 3: Business and corporate structures

Michelle Wong Min Er, Shearn Delamore & Co, Kuala Lumpur

3.1 Common forms of legal entities

The most common form of legal entity in Malaysia is the private company limited by shares incorporated pursuant to the Malaysian Companies Act 2016. It is a separate legal entity from that of its shareholders/members, and it can have up to 50 members. A private company shall restrict the transfer of its shares.

Unless regulated by industry or business rules and requirements, a private company can be incorporated with a sole shareholder. A private company must have, at all times, a minimum of one resident director, that is, a director who ordinarily resides in Malaysia.

Other forms of legal entity are a public company limited by shares, a company limited by guarantee and an unlimited company, all of which can be incorporated pursuant to the Companies Act.

The below information focuses on private companies.

3.2 Incorporation process

A name search must first be carried out to ensure that the proposed name of the company is available. Once the name is approved, the name can be reserved and an application for registration of the company is to be submitted online within 30 days after the name is approved to the Companies Commission of Malaysia (CCM) with the following information and the prescribed incorporation fee:

- proposed company name;
- status of a private or public company;
- proposed type of business;
- address of the registered office;
- business address;
- complete details of the directors(s) and promoter(s);
- declaration from the directors(s) and promoter(s);
- declaration of compliance from individuals responsible for incorporation; and
- additional documents (if any).

Upon the submission of complete information, and compliance with all required procedures, the CCM will issue a notice of registration, which signifies that the company has been successfully incorporated. If the company requires, it can submit a prescribed fee to the CCM to request a certificate of incorporation.

The incorporation process is fairly quick and can be completed within a week or two, depending on the compilation and submission of the necessary information, documents and fee required.

3.3 Ongoing reporting and disclosure obligations

Apart from ongoing documents and notifications that are required to be filed or lodged under the Companies Act (eg, changes to the directors, register of members and issuance of new shares), every year, a private company is required to lodge with the CCM:

- an annual return not later than 30 days from the anniversary of its incorporation date; and
- the financial statements (which are to be audited unless exempt pursuant to the Companies Act) and directors' report within 30 days of the circulation of the documents to the shareholders of the company. The documents have to be circulated to the shareholders within six months of the private company's financial year end. An auditor is required to be appointed for each financial year of the private company (unless exempt pursuant to the Companies Act according to the conditions determined by the CCM).

All companies are subjected to the beneficial ownership reporting framework under the Companies Act. Companies have a continuous obligation to maintain a register of beneficial owners and to obtain, identify, verify, record and keep up to date the beneficial ownership information in the register of beneficial owners together with the relevant supporting documents. A beneficial owner of a company is an individual or natural person who ultimately owns or controls a company through shares in the company, or who exercises control over the company by other means.

A company is required to send a notice to its members to require its members to inform the company as to whether the member is a beneficial owner of the company or to indicate the beneficial owners of the company. A beneficial owner must exercise his responsibility to notify the company if he is a beneficial owner of the company and to provide the relevant information as required under the Companies Act.

3.4 Management structures

The board of directors has all the powers necessary for managing, directing and supervising the management of the business and affairs of the company subject to any modification, exception or limitation contained in the Companies Act or in the constitution of the company.

The Companies Act does not impose a limit on the maximum number of directors, but a company may want to limit the number of directors in its constitution. The board of directors can set out their powers in the constitution of a company, and officers can have limits of authority imposed on them. The board of directors may delegate its powers to any committee of the board of directors, director, officer, employee, expert or any other person.

There is no legal requirement to have a risk/compliance/governance committee or officer for a private company.

3.5 Director, officer and shareholder liability

A company incorporated in Malaysia can have a constitution to set out the rights, powers, duties and obligations of the company, each director and each member of the company (to the extent that they are permitted to be modified in accordance with the Companies Act and the constitution does not contravene, and is not inconsistent, with the Companies Act). If a company has no constitution, the company, each director and each member of the company shall have the rights, powers, duties and obligations set out in the Companies Act.

A director of a company shall at all times exercise his/her powers in accordance with the Companies Act, for a proper purpose and in good faith in the best interest of the company. The directors owe a fiduciary duty to the company.

Directors and officers of a company can be personally liable for breaches of the Companies Act. For example, a failure to keep accounting records can result in every officer who is in breach to be liable, on conviction, to a fine not exceeding MYR 500,000 or imprisonment for a term not exceeding three years, or both.

A private company is a separate legal entity from that of its members, and the liability of its members is limited to the amount, if any, unpaid on shares held by the members. While the Companies Act establishes that a company incorporated in Malaysia is a separate legal entity, cases decided in Malaysia have, in certain instances, pierced the corporate veil where there is evidence of actual fraud in common law, or some inequitable or unconscionable conduct amounting to fraud in equity.

Chapter 4: Takeovers

Janet Looi, Skrine, Kuala Lumpur

4.1 Overview of key laws and regulations

Takeovers of public companies in Malaysia are primarily governed by the Malaysian Code on Takeovers and Mergers 2016 (the 'Code'), the Rules on Takeovers, Mergers and Compulsory Acquisitions (the 'Rules') and the Capital Markets and Services Act 2007 (CMSA).

The Code, which is issued by the Securities Commission Malaysia and enacted pursuant to section 217 of the CMSA, sets out 12 principles to be observed and complied with by all persons engaged in any transaction that is subject to the Code and Rules. This includes, among others, the principle that all shareholders must be treated equally in any takeover transaction and should not be disadvantaged by the treatment or conduct of any relevant party to a takeover.

The Rules stipulate operational and conduct requirements in relation to takeovers and are issued by the Securities Commission under section 377 of the CMSA.

The Code and Rules apply to mergers and takeovers of listed companies, unlisted public companies with more than 50 shareholders and net assets of MYR 15m or more, business trusts listed in Malaysia and real estate investment trusts listed in Malaysia.

If the disposal, acquirer or target in a takeover is listed on Bursa Malaysia Securities Berhad ('Bursa'), they are also subject to the listing requirements issued by Bursa.

4.2 Types of takeover

4.2.1 Mandatory offer

An acquirer, together with persons acting in concert (PAC) with the acquirer (if any), triggers the obligation to extend a mandatory offer to acquire all the shares of a target that are not already owned by the acquirer and any PAC, if the acquirer together with any PAC:

- obtains 'control' of the target (ie, acquires more than 33 per cent of the target); or
- triggers the creeping provisions (ie, acquires more than two per cent of the voting rights or shares of a target in any six-month period where the acquirer and the PAC's shareholding were more than 33 per cent but less than 50 per cent of the voting rights or shares in the target).

4.2.2 Voluntary offer

An acquirer who has not incurred an obligation to make a mandatory offer is allowed to make a voluntary offer to acquire the voting shares or rights of a target that is not already owned by the acquirer.

However, such a voluntary offer must be conditional upon the acquirer having received acceptances that would result in the acquirer holding in aggregate more than 50 per cent of the voting shares or rights of the target.

4.2.3 Partial offer

An acquirer who has not incurred an obligation to make a mandatory offer is also allowed to make a partial offer (ie, a voluntary offer to acquire less than 100 per cent of any class of the voting shares or rights of a target) for the voting shares or rights of a target that is not already owned by the acquirer.

However, an acquirer is not allowed to make a partial offer unless approved by the Securities Commission Malaysia (SC).

4.3 Process overview

4.3.1 Pre-bid due diligence

Generally, due diligence on targets that are listed public companies is limited to information that has been publicly announced by the target, or by public searches, such as company searches at the CCM, or bankruptcy or winding-up searches at the Department of Insolvency.

In a friendly takeover, a shareholder of the target company is likely to have initiated discussions with the potential acquirer subject to confidentiality undertakings and entry into non-disclosure or confidentiality agreements that would allow the acquirer and its appointed advisers to conduct due diligence on the target. Where a target company is a listed public company, the scope of the due

diligence is limited to information on the target that is publicly announced, as the parties have to be very careful not to allow access to information that will be deemed insider information.

4.3.2 Definitive agreement

The shareholder of the target company and the potential acquirer in a friendly takeover may enter into a definitive sale and purchase agreement for the acquisition of a specific block of shares in the target company before the takeover offer is launched. The definitive agreement typically includes provisions such as the purchase consideration, undertakings or covenants, conditions precedent and termination rights.

In the event that the sale and purchase of the shares pursuant to the definitive agreement involves the acquisition of more than 33 per cent of the target or triggers the creeping provision, the acquirer would be under the obligation to extend a mandatory offer to acquire all the shares of a target that is not already owned by the acquirer and any PAC.

4.4 Related party transactions

If the potential seller or potential acquirer of the shares is a listed public company or a subsidiary of a public company listed on the Main Market of Bursa the transaction will be a related party transaction and the prior approval of the shareholders (of the listed company) in a general meeting will be required where the transaction has a percentage ratio of five per cent or more.[1]

Where any one of the percentage ratios of a related party transaction is 0.25 per cent or more, such a related party transaction must be announced to Bursa as soon as possible after the terms of the transaction have been agreed, unless, inter alia, the value of the consideration of the transaction is less than MYR 500,000.

A related party includes a person who is, or was, a director or major shareholder of the listed public company, or persons connected with such director or major shareholder, within the preceding six months of the date on which the terms of the transaction were agreed.

4.5 Takeover process

An acquirer who intends to make a takeover offer is required to make an immediate announcement regarding the takeover offer by way of a press notice and send a written notice to the board of the target or adviser designated by the board of the target. The notice is also to be sent to the Securities Commission and Bursa if the acquirer or the target is listed in Malaysia.[2]

The board of the target upon receiving a written notice makes an immediate announcement of the receipt of the written notice and dispatches a copy to all shareholders of the target within seven days.

Within 21 days from sending the written notice, the acquirer is required to dispatch the offer documents (upon clearance by the Securities Commission) to the board and shareholders of the target.

1 Paragraph 10.08 of the Bursa Malaysia Main Market Listing Requirements.

2 Paragraph 9.10 of the Securities Commission Rules on Take-overs, Mergers and Compulsory Acquisitions.

Within ten days from the dispatch of the offer documents, the board of the target is required to issue its comments, opinion and views on the takeover offer in a board circular to the shareholders of the target. The independent adviser appointed is also required to issue an independent advice circular to the board and shareholders of the target.

The acquirer must keep the offer open for at least 21 days from the dispatch of the offer documents (unless the Securities Commission has granted approval for an extended period, in which case the offer must be kept open until the end of the extended offer period).

Unless prior written consent of the Securities Commission has been obtained, the board of the target shall not announce material information relating to trading results, profit or dividend forecasts, or asset valuations until after the 39th day following the dispatch of the offer documents.

The acceptance condition to the takeover offer must be met (ie, the acquirer holding in aggregate more than 50 per cent of the voting shares or rights of the target) within 60 days from the dispatch of the offer documents.

4.6 Reporting obligations

Each substantial shareholder of the target is also required to comply with disclosure requirements on a substantial shareholding as set out in the Companies Act 2016.

A substantial shareholder of the target is required to notify the target of its interest or change in its interest in voting shares in the target. Persons ceasing to be a substantial shareholder are also required to notify the target. A copy of such a notice shall also be served to the CCM on the day on which such a person gives notice

Chapter 5: Foreign investment

Pamela Kung, Shearn Delamore & Co, Kuala Lumpur

5.1 Foreign investment control/restriction

Over the years, foreign equity restrictions in many sectors across Malaysia have been liberalised. For instance, in April 2012 the government allowed up to 100 per cent foreign equity participation in various services sectors, such as telecommunications, healthcare and education.[3]

Notwithstanding such liberalisation policies, restrictions on foreign equity ownership remain in place for certain sectors. These restrictions may be imposed through the approval of, or issuance of licence by, the relevant ministries or regulatory bodies in Malaysia. Some of the affected sectors include trading, manufacturing, and oil and gas.

3 See www.miti.gov.my/index.php/pages/view/4236 accessed 14 October 2024.

Foreign investors looking to set up business in the trading sector need to be aware of the Guidelines on Foreign Participation in the Distributive Trade Services Malaysia (DTG)[4] issued by the Ministry of Domestic Trade and Cost of Living (MDTCL). The DTG regulates the distributive trade sector and requires proposals for foreign involvement in distributive trade to be approved by MDTCL. While the government has gradually liberalised equity ownership in trading companies, those conducted on a larger scale, such as hypermarkets, must still have at least 30 per cent equity participation by Bumiputera.[5] Hypermarket operators who do not fulfill the 30 per cent Bumiputera participation must provide revenue contribution as set out in paragraph 6.2.3.2 of the DTG. Further, the DTG prohibits foreign involvement in certain distributive trade businesses, such as mini-markets and convenience stores.

In the manufacturing sector, under the Industrial Co-ordination Act 1975 of Malaysia, companies intending to carry out manufacturing activities are required to submit an application to the Malaysian Investment Development Authority for a licence,[6] unless it is a manufacturing company with shareholders' funds of less than MYR 2.5m and less than 75 full-time paid employees.[7] Companies exempted from the manufacturing licence as confirmed through the exemption letter are also eligible to apply for various facilities from the Government such as import duty exemptions for machinery and equipment and raw materials under the Customs Duties (Exemption) Order 2017, Sales Tax (Persons Exempted From Payment Of Tax) Order 2018 and Sales Tax (Goods Exempted from Tax) Order 2022; as well as investment incentives under the Promotion of Investments Act 1986 and the Income Tax Act 1967, among others, subject to fulfilling the requisite criteria and condition.[8] Equity shareholding in all manufacturing projects were liberalised effective from 17 June 2003, allowing foreign investors to hold 100 per cent of the equity in all investments in new projects, as well as investments in expansion or diversification projects by existing companies irrespective of the level of exports and type of product or activity.[9] Nevertheless, foreign investors seeking a stake in manufacturing companies that were granted manufacturing licences prior to liberalisation of the equity conditions in 2003 will have to be wary that these manufacturing licences may still have equity conditions attached to them.

Therefore, their investments may be affected unless the manufacturing company applies for, and is granted, a waiver of the equity conditions that were imposed prior to 17 June 2003.

The Petroleum Development Act 1974 and the Petroleum Regulations 1974 are the main legislation governing petroleum activities and operations in Malaysia. Any person wishing to participate in the upstream sector of the oil and gas industry must obtain a licence from Petroliam Nasional Berhad (PETRONAS),[10] which has been vested with the ownership and control of petroleum resources in Malaysia.[11] Foreign companies wanting to participate in exploration operations are required to enter into production-sharing contracts with PETRONAS, which will contain the requirements imposed by

4 See www.kpdn.gov.my/images/2023/GP/gp-2022.pdf accessed 14 October 2024.

5 'Bumiputera' means Malaysians of indigenous origin.

6 Section 3(1) of the Industrial Co-ordination Act 1975.

7 Rule 2 of the Industrial Co-ordination (Exemption) Order 1976 as amended by the Industrial Co-ordination (Exemption) (Amendment) Order 1986.

8 See www.mida.gov.my/wp-content/uploads/2022/05/GD_ICA10_12052022-1.pdf accessed 14 October 2024.

9 See www.mida.gov.my/setting-up-content/equity-policy-protect-foreign-investment accessed 14 October 2024.

10 Regulation 3 of the Petroleum Regulations 1974.

11 Section 2 of the Petroleum Development Act 1974.

PETRONAS. Further, no person other than PETRONAS may carry out business in the downstream sector unless the Prime Minister and Ministry of International Trade and Industry have given permission.[12]

There are also foreign restrictions on the acquisition of property in Malaysia. There are certain properties that are off-limits to foreigners:

- property valued at less than MYR 1m per unit;
- residential units under the category of low and low-medium cost;
- properties built on Malay reserved land; and
- properties allocated to Bumiputera interest in any property development project.

Further, there is a minimum threshold for foreigners to acquire property in Malaysia, which varies in different states or zones/areas across the states. For instance, the minimum threshold in Kuala Lumpur is MYR 1m, whereas in Kuala Selangor in the state of Selangor, the threshold is a minimum of MYR 2m for residential property and MYR 3m for commercial and industrial property.

5.2 Foreign exchange control

Pursuant to the Foreign Exchange Policy (FEP) administered by the Central Bank of Malaysia (Bank Negara Malaysia – BNM), generally, non-resident investors are free to:

- undertake any type of investment in ringgit assets or foreign currency assets in Malaysia (direct or portfolio investment) without any restriction;
- open a ringgit account or foreign currency account with a licensed onshore bank; funds are free to be remitted into and out of such accounts, subject to normal due diligence processes by a licensed onshore bank; and
- repatriate divestment proceeds, profits, dividends or any income arising from investments in Malaysia, provided that repatriation is made in a foreign currency.

Non-resident investors also have the flexibility to hedge foreign exchange exposure arising from their investments in Malaysia, either via a licensed onshore bank or an Appointed Overseas Office (AOO). Further details on AOOs are available in Notice 1 of the FEP[13] and its corresponding FAQs[14] on the BNM website. Further information in respect of the FEP rules applicable to non-residents is also available on www.bnm.gov.my/fep.

12 See https://www.bnm.gov.my/documents/20124/60360/FAQs_Non-Resident+Buying+and+Selling+of+FX.pdf accessed 5 June 2024.

13 See www.bnm.gov.my/documents/20124/60360/Notice+1_Dealings+in+Currency%2C+Gold+and+Other+Precious+Metals.pdf accessed 14 October 2024.

14 See www.bnm.gov.my/documents/20124/60360/FAQs_Non-Resident+Buying+and+Selling+of+FX.pdf accessed 5 June 2024.

5.3 Applicable tax incentive or grants

Malaysia offers a wide range of tax incentives designed to attract foreign investment. These incentives are applicable to, among others, the manufacturing, agricultural, tourism and approved services sectors, including R&D, training and environmental protection.

Direct tax incentives grant partial or total relief from income tax for a specified period, while indirect tax incentives come in the form of exemptions from import or export duty, sales tax and excise duties.

The key tax incentives available in Malaysia are pioneer status, investment tax allowance and reinvestment allowance. There are also 'special pre-packaged' incentives covering a number of areas of direct and indirect tax and regional economic corridors.

Other available tax incentives include double deduction of certain expenses, R&D incentives, Malaysia Digital status, industrial building allowance, principal hub incentive, global trading centre, incentives in the Labuan international business and financial centre, and tariff-related incentives, such as exemption from import duty on machinery, equipment or raw materials

Chapter 6: Restructuring and insolvency

Claudia Cheah, Skrine, Kuala Lumpur

6.1 Main legislation and processes

The main legislation governing corporate restructuring and insolvency is the Companies Act 2016, while individual bankruptcy is governed by the Insolvency Act 1967. The main corporate restructuring and insolvency processes are corporate voluntary arrangement (CVA), judicial management (JM), schemes of arrangement (SOA), receivership and winding up. The first two processes are new statutory mechanisms that came into force on 1 March 2018. The procedural implementation of these mechanisms is governed by the Companies (Corporate Rescue Mechanism) Rules 2018.

6.2 Corporate voluntary arrangements

The CVA is modelled on the company voluntary arrangement under the UK Insolvency Act 1986. It is meant to be a quick and cheap restructuring process with little court intervention. When it was first introduced, the CVA was limited in its application and could not be applied to publicly listed companies or companies with charges over their assets or undertakings. This was changed by the Companies (Amendment) Act 2024, whereby with effect from 31 January 2025, the CVA has been made available to companies (both private and publicly listed) with charges over their assets or undertakings.

The CVA is proposed by the directors of a company (which is not under JM and not being wound up) to the company and its unsecured creditors. No court sanction is required for a voluntary arrangement,

even after it has been approved by the requisite majority of creditors and members. There is also no requirement to separate creditors into separate classes for the purpose of approving a voluntary arrangement.

A qualified insolvency practitioner is appointed as a nominee to assess the viability and prospect of success of the proposed CVA. They have to issue a statement with their opinion on whether the proposed arrangement has a reasonable prospect of being approved and implemented; whether the company is likely to have sufficient funds available during the proposed moratorium to enable the company to carry on its business; and that meetings of the company and its creditors should be summoned to consider the proposed CVA.

Upon the filing of a CVA application, a statutory moratorium of 28 days commences (subject to a further extension of 60 days). During this period, no proceedings may be taken by creditors against the company.

Once the requisite majority approval of the creditors (75 per cent of the total value of creditors present and voting at a meeting) and members (simple majority approval of 51 per cent) is obtained, the CVA will be implemented by a supervisor (who is normally the nominee). All parties will be bound by the voluntary arrangement, including non-consenting creditors.

There is no recourse under the Companies Act for aggrieved parties to challenge the proposal/arrangement or outcome of the creditors' meetings. There is, however, provision to challenge the act, omission or decision of the supervisor by way of an appeal to the court.

6.3 Judicial management

A company (via its members or board of directors) and its creditors (including contingent or prospective creditors) may apply to the court to appoint a qualified insolvency practitioner as a judicial manager of the company. The court must be satisfied that the company is or will be unable to pay its debts, and that the making of a JM order is likely to achieve one or more of the three statutory purposes: the company may survive; there may be a compromise or arrangement reached under section 366 of the Companies Act; or it would result in a more advantageous realisation of the company assets than on a winding up.

When it was first introduced via the Companies Act 2016 and came into force on 1 March 2018, the JM was limited in its application, in that publicly listed companies are excluded from applying for a JM order. As such, when related companies owned by a publicly listed company wish to pursue a global restructuring of the group debts, they would have to resort to a SOA and not a JM.

The JM has been made available to publicly listed companies via the amendments introduced by the Companies (Amendments) Act 2024 (the '2024 Amendments'), which came into force on 1 April 2024. The 2024 Amendments also introduced provisions allowing super priority rescue financing for companies under JM. There are three types of priority which the court may grant where the company in distress is to receive rescue financing:

- first, the court may order that the debt arising from any rescue financing obtained by the company in distress be paid immediately after settling the costs and expenses of the winding up. This priority sits above preferential debts;
- second, the court may allow the creation of charges over the unencumbered assets of the company to secure the rescue financing; and
- third, the court may allow the creation of charges over encumbered assets in favour of the rescue financier, with the same priority as the existing secured creditor, or higher priority over the existing secured creditor, provided that the interests of the existing secured creditor are adequately protected.

Upon the filing of a JM application, a statutory moratorium commences until such time that the JM application is disposed of. During this period, no proceedings may be taken by creditors against the company or to enforce any charge created by the company.

Once a judicial manager is appointed, the board of directors' power to manage the company is largely stripped and placed in the hands of the judicial manager. If the company is in receivership, the receiver and manager must vacate the office, and if there is any pending winding up petition against the company, the same shall be dismissed. The judicial manager has wide powers, including the power to take control of assets, deal with and dispose of assets (including charged assets, subject to court approval), enter into new contracts and summon persons to appear and produce documents relating to the company.

The judicial manager needs to come up with a rescue proposal within the first two months of his or her appointment, and the proposal needs to be approved by at least 75 per cent of the total value of creditors present at a meeting and voting.

Once approved by the creditors, the judicial manager will report the results to the court. The proposal will be implemented by the judicial manager and binding on all creditors, including the non-consenting creditors. The JM order remains in force for six months and can be extended on the application of the judicial manager for any further period as the court deems fit.

6.4 Scheme of arrangement

A scheme of arrangement (or compromise) is another corporate rescue mechanism. It can be adopted by a company that is not insolvent, but is facing financial difficulties. It is commonly used to alter the rights of creditors, re-organise the share capital of the company, or to undertake a reconstruction or merger involving the company.

The advantage of this process is that it enables the company to continue with its daily operations, even during times of financial distress, and the directors continue to be in control of the company.

An application for SOA may be made by the company, any creditor or member of the company, a liquidator or a judicial manager ('SOA Application'). It is normal for such an application to include a request for an order to restrain all proceedings against the company pending the approval of

the scheme. Such a restraining order may be granted for not more than three months and may be extended for not more than nine months by way of application to the court.

Via the 2024 Amendments, a statutory moratorium comes into effect with the filing of an SOA Application. The statutory moratorium continues for two months or until the disposal of the SOA Application, whichever is earlier.

The court may appoint an approved liquidator to assess and report to the court on the viability of the proposed scheme. The majority of 75 per cent in value of the creditors or class of creditors present and voting is required to approve the proposed scheme. Once approved and a court sanction is given, the scheme will be binding on all parties, including the non-consenting creditors.

Similar to the JM, the 2024 Amendments have allowed super priority rescue financing to be made available to companies seeking to restructure their debts via a SOA.

Other significant improvements or changes brought about by the 2024 Amendments vis-à-vis the SOA, include:

- the introduction of scheme without meeting, or more commonly known as the 'pre-pack' scheme, whereby the court may sanction a scheme that has been pre-negotiated and agreed by the requisite majority creditors without a scheme meeting;
- a new cross-class cram down mechanism, whereby the court is empowered to bind all creditors (including dissenting class of creditors) to a scheme;
- the related company of the scheme company may also apply for a restraining order, so that it is similarly protected from legal proceedings pending the hearing of the SOA Application by the scheme company; and
- the court may make such orders as deemed necessary, including ordering a revoting, reclassification of creditors and giving directions on the admission and weightage of debts of creditors for the purpose of revoting.

6.5 Receivership

A receiver may be appointed privately by a creditor (debenture holder) or by the court.

6.5.1 Private receiver

A private appointment is governed by the terms of the instrument creating the charge. Such an instrument is usually a debenture, often created by a company as a loan security in favour of a financial institution. It is usual for a debenture to provide for the appointment of not only a receiver but also a manager with the power to manage the charged assets. The scope of the debenture is critical, as the receiver/manager is only empowered to take control of assets that are charged under the debenture (either by way of a fixed charge or floating charge). There isa statutory presumption that the receiver/manager acts as the agent of the company, unless the instrument of appointment expressly provides otherwise. The receiver/manager seeks the best means of recovering for the debenture holder, without the need seriously to consider the benefits to the chargor.

6.5.2 Court-appointed receiver

The court may appoint a receiver/manager under the following circumstances:

- the company has defaulted in its payment or obligations to a debenture holder;
- the company proposes to sell or otherwise dispose of the secured property in breach of the terms of any instrument creating the security or charge;
- it is necessary to preserve the secured property for the benefit of the debenture holder; or
- it is necessary to preserve the property of a company pending the disposal of a suit, where there is a good *prima facie* claim of title by the applicant and evidence that the property is in jeopardy.

A court-appointed receiver/manager is an officer of the court, and not an agent of the company.

6.5.3 Power and duties of a receiver

In addition to the powers conferred either under a debenture or by a court order, a receiver shall have the powers set out in the sixth schedule of the Companies Act 2016, which includes, among others, the power to take possession and control of the property in accordance to the terms of that order, grant options over the property, carry on the business of the company, demand and recover income of the property in receivership and exercise the right to inspect books or documents that relate to the property in receivership.

6.6 Winding up

There are two types of winding up processes: compulsory winding up and voluntary winding up.

6.6.1 Compulsory winding up

The company, its contributory and any creditor (including a contingent or prospective creditor) of a company may petition for the company to be wound up by the court. The commencement of winding up shall be at the date of the winding up order. Section 465(1) of the Companies Act stipulates 12 situations where the court may order a company to be wound up. The most common situation is where the company is unable to pay its debts. A company is deemed unable to pay its debt when it is indebted in a sum exceeding MYR 50,000 and fails to pay the same within 21 days on receipt of a written demand for payment; when an execution or other process issued on a judgment, decree or order of any court in favour of a creditor of the company is returned unsatisfied in whole or in part; or it is proved to the satisfaction of the court that the company is unable to pay its debt after taking into account the contingent and prospective liabilities of the company.

6.6.2 Voluntary winding up

A company may also be wound up voluntarily by its directors and shareholders or creditors. The court is generally not involved in the process. A voluntary winding up shall commence where an interim liquidator has been appointed before the resolution for voluntary winding up is passed and, in any other case, at the time of the passing of the resolution for voluntary winding up.

There are two types of voluntary winding up:

- *Members' voluntary winding up*: The directors and shareholders of a company may agree that a resolution be passed to wind up the company, even when the company is solvent. The directors must make a declaration of solvency by confirming that the company will be able to pay its debts in full within 12 months after the initiation of the winding up process. During this process, the assets of the company are sold, liabilities paid and the balance assets distributed among the members. If it is subsequently discovered that the company is insolvent, the members' voluntary winding up is converted into a creditors' winding up.
- *Creditors' voluntary winding up*: If the directors are unable to make a declaration of solvency, a resolution can still be passed for a creditors' voluntary winding up, whereby the creditors will be involved in charting the course of the liquidation.

6.6.3 Effect of winding up

Once a winding up process has commenced, there shall be no disposition of property of the company other than an exempt disposition, including any transfer of shares or alteration in the status of the members of the company, except with the approval of the court.

Unless a private liquidator (often an accountant holding a liquidator's licence) is appointed, the official receiver will by default be appointed as the liquidator of the wound-up company. The wound-up company continues to exist as a legal entity under the management of the liquidator.

The liquidator's duties include managing the assets of the company, ascertaining its liabilities, investigating the internal affairs of the company, realising the assets, making the appropriate distribution to parties entitled to the assets and applying for the dissolution of the company when the winding up process comes to an end.

6.7 Personal bankruptcy

The statutory threshold for the commencement of bankruptcy proceedings against an individual debtor is a judgment debt of a minimum of MYR 100,000. On the making of a bankruptcy order, all the bankrupt's assets shall vest in the Director General of Insolvency.

A debtor may propose a voluntary arrangement to their creditors any time before they are adjudged bankrupt. A debtor who intends to propose a voluntary arrangement shall appoint a nominee to act in relation to the voluntary arrangement or for the purpose of supervising the implementation of the voluntary arrangement.

A bankrupt may be discharged by an order of the court or by a certificate issued by the Director General of Insolvency. A bankrupt may be entitled to an automatic discharge on the expiration of three years from the date of submission of their statement of affairs, if they have paid the sum of money determined by the Director General of Insolvency for the purposes of the administration of the bankrupt estate, and if they have complied with the requirement to render an account of moneys and property to the Director General of Insolvency.

Chapter 7: Employment, industrial relations, and work health and safety

Selvamalar Alagaratnam, Skrine, Kuala Lumpur

7.1 Employees' rights and protection

Employee's rights and other statutory protection for employees in Malaysia depend on several statutes.

Prior to the amendments to the Employment Act, 1955 (EA), the EA generally only applied to employees who earn a monthly salary of less than MYR 2,000 or are engaged in manual labour ('EA Employees'). The EA has since been amended by the Employment (Amendment) Act 2022 which took effect on 1 January 2023. One of the main changes to the EA is that the EA now applies to all employees in West Malaysia, with the effect that the entitlements and protections that previously only applied to EA Employees now apply to all employees, save for a few exceptions.

The EA provisions which do not apply to all employees are:

- entitlement to statutory payment for working on a rest day;
- entitlement to statutory payment for working overtime;
- eny regulations relating to shift work allowance;
- entitlement to statutory payment for working on a public holiday; and
- regulation relating to termination, lay-off and retirement benefits.

The above EA provisions do not apply to employees: (1) who earn a monthly salary of more than MYR 4,000; and (2) who are not employed ('Excluded Employees'):

- as manual labourers or supervisors of manual labourers;
- to operate or maintain any mechanically propelled vehicle for the purpose of transporting passengers or goods or for reward or commercial purposes;
- as a domestic employee; or
- in certain positions on seagoing vessels.

The EA guarantees minimum terms and conditions of employment, such as wage and hours, and several leaves, which may not be contractually waived.

The states of Sabah and Sarawak in East Malaysia have equivalent legislation (with some differing provisions) that cover similar categories of employees.

7.1.1 Working hours and leave

Employees are entitled to protection in terms of maximum hours of work. No employee may be required to work more than eight hours a day or more than 45 hours a week, or more than five consecutive hours without a break of at least 30 minutes. Every employee is entitled to one whole day of rest each week (rest day).

Employees are also entitled to paid sick leave, annual leave and public holidays

Sick leave

Sick leave is as follows:

- 14 days in each calendar year if he or she has been in employment for a period of less than two years;
- 18 days in each calendar year if he or she has been in employment for a period of two years or more but less than five years; and
- 22 days in each calendar year if he or she has been in employment for a period of five years or more.

If hospitalisation is necessary, an employee is entitled to sick leave of 60 days in each calendar year.

Annual leave

Annual leave is as follows:

- eight days for every 12 months of continuous service if he or she has been in employment for a period of less than two years;
- 12 days for every 12 months of continuous service if he or she has been in employment for a period of two years or more but less than five years; and
- 16 days for every 12 months of continuous service if he or she has been in employment for a period five years or more.

Maternity and paternity leave

All female employees are entitled to paid maternity leave of no less than 98 consecutive days. This entitlement is limited to employees who have been in employment for no less than 90 days in the nine-month period immediately preceding confinement, which must include employment in the four months immediately preceding confinement. An employee is also not entitled to paid maternity leave if she has five or more surviving children.

All married male employees are entitled to seven consecutive days of paid paternity leave. This entitlement is limited to employees who have been employed at least 12 months immediately before the commencement of such paternity leave and that such employees have notified their employer of

the pregnancy of their spouse at least 30 days from the expected confinement or as early as possible after the birth of the child.

Public holidays

There are 11 paid gazetted holidays, five of which must be:

- the National Day (31 August);
- the birthday of the King (Malaysia's monarch and head of state) (the first Saturday of every June);
- the birthday of the ruler of the state (differs from state to state) or the federal territory (1 February) in which the employee wholly or mainly works;
- Workers' Day (1 May); and
- Malaysia Day (16 September).

Overtime

If an employee works in excess of their normal working hours per day, they are entitled to overtime pay (this does not apply to Excluded Employees), which is calculated as follows:

- for any overtime work carried out in excess of normal hours of work, at a rate that is not less than 1.5 times the hourly rate of pay;
- for work on a rest day:
  - for any period of work that does not exceed half the normal hours of work, wages equivalent to 0.5 times the ordinary rate of pay for work done on that day; and
  - for any period of work that is more than half, but that does not exceed, the normal hours of work, one day's wages at the ordinary rate of pay for work done on that day;
- for any work carried out in excess of the normal hours of work at a rate that is not less than two times the hourly rate of pay; and
- for work on a public holiday, in addition to the day's wages, two days' wages at the ordinary rate of pay, regardless of whether the period of work done on that day is less than the normal hours of work, and for work in excess of the normal hours of work, at a rate that is not less than three times the hourly rate of pay.

Notwithstanding the payment of overtime pay, no employee may be required to work more than 12 hours a day or in excess of 104 hours of overtime in any one month.

7.1.2 Termination

All employees in Malaysia, regardless of salary or nationality, enjoy protection against unjust dismissal. Pursuant to the Industrial Relations Act 1967 (IRA), an employee's employment may

only be terminated for just cause or excuse. 'Just cause or excuse' is not defined by the IRA or any other legislation. Generally, misconduct, poor performance and redundancy are accepted as just cause for termination.

Where termination is on the ground of redundancy, termination or retrenchment benefit is payable. Case law dictates that if the financial position of the employer permits it, and especially if the retrenchment exercise is carried out with the aim of increasing efficiency and profits, fair and reasonable benefits should be made available. Currently, one month's salary for each year of service is considered fair and reasonable.

Employees (except for Excluded Employees) are entitled to minimum termination benefits as follows and pro rata in respect of an incomplete year of service, calculated to the nearest month:

- ten days' wages for every year of employment if they have been employed for a period of less than two years;
- 15 days' wages for every year of employment if they have been employed for a period of two years or more but less than five years; and
- 20 days' wages for every year of employment if they have been employed for a period of five years or more.

If the employee's contract of employment provides for more favourable termination/retrenchment benefit, they are entitled to that contractual benefit.

7.1.3 Retirement

There is no mandatory retirement age and it is purely contractual. Permanent employees are entitled to the minimum retirement age of 60 years as provided for by the Minimum Retirement Age Act 2012.

7.1.4 Freedom of association

Every employee has the right to freedom of association. The IRA prohibits any person from interfering with or restraining an employee from forming, assisting in the formation of or joining a trade union.

7.1.5 Safety, health and welfare

Pursuant to the Occupational Safety and Health Act 1994, employees have a right to safety, health and welfare at work. Employers' duties extend, but are not limited to:

- the provision and maintenance of systems of work that are, so far as is practicable, safe and without risk to health;
- the provision of such information, instruction, training and supervision as is necessary to ensure, so far as is practicable, the safety and health at work of employees;

- so far as is practicable, the maintenance of any place of work in a condition that is safe and without risk to health;
- the provision and maintenance of the means of access to and egress from a place of work that are safe and without such risk; and
- the provision and maintenance of a working environment for employees that is, so far as is practicable, safe, without risk to health and adequate as regards facilities for welfare at work.

7.1.6 Data protection

The Personal Data Protection Act 2010 (PDPA) gives employees the right to be informed by way of a Personal Data Protection notice (that is to be issued to them in both English and Malay) of the purpose of collection of their personal data, how their personal data will be processed and their rights as data subjects. These rights include the right to access personal data; to correct personal data where it is inaccurate, incomplete, misleading or not up to date; and to withdraw consent to the processing of personal data. In certain circumstances, for example, where sensitive personal data is processed or where data is transmitted beyond borders, the employee's explicit consent is required.

7.2 Statutory contributions and minimum wage

Employees' entitlement to statutory contributions and minimum wages are governed by the following legislation outlined below.

7.2.1 Employees Provident Fund Act 1991

Employees Provident Fund Act 1991 (EPF) makes it mandatory for all employers and most employees (except for those excluded from the application of the EPF Act) to contribute to a state-managed provident fund at contribution rates that are no less than the rate prescribed by the EPF Act.

Contributions by foreign nationals employed in Malaysia and domestic servants are voluntary.

7.2.2 Employees' Social Security Act 1969

The Employees' Social Security Act 1969 provides social security for all employees in the event of contingencies, such as employment injuries. The Act makes it mandatory for employers and employees to contribute to the fund at the rate prescribed by the Act.

7.2.3 Employment Insurance System Act 2017

The Employment Insurance System Act 2017 provides certain benefits and a re-employment placement programme for insured persons in the event of the loss of employment, and makes it mandatory for employers and employees to contribute to the fund at the prescribed rate.

7.2.4 Minimum Wages Order 2022

The Minimum Wages Order 2022, provides that the minimum wage rates payable to an employee throughout Malaysia are as follows:

Minimum wages rate				
Monthly	Daily			Hourly
	Number of working days in a week			
MYR1,500	6	5	4	MYR7.21
	MYR57.69	MYR69.23	MYR86.54	

7.3 Work permits

There are several types of work permit or visa available to foreign nationals who are gainfully employed in Malaysia. The types of passes issued by the immigration authorities of Malaysia are outlined below.

7.3.1 Short-term social visit pass

Short-term social visit passes are issued at the entry point to foreign citizens for social and business visits and are usually valid for 30 days or less. The duration is discretionary but is usually for a period of 30 days. Examples of limited business purposes include attending meetings, conferences, business discussions or seminars; inspecting or setting up factories; auditing a company's accounts; signing agreements; and surveying business opportunities and investment potential.

7.3.2 Professional visit pass

Professional visit passes are issued to foreign citizens who hold acceptable professional qualifications for the purpose of taking up professional work in Malaysia for a Malaysian entity for a short-term period (including extensions) not exceeding 12 months. Applications must be made by the Malaysian entity concerned.

7.3.3 Employment pass

Employment passes are issued to foreign citizens who enter Malaysia to take up paid employment under a contract of service with an employer, referred to as expatriates. The duration of employment passes depends on the nature of employment and the needs of the employer. The maximum period for any employment pass is five years, and the norm is between two and three years.

Applications must be made by the employer, and the requirements below must be met before an application will be considered by the Immigration Department:

- minimum paid-up capital of employer ranging between MYR 250,000 and MYR 1m;
- recommendation from monitoring agencies;
- registration of employer with relevant monitoring agencies;
- minimum monthly salary of at least MYR 3,000;
- the skill, qualification and experience required for the expatriate position must be such that it cannot be fulfilled by local candidates; and
- the expatriate's role must be relevant to the activities of the employer.

7.3.4 Residence Pass–Talent

The Residence Pass–Talent is only available in Peninsular Malaysia and is issued to foreign citizens considered to be high-achieving individuals with the capacity to drive business results that contribute towards the national key economic areas (NKEA). The 12 industries forming the NKEA are Greater Kuala Lumpur/Klang Valley; oil, gas and energy; palm oil; financial services; tourism; business services; communication, content and infrastructure; electronics and electrical; wholesale and retail; education; healthcare; and agriculture. A high-achieving individual with the capacity to drive business results that contribute towards Malaysia's economic transformation may apply for the Residence Pass–Talent. Applications must be submitted by the foreign citizen online at https://rpt.talentcorp.com.my.

Applications are reviewed against a set of criteria designed to gauge both the applicant's qualifications and economic contributions to the country. The applicant is required to:

- have worked in Malaysia for a minimum period of three continuous years;
- hold a valid employment pass with more than three months' validity at the time of the application;
- hold a PhD, master's degree, bachelor's degree or diploma in any discipline from a recognised university, or a professional or competency certificate from a recognised professional institute;
- hold a Malaysian income tax file number and have paid income tax for at least two years;
- possess five years of total work experience; and
- earn a basic salary of MYR 15,000 per month.

7.3.5 Visit pass (temporary employment)

These passes are issued for the employment of foreign nationals as semi-skilled, unskilled or domestic helpers, from specific source countries in certain sectors of the economy, such as agriculture, construction, manufacturing, plantation and various types of services.

Different procedures for the recruitment of foreign workers are applicable to employers in Peninsular Malaysia, Sabah, Sarawak and the Federal Territory of Labuan.

7.3.6 Long Term Social Visit pass

This is a type of pass that can be applied by Malaysians for their spouses. The holder of this pass can remain in the country for a period of five years (on condition that they comply with all the requirements as may be prescribed by the immigration authorities) and are allowed to engage in any form of paid employment or in any business or professional occupation.

7.3.7 Dependent pass

This is a type of pass that can be applied by employment pass holders. Employment pass holders are eligible to apply for a dependent pass for their spouses, children under 18 years of age and legally adopted children under 18 years of age. Dependent pass holders are strictly prohibited from engaging in any form of employment and must apply for their own employment pass in order to work in the country.

7.3.8 De Rantau/Digital Nomad programme pass

This is a type of pass that is available to digital freelancers/independent contractors, or remote workers (workers employed by foreign entities) who are IT and digital professionals or employed in a management capacity. It does not allow for foreign nationals to gain employment with a Malaysian company.

7.3.9 Malaysia my Second Home (MM2H)

This initiative by the Malaysian Government allows foreign nationals who meet specific financial and medical criteria to reside in the country for an extended period. While the permit does not include the right to work, holders may apply for other types of passes, subject to the conditions of those passes.

7.3.10 Student pass

This pass allows foreign nationals to remain in the country for educational purposes. Holders of this pass are allowed to work part-time for a maximum of 20 hours per week during semester breaks or holidays, subject to prior approval from the Department of Immigration.

Chapter 8: Tax

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8.1 Taxation of individuals and companies

The principal legislation for taxing income is the Income Tax Act 1967. Taxation is generally levied on a territorial basis in Malaysia whereby income tax is chargeable upon income 'accruing in or derived from Malaysia or received in Malaysia from outside Malaysia'. The prevailing corporate tax rate is 24 per cent but small and medium companies, as defined, enjoy a reduced tax rate of 15 per cent on its chargeable income up to MYR 150,000; the next MYR 450,000 of its chargeable income is taxed at 17 per cent, and any excess at 24 per cent. Individuals are taxed at progressive tax rates from nil per cent to 30 per cent, while non-resident individuals are taxed at a flat rate of 30 per cent.

With effect from 1 January 2022, tax-resident individuals and entities are subject to taxation on their foreign-source income when it is remitted to Malaysia. A limited exemption on specified categories of foreign source income has been given for the period from 1 January 2022 to 31 December 2026 for tax-resident individuals and entities, subject to meeting the requisite conditions.

With effect from 1 January 2024, a new capital gains tax has been introduced to tax gains or profits from the disposal of capital assets by a company, limited liability partnership, trust body or cooperative society. Disposers who are individuals are not subject to the said capital gains tax.

8.2 Withholding tax

Withholding tax is applicable in Malaysia if a non-resident payee derives, or is deemed to derive, from Malaysia, interest, royalty, rent for use of moveable property, contract payments for projects carried out in Malaysia, miscellaneous income under section 4(f) of the ITA, technical fees for services performed in Malaysia and other similar types of fees.

8.3 Transfer pricing

Transfer pricing legislation imposing the arm's-length principle took effect from 1 January 2009. Under section 138C of the ITA, taxpayers may enter into advance pricing arrangements to determine the prices in cross-border transactions with associated persons.

8.4 Real property gains tax (RPGT)

RPGT is levied on capital gains accruing from the disposal of real property and shares in a real property company. Real property is defined as 'any land situated in Malaysia, and any interest, option or other right in or over such land'. The holding or grant of a lease may also amount to an interest in land.

8.5 Stamp duty

Malaysia imposes stamp duty on prescribed instruments, defined to include any written document. In a business or asset sale, *ad valorem* stamp duty is charged on all instruments conveying the assets, meaning movable or immovable property. Loans, services and equipment lease agreements are also subject to *ad valorem* stamp duty. There are other rates of stamp duty on other classes of instruments, which are generally lower than the rates above.

8.6 Indirect taxes

The Royal Customs and Excise Department Malaysia (Customs) has the care and management of indirect taxes, namely customs duties, excise duties and the sales tax and service tax. The previous goods and services tax (GST) was abolished from 1 September 2018 and since replaced by a new sales tax and service tax regime.

8.6.1 Service tax

Service tax is imposed on 'taxable services' provided in Malaysia by a registered person, that is, a 'taxable person', in carrying on his business. Service tax is also imposed on taxable services acquired by any person in Malaysia from a person outside Malaysia. It is also chargeable on digital services provided by foreign service providers to any consumer in Malaysia. Service tax is generally levied at the rate of eight per cent unless other specified rates apply.

8.6.2 Sales tax

Sales tax applies to taxable goods 'manufactured' in Malaysia by a registered manufacturer. Sales tax also applies to taxable goods imported into Malaysia.

Upon importation, other taxes and duties such as import duties, excise duties, anti-dumping duties, etc, may also apply on goods imported into Malaysia, depending on the nature and type of goods.

8.7 Attractive tax incentives and relief

Malaysia has an aggressive and progressive approach towards the granting of special tax incentives to attract foreign direct investments. This includes many promoted activities, products and areas (such as free zones, Iskandar Development Region, Northern Corridor Economic Region, East Coast Economic Region, Sabah Development Corridor, Sarawak Corridor of Renewable Energy and the Multimedia Super Corridor) and a wide-ranging network of double taxation treaties with numerous jurisdictions. Malaysia has also entered into numerous bilateral and regional free trade agreements with other countries.

8.8 Special laws for Labuan

Labuan has specific laws applicable only to 'Labuan entities', that is, Labuan foundations, Islamic foundations, Islamic partnerships, limited partnerships, limited liability partnerships, trusts, Islamic trusts and financial institutions established in Labuan. A Labuan entity carrying on Labuan trading activities enjoys a lower tax rate of three per cent. Income from Labuan non-trading activities carried on in Labuan is not taxable. There are withholding tax exemptions on specified payments to non-residents and other tax exemptions and incentives available to Labuan entities.

Chapter 9: Intellectual property

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9.1 Administration of IP Matters

A statutory body known as the Intellectual Property Corporation of Malaysia (MyIPO) was set up pursuant to the Intellectual Property Corporation of Malaysia Act 2002. MyIPO's functions include, among others, to ensure the provisions of the intellectual property legislation in Malaysia are administered and enforced, to act as an agent of the government and provide services in administering, collecting and enforcing payment of prescribed fees or any other charges under the intellectual property legislation, and to advise on the review and updating of all intellectual property legislation in Malaysia.

9.2 Patents

The Patents Act 1983 and Patents Regulation 1986 provide for the law on the patentability, rights, ownership, infringement and offences relating to patents. An invention is patentable if it:

- is new;
- involves an inventive step;
- is industrially applicable; and
- does not fall into any non-patentable invention category, such as discoveries, scientific theories, mathematical methods, plant or animal varieties, or essentially biological processes for the product of plants or animals, schemes and rules or methods for doing business.

An application for a grant of a patent can be filed with the Intellectual Property Corporation of Malaysia (MyIPO). As Malaysia has also acceded to the PCT, PCT applications can also be filed through MyIPO.

For a patent application that is not derived from a PCT application ('domestic application'), the application should be filed within 12 months from the first application filed by the foreign applicant, if any, which is normally in the applicant's home country. For a national phase application derived

from a PCT application ('national phase application'), the Malaysian national phase application must be filed within 30 months from the priority (or first filing) date.

Once a patent application is filed, it will not be examined automatically by the examiners at MyIPO for compliance with the substantive requirements of the Patents Act. A request for substantive examination must be made together with payment of the prescribed fee within the time frame of 18 months from the filing date for a domestic application and within four years from the international PCT filing date for a national phase application.

There are generally three ways to 'expedite' the substantive examination of a patent application:

1. *Expedited examination*

   An applicant who requests or has requested for substantive examination may request for approval of expedited examination once his application has been made available for public inspection (18 months from the priority date). The Patent Registrar will approve the request for an expedited examination if he is reasonably satisfied that any of the following grounds have been met:

   - it is in the national or public interest;
   - there are infringement proceedings taking place or evidence showing potential infringement;
   - the applicant plans to commercialise or has already commercialised the invention within two years from the filing date of the request for expedited examination;
   - the invention relates to green technologies;
   - the application for grant of the patent is a condition to obtain funds or monetary benefits from the government or recognised institutions; or
   - any other reasonable grounds.

2. *PPH (Patent Prosecution Highway)*

   Malaysia has PPH programmes with the Patent Offices of Chana, China, South Korea, the US and the European Patent Office. The PPH provides a fast-track patent examination procedure for patent applications in Malaysia if a counterpart foreign application has already been examined by the Patent Office of a participating foreign country. The Malaysian patent application may be amended to conform to the claims deemed patentable in the selected foreign application.

3. *ASPEC (ASEAN Patent Examination Co-operation)*

   ASPEC is a programme for IP Offices from participating ASEAN member states to utilise the results of search and examination from another participating IP Office. There are nine participating IP Offices: Brunei Darussalam, Cambodia, Indonesia, Lao PDR, Malaysia, the Philippines, Singapore, Thailand and Vietnam.

The duration of a patent shall be 20 years from the filing date of the application. However, where a patent application was filed before 1 August 2001, and was pending on that date, the duration of the patent granted on that application shall be 20 years from the date of filing or 15 years from the date of grant, whichever is longer. The duration of a patent granted before 1 August 2001 and still in force on that date shall be 20 years from the date of filing or 15 years from the date of grant, whichever is longer. Patent applications derived from PCT applications are protected for a maximum of 20 years from the international PCT filing date.

The owner of a patent has exclusive rights to exploit the patented invention, assign or transmit the patent and conclude licence contracts. The owner of a patent shall have the right to institute court proceedings against any person who has infringed or is infringing the patent by performing any act exploiting the owner's rights in the patent without the owner's agreement. The owner of the patent may obtain remedies, such as damages, an account of profits or injunctions.

Utility innovations are also protected under the Patents Act 1983, and require the same elements as patents, except for the requirement of an inventive step. The duration of protection for a utility innovation is an initial term of ten years, which can be extended for two additional periods of five years each.

The Patents (Amendment) Act 2022 and Patents (Amendment) Regulations 2022, both effective from 18 March 2022, introduced some notable changes to Malaysia's patents legislation. In particular, the amendments introduce provisions for compliance with the Budapest Treaty on the International Recognition of the Deposit of Microorganisms for the Purposes of Patent Procedure, as well as provisions which introduce a post-grant opposition procedure (which have yet to come into force). Additional amendments concern, amongst others, the following matters:

- restoration of priority date for patent applications;
- limitations on divisional applications under certain circumstances;
- revision of deferment of examination requests;
- extension of the limitation period for infringement proceedings from five to six years;
- recognition of patents as property which can be dealt with as the subject of security interests;
- revisions of the notice of trust in the register;
- amendments to invalidation proceedings;
- regulation of appeals concerning decisions made by the Patents Registrar;
- expansion of compulsory licensing provisions to address pricing and public health concerns; and
- introduction of third-party observation rights on patentability.

Notably, the Patents (National Depositary Authority) Regulations, 2022 introduced provisions relating to the appointment of National Depositary Authorities in Malaysia and, on 27 March 2024, the Microbial Culture Collection Unit of Universiti Putra Malaysia was appointed Malaysia's first National Depositary Authority.

9.3 Trademarks

The Trademarks Act 2019, Trademarks Regulations 2019, and the Guidelines of Trademarks 2019 provide for the law on the use, registrability, duration, ownership, infringement and offences relating to trademarks.

A trademark means any sign capable of being represented graphically that is capable of distinguishing goods or services of one undertaking from those of other undertakings. A sign includes any letter, word, name, signature, numeral, device, brand, heading, label, ticket or shape of goods or their packaging, colour, sound, scent, hologram, positioning, sequence or motion, or any combination thereof.

Any person claiming to be a bona fide proprietor of a trademark may apply for the registration of the trademark if the person is using or intends to use the trademark or has authorised or intends to authorise another to use the trademark in the course of trade. A trademark cannot be registered if, among others:

- it is not capable of being represented graphically;
- it is not capable of distinguishing goods or services of one undertaking from those of other undertakings;
- it is not distinctive;
- it consists exclusively of signs or indications that may serve to designate the kind, quality, quantity, intended purpose, value, geographical origin or other characteristics of goods or services;
- it consists exclusively of signs or indications that have become customary in the current language of the territory or in the bona fide and established practices of the trade;
- it consists exclusively of the name of a country; or
- it contains or consists of recognised geographical indications.

Applications for registrations of a trademark must be made to MyIPO. Malaysia has acceded to the Madrid Protocol; thus, trademark owners may also obtain protection abroad by filing one international application through MyIPO.

The duration of protection is ten years from the date of registration. This can be extended for additional ten-year periods upon subsequent payment of renewal fees.

The registered proprietor of a trademark has the exclusive rights to use the trademark and authorise others to use the trademark in relation to the goods or services for which the trademark is registered. A registered proprietor of a trademark can also institute court proceedings against infringers for the infringement of a trademark. In enforcing trademark rights, the registered proprietor can seek remedies, such as damages, an account of profits in lieu of damages, injunctions and additional damages.

The Trademarks Act 2019 also provides an avenue for the registered proprietor to lodge a complaint to the relevant authorities (Enforcement Division of the Ministry of Domestic Trade and

Cost of Living) to investigate any person who has committed or is committing an offence under the Act. The offences include counterfeiting a trademark, falsely applying a registered trademark to goods or services, making or possession of articles for committing offence, importing or selling goods with falsely applied trademark and falsely representing a trademark as registered.

With regards to trademarks that are either unregistered or pending registration, an aggrieved party may have recourse to a remedy under the law of passing off. However, in order for a passing off action to succeed, the aggrieved party must prove that there is goodwill or reputation in the unregistered mark, that there is misrepresentation by the other party and that he has suffered damage or loss to his goodwill or reputation as a result of that misrepresentation. Notably, in conformance with the Paris Convention, the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs), the Trademarks Act 2019 also has provisions setting out the scope of protection for well-known trademarks in Malaysia.

9.4 Copyright

The Copyright Act 1987 provides for the law on the subsistence, duration, ownership, infringement and offences relating to copyright.

The following works are eligible for copyright:

- literary works;
- musical works;
- artistic works;
- films;
- sound recordings; and
- broadcasts.

Derivative works of original works, such as translations, adaptations, arrangements and other transformations of works, collections of works or collections of mere data, whether in machine readable or other form which, by reason of the selection and arrangement of their contents, constitute intellectual creation, are eligible for copyright. Published editions of literary, musical, or artistic works are also eligible for copyright. As Malaysia is a member of the Berne Convention, works of foreign authorship are also entitled to the same rights and protection in Malaysia as a work created by a Malaysian author. Works that were first published in a country that is a member of the Berne Convention, or where it is first published elsewhere, it is then published in a country that is a member of the Berne Convention within 30 days of such publication elsewhere would be accorded protection in Malaysia as if it were first published in Malaysia.

In line with its obligations under the TRIPs Agreement, Malaysia also recognises a performer's right in his live performance. Pursuant to the Copyright (Amendment) Act 2000, performers' rights are now incorporated as part of the Copyright Act 1987. Thus, a performer may control the way his live performance will be communicated to the public as well as the fixation (ie, recording) of his

live performance as a sound recording or on film. Additionally, a performer may also control the reproduction, distribution, rental or sale of a fixation of his live performance.

Copyright protection does not extend to any idea, procedure, method of operation or mathematical concept.

In order for copyright to subsist, it must be shown that sufficient effort has been expended to make the work original in character, the work has been reduced to a material form, the author is a qualified person, and that the work was first published in Malaysia. There is no registration requirement. There is a voluntary notification of copyright mechanism as introduced by the Copyright (Amendment) Act 2012; however, failure to notify does not mean that copyright does not subsist in the said work. First ownership will vest with the author unless:

- the work is commissioned, in which case ownership will be deemed to be transferred to the person who commissioned the work; or
- the work was made in the course of the author's employment, in which case ownership will be deemed to be transferred to the author's employer.

The duration of protection for literary, musical or artistic works is for the life of the author plus 50 years. The duration for protection for published editions, films, sound recordings, broadcasts and performances is for 50 years from the beginning of the calendar year after which the work was first published or performed.

The rights conferred by copyright are the exclusive right to control the reproduction in any material form; communication to the public; performance, showing or playing to the public; distribution of copies to the public by sale or other transfer of ownership; and commercial rental to the public. The owner of a work that is protected by copyright can institute civil proceedings against any person who infringes the copyright, and seek remedies, such as damages, account of profits in lieu of damages, statutory damages or injunctions.

The Copyright (Amendment) Act 2020 (which came into force on 1 July 2020) introduced provisions empowering the Copyright Tribunal to hear any dispute relating to royalties arising between a licensing body and any of its members, providing for an alternative dispute resolution mechanism.

The Copyright (Amendment) Act 2022 (which came into force on 18 March 2022, except for sections 4, 5, 6 and 10, which came into force on 30 June 2022) introduced:

- Amendments to the Copyright Act, 1987 which lay the groundwork for Malaysia's accession to the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled, 2013.
- New offences aimed at tackling piracy on the internet, including among others, making it a specific offence to facilitate copyright infringement via the manufacture, import, sale, etc of streaming technologies.
- Amendments to the Copyright Act 1987 such that applications for voluntary notifications of copyright may now only be made by the owner or assignee of the copyrighted work, and not the author.

9.5 Designs

The Industrial Designs Act 1996 and Industrial Designs Regulations 1999 provides for the registration, duration, ownership, infringement and offences relating to industrial designs.

Industrial design means the features of shape, configuration, pattern or ornament applied to an article by any industrial process or means, being features which in the finished article appeal to the eye and are judged aesthetically by the eye. Industrial design does not include a method or principle of construction, or features of shape or configuration that are dictated solely by the function that the article has to perform or are dependent on the appearance of another article of which the article is intended by the author of the design to form an integral part. The author of an industrial design shall be treated as the original owner of the industrial design unless:

- the industrial design is commissioned, in which case the person commissioning the industrial design shall be treated as the original owner of the industrial design; and
- the industrial design is created by an employee in the course of employment, in which case the employer shall be treated as the original owner of the industrial design.

The owner of an industrial design is entitled to make an application for the registration of the industrial design. An industrial design shall not be registered unless it is new and does not merely involve a method of construction or dictated solely by function. It is to be noted that an artistic work incorporating a design may also be registrable under the Industrial Designs Act 1996. An application to register an industrial design must be made to MyIPO.

The duration of protection is five years from the date of filing. The period of registration of an industrial design may be extended for four further consecutive terms of five years each.

The owner of a registered industrial design shall have the right to institute legal proceedings against any person who has infringed or is infringing any of the rights conferred by the registration of the industrial design to obtain remedies, such as damages, account of profits in lieu of damages or injunctions.

9.6 Other

9.6.1 Geographical Indications Act 2022

The Geographical Indications Act 2022 came into force on 18 March 2022, repealing the Geographical Indications Act 2000. This Act accords protection to goods which are named after the region or locality in which the goods are produced. A geographical indication is an indication that identifies any goods as originating in a country or territory, or a region or locality in that country or territory, where a given quality, reputation or other characteristic of the goods is essentially attributable to their geographical origin. Akin to trademarks, there is a requirement to register geographical indications. However, geographical indications which are contrary to public order and morality are not registrable. Once registered, a geographical indication is afforded protection for a ten-year duration, subject to renewals. In the case of any infringement of

geographical indications, the actions and remedies available to an aggrieved party are also similar to those of trademark infringement.

Among others, the Geographical Indications Act 2022 introduced the following salient changes:

- foreign governments can now apply for registration of a geographical indication;
- geographical indications can only be sought in respect of goods falling within one or more of the categories of goods set out in the guidelines or practice directions issued by the Registrar of Geographical Indications;
- extensive new provisions on the examination procedure;
- expands on the rights conferred to registered proprietors;
- new statutory offences relating to, among others, the false use of geographical indications, and import and sale of goods bearing a falsely applied geographical indication;
- new grounds for refusal of registration of a geographical indication and introduces a new provision which contains all the grounds for refusal;
- expands protection of homonymous geographical indications and allows registration of homonymous geographical indications for all types of goods with practical conditions differentiating the homonymous and earlier geographical indications;
- new provisions relating to the institution of proceedings in court; and
- provisions for cancellation of a registered geographical indication.

9.6.2 Layout-Designs of Integrated Circuits Act 2000

The Layout-Designs of Integrated Circuits Act 2000 protects the layout of integrated circuits. Layout design means the three-dimensional disposition, however expressed, of the elements of an integrated circuit and some or all of the interconnections of the integrated circuit, or such a three-dimensional disposition prepared for an integrated circuit intended for manufacture. In order to qualify for protection, the layout design of an integrated circuit has to be original, to the extent that the layout design must result from the creator's own intellectual effort and be freely created. Registration is not a pre-requisite to the granting of protection for layout designs of integrated circuits.

9.6.3 Protection of New Plant Varieties Act 2004

The Protection of New Plant Varieties Act 2004 provides for the protection of the rights of breeders of new plant varieties. An application for the registration of a new plant variety and a grant of a breeder's right can be made to the Plant Varieties Board.

9.6.4 Confidential information and trade secrets

Apart from the intellectual property rights protected by statute, confidential information and trade secrets are also entitled to protection under the principles of common law and equity. An action for breach of confidence requires that the information be confidential in nature, that it was imparted in circumstances importing an obligation of confidence and that the use of the information was unauthorised.

Chapter 10: Financing

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10.1 Licensing requirements for banks

Malaysia has a dual banking system, where the conventional banking system operates side by side with the Islamic banking system. The key statute governing the conventional banking industry is the Financial Services Act 2013 (FSA), whereas the Islamic Financial Services Act 2013 (IFSA) governs the Islamic banking industry. The regulator of banks licensed under the FSA and IFSA is Bank Negara Malaysia (BNM). BNM has broad powers of supervision and control over banking institutions licensed under the FSA and the IFSA. BNM has also issued various guidelines, standards and directives relating to, among others, prudential matters applicable to banking institutions, including standards relating to capital adequacy, liquidity, corporate governance, risk management and related party transactions.

A bank may be licensed under the FSA as a commercial bank or investment bank. Investment banks that undertake capital market activities in addition to banking activities are also regulated by the Securities Commission and are licensed to carry on business in dealing in securities under the CMSA. BNM and the Securities Commission work hand in hand to regulate investment banks and have both issued guidelines regulating investment banks.

BNM also regulates development financial institutions prescribed under the Development Financial Institutions Act 2002 to promote the industrialisation of important sectors of the Malaysian economy.

The FSA regulates, among others, licensed business. Licensed businesses are businesses licensed by the Minister, on the recommendation of BNM under section 10 of the FSA. Licensed business includes the following activities with the following definitions under subsection 2(1) of the FSA:

1. banking business, which means:

   '(a) the business of – (i) accepting deposits on current account, deposit account, savings account or other similar account; (ii) paying or collecting cheques drawn by or paid in by customers; and (iii) provision of finance; and (b) such other business as prescribed under section 3 [of the FSA]';

2. insurance business;

3. investment banking business, which means:

   ‘(a) the business of— (i) accepting deposits on deposit account; and (ii) provision of finance; Act 671; (b) any regulated activity carried on pursuant to a Capital Page 18 of 180 Markets Services licence under the Capital Markets and Services Act 2007; and (c) such other business as prescribed under section 3 [of the FSA]’.

An applicant for a commercial banking licence, investment banking licence or Islamic banking licence under the FSA or IFSA must be a public company incorporated under the Companies Act 2016.

A Labuan company may carry on business in Labuan as a Labuan bank licensed under the Labuan Financial Services and Securities Act 2010 (LFSSA) or the Labuan Islamic Financial Services and Securities Act 2010 (LIFSSA). The Labuan banks are subject to the regulation and supervision of the Labuan Financial Services Authority (the ‘Labuan FSA’).

The LFSSA regulates, among others:

1. Labuan banking business, which means:

   ‘(a) the business of receiving deposits on current account, deposit account, savings account or any other account as may be specified by the [the Labuan FSA]; (b) Labuan investment banking business; (c) Labuan financial business (d) Labuan Islamic banking business; (e) such other business as the [Labuan FSA], with the approval of the Minister, may specify, in any currency (including ringgit where permitted by the Exchange Control Act 1953 or such other relevant law in force)’ (LFSSA, s 2(1)); and

2. Labuan investment banking business, which means:

   ‘(a) the business of providing credit facilities; (b) the business of providing consultancy and advisory services relating to corporate and investment matters, including dealing in securities, or making and managing investments on behalf of any person; (c) the business of undertaking foreign exchange transactions, interest rate swaps, dealings in derivative instruments or derivative financial instruments or any other similar risk management activities; (d) Labuan Islamic investment banking business; (e) Labuan financial business; or (f) such other business as the [Labuan FSA], with the approval of the Minister, may specify, in any currency (including ringgit where permitted by the Exchange Control Act, 1953 or such other relevant law in force)’ (LFSSA, s 2(1)).

For a person who carries on Labuan banking business, Labuan investment banking business or Labuan financial business to be a Labuan company, a foreign Labuan company (which is a corporation incorporated or registered under the Labuan Companies Act 1990) or a Malaysian bank, they must hold a valid licence to carry on such business (LFSSA, s 87(1)).

Chapter 11: Privacy laws and data protection

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11.1 Overview

The Personal Data Protection Act 2010 (PDPA) came into force on 15 November 2013 and provides various safeguards to protect the interests of data subjects. It regulates the processing and use of personal data, defined 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, and which is:

- being processed wholly or partly by means of equipment operating automatically;
- recorded with the intention that it should be processed wholly or partly by such equipment; or
- recorded as part of or with the intention that it should form part of a relevant filing system.

The PDPA imposes various obligations on a data user by way of seven data protection principles, namely the general principle, notice and choice principle, disclosure principle, security principle, retention principle, access principle and the data integrity principle. It also prohibits transfers of personal data out of Malaysia without the consent of data subjects or unless the transfer falls within an applicable exception. The PDPA purports to safeguard personal data by requiring the data user to comply with the data protection principles and by conferring certain rights to the data subject in relation to his personal data, such as access and correction rights, as well as the right to revoke consent. It also provides for the appointment of a Personal Data Protection Commissioner to oversee compliance with its provisions.

Several regulations and orders were also issued pursuant to the PDPA, addressing issues pertaining to, among others, consent, standards and registration of data users. At the end of 2015, the Personal Data Protection Standards were introduced, which spell out detailed measures and requirements pertaining to data security, data retention and data integrity for implementation by data users. Compliance with the Standards is mandatory for all parties who process or handle personal data.

11.2 Obligations on specific classes of data users

Pursuant to the Personal Data Protection (Class of Data Users) Order, 2013, certain classes of data users are required to register with the Personal Data Protection Commissioner, namely those involved in the following sectors: communications, banking and financial institutions, insurance, health, tourism and hospitalities, transportation, education, direct selling, services (eg, legal, audit, engineering, accountancy services), real estate and utilities. Subsequently, in late 2016, moneylenders and pawnbrokers were also added to the list of data users required to be registered. There are fees chargeable for registration and renewal. Failure to register is an offence under the PDPA.

Data user forums were also formed pursuant to the PDPA for specific sectors and each data user forum was directed by the Personal Data Protection Commissioner to develop its own codes of practice for adherence by data users in the respective sectors. To date, the following enforceable codes of practice have been registered: Code of Practice for Private Hospitals in the Healthcare Industry, Code of Practice for the Utilities (Water) Sector, Code of Practice for the Utilities (Electric) Sector, Code of Practice for the Insurance/Takaful Industry, Code of Practice for the Banking and Financial Sector, Code of Practice for the Transportation Sector (Aviation) and Code of Practice for the Communications Sector. Additionally, the Personal Data Protection Commissioner registered the General Code of Practice of Personal Data Protection which applies to the classes of data users set out in the Personal Data Protection (Class of Data Users) Order 2013 for whom no codes of practice have been registered and for whom there is no data user forum to develop a code of practice.

11.3 Upcoming amendments to the PDPA

Several proposal and consultation papers have also been issued from time to time by the Personal Data Protection Commissioner, and it has been reported that amendments to the PDPA are in the pipeline, but the draft bill has not yet been made publicly available. The amendments are to bring the PDPA in line with global data protection standards (including the EU's General Data Protection Regulation) and statements from government officials indicate that the amendments will include, among others, mandatory data breach notification obligations, a requirement to appoint data protection officers, direct obligations on data processors, data portability and the removal of the whitelist regime for transfers of personal data out of Malaysia.

Additionally, it was announced that the government is developing the following seven personal data protection guidelines: Notification of Data Breach Guidelines, Data Protection Officer Guidelines, Data Portability Guidelines, Cross-Border Data Transfer Guidelines and Mechanism, Data Protection Impact Assessment Guidelines, Privacy by Design Guidelines, and Profiling and Automated Decision-Making Guidelines. These guidelines provide an indication as to what will likely be introduced as a part of the upcoming amendments to the PDPA.

Chapter 12: Technology, media and telecommunications

Charmayne Ong, Skrine, Kuala Lumpur

The technology, media and telecommunications (TMT) industry in Malaysia is governed by the Ministry of Communications and regulated by the Malaysian Communications and Multimedia Commission (MCMC), which was established pursuant to the Malaysian Communications and Multimedia Commission Act 1998 (the 'MCMC Act').

12.1 Regulatory Framework

12.1.1 Communications and Multimedia Act 1998

The Communications and Multimedia Act 1998 (CMA) sets out the general regulatory and licensing framework for the communications and multimedia industry and provides the Minister of Communications and the MCMC with specific powers of oversight over the communications and multimedia industry, such as powers to issue directions, determinations, declarations and decisions, as well as powers of investigation and enforcement.

Subsidiary legislation, statutory instruments, and industry codes and guidelines address specific matters dealt with in the CMA in more detail. For example, there are technical codes registered by the MCMC setting out the technical standards for certifying certain communications equipment.

12.1.2 Other legislation

The Computer Crimes Act 1997 (CCA) was enacted to provide for offences relating to the misuse of computers, such as the offences of unauthorised access to computers, unauthorised modification of computer contents, and the communication of computer passwords, codes or any other means of access to a computer to unauthorised persons.

The Film Censorship Act 2002 (FCA) was enacted to provide for the censorship of films and other related matters, including the establishment of the Film Censorship Board (FCB). Section 2 of the FCA states that it shall not be construed as permitting the censorship of any film transmitted over the Internet.

The Perbadanan Kemajuan Filem Nasional Malaysia Act 1981 was enacted to establish the National Film Development Corporation of Malaysia (commonly abbreviated as 'FINAS') and requires any person intending to produce, distribute or exhibit films in Malaysia to obtain a licence.

12.2 Licensing regime under the CMA

Any person providing any of the licensable activities set out in the Communications and Multimedia (Licensing) Regulations 2000 (the 'Licensing Regulations') will need a licence. The Licensing Regulations also set out the licence application procedure, applicable fees and forms, as well as the information required for an application. Certain activities and services are exempted from the licensing requirement – these are set out in the Communications and Multimedia (Licensing) (Exemption) Order 2000 and include, for example, private or incidental network facilities and services.

Licenses under the CMA may be issued either as 'individual' or 'class' licences, save for Applications Service Provider licences which are only issued as class licences. An individual licensce imposes a high degree of regulatory control which is for a specified person to conduct a specified activity and may include special conditions. Individual licences are subject to equity restrictions although leniency may be applied for and will depend on certain factors. A class licence, on the other hand, is a 'light-handed' form of regulation designed for easy market access.

12.3 Numbering and electronic addressing

Pursuant to the CMA, the MCMC is vested with the control, planning, administration, management and assignment of the numbering and electronic addressing of network and applications services. In the exercise of its powers, the MCMC developed and issued the Numbering and Electronic Addressing Plan, which sets out the rules relating to the use, assignment, transfer, portability, and structure of numbers and electronic addresses in Malaysia.

12.4 Spectrum

The use of spectrum in Malaysia is heavily regulated and must be pursuant to an assignment of spectrum issued by the MCMC, namely either an apparatus assignment, class assignment, or spectrum assignment. The use of spectrum under an applicable class assignment does not involve any application or fees, whereas an apparatus assignment must be applied for and is an assignment by MCMC to use a specified kind of network facility at a specified frequency band(s). Spectrum assignments can only be issued by MCMC when specific frequency bands have been determined by the Minister of Communications, and assignments are made by way of auction or tender.

The MCMC has also developed and published the Spectrum Plan 2022 which sets out, among others, Malaysia's Table of Frequency Allocations and which incorporates the Radio Regulations issued and regulated by the International Telecommunications Union.

12.5 Media and online content

Online content is primarily under the MCMC's purview. The MCMC registered the Content Code 2022, an industry code developed by the Communications and Multimedia Content Forum which is aimed at facilitating self-regulation in the industry and which sets out standards and practices

relating to the dissemination of content in the networked medium (which includes content communicated over the Internet and traditional media outlets like television).

The FCB regulates and censors content disseminated via traditional media outlets such as TV and cinemas. We understand that, in practice, the FCB does not regulate/censor online content. FINAS has prerogative over film production, distribution and exhibition activities in Malaysia. They currently do not require online content providers (eg, over-the-top media services) to obtain any distribution licence from them. Any film production activities taking place in Malaysia will, however, require a production licence from FINAS, regardless of the medium the film will be shown in.

Other legislation, statutory instruments, codes and guidelines may also be relevant to the dissemination of content in Malaysia depending on the context, for example, the Sedition Act 1948 which prohibits seditious publications.

In relation to music licensing, there are currently three licensing bodies authorised under the Copyright Act 1987 for collection of music-related royalties in West Malaysia: (1) Music Authors' Copyright Protection Berhad representing composers and lyricists; (2) Public Performance Malaysia Sendirian Berhad representing recording companies; and (3) Recording Performers Malaysia Berhad representing singers and musicians of sound recording.

12.6 Certification of communications equipment

Pursuant to the Communications and Multimedia (Technical Standards) Regulations 2000, all communications equipment must be certified by the MCMC or its registered certifying agency (ie, SIRIM QAS International Sendirian Berhad) with either a compliance approval, which is granted to a specific model of a device which has been certified as compliant with the specified standards or technical codes, or by way of a special approval. Special approvals are only granted to equipment used exclusively by the applicant for specific purposes.

12.7 Access regime

The CMA also provides for an access regime, which mandates that access be provided to designated services and facilities such as fixed and mobile network origination services and co-location services.

Chapter 13: Competition

Tan Shi Wen, Skrine, Kuala Lumpur

13.1 Legislation and the regulator

Competition law in Malaysia is governed by the Competition Act 2010 (the 'Competition Act') and the relevant competition authority is the Malaysian Competition Commission (MyCC) which has been given wide powers of investigation and enforcement under the Competition Act.

13.2 Anti-competitive agreement

Section 4 of the Competition Act prohibits both horizontal and vertical agreements between enterprises that have the object or effect of significantly preventing, restricting or distorting competition in any market for goods or services (the 'Chapter 1 Prohibitions').The Act deems as anti-competitive all 'horizontal agreements' between enterprises that have the object of: (1) fixing purchase or selling prices or any other trading conditions; (2) sharing market or sources of supply; (3) limiting or controlling production, market outlet or market access, technical or technological development, or investment; or (4) bid rigging.

There is no similar deeming provision for 'vertical agreements', but the MyCC has set out in its Chapter 1 Prohibition Guidelines the types of vertical agreements that the MyCC will initially consider as its enforcement priorities:

- those involving price (in particular, the MyCC states that it would take a strong stance against minimum resale price maintenance); and
- those involving non-price restrictions (eg, tying, exclusive distribution agreements, agreements that require the buyer to purchase all/most of its supplies from the supplier, exclusive customer allocation agreements, franchise agreements and up-front access agreements).

13.3 Abuse of dominance

Section 10 of the Competition Act prohibits an enterprise that is in a dominant position from engaging, either independently or collectively, in any conduct that amounts to an abuse of that dominant position in any market ('Chapter 2 Prohibitions').

'Dominant position' is when one or more enterprises possess significant power in a market to adjust prices, output or trading terms, without effective constraint from competitors or potential competitors. The Act does not define 'abuse of dominant position', but provides a non-exhaustive list of what may amount to such conduct, such as imposing unfair prices or unfair trading conditions on any supplier or customer, refusing to supply an enterprise or a category of enterprises and so on.

The MyCC has set out in the Chapter 2 Prohibition Guidelines two categories of anti-competitive conduct in this regard: (1) 'exploitative conduct': taking advantage of the market structural conditions and charging an excessive price (eg, if a dominant entity believes that there are no new entrants likely, then it will set a high price to exploit customers); and (2) 'exclusionary conduct' (conduct that prevents efficient new competitors from entering or significantly harming equally efficient competitors, either by driving them out or preventing them from effectively competing.)

13.3.1 Exception/defence to a finding of an abuse of dominance

A conduct will not amount to an 'abuse' of dominance if the enterprise in a dominant position has a reasonable commercial justification for its actions or such actions represent a reasonable commercial response to the market entry or market conduct of a competitor.

13.4 Merger controls

The CVA is modelled on the company voluntary arrangement under the UK Insolvency Act 1986. It is meant to be a quick and cheap restructuring process with little court intervention. When it was first introduced, the CVA was limited in its application and could not be applied to publicly listed companies or companies with charges over their assets or undertakings. This was changed by the Companies (Amendment) Act 2024, whereby with effect from 31 January 2025, the CVA has been made available to companies (both private and publicly listed) with charges over their assets or undertakings.

13.5 Exemption orders

Parties may also apply to the MyCC for an individual exemption of a particular agreement or a block exemption of a category of agreements from the Chapter 1 Prohibitions. The applicants must show that they meet all the criteria set out in section 5 of the Act (the 'Exemption Criteria').

On 1 April 2024, pursuant to section 8(1) of the Act, the MyCC issued the Competition (Block Exemption for Vessel Sharing Agreements in respect of Liner Shipping Services through Transportation by Sea) Order 2024 (BEO) for certain vessel-sharing agreements (VSAs) between liner shipping operators in which the parties to the VSAs may discuss and agree on the operational arrangements relating to liner shipping services through transportation by sea, which includes the coordination or joint operation of vessel services and the exchange or charter of vessel space.

This BEO, which is effective for the period 7 July 2022 to 6 July 2025 (unless it is withdrawn by the MyCC), is the fourth BEO issued by the MyCC in respect of the said VSAs. The previous BEOs expired on 6 July 2017, 6 July 2019 and 6 July 2022. The liner shipping industry remains the first and only industry in Malaysia to receive formal block exemptions under the Competition Act.

13.6 Enforcement and penalties

An investigation by the MyCC has no duration and may arise in three ways: (1) the MyCC can initiate investigations; (2) by the direction of a minister for domestic trade and consumer affairs; (3) by third-party complaints.

The MyCC has wide powers under the Competition Act, which include:

- the power to enter and search premises with or without a warrant;
- the power to require access to, or require the production of, documents and information; and
- the power to impose interim directions during an investigation, such as prohibiting parties from acting in accordance with any agreement that may be in breach of the Act.

Upon the finding of an infringement, the MyCC is empowered to impose a financial penalty of up to ten per cent of the worldwide turnover of an enterprise for any infringement of the prohibitions over the entire period during which the infringement occurred.

Chapter 14: Dispute resolution

Yee Mei Ken, Shearn Delamore & Co, Kuala Lumpur

14.1 Structure of the courts

The Malaysian judicial system is composed of subordinate and superior courts. The jurisdictions and powers of the courts are stipulated in the Subordinates Courts Act 1948 (SCA) for the subordinate courts and Courts of Judicature Act 1964 (CJA) for the superior courts.

The hierarchy of the courts begins from the Magistrates' Court, Sessions Court, High Court, Court of Appeal and the Federal Court as the highest court of the land.

The Magistrates' Court and the Sessions Court form the subordinate courts, while the High Courts (consisting of the High Court in Malaya and the High Court in Sabah and Sarawak), the Court of Appeal and the Federal Court make up the superior courts.

The SCA and CJA outline the different jurisdictions of the courts in both criminal and civil matters. The sentences permissible to be delivered by the courts are also encapsulated in the SCA and CJA.

14.1.1 Magistrates' Courts

For criminal matters, the First Class Magistrates' Courts have jurisdiction to try offences punishable by fines only (not exceeding MYR 100,000) or where their maximum term of imprisonment does not exceed ten years. Further, the two offences of: (1) robbery; and (2) lurking, house-trespass or housebreaking by night in order to commit an offence punishable with imprisonment are specifically stated to be under the jurisdiction of the First Class Magistrates' Courts. On the other hand, the Second Class Magistrates' Courts only have the jurisdiction to try offences for which the offence is punishable by a fine only or where the maximum imprisonment term does not exceed one year.

For civil matters, the First Class Magistrates' Courts can try all actions and suits where the amount in dispute or value of the subject matter does not exceed MYR 100,000. The Second Class Magistrates' Courts are only empowered to try original actions or suits of debt recovery or liquidated monetary demand of not exceeding MYR 10,000.

14.1.2 Sessions Court

For criminal matters, the Sessions Courts have jurisdiction to try all offences, except offences punishable by death.

For civil matters, the Sessions Courts have unlimited jurisdiction to try matters pertaining to motor vehicle accidents, landlords and tenants, and distress. The Sessions Courts also have jurisdiction to try all actions and suits where the amount in dispute or the value of the subject matter does not exceed MYR 1m.

14.1.3 High Court

High Courts have unlimited original jurisdiction to try any criminal and civil matter, and pass any sentence and award allowed by law. High Courts also exercise supervisory, revisionary and appellate jurisdiction. For instance, High Courts may decide on Constitutional questions and hear appeals from subordinate courts, subject to the applicable laws.

The decisions of subordinate courts must involve an amount in dispute exceeding MYR 10,000 to be appealable except on a question of law. High Courts are also empowered to hear all appeals from subordinate courts where they concern the maintenance of wives or children, regardless of the amount in dispute.

14.1.4 Court of Appeal

Generally, every proceeding in the Court of Appeal shall be heard and disposed of by a panel of three judges or a greater uneven number of judges.

The Court of Appeal has jurisdiction to hear all appeals against any decision made by the High Court in the exercise of its original jurisdiction and in the exercise of its appellate or revisionary jurisdiction in respect of any criminal matter originated from the Sessions Court.

For civil matters, the Court of Appeal has jurisdiction to hear and determine appeals from any judgment or order of any High Court in any civil cause or matter, provided that, among others, the amount in dispute must exceed MYR 250,000 unless with leave of the Court of Appeal; the judgment or order sought to be appealed against is not a consent judgment or order; and the judgment or order sought to be appealed against is not one that relates to costs only unless with leave of the Court of Appeal.

14.1.5 Federal Court

The Federal Court was established under Article 121(2) of the Federal Constitution. It is the final court of appeal and/or the apex court in Malaysia.

Similar to the composition of the Court of Appeal, every proceeding in the Federal Court is usually heard and disposed of by a panel of three judges. That said, the law provides that Federal Court cases may be presided over by a panel of a greater uneven number of judges. For example, in 2019 an unprecedented bench of nine judges was convened to hear and deliver a landmark case in Malaysia.

The Federal Court has jurisdiction to hear and determine any criminal appeal from any decision of the Court of Appeal in its appellate jurisdiction in respect of any criminal matter decided by the High Court in its original jurisdiction.

For civil matters, the Federal Court only has jurisdiction to hear the following matters, subject to leave of the Federal Court being granted:

- the decision of the Court of Appeal in respect of any civil matter decided by the High Court in exercise of its original jurisdiction where it involves a question of general principle decided for the first time;
- the decision of the Court of Appeal in respect of any civil matter decided by the High Court in exercise of its original jurisdiction where it involves an important question of law and the further deliberation of the law will be for public advantage; or
- the decision of the Court of Appeal is in relation to any questions on the Federal Constitution, including the validity of any written law relating to any such provision.

14.2 Use of arbitration

In Malaysia, other than resolving disputes through court proceedings, which is the most commonly used method, there are also other forms of ADR, such as arbitration and mediation.

Arbitration proceedings are presided over by arbitrators and governed by the Arbitration Act 2005. Arbitration proceedings may be held in the Asian International Arbitration Centre or any other premises agreed upon between the parties. Parties are also free to agree on the procedure to be abided by the arbitral tribunal in the conduct of the proceedings. An arbitration award is final, conclusive and enforceable, like any other court orders.

Parties entering into commercial agreements may agree to resolve their disputes through arbitration, which is often spelled out in the contract. Many opt for arbitration for various reasons and the most hailed advantage of arbitration is its confidentiality. In contrast to court proceedings, arbitration is a private process whereby only the parties to the dispute and the arbitrator presiding over the matter will be privy to the matter. The parties are prohibited from publishing, disclosing or communicating any information relating to the arbitration proceedings or an award made in those arbitral proceedings to any third party.

14.3 Mediation

Other than court proceedings and arbitration, parties may also resolve their disputes through mediation. The mediation procedure is governed by the Mediation Act 2012. In a mediation procedure, parties may jointly appoint a mediator from the list of Certified Mediators registered with the Malaysian Mediation Centre.

Mediation focuses on the interests and needs of the parties over and above the rights and legal positions of the parties under the law. Hence, mediation is a more relaxed and flexible procedure where parties are free to negotiate and voice their wants and expectations. Further, all admissions and concessions made or documents produced during mediation occur on a without-prejudice basis. A successful mediation will result in the signing of a settlement agreement or recording of a consent order.

In reality, mediation is often directed by courts before trials. There is an in-built mediation mechanism in the court proceedings. Mediation under the Mediation Act will not prevent the commencement of any civil action in court or arbitration.

14.4 Other forms of settlement

Other than arbitration and mediation, parties may also resolve their disputes through private negotiation and settlement. In negotiation, parties directly communicate and attempt to reach a settlement agreement with or without the assistance of legal representatives. In the event that a court proceeding has commenced, Order 22B of the Rules of Court 2012 allows any party to the proceeding to serve on the other party an offer to settle in the prescribed form before the court disposes of the matter. Such an offer is not admissible as evidence in the subsequent court process if the attempt to settle fails, save as to cost. Where an offer to settle is accepted, the court may incorporate any of the terms of the offer into a judgment.

Singapore

Chapter 1: Introduction

Dinesh Dhillon, Allen & Gledhill, Singapore

Fay Fong, Allen & Gledhill, Singapore

1.1 Political and constitutional structure

Singapore is a republic with a parliamentary system of government based on the Westminster model, with Members of Parliament representing constituencies. The Constitution lays down the basic framework for the three organs of state: the executive, legislature and judiciary.

Parliament and the President jointly make up the Legislature of Singapore. The Singapore Parliament is unicameral and is made up of Members of Parliament who are elected, as well as Non-Constituency Members of Parliament and Nominated Members of Parliament who are appointed. Singapore's executive branch of government consists of the elected President as the Head of State, the Cabinet led by the Prime Minister and the Attorney General.

1.2 Legal structure

Singapore is a common law jurisdiction and derives its legal system from English common law. Until 1994, Singapore's court of final appeal was the Privy Council in the UK and decisions on common law by the House of Lords were taken as being virtually binding on the local courts. It is expressly provided in the Application of English Law Act that English common law, insofar as it was part of the law of Singapore before 12 November 1993, continues to be a part of the law of Singapore. However, Singapore has built its own substantial body of case law over the years. English judgments are still referred to and applied where appropriate by the local courts, although Australian and Canadian judgments are also referred to for guidance.

The judiciary consists of the Supreme Court and the state courts. The head of the judiciary is the Chief Justice. The Supreme Court comprises the Court of Appeal and the High Court, and specialised courts, such as the Singapore International Commercial Court (SICC) and the family justice courts. The Court of Appeal hears appeals of civil and criminal cases from the High Court. The state courts comprise several courts, including specialised courts such as small claims tribunals and employment claims tribunals.

1.3 Economy

The World Bank, in its *Doing Business 2020* report, ranked Singapore as the world's second easiest place to do business. The World Economic Forum ranked Singapore as the top most competitive economy in the world for 2019.

Singapore has one of the highest GDP per capita ratios in the world. Singapore's attractiveness to investors and businesses is the result of its strong economy, its sophisticated and stable business and political environment, and its highly skilled workforce.

Chapter 2: The business environment

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2.1 Government structure

The Singapore government is modelled on the UK's Westminster system. It consists of three branches: the legislature, executive and judiciary. The Prime Minister is the head of the government, while the President is the Head of State. The Chief Justice is the head of the judiciary.

The legislature, responsible for making laws, comprises the President and Parliament. The legislature is led by the Speaker of Parliament. The proceedings of the legislature can be found in the Official Reports of the Singapore Parliamentary Debates, also referred to as the Hansard.

The executive comprises the Cabinet and is responsible for implementing laws. The executive is led by the Prime Minister, who is advised on legal matters by the Attorney-General. The Attorney-General also acts as the Public Prosecutor and has the discretion to decide whether to prosecute cases (ie, prosecutorial discretion).

The judiciary is responsible for interpreting the law through the courts. These include: the Supreme Court (made up of the Court of Appeal, which is the highest court in the Singapore judiciary system, and the High Court); the state courts (which includes the Small Claims Tribunals); and the Family Justice Courts. The Singapore International Commercial Court (also referred to as the SICC), a specialised division of the High Court, focuses on resolving transnational commercial disputes, with cases adjudicated by a panel of local and international judges from both civil and common law traditions.

2.2 Legal system

Singapore operates under a common law legal system, where laws, encompassing both criminal and civil matters, are derived from statutes and cases. The Singapore Constitution is the supreme law of the Republic, rendering any law implemented after the commencement of the Constitution that is inconsistent with it, void to the extent of its inconsistency.

Statutes are passed by Parliament are accessible online at Singapore Statutes Online. Key statutes governing commercial law include the Companies Act 1967 (the Companies Act), the Employment Act 1968 and the Competition Act 2004. Key statutes governing criminal law are the Penal Code 1871 and the Criminal Procedure Code 2010.

Case law comprises the body of cases decided by the judiciary over time, many of which are reported and can be found in online depositories. In cases which involve statutory provisions, the courts may interpret these provisions in the process of deciding the case. As such, a full understanding of a statutory provision may necessitate a review of the relevant case law.

Courts in Singapore also adhere to the doctrine of binding precedent or *stare decisis*, where lower courts must follow the decisions of higher courts in similar cases. For example, the decisions of the Court of Appeal are binding on the High Court. While decisions from other Commonwealth jurisdictions are not binding on Singapore courts, English cases are often cited in Singapore courts, especially when there is no direct local authority on a topic.

Deciding on the appropriate court to bring a particular case involves several considerations, including the significance of the dispute. Disputes where the claim exceeds SGD 250,000 (approx US$194,000) are heard by the High Court, and claims below SGD 20,000 (approx US$15,500) are commonly heard by the Small Claims Tribunal.

Alongside the courts, arbitration has been widely favoured as an alternative dispute resolution mechanism. The Singapore International Arbitration Centre (SIAC) is a global arbitration institution which offers cost-effective and efficient case management services to parties worldwide. Apart from cases, Singapore's arbitration laws are also codified in statutes such as the Arbitration Act 2001 and the International Arbitration Act 1994. Singapore is also a signatory to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (also known as the New York Convention), which allows Singapore arbitration awards to be enforced in numerous countries. The Singapore courts also actively support arbitration, allowing parties to arbitration agreements to seek various critical interim orders from the Singapore courts to aid in the arbitration process.

Certain regulatory bodies in Singapore also have the power to impose penalties for breaches of legislation, regulations and licences. For example, the Monetary Authority of Singapore has imposed civil penalties for breaches of the Securities and Futures Act 2001 on multiple occasions. Similarly, the Infocomm Media Development Authority has also taken enforcement action for breaches of issued licence terms. Given that these penalties can be significant, it may be worth considering making written representations to the relevant authorities when an enforcement issue arises. Depending on the situation, it may also be worth initiating internal corporate investigations. Singapore laws protect privileged communications, which means it is crucial to understand your legal rights at an early stage of any potential enforcement action.

Chapter 3: Business and corporate structures

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3.1 Common forms of legal entities

Companies incorporated in Singapore are business entities that are principally governed by the Companies Act and regulated by the Accounting and Corporate Regulatory Authority (ACRA). Before formally registering their chosen business structure, applicants have the option of selecting from the following forms of corporate structures, depending on their various business needs.

3.1.1 Sole proprietorship

A sole proprietorship is a business owned and controlled by an individual, a company or a limited liability partnership (LLP). It is not a separate legal entity from its sole proprietor. As such, the sole proprietor has unlimited liability and is personally liable for all liabilities incurred during the course of business. A sole proprietorship can also sue or be sued in the proprietor's name. A sole proprietorship structure is usually recommended for small-scale businesses with no or negligible risk, but may not be ideal for businesses that intend to recruit staff or pursue rapid expansion.

3.1.2 Partnership

A partnership is a business owned by at least two, but not more than 20 partners. A partnership and all of its partners are regarded as a single legal entity. This means that partners have unlimited liability and are personally liable for the debts or legal liabilities of the partnership. In addition, partners are personally liable for the actions of other partners in the business and a partnership can sue or be sued in the partners' names. A partnership is usually recommended for individuals looking to start and operate a small-scale business with few compliance requirements. However, this structure may not be suitable for businesses looking to own property, or businesses involving more than 20 individuals.

3.1.3 Limited liability partnership (LLP)

An LLP is a vehicle that gives business owners the flexibility to operate as a partnership while having a separate legal identity, like a private limited company. This means that all of its partners are liable only up to the limit of their contributions and are not personally liable for the debts and obligations of the LLP except in situations where those debts and obligations arise as a result of their own wrongful acts or omissions. Further, unlike partnerships, an LLP can sue, be sued and acquire and hold property in its own name. The mutual rights and duties of the LLP and its partners are governed by a LLP agreement. The LLP has perpetual succession, and any change in the partners of an LLP will not affect its existence, rights or liabilities.

Registration costs are also lower than that of a company, and there are fewer formalities and procedures to comply with. An LLP structure is typically used by chartered professionals, such as lawyers and accountants.

3.1.4 Limited partnership (LP)

An LP is another vehicle for doing business in Singapore consisting of a minimum of two partners, including at least one general partner and at least one limited partner, without any limit as to the maximum number of partners. In contrast to an LLP, an LP does not have a separate legal personality and therefore cannot sue or be sued, or own property, in its own name. While the general partner is liable for the actions of the limited partnership, including its debts and obligations, a limited partner generally is not liable for the debts or obligations of the LP beyond its agreed contribution, provided that they do not take part in the management of the LP.

In Singapore, the LP structure is and is commonly found in the private equity and fund investment businesses as it offers both limited liability and tax transparency to investors who do not wish to participate in management. As such, it may not be suitable for business owners who do not want to be personally liable for the debts and obligations of the business.

3.1.5 Private company limited by shares

A private company limited by shares is one of the most commonly used vehicle for doing business in Singapore. There are two types of private companies in Singapore, namely: (1) an exempt private company with 20 or fewer members and where no corporation holds a beneficial interest in the company's shares; and (2) a private company with 50 or fewer members.

A private company limited by shares has separate legal personality and therefore can own property in its own name, incur debts and liabilities on its own behalf, and sue and be sued in its own name. However, this also means that shareholders' liabilities extend only to contributing the amount that remains unpaid (if any) on shares for which they have subscribed. As such, where shares have been issued on a fully paid basis, shareholders will have no further liability to the company, even if the company is wound up.

A private company limited by shares has higher set-up and maintenance costs relative to other business structures. Nevertheless, it is usually recommended for business operation, owing to its perception of credibility under requirements in the Companies Act, and its enjoyment of corporate tax rates and coverage pursuant to double tax agreements.

3.1.6 Branch

A branch is an extension of a foreign company, often used by foreign companies wishing to conduct business in Singapore. Instead of incorporating a Singapore subsidiary company to carry on business in Singapore or transferring its registration to Singapore via the inward re-domiciliation regime, a foreign company may carry on business in Singapore by registering the foreign company as a foreign company with ACRA.

Through the branch, the foreign company carries out its Singapore operations while using its own name. The branch is usually recommended for a foreign company wishing to leverage its existing name and reputation. However, the branch is not a separate legal entity as it is considered to be merely an extension of the foreign company that is incorporated outside Singapore. Accordingly, any liabilities or obligations which arise against it in Singapore may be enforced against all the assets of the foreign company. It is therefore not usually recommended for a foreign business requiring a separate legal entity in Singapore.

3.1.7 Representative office

Similar to a branch, a representative office is an extension of its foreign parent company and is not a separate legal entity from the parent company. However, unlike a branch, it is not permitted to

conduct any commercial activities and is temporary in nature, usually for one year with the potential to renew for a maximum of three years.

Generally, a representative office is typically used to conduct activities relating to market research and feasibility studies, without incurring incorporation and compliance costs, often as a precursor to the commencement of full-scale operations in Singapore. As such, it is usually recommended for foreign companies to register a representative office in Singapore if it wishes to assess the business environment in Singapore before it makes investment decisions or sets up a permanent establishment in Singapore.

3.2 Ongoing reporting and disclosure obligations

3.2.1 Sole proprietorship

Sole proprietorships are generally not required to file annual returns nor financial statements. However, sole proprietors are required to file their annual tax return that includes the profits of the sole proprietorship to the Inland Revenue Authority of Singapore (IRAS).

3.2.2 Partnership

Partnerships are not required to file annual financial statements with ACRA and do not need to pay income tax on the income earned by the partnership. However, while the partnership does not pay tax, the partnership is still required to file an annual income tax return showing all income earned by the partnership and deductions claimed for expenses incurred in carrying on the partnership. Further, each partner will be taxed on their individual share of the income on the partnership. Where the partner is an individual, their share of income will be taxed based on the individual income tax rate. Where the partner is an entity, the partner's share of income will be taxed on the corporate income tax rate.

3.2.3 Limited liability partnership (LLP)

Similar to partnerships, an LLP will not be liable to tax at the entity level, but each individual partner will be taxed on their share of the income from the LLP. An LLP is also not required to file its financial statements or have them audited but it is however required to keep its accounting records, profit and loss accounts, and balance sheets up-to-date, so as to explain sufficiently all the transactions and financial position of the LLP. Further, the manager of an LLP must submit an annual declaration of solvency or insolvency to ACRA, which will be made available to the public. The first annual declaration must be lodged within the first 15 months from the date of the registration of the LLP. Subsequently, a declaration must be lodged once every calendar year and not more than 15 months after the last declaration was lodged.

3.2.4 Limited partnership (LP)

Similar to LLPs, LPs will also not be liable to tax at the entity level, but each individual partner will be taxed on their share of the income from the LP. An LP is also not required to file its financial statements or have them audited, but is required to keep its accounting records, profit and loss accounts and balance sheets that will sufficiently explain the LP's transactions and financial position.

3.2.5 Private company limited by shares

All private companies, including exempt private companies, are required to file their annual returns with ACRA within seven months of the company's financial year-end. The annual return is an electronic form that provides important particulars of the company, such as the names of the directors, secretary, its members and the date to which the financial statements of the company are made up to. This provides critical information that helps company stakeholders make informed decisions. Private companies and insolvent exempt private companies are required to file their full set of financial statements with their annual returns, whereas solvent exempt private companies are exempt from filing their financial statements.

Private companies are also required to have their financial statements audited. The directors of a company must appoint at least one ACRA-approved accounting entity to be the company's auditor within three months of the company's incorporation. Companies exempt from audit requirements include dormant companies and small companies, as defined in the Companies Act.

3.2.6 Branch

Together with its foreign parent company, a branch office is required to lodge with ACRA its financial statements made up to the end of the financial year, within 60 days of the date on which its annual general meeting is held, or within such period as the directors of the foreign company would have been required to lodge its financial statements if the company were a public company incorporated under the Companies Act and does not keep a branch register outside Singapore.

The foreign company and branch office must also lodge audited statement of its assets used in and liabilities arising out of its Singapore operations, an audited profit and loss account for the last preceding financial year of the company which complies with accounting standards prescribed by the Companies Act, and a statement of the name of the auditor who audited these documents. Where a branch office is dormant, it may be exempt from audit requirements.

3.2.7 Representative office

A representative office is not required to file annual returns with ACRA or annual tax returns with the IRAS.

3.3 Management structures

3.3.1 Sole proprietorship and partnership

In order to set up a sole proprietorship or a partnership, the sole proprietor or at least one partner of the partnership must be: (1) at least 18 years old; and (2) a Singapore citizen, a Singapore permanent resident or an eligible foreigner holding a relevant long-term pass to work in Singapore.

Nevertheless, a foreigner (or foreigners in the case of a partnership) residing overseas may set up a sole proprietorship or a partnership, provided that they appoint at least one locally resident authorised representative, who must be: (1) a natural person; (2) at least 18 years of age; (3) of full legal capacity; and (4) ordinarily resident in Singapore. A person is considered to be 'ordinarily resident in Singapore' if they are a Singapore citizen, a permanent resident or a foreigner who has been issued a relevant work pass. If the foreigner wishes to be present in Singapore to manage the operations of the sole proprietorship or partnership, they must obtain the relevant work pass from the Ministry of Manpower (MOM) after registering the entity.

3.3.2 Limited liability partnership (LLP)

Every LLP must have at least two partners, who can be an individual, local company, foreign company or another LLP. The LLP is also required to appoint at least one manager who must be: (1) a natural person; (2) at least 18 years of age; (3) of full legal capacity; and (4) ordinarily resident in Singapore. The manager takes part in the management of the LLP, but need not be a partner.

The manager will be held responsible should the LLP fail to comply with the requirements of the Limited Liability Partnerships Act 2005 relating to: (1) the filing of a declaration of solvency; (2) the registration of any change in particulars of the LLP; and (3) the publication of the LLP's name, registration number and limited liability status on its invoices and correspondence. As such, in contrast with partners, the manager of the LLP shoulders heavier responsibilities.

Similar to a sole proprietorship and LLP, a foreigner who wishes to register an LLP in Singapore is also required to appoint a locally resident manager, and obtain the relevant work pass from MOM if the foreigner wishes to be present in Singapore to manage the operations of the LLP.

3.3.3 Limited partnership (LP)

An LP must consist of a minimum of two partners, with at least one general partner and one limited partner, with no limit to the maximum number of partners. The general partner of an LP can be an individual or a company; and the limited partner of an LP can be an individual, company or unregistered foreign company.

Where the registered general partners of an LP are not ordinarily resident in Singapore, ACRA may require the appointment of a manager who is ordinarily resident in Singapore. The local manager of an LP is responsible for discharging all obligations of the LP, and are subject to the same responsibilities, liabilities and penalties as a general partner of the LP, if the general partner defaults

on such obligations. The manager must not be an undischarged bankrupt, unless they have obtained permission from the High Court or the Official Assignee.

Similar to LLPs, a foreigner who wishes to register an LLP in Singapore is required to appoint a locally resident manager, and obtain the relevant work pass from MOM if the foreigner wishes to be present in Singapore to manage the operations of the LLP.

3.3.4 Private company limited by shares

A company must have at least one director who is at least 18 years old and ordinarily resident in Singapore. As such, if there is only one locally resident director, they may not resign or vacate their office until a replacement is found. The Companies Act also bans certain classes of people from acting as director or taking part in the management of the company, such as undischarged bankrupts.

A company must also have at least one company secretary. The company secretary must be a natural person and resident in Singapore, cannot be debarred from acting as a secretary under the Companies Act, and must be appointed within six months from the date of incorporation of the company. A director can be the secretary of the company provided that they do not act in the capacity of the director and the secretary at the same time. Accordingly, a sole director of a company may not act or be appointed as its secretary.

In addition, the Companies Act requires every company to appoint an ACRA-approved auditor within three months from the date of incorporation, unless the company is exempt from audit requirements. Such company auditor can be a public accountant, an accounting corporation, an accounting firm or an accounting limited liability partnership, and must hold office until the conclusion of the first annual general meeting of the company.

3.3.5 Branch

To register itself as a branch, the foreign company must appoint at least one authorised representative, who must be ordinarily resident in Singapore, to act on its behalf.

3.3.6 Representative office

A representative office can have a maximum of five staff members, and must be represented by staff from its own headquarters or its Singapore staff, with a chief representative stationed in Singapore who will be responsible for the representative office's matters in Singapore.

3.4 Director, officer and shareholder liability

3.4.1 Sole proprietorship, partnership and Limited liability partnership (LLP)

To register a sole proprietorship, partnership or LLP, a name application must first be made to ACRA to determine the availability of the proposed name for its use in Singapore. A fee of SGD 15 (approx

US$11.60) is payable for each approved name. If the name application is approved, the name will be reserved for 120 days after the applicant is notified of the approval.

Registration of the relevant entity with ACRA costs an additional fee of SGD 100 (approx US$77). Such a registration can be completed within a day, provided all the supporting documents are correctly lodged. However, if ACRA needs to refer the application to another government authority for approval or review, approval of the application may take between 14 to 60 days.

3.4.2 Limited partnership (LP)

Before a LP can be registered, a name application must first be submitted to ACRA to determine the availability of the proposed name for its use in Singapore. A fee of SGD 15 (approx US$11.60) is payable for each approved name. If the application is approved, the name will be reserved for 120 days after the applicant is notified of the approval.

Registration of the LP with ACRA costs an additional fee of SGD 100 (approx US$77) for a one-year registration or SGD 160 (approx US$124) for a three-year registration. Such a registration can be completed within a day, provided all the supporting documents are correctly lodged. However, if ACRA needs to refer the application to another government authority for approval or review, approval of the application may take between 14 to 60 days.

LP registrations must be renewed up to 60 days before the expiry date, and such a renewal with ACRA costs SGD 30 (approx US$23.20) for a one-year registration or SGD 90 for a three-year registration.

3.4.3 Private company limited by shares

Before a company can be incorporated, a name application must first be submitted to ACRA to determine the availability of the proposed name for its use in Singapore. A fee of SGD 15 (approx US $11.60) is payable upon approval of each name. If the application is approved, the name will be reserved for 120 days after the applicant is notified of the approval.

After the company name has been approved, the company can be incorporated. A registration fee of SGD 300 (approx US$232) is payable for a private company limited by shares. A copy of the company's constitution and such other documents as may be prescribed must also be submitted to ACRA. The incorporation application is generally processed within the same working day after the payment of the registration fee. However, it can take between 14 and 60 days if ACRA needs to refer the application to another government authority for approval or review.

3.4.4 Branch

Similar to the setting up of a private limited company, sole proprietorship and different forms of partnerships, a name application must first be submitted to ACRA for a fee of SGD 15 (approx US$11.60). If the application is approved, the name will be reserved for 120 days after the applicant is notified of the approval.

Registration of a branch office on ACRA will cost an additional SGD 300 (approx US$232), and the applicant must file certain documents with ACRA including, among others, a notice of the situation of the foreign company's registered office in Singapore, and a notice in prescribed form containing the registration number of the foreign company as indicated on the foreign company's certificate of incorporation, a description of the business carried out by the foreign company, and the type of legal form or legal entity of the foreign company.

Provided that all the necessary documents are in order, the application to register the branch of a foreign company will usually be processed within the same working day once the registration fee is paid.

3.4.5 Representative office

A foreign company in the manufacturing, international trading, wholesale, trade and trade-related business sectors that wishes to register a representative office in Singapore must: (1) have been established in its home country for at least three years; (2) have incurred a sales turnover greater than US$250,000; and (3) have a maximum of five staff in the representative office.

Such representative office must be registered with Enterprise Singapore. The application forms for registration can be obtained and submitted through the Enterprise Singapore website. Applicants must also submit the following documents along with the application form: (1) copies of the parent company's latest audited accounts; and (2) copies of the parent company's certificate of incorporation. For any document not in English, an official English translation must be submitted to the online portal pursuant to the application. The processing fee for setting up a representative office and renewing the representative office each year is SGD 200 (approx US$155).

A foreign company in other sectors such as banking, finance, financial exchanges, insurance and law should approach the relevant regulator if they wish to register a representative office.

Chapter 4: Takeovers (friendly M&A)

Lee Kee Yeng, Allen & Gledhill, Singapore

4.1 Legal and regulatory framework

Where an entity is listed in Singapore and is being acquired or taken over, such an activity is principally governed by an advisory body known as the Securities Industry Council (SIC). The SIC is the principal regulator that administers and enforces the Singapore Code on Takeovers and Mergers (the 'Takeover Code'). The SIC comprises members appointed by the Minister of Finance and most members are from the private sector, including industry representatives, finance sector professionals and legal experts. The day-to-day business of the SIC is conducted by a professionally staffed, full-time secretariat.

The Takeover Code applies to the takeover or merger of corporations (whether local or foreign), business trusts and real estate investment trusts (REITs), with a primary listing of their equity securities in Singapore (a 'relevant entity'). It also applies to unlisted Singapore companies and unlisted registered business trusts or REITs, with more than 50 shareholders or unit holders, and net tangible assets of SGD 5m or more. Although the Takeover Code does not have the force of law, any breaches may result in the imposition of sanctions by the SIC.

Where either the acquiring company or the target company is a company listed on the Singapore Exchange (the SGX), the SGX Listing Manual also applies.

4.2 Merger control and statutory shareholding restrictions in specific industries

Section 54 of the Competition Act prohibits mergers that result, or may be expected to result, in a substantial lessening of competition within any market for goods or services in Singapore. A failure to follow merger control procedures, where it would otherwise have been advisable to do so, could result in financial penalties, or a direction for the merger to be unwound or for divestments to be carried out.

Other statutes relating to particular industries or entities designated as critical to Singapore's national security interest also govern takeover activity in Singapore, insofar as they limit or require prior regulatory approval for ownership in entities engaged in those industries. Such industries may include banking, finance, insurance and the media.

4.3 Types of takeover offers

4.3.1 Mandatory offers

A mandatory offer is triggered when an offeror acquires 30 per cent or more of the voting rights of the target company or, if it already holds between 30 and 50 per cent of the target company's voting rights, it acquires more than one per cent of the target company's voting rights in any rolling six-month period. In regard to a mandatory offer, the offer price cannot be lower than the highest price paid by the offeror or its concert parties for any shares carrying voting rights in the target company during and in the six months preceding the offer period. The consideration paid in regard to the mandatory offer should be in cash or be accompanied by a cash alternative. A mandatory offer is conditional upon the offeror obtaining acceptances that will result in the offeror, and persons acting in concert with it, holding shares carrying more than 50 per cent of the voting rights of the target company. Generally, no other conditions are permitted to be imposed in regard to a mandatory offer.

Where an offeror acquires more than 50 per cent of the voting shares of a target company and, as a result, the offeror acquires or consolidates control of the public company because the target company itself had effective control of the public company, the offeror may be required to make a mandatory takeover offer for the public company.

4.3.2 Voluntary offers

A voluntary offer occurs where the offeror makes an offer for all the shares in the target company, when the offeror has not incurred an obligation to make a mandatory offer. A voluntary offer must always be conditional on the offeror and its concert parties acquiring more than 50 per cent of the target company. In addition, the offeror may stipulate other objective conditions, such as shareholders' approval and certain regulatory approvals. In regard to a voluntary offer, the offer price cannot be lower than the highest price paid by the offeror or any of its concert parties for any shares carrying voting rights in the target company during the three months preceding the offer period. The offer may be in cash or securities, or a combination thereof.

4.3.3 Partial offers

Partial offers are voluntary offers for less than 100 per cent of the outstanding shares in a target company. All partial offers must be approved by the SIC. Generally, the provisions in the Takeover Code applicable to a voluntary offer will also apply to partial offers, and the documents required for a partial offer will also be required in relation to a voluntary offer. Consideration in terms of a partial offer may be in the form of cash or securities, or a combination of both.

4.3.4 Scheme of arrangement

The acquisition of a Singapore incorporated company may also be carried out through a scheme of arrangement provided for in Section 210 of the Companies Act. In regard to a scheme of arrangement, outstanding shares in the target company are either cancelled or transferred to the acquirer in consideration made up of cash and/or shares. Usually, a scheme of arrangement is only used in a situation where the acquiror wishes to acquire all the shares in a target company and such acquisition is supported by the target company. All schemes of arrangement in regard to a public company to whom the Takeover Code applies would be subject to compliance with the Takeover Code. In accordance with Section 210 of the Companies Act, a scheme of arrangement requires the approval of a majority of the members of the target company present and voting, representing at least 75 per cent in terms of the value of the shares voted on at a scheme meeting. During the voting process, the acquiror and the related parties, as well as common substantial shareholders in the acquiror and the target company must abstain from voting. Furthermore, the scheme also requires the approval of the High Court. Once an order for a scheme of arrangement has been approved by the High Court, it binds all the shareholders, including those who objected to it at the scheme meeting or in the High Court.

4.3.5 Amalgamation process

As an alternative to the scheme of arrangement, the acquisition of a Singapore incorporated public company may be carried out through an amalgamation process. Such a process may involve either two or more companies amalgamating and continuing as one company, or two or more companies

amalgamating and forming a new company. The main difference in terms of the amalgamation process is that it does not require the approval of the High Court.

4.4 Directors' duties

The Takeover Code prevents a target company from frustrating a bona fide offer. When a target company's board of directors has been notified of a bona fide offer, or after the target's board has reason to believe that a bona fide offer is imminent, the board cannot, without the shareholders' approval, take any steps that could effectively result in either the offer being frustrated, or deny the target shareholders' the opportunity to decide on the merits of the offer. The target company's board of directors must obtain the advice of an independent financial adviser when it receives an offer or is approached with a view to an offer being made and must, subsequently, inform the shareholders of the substance of this advice. In addition, the directors of a company have a fiduciary duty under common law to act in the interests of the company and its shareholders as a whole.

4.5 Shareholder disclosures

The parties to a takeover and their associates are required to disclose their dealings in securities of the target, as well as dealings in the securities of the offeror (in the case of an offer which involves a share swap), in accordance with the requirements of the Takeover Code. Save for certain limited categories of dealings, which may be privately disclosed to the SIC, disclosure is typically required to be made publicly on a daily basis. The term 'associate' will normally include a holder of five per cent or more of the equity share capital of the offeror or target company. Apart from the Takeover Code, shareholder disclosure obligations are found in the Companies Act and the SFA and are required by the SGX in regard to listed companies. Disclosure obligations arise when a shareholder becomes a substantial shareholder, that is, a shareholder who has an 'interest' of five per cent or more of the total votes attached to all the voting shares in a company. Disclosure must subsequently be made if there is a change in the substantial shareholder's interest in the voting shares of a company, in threshold bands of one per cent.

4.6 Suspension of trading and compulsory acquisition

The SGX may suspend the trading of the shares in a target company if the number of shares in public hands falls below ten per cent. An offeror who acquires not less than 90 per cent of the issued target company shares pursuant to a takeover offer (excluding those shares held at the date of the offer by, or by a nominee for, the offeror or the specified persons in Section 215 of the Companies Act) is entitled to compulsorily acquire any remaining target shares under Section 215(1) of the Companies Act. Conversely, dissenting shareholders of the target company have a right to be bought out by the offeror if the offeror and the specified persons under Section 215(3) of the Companies Act hold 90 per cent or more of the issued target company shares after the offer.

Chapter 5: Foreign investment

Tan Shao Tong, WongPartnership, Singapore

5.1 Introduction

Singapore, known for its strategic location, robust economy, and political stability, has been an attractive location for foreign investment. The city-state's open and well-regulated market serves as the gateway to ASEAN and the Asia-Pacific region, offering investors a conducive environment for growth and expansion. The Singapore government's forward-looking policies have consistently nurtured a business-friendly climate, which is underpinned by a strong legal system, a skilled workforce, and an efficient infrastructure. The Singapore government has also set up various organisations to encourage foreign investments. Various tax incentives are also offered to promote growth in specific sectors.

5.2 Foreign investment control/restriction

5.2.1 Introduction

Singapore generally welcomes foreign investment. However, the Significant Investments Review Act 2024 (SIRA) which came into force on 28 March 2024, introduces certain requirements when there are specified changes in the ownership and control of designated entities.

In addition, certain specific sectors, such as the broadcasting, newspaper and real estate sectors, are subject to additional regulatory controls and restrictions for foreign investment. The Singapore government controls these sectors through licensing regimes (applying both qualitative and quantitative criteria depending on the sector involved) and legislative restrictions.

These controls and restrictions are discussed in greater detail in the following sections.

5.2.2 Foreign investment control

Singapore has relatively minimal foreign investment control. For foreign individuals or corporations who intend to invest in a Singapore company, there are no special post-closing or filing requirements. Nevertheless, the SIRA, which came into force on 28 March 2024, introduces certain requirements when there are specified changes in the ownership and control of designated entities. The SIRA complements existing sectoral legislation and manages significant investments into critical entities, to safeguard Singapore's national security interests. The list of designated entities is published in the *Government Gazette* and is also available online at https://www.osir.gov.sg/designation/designated-entities.

Parties (whether local or foreign) will need to notify or seek approval if they are involved in transactions that meet the prescribed thresholds for the designated entities. The default obligations, which may be varied by the Minister of Trade and Industry), are: (1) notifying the Minister within seven calendar days of becoming a five per cent controller in a designated entity; and (2) seeking the Minister's approval prior to becoming a 12, 25 or 50 per cent controller in a designated entity.

5.2.3 Restrictions on investment in the broadcasting sector

Broadcasting is a restricted sector which requires licensing in Singapore. Unless approved by the IMDA, a company must not be granted or hold a relevant licence if: (1) any foreign source(s) holds at least 49 per cent of the shares in the company or its holding company, or if any foreign source(s) is in a position to control 49 per cent of the voting power in the company or its holding company; or (2) all or a majority of persons having the direction, control or management of the company or its holding company are appointed by or accustomed or under an obligation to act in accordance with the directions, instructions or wishes of any foreign source(s).

In this regard, a relevant licence means any free-to-air licence, or any broadcasting licence under which a subscription broadcasting service may be provided, which permits broadcast which is capable of being received in 50,000 or more homes. But it not include any class licence in the case of (1) and (2) (in the above paragraph), or any other broadcasting licence that IMDA may specify in the public interest or in the interests of public security or order, or national defence.

The CEO of a broadcasting company and at least half of the directors of the broadcasting company must be Singapore citizens.

A person must also not receive any fund from any foreign source for the purposes of financing any broadcasting service owned or operated by any broadcasting company without the prior consent of the IMDA.

5.2.4 Restrictions on investment in the newspaper sector

Newspaper companies are required to issue two classes of shares: management shares and ordinary shares. At least one per cent of a newspaper company's issued and paid-up capital must be management shares and such management shares can only be issued or transferred to Singapore citizens or approved corporations. In addition, all directors of a newspaper company must be Singapore citizens.

Similar to companies in the broadcasting sector, a person who has been granted a newspaper permit must not receive on behalf or for the purposes of any newspaper any funds from a foreign source without the prior consent of the IMDA.

In addition, any person (whether local or foreign) who becomes a substantial shareholder or controller of a newspaper company must also seek the approval of the IMDA.

5.2.5 Restrictions on investment in the real estate sector

Another sector that is restricted by legislation in Singapore is real estate. Most residential property in Singapore is subject to foreign ownership restrictions while commercial and industrial properties are generally not subject to foreign ownership restrictions.

In this regard, foreigners are generally not permitted to purchase public housing flats (ie, Housing and Development Board flats (or HDB flats)) unless the purchase is made jointly with their spouse/parent/child who is a Singapore citizen. Under the Residential Property Act 1976, approval must be sought from the Land Dealings Approval Unit for the acquisition of restricted residential property, which includes vacant residential land, terraced houses, semi-detached houses, bungalows/detached houses, strata landed houses not within an approved condominium development under the Planning Act 1998 (eg, town houses or cluster houses), landed residential property at Sentosa Cove, shop houses (for non-commercial use), association premises, places of worship, workers' dormitories/serviced apartments/boarding houses (not registered under the provisions of the Hotels Act 1954), and mixed commercial and residential properties.

In addition to foreign ownership restrictions, foreigners are also subject to higher rates of Additional Buyer's Stamp Duty (ABSD) when purchasing residential property, which is 60 per cent of the purchase price or market value of the property (whichever is higher) with effect from 27 April 2023. Nevertheless, pursuant to certain free trade agreements to which Singapore is a party, nationals of some countries are accorded the same ABSD treatment as Singapore citizens, ranging from nought to 30 per cent depending on the number of residential properties they already own.

In addition, when non-resident property traders sell real estate property situated in Singapore, the purchaser of such real estate property will be required to withhold tax at a rate of 15 per cent on the purchase price of the property.

5.3 Foreign exchange control and income taxation

5.3.1 MAS

The MAS is Singapore's central bank and integrated financial regulator. It issues currency, oversees payment systems and serves as banker to and financial agent of the government.

5.3.2 Capital injection

There are no foreign exchange or currency restrictions on the remittance or repatriation of capital or profits in or out of Singapore. Therefore, funds may be freely remitted into and out of Singapore.

The government imposes certain restrictions on the lending of the Singapore dollar by certain classes of financial institutions in Singapore to non-resident financial institutions to limit speculation in the country's currency market unless certain conditions are met. However, these restrictions do not apply to the lending of Singapore dollars to individuals and non-financial institutions.

5.3.3 Income taxation and repatriation of funds

Taxes that are applicable to businesses operating in Singapore (including permanent establishments of foreign businesses) affect the amount of profits that may be repatriated out of Singapore. Such taxes include income tax, which is generally payable on the gains or profits accruing in or derived from Singapore or received in Singapore from outside Singapore, regardless of the tax residency status of the corporate entity, subject to applicable tax exemptions. For example, foreign-sourced dividends received in Singapore may be exempt from tax if: (1) the taxpayer is tax resident in Singapore; (2) the dividends (or the income from which the dividends are paid) have been subject to tax in the relevant foreign jurisdiction; (3) the headline corporate income tax rate in the relevant foreign jurisdiction is at least 15 per cent; and (4) the Comptroller of Income Tax is satisfied that the tax exemption is beneficial to the taxpayer.

Additionally, certain types of income derived in Singapore and received by non-resident businesses may be subject to withholding taxes.

In relation to dividends, Singapore operates a one-tier taxation system. This means that dividends are exempt from tax in the hands of the recipient. The amount from which the dividends are paid are subject to Singapore corporate income tax. Therefore dividends paid to shareholders (including foreign shareholders) by a company tax resident in Singapore are exempt from further income tax.

5.4 Applicable tax incentive or grant

Singapore has various tax incentive schemes which may help reduce the effective income tax rate of eligible persons engaged in prescribed activities or industries that are aligned with Singapore's economic development. These schemes are set out in the Income Tax Act 1947 and the Economic Expansion Incentives (Relief from Income Tax) Act 1967.

Tax incentive schemes are administered by a number of statutory agencies, including the Economic Development Board (EDB), Enterprise Singapore, the Maritime and Port Authority of Singapore (MPA) and the MAS.

5.4.1 Key tax incentives offered by the EDB

To encourage businesses to grow capabilities, conduct new or expanded activities, and conduct headquarter activities in Singapore, the EDB's Pioneer Certificate Incentive (PC) and Development and Expansion Incentive (DEI) offer tax exemptions and concessionary tax rates of five and ten per cent on qualifying income to approved companies for a period of five years.

The EDB also administers the Finance and Treasury Centre Incentive (FTC), to encourage companies to base their treasury management activities in Singapore. Approved companies under the FTC will be entitled to concessionary tax rates of eight per cent on qualifying income and an exemption on withholding tax (WHT) on qualifying interest payments for a period of five years.

5.4.2 Key tax incentives offered by Enterprise Singapore

One of the key tax incentives offered by Enterprise Singapore is the Global Trader Programme (GTP). The GTP is targeted at companies engaged in the international trading of commodities or commodities derivatives. Approved companies under the GTP will be entitled to concessionary tax rates of five, ten or 15 per cent on qualifying trading income.

Enterprise Singapore also administers the Venture Capital Fund Incentive (VCFI) for venture capital and private equity funds and the Fund Management Incentive (FMI) for fund management companies. Approved venture capital and private equity funds under the VCFI are entitled to tax exemptions for up to 15 years on qualifying investment income, while approved fund management companies under the FMI are entitled to a concessionary tax rate of five per cent for up to ten years on management fees and performance bonuses, provided that the applicable conditions for each of the schemes are met.

5.4.3 Key tax incentives offered by the MPA

The MPA administers tax incentives for the maritime sector, through its Maritime Sector Incentive (MSI).

The MSI comprises three awards granted for three types of activity: (1) the MSI – Approved International Shipping Enterprise Award is targeted at ship owners and ship operators which establish their commercial shipping operations in Singapore, and companies which meet the conditions for the award may enjoy tax exemption or an alternative basis of tax on qualifying shipping income for up to ten years; (2) the MSI – Maritime Leasing Award covers vessel and container financing operations in Singapore, and approved companies may enjoy concessionary tax rates of ten per cent on qualifying income for up to five years; and (3) the MSI – Shipping-related Support Services Award is available to companies in which provide shipping-related support services, such as ship broking, forward freight agreement trading, ship management, ship agency, freight forwarding and logistic services, and corporate services rendered to qualifying approved related parties.

Approved companies under the MSI – Shipping-related Support Services Award will enjoy concessionary tax rates of ten per cent on qualifying income for a five-year renewable period.

5.4.4 Key tax incentives offered by the MAS

The MAS administers various tax incentives targeted at the financial sector, one of which is the Financial Sector Incentive (FSI). The FSI is offered to a range of financial institutions engaged in various activities, including banking, capital and derivatives market services, credit facilities syndication, fund management and trustee services. Approved financial institutions under the FSI may enjoy concessionary tax rates of five, ten, 12 or 13.5 per cent for a period of five years.

The MAS also administers the Insurance Business Development Scheme (IBDS) for insurance and reinsurance companies. Approved insurers or reinsurers under the IBDS may enjoy tax exemption or concessionary tax rates of five, eight or ten per cent, depending on the scope of the tax incentive granted.

5.4.5 Grants

Grants may also be offered by various statutory agencies in Singapore.

The EDB offers a variety of grants, including: the Research and Innovation Scheme for Companies for technology development and innovation activities to bring about the development of product and processes from Singapore; the Training Grant for Company to encourage manpower capability development in applying new technologies, industrial skills and professional know-how through the support of training programmes for companies' employees; and the Land Intensification Allowance to encourage the intensification of industrial land use towards more land-efficient and higher value-added activities.

The MPA offers various grants to companies in the maritime sector. These include the Maritime Cluster Fund which supports manpower and business development efforts as well as productivity improvements, and the Maritime Innovation and Technology Fund which aims to expand Singapore's maritime innovation and technology ecosystem.

The MAS, under its Financial Sector Development Fund, issues grants for a range of financial sector activities, the issuing of including bonds, listing on the Singapore Exchange (SGX) and the development of solutions or technology for the financial sector.

Chapter 6: Restructuring and insolvency

Andrew Chan, Allen & Gledhill, Singapore

6.1 Introduction

Insolvency law in Singapore is broadly divided into personal insolvency (or bankruptcy) and corporate insolvency. The main statute governing this area is the Insolvency, Restructuring and Dissolution Act and the subsidiary legislation in relation to the Act.

Penalties for non-compliance with the Insolvency, Restructuring and Dissolution Act and the subsidiary legislation in relation to the Act can be imposed upon insolvent debtors for failure to comply with certain standards set by the statutes. Some acts by creditors are also prohibited in certain circumstances, but the penalties are largely civil rather than criminal.

Corporate insolvency can broadly be divided into the following four categories: liquidation, judicial management (JM), schemes of arrangement and receivership.

6.2 Liquidation

6.2.1 Description

'Liquidation' or 'winding up' refers to a process where the assets of a company are collected and realised. The resulting recoveries are used to pay the company's liabilities, with any surplus going to the shareholders. During the distribution of a company's assets among the non-preferential unsecured creditors of the company, the rule is usually that the assets should be distributed on a pro rata or *pari passu* basis. The end result of liquidation or winding up is usually the dissolution of the company.

6.2.2 Types of liquidation

There are two main types of liquidation: voluntary and compulsory. The main difference lies principally in the manner in which the liquidation process is initiated and the date of its commencement pursuant to the Insolvency, Restructuring and Dissolution Act. For voluntary liquidation to occur, the company generally initiates the process by passing a resolution in a general meeting of shareholders to liquidate the company. For compulsory liquidation to occur, the company, or some other party with the necessary right (eg, a creditor), initiates the process by making an application to the court to liquidate the company. In the context of corporate insolvency, two common types of insolvent winding up are creditors' voluntary liquidation and compulsory liquidation, pursuant to Section 125(1)(e) of the Insolvency, Restructuring and Dissolution Act.

6.2.3 Effect of the commencement of liquidation

Regardless of whether liquidation is compulsory or voluntary, a number of consequences will follow once the process has commenced. In general, the consequences include the following:

- the company's business will generally cease;
- the powers of the company's directors will also cease;
- every invoice, goods order or business letter must include the words 'in liquidation' after the company's name to serve as a notice to all those dealing with the company; and
- any transfer of shares or alteration in terms of the status of the members will be void.

6.2.4 Avoiding liquidation consequences

To avoid the consequences of liquidation (ie, dissolution), an insolvent company has three options: (1) attempt to enter into a scheme of arrangement with its creditors; (2) seek to be placed under JM; or (3) enter into an arrangement with its creditors under Section 187 of the Insolvency, Restructuring and Dissolution Act.

6.3 Schemes of arrangement and compromise

Under a scheme of arrangement and compromise, which is outside of JM, a company must formulate a scheme proposal for consideration by its creditors. Typically, this will include a proposal for a compromise of the company's debts by way of various methods, such as payment of a reduced amount or issuance of equity for debt. The company must then seek the court's approval to call a meeting of its creditors. If approval is granted, the creditors will consider the proposal and vote on it at a meeting. If the requisite majority in terms of the number and value of creditors or class of creditors approve the scheme, the final step is for the court to approve it. In making such a decision the court will consider whether the statutory requirements to carry out the scheme have been complied with, whether sufficient information has been provided to the company's creditors, whether the terms of the scheme are reasonable and whether the terms of the scheme unfairly discriminate against any creditor or class of creditors. If the court approves the scheme and the order sanctioning the scheme is filed with the Accounting and Corporate Regulatory Authority, it becomes binding between the debtor company and its creditors. A scheme can also be sought in regard to JM and, in general, the requirements for a binding scheme in JM are easier to satisfy as compared to one outside of JM.

To facilitate restructuring, and to help enhance Singapore's restructuring framework and its status as a centre for international debt restructuring, Singapore's regime contains features, such as:

- a moratorium: there is a limited automatic moratorium and the court may further order a moratorium in favour of a company that is proposing or intends to propose a new scheme, preventing creditors from, among other things, taking action against the company and giving the company breathing space to put forward its restructuring proposal;
- priority for rescue financing: the court is empowered to order that rescue financing be given equal or super priority;
- cram-down provisions: the court may approve a scheme, even if there are dissenting creditor classes, provided certain safeguards are met; and
- a pre-packaged voting scheme: the court may dispense with calling creditor meetings if certain safeguards are met.

6.4 Judicial management (JM)

6.4.1 Description

An application may be made to the court, as well as out of court, to place a company under JM. The JM regime aims to provide a company that is or is likely to become unable to pay its debts, as and when they fall due, with some 'breathing space', so that it or part of its business can be nursed back to financial health, a scheme of arrangement can be achieved, or the company may achieve a better realisation of its assets than it would in liquidation. There are some parallels between the court and out-of-court process. Below is a description of the court-based JM process.

6.4.2 Commencing a court-based JM process

The court-based JM process begins with a court application made in a prescribed form. This will state, among other things, that the company is or is likely to become unable to pay its debts and that there is a reasonable probability of either rehabilitation for the company, preservation of its business as a going concern, or a better serving of the creditors' interests than when winding up. The application may be made by the company, its directors, a creditor or creditors.

6.4.3 Granting a JM order

The court may make a JM order in relation to a company if it is satisfied that the company is or is likely to become unable to pay its debts and that there is a real prospect that the order will achieve one or more of the following three purposes:

1. survival of the company;
2. approval under the Companies Act of a compromise or arrangement between the creditors and/or members, or any class of them; or
3. a more advantageous realisation of the company's assets than on winding up.

The mere satisfaction of these conditions will not necessarily lead to the granting of a JM order and, exceptionally, if it is in the public interest to do so, the court may grant an order even if the conditions are not met.

6.4.4 Effecting a JM order

Unless discharged, a JM order will remain in force for 180 days (which may be extended by the court). A judicial manager will be appointed and empowered to do all the things necessary for the management of the company's affairs, business and property, including any tasks that are necessary to achieve the purposes of the JM. The judicial manager must prepare and send proposals for achieving these purposes to the creditors within 60 days (which may be extended by the court) of the JM order. If the creditors approve the proposals, the judicial manager must then manage the company in accordance with them. Such proposals may include the company entering into a scheme of arrangement or selling any part of its undertaking that remains viable.

6.4.5 Discharging a JM order

The judicial manager is under a statutory obligation to apply for the discharge of a JM order when it appears that the purposes specified have either been achieved or are incapable of being achieved.

The result of a JM's successful completion largely depends on the judicial manager's proposals and the circumstances in each case. If the proposals lead to a scheme of compromise, this may result in part of the company's debts being extinguished or reduced in accordance with the scheme. The failure of JM will result in the company reverting to its pre-JM position. However, it may well lead to

liquidation because one of the prerequisites for a JM application is a company's inability or likely inability to pay its debts, which is also a ground for liquidation.

6.4.6 Out-of-court JM process

In general, save for the initial process of commencing JM or appointing a JM, the out-of-court JM proceeding is similar to that of the in-court process. The company may place itself into judicial management through a creditors' resolution at a meeting of its creditors without the need for a court order, under Section 94 of the Insolvency, Restructuring and Dissolution Act. In doing so, the company must first consider if the company is, or is likely to become, unable to pay its debts and that there is a reasonable possibility of achieving one or more of the purposes of judicial management, as mentioned above in [6.4.3].

The process begins with the company giving at least seven days' written notice of its intention to appoint an interim judicial manager (IJM). This notice must be sent to both the proposed IJM and any person entitled to appoint a receiver or manager of the company's assets. The company's directors are responsible for appointing the IJM, but this can occur only if specific conditions are met, including authorisation by the company's members or its board (if permitted by the company's constitution) and the written consent of all parties who received the notice.

After the IJM is appointed, the company must notify the relevant authorities and publish the appointment notice in a local newspaper. The IJM assumes the functions and powers of a judicial manager and is responsible for adjudicating creditor claims for voting purposes.

Within 30 days of appointing the IJM, the company must convene a creditors' meeting to vote on commencing JM. Creditors must be given at least 14 days' notice and a full statement of the company's affairs. For JM to proceed, the majority of creditors, both in value and number, must vote in favour of JM. Once approved, a licensed insolvency practitioner (who is not the auditor of the company) is appointed as the JM.

6.5 Receivership

The appointment of receivers or receivers and managers is an alternative to the liquidation process. Although, in principle, receivers may be appointed in respect of individuals, more often than not they are appointed only in relation to companies. Going into receivership does not necessarily spell the end for a company; it can continue to exist as an entity.

A receiver can be appointed by a debenture holder and its key duty is to collect the assets that are the subject matter of the debenture, realise these assets and settle the dues of the creditors. Where the receiver is also appointed as manager, it will have additional power to manage the company's business.

Chapter 7: Employment, industrial relations, and work health and safety

Kelvin Wong, Allen & Gledhill, Singapore

7.1 Employees' rights and protection

7.1.1 Introduction

Employers and employees are generally free to agree on the terms of employment. Nevertheless, Singapore law sets out certain safeguards for employees. This section provides a summary of the regulatory framework surrounding employment in Singapore.

Employment law in Singapore is governed by both statute and case law. The regulatory framework for employment in Singapore is applicable to: (1) all employees who work in Singapore, including foreign employees; and (2) certain employees who work in foreign countries and have employment contracts governed by Singapore law.

7.1.2 Employees' rights and protection

The primary legislation governing employment in Singapore is the Employment Act. The Employment Act applies to all employees, except seafarers, domestic workers and public servants, and sets out minimum terms relating to such matters as annual leave, sick leave, holidays, termination, salary payment and maternity benefits.

Employees who are regarded as more vulnerable receive additional levels of protection under the Employment Act, such as:

- workmen (as defined in the Employment Act) who are in receipt of a salary not exceeding SGD 4,500 per month; and
- every employee, other than workmen or a person employed in a managerial or an executive position, who receives a salary not exceeding SGD 2,600 per month.

In relation to such employees, the Employment Act sets out further minimum terms relating to such matters as rest days, hours of work and overtime pay.

An employment contract that is less favourable to an employee than any of the minimum conditions prescribed by the Employment Act is illegal, null and void to the extent that it is less favourable.

Employers who fail to employ their workforce based on the minimum terms may be liable to fines and/or imprisonment.

Employees who have salary-related disputes or wish to bring wrongful dismissal claims may do so before the Employment Claims Tribunal.

7.1.3 Other statutory protections for employees

The Employment Act and the Child Development Co-Savings Act set out certain parental benefits and maternity protection for employees. These include maternity leave and adoption leave for female employees, paternity leave for male employees, and childcare leave and extended childcare leave for employees who have children. The Employment Act further provides that it is unlawful for an employer to give a female employee notice of dismissal while she is on maternity leave if she is eligible to take such leave and has given sufficient notice in regard to such leave.

The Retirement and Re-employment Act (RRA) provides for a prescribed minimum retirement age (currently 63 years old). Under the RRA, an employer is prohibited from dismissing on the grounds of age any employee who is below the prescribed minimum retirement age unless certain exemptions apply. An employer is also required to offer re-employment to any employee who has attained the prescribed minimum retirement age, as long as the employee fulfils certain eligibility criteria and is willing to continue to work.

The Workplace Safety and Health Act requires employers to take measures that are necessary to ensure the safety and health of employees at work. This includes ensuring a safe work environment and providing the necessary training and supervision for employees to perform their work.

The Work Injury Compensation Act requires employers to compensate an employee covered under the Act if the employee suffers any personal injury due to an accident arising out of and in the course of their employment. Employers are also required to maintain insurance against all liabilities that may be incurred under the Act, subject to certain exceptions.

7.1.4 Industrial relations

Singapore enjoys a relatively high degree of industrial harmony. Since gaining independence in 1965, Singapore has only experienced two major instances of industrial action. Most industrial disputes are resolved by conciliation before the Industrial Arbitration Court (IAC).

Every employee over the age of 16 has the right to be represented by a trade union in Singapore. Under the Industrial Relations Act (IRA), an employer is not permitted to dismiss or threaten to dismiss an employee on the grounds of the employee becoming or proposing to become an officer or member of a trade union.

The IRA sets out the process by which a trade union may be recognised and, thereafter, negotiate a collective agreement with an employer. A collective agreement governs the terms of employment for employees covered by the collective agreement. Once agreed upon between the trade union and the employer and certified by the IAC, the collective agreement is binding on the employer (or its successor) and on the relevant trade union and its members.

A collective agreement is valid for an operative period of not less than two years and not more than three years.

7.2 Statutory contributions and minimum wage

7.2.1 Central Provident Fund

The Central Provident Fund Act (CPFA) sets out a national savings scheme that applies to employees who are Singapore citizens or Singapore permanent residents. Under the CPFA, employers are required to make monthly contributions at prescribed rates to the Central Provident Fund (CPF) accounts of employees who are Singapore citizens or Singapore permanent residents. The contribution rate varies depending on factors, such as the employee's age and salary, and are set out in the First Schedule to the CPFA.

7.2.2 Minimum wage

There is no minimum wage in Singapore. However, progressive wage models apply to Singapore citizens and Singapore permanent residents employed in certain designated sectors, including the cleaning, security, landscape, retail, food services and waste management sectors, through various conditions at the licensing or registration stage.

7.3 Work passes

7.3.1 Work passes for foreign employees

Under the Employment of Foreign Manpower Act (EFMA), foreign employees (being employees who are not Singapore citizens or Singapore permanent residents) are required to obtain a valid work pass before they start work in Singapore. Working in Singapore without a valid work pass is an offence for both the employer and the foreign employee, and may result in fines and/or imprisonment.

Work passes are issued by the Ministry of Manpower (MOM). The different types of work passes available are set out in the Employment of Foreign Manpower (Work Passes) Regulations 2012. They are as follows:

- a work permit (including a training work permit);
- an S pass;
- an employment pass (including a training employment pass);
- a personalised employment pass;
- an EntrePass;
- a working holiday pass;
- a miscellaneous work pass; and
- a letter of consent.

The work pass suitable for each employee depends on the employee's scope of work and their professional qualifications. Generally:

- work permits are issued to unskilled or semi-skilled foreign workers in the construction, manufacturing, marine shipyard, processes or services sectors, as well as foreign domestic workers;
- S passes are issued to mid-skilled foreign employees who earn at least SGD 23,150 per month (as of 1 September 2023 and tentatively to be increased to at least SGD 3,300 per month from 1 September 2025) and meet certain criteria in terms of their qualifications and work experience;
- employment passes are issued to foreign professionals, managers and executives who earn at least SGD 5,000 per month (for all sectors, except financial sectors) and meet certain qualification criteria. For more experienced candidates, a higher salary level will be required to qualify. The MOM has announced that from 1 January 2025, the qualifying salary for new applications will be increased to at least SGD 5,600 per month (for all sectors, except financial sectors); and
- personalised employment passes (PEPs) are issued to: (1) existing employment pass holders who earn a fixed monthly salary of at least SGD 22,500 (as of 1 September 2023); and (2) overseas foreign professionals who have a last drawn fixed monthly salary (within the period of six months from the application) of at least SGD 25,000 (as of 1 September 2023).

Applications for work passes are generally carried out by the employer on the employee's behalf, except in the case of PEPs, which must be applied for by the foreign employee seeking to be a PEP holder.

The work pass issued to a foreign employee is specific to the foreign employee's particular employer and occupation (except in respect of PEP holders). Therefore, a foreign employee who wishes to carry out work for any other entity than the employer appearing on the existing work pass is required to obtain a new work pass to that effect.

Family members of eligible S pass or employment pass holders may join the S pass or employment pass holder in Singapore on a dependant's pass or long-term visit pass (LTVP). Upon obtaining the dependant's pass or LTVP, they may also apply for a letter of consent, which allows them to work in Singapore.

For completeness, the number of work permit holders and S pass holders that may be hired by an employer is limited to a quota, known as the dependency ratio ceiling. This quota varies based on the sector. Employers of work permit holders and S pass holders are also subject to a foreign worker levy.

Further, the Overseas Networks and Expertise Pass (the 'ONE Pass') is a newly introduced personalised pass for top talent across all sectors, including business, arts and culture, sports, as well as academia and research. It allows eligible applicants to concurrently start, operate and work for multiple companies in Singapore at any one time. Candidates for the ONE Pass must either: (1) have earned a fixed monthly salary of at least SGD 30,000 (or its equivalent in foreign currency) within the last year; or (2) will earn a fixed monthly salary of at least SGD 30,000 from their future employer based in Singapore. The MOM has also stated that if an individual has outstanding achievements in arts and culture, sports, or academia and research, such individual can qualify as a candidate for a ONE Pass, even if they do not meet the salary criteria.

Chapter 8: Tax law

Sunit Chhabra, Allen & Gledhill, Singapore

8.1 Taxes applicable to individuals

Singapore tax-resident individuals are subject to tax on their employment income on a progressive scale, with the maximum tax rate being 24 per cent. The employer is required to complete the annual Return of Employee's Remuneration (Form IR8A and accompanying appendices) and issue the completed form to the employee by 1 March each year, reporting all the remuneration received by the employee for the preceding calendar year, and the employee is required to include the information in the Form IR8A and its accompanying appendices in their income tax return to the IRAS, unless the employer has arranged for such information to be transmitted directly to the IRAS.

Most employers in Singapore fall within the scope of the Auto-Inclusion Scheme (AIS) for employment income. Under the AIS, employers submit their employees' income information directly to the IRAS electronically, and such income information is reflected on their employees' electronic income tax return (and automatically included in their income tax assessment).

Certain personal relief may be available to individuals to reduce their chargeable income, including earned income relief, CPF relief and Working Mother's Child Relief, provided that the employee is a Singapore tax resident and satisfies the relevant qualifying conditions for such relief to apply.

8.2 Taxes applicable to businesses

The current tax rate for companies is 17 per cent, with a partial tax exemption for the first SGD 200,000 of annual chargeable income.

Companies are required to electronically file a tax return declaring their income for each year of assessment (YA) and submit supporting documents by 30 November, as well as file an estimate of their income chargeable with tax for each financial year, within three months from the end of the financial year. Companies are then required to pay income tax within one month from the date of the Notice of Assessment, unless such a company is paying via instalments through automatic deductions.

Losses incurred as a result of a trade or business may be set off against income derived from other sources and may, subject to certain conditions, be allowed to be carried forward or backward to be offset against income in another YA, or to be transferred to related Singapore-incorporated companies and offset against such company's profits.

Dividends issued by Singapore tax resident companies are exempt from tax, as Singapore operates a one-tier tax system on corporate profits.

Withholding tax may be chargeable on certain payments, such as interest, royalties and directors' fees made by a Singapore tax resident or Singapore-based entity to a non-tax resident person, at a rate

between ten and 24 per cent, depending on the nature of such a payment. The rate may be reduced by an applicable tax treaty between Singapore and the country in which the recipient is a tax resident.

Aside from companies, a business in Singapore can be structured in various forms, including a partnership, LLP and LP. A partnership does not have a separate legal personality from its partners and is regarded as a tax transparent entity, such that the partners are taxed on their share of income from the partnership for a basis period at the applicable income tax rate. An LLP has a separate legal personality from its partners, but it is treated as a partnership for the purpose of income tax; that is, partners are taxed on their share of income from the LLP, at the applicable income tax rate. However, there are certain deduction restrictions for partners in an LLP. Similarly, an LP is regarded as a tax transparent vehicle and a limited partner in an LP is also subject to certain deduction restrictions.

8.3 Other taxes

Stamp duty is generally payable in regard to the contract or agreement for the sale of or an instrument for the transfer of immovable property in Singapore or shares registered in Singapore, as well as on mortgages and leases. The rate of the buyer's stamp duty is up to six per cent (the higher the consideration or value of the property) for the transfer of immovable property, and the top marginal buyer's stamp duty rate of six per cent will apply to the portion of residential property the value of which is in excess of SGD 3m. For a transfer of shares, stamp duty is payable at the rate of 0.2 per cent the higher the consideration or value of such shares. Generally, stamp duty is payable by the transferee of the property or shares. However, relief from stamp duty may be available in certain circumstances, subject to certain qualifying conditions.

Goods and services tax (GST) is imposed at a rate of nine per cent on any supply of goods or services in Singapore by a GST-registered person and on any import of goods into Singapore. However, certain supplies, including prescribed financial services, are exempt from GST, and GST is chargeable at the rate of zero per cent for exports, as well as on the supply of certain international services. A person is generally required to register for GST, where such person makes, or intends to make, taxable supplies in the course or furtherance of a business exceeding SGD 1m over a 12-month period.

Under the reverse charge regime, a GST-registered person is required to account for GST in the value of imported services provided by a supplier belonging outside Singapore to such person through a business-to-business supply of services to the extent that such services fall within the scope of the reverse charge regime. Under the overseas vendor registration regime, a supplier located outside Singapore who has or reasonably expects its global turnover and value of services supplied to non-GST registered persons located in Singapore for a calendar year or the next 12 months to exceed SGD 1m and SGD 100,000, respectively, may be required to register, charge and account for GST in terms of such supplies.

Chapter 9: Intellectual property

Lam Chung Nian, WongPartnership, Singapore

9.1 Introduction

Singapore has established a well-regarded legal framework for the protection of intellectual property, recognising its importance as a strategic asset for businesses in the digital age, and as a driver for innovation and creativity.

Singapore is a signatory to many international conventions relating to intellectual property, ensuring that its intellectual property regime conforms with international standards, and facilitating the registration and protection of intellectual property rights in Singapore and overseas.

9.2 Copyright

Copyright is a bundle of exclusive rights over works in certain specified categories of subject matter.

9.2.1 Criteria for protection in Singapore

In Singapore, there is no requirement of registration for work to enjoy copyright protection.

The Copyright Act 2021 (CA) outlines specified categories of subject matter in which copyright may subsist, as follows: (1) authorial works, that is, literary, dramatic, musical or artistic works; (2) published editions of authorial works; (3) sound recordings; (4) films; (5) broadcasts; and (6) cable programmes.

The CA further outlines additional conditions which must be met before copyright may subsist in a work, which differ depending on the specific subject matter. The key conditions are discussed in greater detail below.

Authorial work

Under the CA, to enjoy copyright protection, an authorial work must generally be: (1) connected with Singapore or a reciprocating country; (2) fixed in a material form; and (3) original. A reciprocating country in this instance is a member country of the Berne Union or the World Trade Organization (WTO).

Connection to Singapore may be established through several ways specified under the CA, including if a published authorial work is first published in Singapore or a reciprocating country. In relation to unpublished authorial works, this element may be established if the author is a citizen or resident of Singapore or a reciprocating country at the time the work is made.

The requirement of fixation in a material form applies only to a literary, dramatic or musical work and is established when a work is fixed: (1) in writing; (2) by storage in a computer, on any medium by electronic means, or on any other medium from which the work, or a substantial part thereof, can be directly reproduced; or (3) if it is in the form of sounds, embodied in an article.

Originality is generally established through the expansion of sufficient 'human intellect'.[1]

Published editions of authorial works, sound recordings, films, broadcasts and cable programmes

Published editions of authorial works, sound recordings, films, broadcasts and cable programmes must likewise be connected with Singapore or a reciprocating country. However, the reciprocating countries differ depending on the specific subject matter.

9.2.2 Duration of copyright protection

The CA defines the duration of protection for copyrighted works according to the subject matter of the work and the facts surrounding each work. For instance, in the case of an authorial work where the author is identified within 70 years of the year in which the work is made, copyright protection lasts for the lifetime of its author and the subsequent 70 years. However, broadcasts are generally only protected for 50 years after its creation.

9.2.3 Ownership of copyright

The CA provides that ownership of copyright generally vests in the first creator of the work. For instance, the author is the default first owner of an authorial work, and the maker of a film is the default first owner of a film.

However, there are exceptions to this general rule. For instance, the ownership of the copyright of an authorial work created by an employee pursuant to a contract of service belongs to the employer unless the parties have agreed otherwise.

9.2.4 Copyright infringement and exceptions

A copyright owner is conferred various exclusive rights over his copyrighted work depending on the subject matter of the copyrighted work, including to:

- make a copy of the work;
- publish the work;
- perform the work in public, or cause it to be seen or heard in public;
- communicate the work to the public;
- make an adaptation of the work;

1 *Global Yellow Pages Ltd v Promedia Directories Pte Ltd* [2017] 2 SLR 185 at [24].

- do any of the acts discussed above in relation to an adaptation of the work; and
- enter into a commercial rental arrangement in respect of the work.

By way of illustration, the CA provides that the copyright owner of a computer program would have all of the abovementioned exclusive rights, while the copyright owner of a published edition of authorial work would only have the exclusive right to make a copy of that edition.

The most direct form of copyright infringement occurs when a defendant does any of the acts reserved exclusively to the copyright owner, without either owning the copyright or having the licence of the copyright owner. The CA also specifies other forms of infringement, including a recent addition involving the commercial dealing in devices or the provision of services that facilitate access to works communicated to the public without the copyright owners' authority. These devices include physical devices and computer programs.

Notably, copyright infringement requires a causal connection between the infringing work and the copyrighted work. On this basis, infringement would not be established if the defendant had independently created the allegedly infringing work.[2]

Notwithstanding the above, the CA specifies several permitted uses of copyrighted work. These include uses in relation to education, research and development, the dissemination of news, incidental use of the work, and work deemed to be fair. The use of work for computational data analysis such as machine learning has recently been included as a category of permitted use, subject to specified conditions.

Permitted uses may be excluded or restricted only by fair and reasonable contract terms.

9.3 Patents

A patent is a legal right over an invention to exclusively make, use, import or sell the invention.

9.3.1 Registration criteria

According to the Patents Act 1994 (PA), a patentable invention must: (1) be novel; (2) involve an inventive step; (3) be capable of industrial application; and (4) not generally be expected to encourage offensive, immoral or anti-social behaviour.

Novelty

An invention is novel when it has not been made available to the public in any way, anywhere in the world, at the priority date of the invention. The priority date refers to the date of the filing of the patent application, unless the patent application claims priority from an earlier application filed in a country other than Singapore that is a party to the Paris Convention or a member of the WTO. In such cases, the priority date is the date of the filing of the earlier application.

2 *Chua Puay Kiang v Singapore Telecommunications Ltd* [1999] 1 SLR(R) 1 at [110].

Generally, publicly available information that provide 'clear and unmistakable directions' to the invention would anticipate the invention,[3] preventing the invention from being deemed novel.

Inventive step

An invention involves an inventive step if the inventive concept embodied in the invention is not obvious to a normally skilled person in the field of the invention. This normally skilled person is imbued with common general knowledge in the field of the invention.[4]

By way of illustration, an inventive concept that goes against the conventional understanding in the field would generally not be deemed obvious,[5] and could constitute an inventive step.

Industrial application

An invention is capable of industrial application if it can be made or used in any kind of industry.

9.3.2 Registration in Singapore

A patent application in Singapore may be filed as a national application with the Intellectual Property Office of Singapore (IPOS), or initiated through an international application under the Patent Cooperation Treaty (PCT) entering the national phase in Singapore.

Briefly, the PCT simplifies the filing of patent applications in multiple PCT contracting states by allowing an applicant to file a single international patent application. This allows the applicant to establish a filing date in other PCT contracting states, if the applicant subsequently enters into the national phase(s) of those contracting state(s).

9.3.3 Timeline for the grant of a patent

According to IPOS, a patent is generally granted two to four years after the patent is applied for, depending on the complexity of the claimed invention.

However, the patent prosecution process may be accelerated via various programmes offered by IPOS. These include the Patent Prosecution Highway (PPH), the Association of Southeast Asian Nations (ASEAN) Patent Examination Co-operation (ASPEC), the Collaborative Search and Examination (CS&E), and the SG IP Fast Track (SG IP FAST).[6] These are discussed in greater detail below.

PPH and ASPEC

The PPH and ASPEC are work-sharing programmes between participating intellectual property (IP) offices to expedite the examination of qualifying patent applications, by referencing the examination

3 *FE Global Electronics Pte Ltd v Trek Technology (Singapore) Pte Ltd* [2006] 1 SLR(R) 874 at [38].

4 *Merck & Co Inc v Pharmaforte Singapore Pte Ltd* [2000] 2 SLR(R) 708 at [50].

5 *Mühlbauer AG v Manufacturing Integration Technology Ltd* [2010] 2 SLR 724 at [100].

6 https://isomer-user-content.by.gov.sg/61/3c47b6fd-e858-475f-bf8c-659f1cc342c2/patents-formalities-manual.pdf last accessed 23 June 2025.

results from other IP offices. These allow IPOS to tap on the examination results from IP offices in China, Europe, Japan and Malaysia, among others.

CS&E

CS&E is a newly introduced pilot programme between IPOS and the IP office of Vietnam, that allows both IP offices to enhance and expedite the examination of qualifying patent applications, for applicants who seek patent protection in both countries.

Among other benefits, the CS&E programme allows an applicant who files a qualifying patent application at either IP office to receive search and examination results derived through the combined expertise from both IP offices. This is useful for the applicant to decide whether to make a corresponding patent application at the other IP office.

SG IP FAST

SG IP FAST supports applicants in accelerating the patent grant process of qualifying patent applications in Singapore.

9.3.4 Duration of patent protection

A patent granted in Singapore is generally protected for up to 20 years from the date of filing the patent application, subject to annual applications for the patent's renewal after the fourth year from the date of filing the patent application.

9.3.5 Ownership of a patent

A patent is generally granted to the inventor of the claimed application, or to the joint inventors, as the case may be. Inventorship is established when the person(s) claiming the same is the actual deviser of the invention, that is, the person(s) must have 'formulated or contributed to the formulation of the inventive concept' of the invention.7 Two notable exceptions however include: (1) The grant of a patent may be made to a third party who is entitled to the property in the invention under any law or enforceable contract entered into with the inventor. For instance, an employer would be entitled to the grant of a patent for an invention created by his employee in the specified situations under the PA. (2) The grant of a patent may be made to the successor(s) in title of any person who would otherwise be entitled to the grant of the patent.

9.3.6 Patent infringement and exceptions

A patent is infringed where a defendant engages in certain acts that exploit the patented invention without the patent owner's consent. Such acts include where the invention is:

7 *Cicada Cube Pte Ltd v National University Hospital (Singapore) Pte Ltd* [2018] 2 SLR 940 at [62].

- a product, the defendant makes, disposes of, offers to dispose of, uses or imports the product or keeps it whether for disposal or otherwise;
- a process, the defendant uses the process or the person offers it for use in Singapore when the person knows, or it is obvious to a reasonable person in the circumstances, that its use without the consent of the proprietor would be an infringement of the patent;
- a process, the defendant disposes of, offers to dispose of, uses or imports any product obtained directly by means of that process or keeps any such product whether for disposal or otherwise.

The PA also provides defences to the abovementioned prohibited acts, including:

- acts which are undertaken privately and for non-commercial purposes;
- acts that are carried out for experimental purposes; and
- subject to the qualifications outlined in the PA, importing into Singapore a patented product, a product obtained by means of a patented process, or a product to which a patented process has been applied, if the same was produced with the consent of the proprietor of the patent.

9.4 Trademarks

A trademark is a sign that may be used to differentiate the proprietor's goods or services from other goods or services. Trademarks may be protected in Singapore through an action for deceptively presenting (or 'passing off') under the common law, or statutorily through registration under the Trade Marks Act 1998 (TMA).

9.4.1 Passing off

The essential elements that must be established for an action for passing off are: (1) the plaintiff has goodwill; (2) a misrepresentation made by the defendant led to confusion among the public; and (3) damage to the plaintiff's goodwill resulted from such misrepresentation.

Goodwill

Goodwill refers to the 'attractive force [of a business] which brings in custom'8 in Singapore.

Misrepresentation

Misrepresentation may be established when a defendant misrepresents that their goods or services are those of the claimant, or that an economic linkage exists between the claimant and defendant's businesses.9 Subsequently, the likelihood of confusion is assessed in light of relevant factors including the similarity of the claimant's sign and the allegedly infringing sign.10

8 *Singsung Pte Ltd v LG 26 Electronics Pte Ltd (trading as L S Electrical Trading)* [2016] 4 SLR 86 at [32].

9 *The Singapore Professional Golfers' Association v Chen Eng Waye* [2013] 2 SLR 495 at [42].

10 *The Singapore Professional Golfers' Association v Chen Eng Waye* [2013] 2 SLR 495 at [54].

Damage to the claimant's goodwill is established if the claimant proves 'a real and tangible risk of substantial damage', including through a diversion of business to the defendant.11

9.4.2 Registration criteria

Protection of a trademark may also be obtained via registration. Notably, the registration of a trademark does not extinguish a proprietor's rights under the common law.

The TMA outlines various criteria for a trademark to be registrable. These include:

- the sign has to satisfy the TMA's definition of a trademark, that is, it has to be a sign capable of being represented graphically and which is capable of distinguishing 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;
- the trademark must have distinctive character (which would not be the case if the trademark is a generic description of a product or service); and
- the trademark must not be contrary to public policy or to morality, or of such a nature as to deceive the public.

In addition to the above, a trademark that conflicts with an earlier trademark is not registrable. The TMA outlines several grounds on which such conflict may be established, including:

- a trademark is identical with an earlier trademark, and the goods or services for which the trademark is sought to be registered are identical with those for which the earlier trademark is protected;
- there exists a likelihood of confusion on the part of the public, as the trademark is – (1) identical with an earlier trademark; and (2) to be registered for goods or services similar to those for which the earlier trademark is protected; and
- a likelihood of confusion exists on the part of the public, as the trademark is – (1) similar to an earlier trademark; and (2) to be registered for goods or services identical with or similar to those for which the earlier trademark is protected.

9.4.3 Registration in Singapore

A trademark application in Singapore may be filed as a direct national application with IPOS, or initiated through designating Singapore in an international application made under the Madrid Protocol.

11 *Novelty Pte Ltd v Amanresorts Ltd* [2009] 3 SLR(R) 216 at [97] and [105].

9.4.4 Timeline for the registration of a trademark

The registration of a trademark generally takes 12 months from its filing date, subject to objections to the trademark, in which case the processing time would be likely to take longer.12

9.4.5 Duration of trademark protection

A registered trademark in Singapore is generally protected for ten years from the date of registration. It may subsequently be renewed for further periods of ten years at the proprietor's request, accompanied by the prescribed renewal fee.

9.4.6 Trademark infringement and exceptions

A trademark is infringed where a defendant uses a trademark in the course of trade without the consent of the trademark proprietor, where the use of a trademark is:

- identical with the registered trademark, in relation to goods or services identical with those for which the registered trademark was registered;
- identical with the registered trademark, in relation to goods or services similar to those for which the registered trademark was registered, leading to a likelihood of confusion on the part of the public; and
- similar to the registered mark, in relation to goods or services identical with or similar to those for which the registered trademark was registered, leading to a likelihood of confusion on the part of the public.

The TMA outlines various exceptions to the abovementioned prohibited acts, including:

- the use of one's own name;
- descriptive use such as to indicate the kind, quality, quantity, intended purpose, value, geographical origin or other characteristic of goods or services; and
- use for comparative commercial advertising.

9.5 Designs

The Registered Designs Act 2000 (RDA) defines a design as the features of shape, configuration, colours, pattern or ornament applied to any article or non-physical product that give that article or non-physical product its appearance. However, this definition excludes certain subject-matters, including:

- a method or principle of construction;
- designs that are dictated solely by the function that the article or non-physical product has to perform; and

12 S2.3, IPOS, *Trade Marks Infopack* https://isomer-user-content.by.gov.sg/61/d19a8611-cf44-4b24-9a45-7f7a2975df9b/trade-marks-infopack.pdf accessed 12 May 2025.

- designs that enable the article or non-physical product to be connected to, or placed in, around or against, another article or non-physical product so that either article or non-physical product may perform its function.

9.5.1 Registration criteria

The RDA provides that new designs which fall within the abovementioned definition may be registered in Singapore, unless the publication or use of it would be contrary to public order or morality, or it is a computer program or layout-design.

Under the RDA, a design is not considered new if it is the same as a design that is registered, or published in Singapore or elsewhere, in respect of any article or non-physical product before the date of the application for registration of the design at issue. A design is also not considered new if it differs from such a design in immaterial ways.

9.5.2 Registration in Singapore

A design application in Singapore may be filed as a national application with IPOS, or initiated through Singapore's designation in an international filing made under the Hague Agreement Concerning the International Registration of Industrial Design (Hague System).

Under the Hague System, an applicant may file an international design application, in which he may designate the countries for which protection is sought. Subsequently, the designated countries will examine the international registration in accordance with their national laws.

Any interested person may apply for a registered design to be revoked, on the same grounds for which the design could have been refused registration.

9.5.3 Timeline for the registration of a design

The registration of a design generally takes four months from its filing date, subject to deficiencies in the application, in which case the processing time would likely be longer.[13]

9.5.4 Duration of design protection

A registered design is protected for five years from the date of filing the application. The registration may be renewed for further periods of five years upon the application for an extension and the payment of renewal fees, up to a maximum of 15 years.

9.5.5 Ownership of a design

The designer of the design is generally treated as the owner of the design. However, the RDA specifies exceptions to this rule, including that an employer is treated as the owner of the design

13 https://isomer-user-content.by.gov.sg/61/cd6ed076-da63-462f-8b70-d56001037c0a/registered-designs-infopack.pdf last accessed 23 June 2025.

created by an employee in the course of their employment, subject to any agreement to the contrary between the parties concerned.

9.5.6 Design infringement and exceptions

The RDA confers exclusive rights upon a design owner over any article in respect of which the design (or a design that is not substantially different from that design) is applied, or any device for projecting a non-physical product to which the design (or a design that is not substantially different from that design) is applied, as the case may be. These include the rights to sell, make or import into Singapore for commercial purposes such articles or devices.

On this basis, prohibited acts include the doing of anything which is the exclusive right of the registered owner without the consent of the registered owner.

However, the RDA specifies various exceptions, including: (1) the doing of any act for the purpose of evaluation, analysis, research or teaching; and (2) the import, sale, hire, or offer or exposure for sale or hire of any article to which the design has been applied, or any device for projecting a non-physical product to which the design has been applied, if such article or design was placed on the market by or with the consent of the registered owner.

9.6 Others

In addition to the IP rights discussed above, other types of IP rights recognised in Singapore include:

- geographical indications, which refer to an indication used in trade to identify a product that originates from a particular geographic location, that has given the product a specific quality or reputation. For instance, 'Champagne' is utilised to signify wine produced in the Champagne region. Geographical indications are protected under the Geographical Indications Act 2014;
- layout designs of integrated circuits, which are protected under the Layout-Designs of Integrated Circuits Act 1999;
- plant varieties rights, which are protected under the Plant Varieties Protection Act 2004; and
- undisclosed information, which is protected under the common law breach of confidence.

Chapter 10: Financing

Francis Mok, Allen & Gledhill, Singapore

10.1 Licensing requirements for banks

10.1.1 Licensing requirements for banks

Banks in Singapore are supervised and regulated by the MAS. The MAS is Singapore's central bank and integrated financial regulatory authority for all financial institutions in Singapore. The regulatory framework for banks comprises the Banking Act and the MAS Act and the subsidiary legislation promulgated thereunder, as well as the notices, guidelines, circulars, and practice notes and codes issued by the MAS from time to time (collectively, the 'Banking Regulations').

It is a requirement to hold a bank licence in order to carry on any banking business in Singapore. 'Banking business' comprises deposit taking, the provision of cheque services and lending. Aside from banking business, banks are permitted to carry out most other types of business regulated by the MAS (or business that, if carried out in Singapore, would be regulated or authorised by the MAS), including financial advisory services, insurance broking and capital market services.

Generally, banks are prohibited from engaging in non-financial activities, but may conduct non-financial activities that are incidental to, related to or complementary to the banks' financial businesses.

10.1.2 Types of banks

The MAS currently issues three types of bank licences under the Banking Act: (1) a full bank licence; (2) a wholesale bank licence; and (3) a merchant bank licence.

Full banks may provide the whole range of banking business permitted under the Banking Act, including both SGD and non-SGD-denominated banking business. However, foreign banks with full bank licences are restricted in terms of the number of branches and automated teller machines (ATMs) that they may operate. A small number of foreign full banks have been awarded qualifying full bank privileges, which permit them to operate at more locations, share ATMs among themselves, relocate their sub-branches freely and enter into an arrangement with local banks to let their credit card holders obtain cash advances through the ATM networks of local banks.

Wholesale banks operate within the Guidelines for the Operation of Wholesale Banks issued by MAS. They may engage in the same range of banking business as full banks, except that they may not carry out SGD retail banking activities. Wholesale banks are only permitted to maintain one place of business in Singapore.

Merchant banks are also licensed under and governed by the Banking Act. The scope of activities a merchant bank may undertake is generally narrower than that for licensed banks: merchant banks can only conduct the activities prescribed in the Banking Act and Banking (Merchant Banks)

Regulations (including alternative financing and leasing business) and they are not allowed to accept deposits or borrow from the public (except from banks, finance companies, shareholders and companies controlled by shareholders).

10.1.3 Bank representative office

Bank representative offices are also governed under the Banking Act. Bank representative offices must be registered and are subject to the conditions of registration that the MAS may impose. Generally, a bank representative office may carry out liaison work, market research or feasibility studies, but is not allowed to transact for any business in Singapore.

10.1.4 Licensing process and admission criteria

To apply for a bank licence, an applicant needs to submit the prescribed application forms to MAS. Interested applicants are encouraged to contact MAS to discuss the licensing requirements prior to submitting a formal application. MAS usually takes approximately nine to 18 months to approve an application, during which it may ask follow-up questions or request further information on the application.

In assessing an application for a bank licence, MAS will take into consideration the following factors and/or require that the applicant demonstrates the following:

- the financial soundness, track record, world ranking and reputation of the applicant, its parent company and major shareholders;
- the strength of home country supervision, including the willingness and ability of the home supervisory authority to cooperate with MAS, and its framework for cross-border cooperation;
- written consent from the home country supervisory authority for the establishment of a banking operation in Singapore;
- a well-thought-out strategy for banking and financial services in Singapore, and sound business plans to ensure sustained economic viability; and
- robust risk management systems and processes that are commensurate with the applicant's size and proposed business.

Applicants must also meet minimum capital requirements prescribed under the Banking Act, as follows:

- Singapore-incorporated full bank: paid-up capital and capital funds of at least SGD 1.5bn;
- Singapore-incorporated wholesale bank: paid-up capital and capital funds of at least SGD 100m;
- Singapore-incorporated merchant bank: paid-up capital and capital funds of at least SGD 15m; and
- foreign-incorporated full, wholesale or merchant bank: head office funds of at least the equivalent of SGD 200m.

A bank in Singapore must continue to comply with the minimum capital requirements and other conduct of business requirements under the Banking Regulations on an ongoing basis. These may include risk-based capital adequacy requirements, minimum leverage ratio requirements and capital liquidity requirements, as prescribed by the MAS. In addition, banks in Singapore are also expected to follow industry guidelines issued by the Association of Banks in Singapore.

10.1.5 Digital banks

Apart from the traditional banking model, MAS has established an internet banking framework that allows Singapore-incorporated banking groups to set up banking subsidiaries to pursue new business models, including internet-only banks. Such digital bank subsidiaries require separate full bank licences and are subject to the same prudential and regulatory framework as traditional banks (eg, the same licensing and admission criteria apply). However, for a banking subsidiary the Singapore-incorporated parent bank of which has already met the SGD 1.5bn capital requirement will be subject to a lower paid-up capital requirement of SGD 100m, provided that the parent bank has control over the subsidiary.

MAS announced in December 2020 that it had issued licences to two digital full banks and two digital wholesale banks, therefore allowing these entities to conduct digital banking businesses in Singapore. The regulator is currently not granting new digital bank licences. A digital full bank is allowed to take deposits from and provide banking services to retail and non-retail customer segments, while a digital wholesale bank may only serve businesses and other non-retail customer segments. Digital full banks are not allowed to operate ATMs or cash deposit machines (CDM), or join any existing ATM/CDM networks. This is because the objective is for digital banks to adopt innovative digital ways of serving customers and supporting the future digital economy. Digital banks are required to meet the same minimum capital requirements as traditional banks.

Chapter 11: Data protection

Lam Chung Nian, WongPartnership, Singapore

11.1 Introduction

The Personal Data Protection Act (No 26 of 2012 of Singapore) (PDPA) prescribes a regulatory framework for the protection of personal data. It is a consent-based regime where consent of the individual is generally required for any collection, use and disclosure of personal data in Singapore, unless statutory exceptions apply.

The PDPA establishes a baseline standard of protection for personal data by complementing sector-specific legislative and regulatory frameworks. Organisations will therefore have to comply with the PDPA as well as the common law and other relevant laws applicable to the handling of personal data. For example, personal data can potentially constitute confidential information and consent will similarly be required for the use and disclosure of the confidential information.

For the purposes of the PDPA, 'personal data' means data, whether true or not, about an individual who can be identified from: (1) that data; or (2) that data and other information to which the organisation has or is likely to have access.

11.2 Key data protection obligations under the PDPA

The key data protection obligations under the PDPA are outlined as follows:

Consent, purpose limitation and notification obligations

Before collecting, using or disclosing personal data in Singapore, an organisation shall: (1) notify the individual of the purposes for which it will be collecting, using or disclosing that personal data; and (2) obtain the individual's consent for the collection, use or disclosure (as the case may be) of their personal data against notified purposes, which must be purposes that a reasonable person would consider appropriate in the circumstances.

An organisation shall not, as a condition of providing a product or service, require an individual to consent to the collection, use or disclosure of personal data about the individual beyond what is reasonable to provide the product or service to that individual.

On giving reasonable notice to the organisation, an individual may at any time withdraw any consent given in respect of the collection, use or disclosure by that organisation of personal data about the individual for any purpose. On receipt of the withdrawal notice, the organisation concerned shall inform the individual of the likely consequences of withdrawing their consent, and cease (and cause its data intermediaries and agents to cease) collecting, using or disclosing the personal data, unless such collection, use or disclosure (as the case may be) without the consent of the individual is required or authorised under the PDPA or other written law.

Access obligation

An organisation shall ensure that upon request by an individual, it shall, as soon as reasonably possible, provide the individual with: (1) the personal data about the individual that is in the possession or under the control of the organisation; and (2) information about the ways in which that personal data has been or may have been used or disclosed by the organisation within a year before the date of the request.

Correction obligation

Unless an organisation is satisfied on reasonable grounds that a correction should not be made, an organisation shall, upon receiving a request from an individual to correct an error or omission in their personal data that is in the possession or under the control of the organisation: (1) correct the personal data as soon as practicable; and (2) send the corrected personal data to every other organisation to which the personal data was disclosed by the organisation within a year before the

date the correction was made, unless that other organisation does not need the corrected personal data for any legal or business purpose.

Accuracy obligation

An organisation is required to make a reasonable effort to ensure that personal data collected by or on its behalf is accurate and complete, if the personal data is likely to be: (1) used to make a decision that affects the individual concerned; or (2) disclosed by the organisation to another organisation.

Protection obligation

An organisation is required to protect personal data in its possession or under its control by making reasonable security arrangements to prevent unauthorised access, collection, use, disclosure, copying, modification, disposal or similar risks to the personal data in question.

Retention limitation obligation

An organisation shall cease to retain documents containing personal data, or remove the means by which the personal data can be associated with particular customers, as soon as it is reasonable to assume that: (1) the purpose for which the personal data was collected is no longer being served by retention of the personal data; and (2) retention is no longer necessary for legal or business purposes.

Transfer limitation obligation

An organisation shall not transfer any personal data to a country or territory outside Singapore except in accordance with requirements prescribed under the PDPA, to ensure that organisations provide a standard of protection to personal data so transferred that is comparable to the protection under the PDPA.

In practice, the most common way to comply with the Transfer Limitation Obligation in Singapore is to enter into a data transfer agreement with the overseas recipient that: (1) requires the recipient to provide to the personal data transferred to the recipient a standard of protection that is at least comparable to the protection under the PDPA; and (2) specifies the countries and territories to which the personal data may be transferred under the contract.

Accountability obligation

An organisation shall undertake measures in order to ensure that they meet their obligations under the PDPA and demonstrate that they can do so when required. Some of these measures are specifically required under the PDPA. In particular, an organisation shall: (1) develop and implement data protection policies and practices that are necessary for the organisation to meet its obligations under the PDPA; (2) develop a process to receive and respond to complaints arising with respect to the PDPA; (3) designate one or more individuals to be responsible for

ensuring that the organisation complies with the PDPA (commonly referred to as the data protection officer), and make available to the public the business contact information of at least one of the individuals designated; (4) communicate to its employees information about its data protection policies and practices; and (5) make available on request information in relation to its data protection policies and practices, including processes to receive and respond to complaints.

In addition to the data protection regime outlined above, the PDPA also contains the Do-Not-Call (DNC) provisions. These provisions generally prohibit organisations from sending marketing messages to Singapore telephone numbers registered with the DNC Registry, unless clear and unambiguous consent has been obtained, or statutory exceptions or exemptions apply.

11.3 Enforcement and offences

Among other remedies, contraventions of the PDPA may result in financial penalties of up to SGD 1m (approx US$0.77m), or ten per cent of an organisation's annual turnover in Singapore if the organisation's annual local turnover exceeds SGD 10m (approx US$7.74m).[14]

The PDPA also defines certain offences relating to personal data and anonymised information, including for certain forms of unauthorised disclosure of personal data, improper use of personal data, and unauthorised re-identification of anonymised information.

Chapter 12: Competition law

Daren Shiau, Allen & Gledhill, Singapore

12.1 Introduction

The Competition Act is the principal statute governing the competition law regime in Singapore. The provisions set out in the Competition Act are administered by the Competition and Consumer Commission of Singapore (CCCS).

The CCCS is the most active competition regulator in the ASEAN region, leading in terms of cartel and abuse of dominance investigations, as well as the calling-in and investigation of mergers with an effect in Singapore.

14 PDPC Singapore, 'Amendments to Enforcement under the Personal Data Protection Act (PDPA) in updated Advisory Guidelines and Guide', 1 October 2022, https://www.pdpc.gov.sg/news-and-events/announcements/2022/09/amendments-to-enforcement-under-the-personal-data-protection-act-in-updated-advisory-guidelines-and-guide accessed 28 June 2024.

12.2 Cartel regulation

12.2.1 Application

Section 34 of the Competition Act 2004 prohibits agreements between undertakings, decisions by associations of undertakings or concerted practices that have as their objective or effect the prevention, restriction or distortion of competition within Singapore (the 'Section 34 Prohibition').

The term 'agreement' in the Section 34 Prohibition covers both legally enforceable and non-enforceable agreements, including informal understandings and gentlemen's agreements.

12.2.2 Prohibited matters

Under the Competition Act, agreements, decisions or concerted practices that may have the objective or effect of preventing, restricting or distorting competition within Singapore include:

- directly or indirectly fixing purchase or selling prices, or any other trading conditions;
- limiting or controlling production, markets, technical development or investment;
- sharing markets or sources of supply;
- applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; or
- making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations that, by their nature or according to commercial usage, have no connection with the subject of such contracts.

As set out in Chapter 2 of the CCCS Guidelines on the Section 34 Prohibition, other typically prohibited activities include: bid-rigging (collusive tendering); joint purchasing or selling; sharing information; exchanging price and non-price information; restricting advertising; and setting technical or design standards.

The CCCS takes a hardline approach to information exchange between competitors. A passive mode of participation in a discussion or the fact that an undertaking does not act on the confidential information received does not relieve the undertaking of liability under the Section 34 Prohibition, unless it has publicly distanced itself from the anti-competitive discussion.

12.2.3 Vertical agreements

Pure vertical agreements are excluded from the Section 34 Prohibition. Pure vertical agreements are narrowly defined as agreements between parties who operate at a different level in the production or distribution chain and relate to the conditions under which the parties may purchase, sell or resell certain products.

However, a vertical relationship and/or having a diagonal agreement does not preclude the finding of a concerted practice that infringes the Section 34 Prohibition, for example agreements of a hub-and-spoke nature. In addition, vertical agreements are not excluded from the Section 47 Prohibition.

12.2.4 Infringement decisions

To date, the CCCS has issued three international cartel decisions concerning the freight forwarding industry, the machinery and industrial equipment industry, and the industry for electronic circuitry components. The CCCS has also conducted dawn raids and investigations within and outside Singapore in regard to a wide range of industries, including the autoparts, consumer electronics, financial services, fast-moving consumer goods (FMCG), logistics, petrochemicals, precision manufacturing and shipping industries.

12.3 Abuse of dominance

12.3.1 Application

Section 47 of the Competition Act prohibits any conduct on the part of one or more undertakings that amounts to the abuse of a dominant position in any Singapore market (the 'Section 47 Prohibition'). In assessing whether the Section 47 Prohibition applies, a two-stage test is applied: (1) whether the undertaking is dominant in the relevant market; and (2) whether it is abusing that dominant position.

12.3.2 Definition of 'dominance'

An undertaking will be dominant for the purposes of Singapore competition law if it has substantial market power. Market power arises where an undertaking does not face sufficiently strong competitive pressure and can be thought of as having the ability to profitably sustain prices above competitive levels or restrict output or quality below competitive levels. Generally, as a starting point, the CCCS will consider a market share above 60 per cent as likely to indicate that an undertaking is dominant in the relevant market. However, the CCCS has indicated in its Guidelines on the Section 47 Prohibition that this starting point does not preclude dominance being established at a lower market share. This position has been taken by the CCCS in *Re Abuse of a Dominant Position by SISTIC.com Pte Ltd* [2010] SGCCS 3 and upheld by the Competition Appeal Board in *Re Abuse of a Dominant Position by SISTIC. com Pte Ltd* [2012] SGCAB 1.

The definition of the market is also relevant in the assessment of whether an undertaking is dominant. In this regard, the extent to which there are constraints on an undertaking's ability to profitably sustain prices above competitive levels will be considered. Such constraints include the extent of existing and potential competition and other factors, such as the existence of powerful buyers and economic regulation.

12.3.3 Definition of 'abuse'

It is noteworthy that the Section 47 Prohibition also applies to undertakings in a dominant position outside Singapore that abuse their dominant position in a market in Singapore. The Section 47 Prohibition will apply where the conduct is engaged in by entities that form a single economic unit, where that single economic unit is dominant in a relevant market. Collective dominance can also be established between two or more economic entities that are legally independent from each other. Under the Competition Act, conduct may constitute an abuse if it consists of:

- predatory behaviour towards competitors;
- limiting production, markets or technical development to the prejudice of consumers;
- applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; or
- making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations that, by their nature or according to commercial usage, have no connection with the subject of the contracts.

Other categories of conduct that may amount to abuse include pricing below cost, certain discount schemes, certain cases of price discrimination, margin squeezes, vertical restraints, exclusive purchasing agreements, refusals to supply and refusals to allow access to an essential facility.

12.3.4 Notification

An undertaking that is unsure whether its agreement, decision or conduct infringes the Section 34 and/or Section 47 Prohibitions may notify the CCCS either for guidance or a decision. Generally, the CCCS will take no further action once it has provided guidance or a decision, unless certain matters are brought to its attention, such as complaints from third parties.

The fast-track procedure for cases involving the Section 34 and/or Section 47 Prohibition allows businesses under investigation to enter into an agreement with the CCCS, where the business will admit its liability early by acknowledging its participation in an anti-competitive activity. In return, it will receive a reduction on the financial penalty to be imposed.

12.4 Merger control

12.4.1 Application

Section 54 of the Competition Act prohibits mergers (including the creation of full-function joint ventures) that result, or may be expected to result, in a substantial lessening of competition within any market for goods or services in Singapore (the 'Section 54 Prohibition'). The Section 54 Prohibition may apply even where a merger party is located outside Singapore, so long as the merger has an effect on a market in Singapore.

12.4.2 Notification

The CCCS requires all merger parties to conduct a mandatory self-assessment on whether a merger filing is necessary. A merger control filing to the CCCS is expected and advisable if the findings of the self-assessment are that the merger exceeds the indicative quantitative thresholds. Further, the CCCS amended its merger guidelines in 2022, with a greater focus on innovation and to address killer acquisitions. The articulated focus of the CCCS on innovation markets also means that deals can be called in while not meeting the conventional definition of markets and market shares.

In considering whether to notify a merger in Singapore, merger parties and their advisors should be aware of the following features of Singapore's risk-based merger control regime:

- the CCCS has an active market intelligence function, keeping markets under review to ascertain which M&As are taking place and those that have not been notified to the CCCS;
- there are no jurisdictional safe harbours, where mergers that do not trigger specified quantitative thresholds are exempt or excluded from the Section 54 Prohibition;
- in the absence of a merger notification, parties bear an evergreen antitrust risk; and
- where the CCCS investigates, the CCCS would already have formed its theories of harm and the burden of proof will be on the merger parties to demonstrate why the CCCS is wrong.

In addition, the recent CCCS decision in CCCS Case No 500/001/18 – *Grab/Uber* – in 2018 provides two significant risks that undertakings ought to take note of:

- undertakings that have conducted a self-assessment may still be found to have intentionally or negligently infringed the Section 54 Prohibition if they proceed to close a transaction without notifying the CCCS: despite the parties in *Grab/Uber* having conducted a self-assessment, the CCCS disagreed with the findings of the self-assessment and found that the parties had intentionally or negligently infringed the Section 54 Prohibition by failing to notify the transaction; and
- the CCCS may reject undertakings' post-completion merger control filings and instead conduct an investigation: while the Singapore merger control regime allows for post-completion merger control filings, the CCCS prefers pre-completion filings and may reject post-completion filings or call-in unnotified transactions, opting instead to investigate the merger.

The CCCS has stated that if a merger results in the indicative quantitative notification thresholds (the 'Quantitative Thresholds') being crossed, the CCCS is likely to give further consideration to the merger before being satisfied that it will not result in a substantial lessening of competition. The Quantitative Thresholds are:

- a post-merger combined market share of the three largest firms of at least 70 per cent and the merged undertaking has a market share of at least 20 per cent; or
- a merged undertaking with a market share of at least 40 per cent.

The CCCS may also, and as a matter of practice does, call-in and investigate transactions that fall below the Quantitative Thresholds. The test as to the existence of a substantial lessening of competition is qualitative rather than quantitative. Qualitative factors include the ease and

speed of supply-side substitution, countervailing buyer power, market transparency and cost stability in the market. In particular, the CCCS has also investigated transactions six years after the transaction was completed.

The CCCS has, to date, issued one infringement decision for a completed transaction and issued four provisional decisions to block transactions. The rapid succession of merger decisions by the CCCS in the past few years requiring commitments, in addition to the prohibition of transactions, signals its increasingly aggressive stance in regard to enforcement towards merger control. The CCCS has also been stepping up its enforcement of gun-jumping, specifically, information sharing prior to the consummation of a merger, and ancillary restrictions, such as non-compete obligations and supply restrictions, in the context of a merger.

12.5 Consequences of infringement

If the CCCS decides that there has been an infringement in terms of any of the abovementioned prohibitions, it may direct that the infringement be brought to an end and, where necessary, specify a particular course of action to eliminate the harmful effect of the infringement and prevent its recurrence. To illustrate, the CCCS has, pursuant to its merger control powers, issued four provisional decisions to block transactions and accepted commitments in eight merger decisions to date.

In addition, if the CCCS is satisfied that the infringement has been committed intentionally or negligently, it may impose a financial penalty of up to ten per cent of the Singapore undertaking's turnover for each year of the infringement, up to a maximum of three years. The financial penalty is calculated based on the relevant turnover for the financial year preceding the date when the undertaking's participation in the infringement ended.

Chapter 13: Dispute resolution

Dinesh Dhillon, Allen & Gledhill, Singapore Fay Fong, Allen & Gledhill, Singapore

13.1 Structure of the courts

13.1.1 Introduction

Singapore's legal system is consistently ranked highly by both regional and international bodies. Singapore's excellent dispute resolution services are not confined to the judiciary. In 2007, in regard to the UK House of Lords opinion in the case known as *West Tankers v RAS Riunione Adriatica di Sicurta SpA* [2007] UKHL 4, Lord Hoffmann stated in his judgment that Singapore stands as one of the world's 'leading centres of arbitration'.

13.1.2 Litigation

COURT STRUCTURE

The legal profession in Singapore does not divide lawyers into barristers and solicitors. The civil court structure comprises two tiers: the Supreme Court and the state courts.

The principal courts under the state courts are magistrates' courts and district courts. The magistrates' courts generally hear disputes in which the amount claimed or the value of the subject matter in dispute does not exceed SGD 60,000. District courts generally hear cases where the amount claimed or the value of the subject matter in dispute is between SGD 60,000 and SGD 250,000, or up to SGD 500,000 (for road traffic accident claims or claims for personal injuries arising out of industrial accidents). State courts also consist of specialised courts that deal with specific types of claims. For example, small claims tribunals provide a quick and inexpensive forum for the resolution of small claims that fall within certain categories, such as disputes arising from contracts for the sale of goods or the provision of services. Employment claims tribunals provide a speedy and low-cost forum for the resolution of employment-related disputes, within prescribed claim limits.

The Supreme Court comprises the High Court and the Court of Appeal. The High Court consists of the Chief Justice and the Judges of the High Court, while the Court of Appeal consists of the Chief Justice and the Judges of Appeal. The High Court comprises the Appellate Division of the High Court and the General Division of the High Court. The General Division of the High Court has original jurisdiction to hear disputes where the amount claimed or the value of the subject matter in dispute is greater than that which the state courts have jurisdiction to hear, and also hears appeals from district courts and magistrates' courts. The Court of Appeal hears certain prescribed categories of appeals from the High Court and the Appellate Division of the High Court hears those appeals that are not allocated to the Court of Appeal. Unlike the Court of Appeal, the Appellate Division of the High Court does not have criminal jurisdiction and does not hear appeals relating to criminal cases.

In January 2015, the SICC was launched as a division of the General Division of the High Court and part of the Supreme Court of Singapore. The SICC is designed to deal with transnational commercial disputes, where the claim is of an international and commercial nature. The SICC was established to address the increase in commercial litigation and international commercial arbitration in Singapore, such as cross-border commercial disputes governed by foreign law, and enhances Singapore's position as a key legal and business hub in Asia.

The SICC has several unique features that effectively meet the growing demand for effective transnational dispute resolution in this region. For instance, the SICC bench comprises a diverse panel of eminent international and local judges, who are experienced specialist commercial judges in their own right. As of June 2024, the SICC panel of judges comprises 21 judges from ten different civil and common law jurisdictions, including Australia, Canada, China, France, Hong Kong, India, Japan, Singapore, the UK and the US. Another important feature of the SICC is that it allows foreign lawyers to represent parties in certain circumstances, so long as they are registered with the court and subject themselves to a Code of Ethics.

The procedures of the SICC are also flexible and may be tailored to suit parties' preferences in regard to several aspects. For complex disputes, the SICC has recently established the Technology, Infrastructure and Construction List (the 'TIC List'), with various protocols and enhanced features for efficient resolution. A Litigation–Mediation–Litigation Protocol has also been established with the Singapore International Mediation Centre to provide parties with options for multi-tiered dispute resolution.

TRIAL PROCESS

With a view to improving the efficiency of court proceedings, Singapore became the first country in the world to introduce a compulsory, nationwide paperless court filing system in 2000. The electronic filing system made provision for documents to be filed, served, delivered or otherwise conveyed using electronic services. In January 2013, an integrated electronic litigation system (known as eLitigation) was launched, as an enhanced version of the electronic filing system to provide law firms and court users with an integrated platform for the filing and service of court documents, and for the active management of case files throughout the litigation process. Singapore's first technology court was also launched on 8 July 1995, incorporating a wide variety of computer systems and audio-visual equipment to assist with hearings. The availability of such video-conferencing facilities make it convenient for foreign witnesses to give evidence in court without having to be physically present. This has been proven to be extremely useful, especially during the Covid-19 pandemic. In addition, Singapore courts actively manage cases with a focus on the expeditious conduct of claims. Registrar's Case Conferences are scheduled shortly after the commencement of proceedings, for parties to update the court on the proceedings' status, to indicate the need for and intention of the parties to make interlocutory applications, and for the court to set timelines. As a result, it is not uncommon for a trial to be concluded within six to 12 months of proceedings being commenced.

ENFORCEMENT OF FOREIGN JUDGMENTS

It is worth noting that a judgment creditor who has obtained a judgment from a foreign court may enforce that judgment in Singapore by a suit on a debt under the traditional common law position, or pursuant to statute, provided that the relevant criteria for enforcement have been fulfilled.

One such key statute is the Choice of Court Agreements Act, which entered into force on 1 October 2016. This Act implements the Convention on Choice of Court Agreements concluded at The Hague on 30 June 2005. Among other things, the Convention requires contracting states to recognise and enforce judgments by the courts of other contracting states designated through the exclusive choice of court agreements in international civil or commercial cases, subject to certain exceptions in the Convention. The Convention counts Singapore, Mexico, the United Kingdom and all the EU Member States among its contracting parties. Under the Act, the foreign judgment will be generally recognised and enforced if it has effect and is enforceable in the state in which the judgment originated. This development also strengthens Singapore's position as a dispute resolution hub in Asia, by enhancing the international enforceability of Singapore court judgments.

13.1.3 Expert determination

Expert determination is a means by which parties to a contract instruct a third party to decide on an issue. The third party is ordinarily an expert chosen for their expertise in relation to the issue between the parties. Singapore courts have decided that where the expert's determination has been agreed between the parties as final, that expert's determination will be binding on them. This dispute resolution tool has proven very useful in shipping cases, particularly when highly technical matters are at issue.

13.2 Use of arbitration

13.2.1 Arbitration

Singapore courts encourage the use of arbitration as a means to resolve disputes and this is evidenced by the fact that they recognise arbitration agreements and have stayed legal proceedings because of such agreements. Statutory rules have been enacted in the form of the Arbitration Act (which deals with domestic arbitration), as well as the International Arbitration Act (which deals with international arbitration), to provide for the said stay of legal proceedings in such cases.

The legislative framework concerning arbitration in Singapore has been frequently revisited by the Singapore government (amendments were recently made in 2012 and 2020) in order to ensure that the arbitration regime is on par with other jurisdictions and that Singapore remains an attractive venue for arbitration.

The SIAC was established in July 1991 as a not-for-profit, non-governmental organisation to meet the demands of the international business community for a neutral, efficient and reliable dispute resolution institution in Asia. The SIAC comprises a Court of Arbitration, which oversees the case administration and arbitral appointment functions of the SIAC; and the Board of Directors, which oversees its corporate and business development functions. On 30 December 2016, the SIAC announced the official release of the first edition of the Investment Arbitration Rules by the Singapore International Arbitration Centre, a specialised set of rules to address the unique issues present in the conduct of international investment arbitration. The SIAC Investment Arbitration Rules 2017 came into effect on 1 January 2017. As of 2024, the SIAC has an experienced international panel of over 600 expert arbitrators from over 40 jurisdictions. This includes over 100 experienced arbitrators in the energy, engineering, procurement and construction sectors, from more than 25 jurisdictions.

In addition, an arbitration facility centre (Maxwell Chambers) was launched in 2010, with the government's support. There are many arbitration bodies represented in Singapore, such as the International Court of Arbitration of the International Chamber of Commerce (ICC), the International Centre for Dispute Resolution (ICDR) (the international division of the American Arbitration Association (AAA)), the Arbitration and Mediation Centre of the WIPO, the Singapore Chamber of Maritime Arbitration (SCMA) and the Singapore Institute of Arbitrators.

Further strengthening Singapore's attractiveness as an arbitration hub is the fact that Singapore is a signatory to the New York Convention, affording ease of enforcement of arbitral awards. The judiciary has also consistently delivered pro-arbitration decisions, with a policy of minimal curial intervention.

In *Aloe Vera of America, Inc v Asianic Food (S) Pte Ltd & Anor* [2006] 3 SLR(R) 174, the Singapore court expressly opined that the courts should give effect to foreign arbitration awards.

The Civil Law Act was amended on 28 June 2021 to extend the existing framework for third-party funding in Singapore not only to international arbitration, but also to domestic arbitration proceedings, certain proceedings before the SICC and related mediation proceedings. This offers businesses further alternatives to fund meritorious claims. Third-party funding is already available in other international arbitration centres and such introduction in Singapore strengthens the country's position as a key arbitration seat in the world. Entities that provide third-party funding must meet certain specific criteria set out in the regulations.

13.3 Other forms of dispute resolution

13.3.1 Mediation

Mediation forms a part of Singapore's full suite of dispute resolution services, one which serves to complement court litigation and arbitration. It is cost effective, flexible and fast. Mediation services are offered by the Singapore Mediation Centre (SMC) and the Singapore International Mediation Centre (SIMC), as well as the State Courts Centre for Dispute Resolution (SCCDR).

The Singapore International Mediation Institute (SIMI) and the SIMC were officially launched on 5 November 2014, with a view to developing Singapore into a centre for international commercial mediation. As a professional standards body for mediation, the SIMI implements and maintains a credentialing scheme for mediators and audits and ensures that high standards are met with registered partners who run training and/or mediation services.

The SIMC focuses on mediating international commercial disputes, with a panel of internationally respected mediators. The SIMC has signed memoranda of understanding with other mediation centres in the region to promote and develop mediation in Asia.

The SMC focuses on domestic commercial mediation and also provides other dispute resolution services, such as adjudication. The SMC has a panel of highly qualified mediators and neutrals, which includes retired Supreme Court judges, Members of Parliament, former judicial commissioners, senior counsel, and leaders from different professions and industries.

The SCCDR employs a judge-led court dispute resolution process to ensure that cases in the state courts are managed robustly. In addition to judge-led case management, the SCCDR also conducts neutral evaluation, judicial mediation and conciliation to facilitate the resolution of disputes without trial.

On 1 November 2017, the Mediation Act came into force. The Mediation Act strengthens the enforceability of mediated settlements in providing a legislative framework for mediation. It also provides much-valued certainty for cross-border mediation users in areas where the common law position is unclear or differs from jurisdiction to jurisdiction.

The Mediation Act allows parties to apply to court to have their settlement agreement recorded as a court order to strengthen its enforceability. It also provides that communications made during mediation cannot be disclosed to third parties to the mediation and cannot be admitted in court or arbitral proceedings as evidence, except under the circumstances set out in the Mediation Act. For example, a person may disclose something communicated during mediation to a third party to the mediation if the disclosure is made with the consent of all the parties to the mediation (including the maker of the communication). The Mediation Act also allows parties to apply to court to stay ongoing court proceedings in relation to the same dispute.

On 7 August 2019, a treaty to facilitate the enforcement of settlement agreements that have been entered into with the assistance of mediation was signed. This is known as the UN Convention on International Settlement Agreements Resulting from Mediation. As of June 2025, 58 countries have signed the Convention, which came into force on 12 September 2020.

The Convention seeks to promote the use of mediation as a key means to resolve commercial disputes more amicably, quickly and cost effectively. Where a written settlement agreement is entered into between two or more parties who have their place of business in different states that have acceded to or ratified the Convention, the party seeking enforcement may apply directly to the courts in the state where the assets are located. This obviates the need to first obtain a judgment on the dispute before being able to seek enforcement.

In addition, the enforcement procedure is simple. The party seeking enforcement need only provide the following to the relevant authority in the state where enforcement is sought:

- a copy of the signed settlement agreement; and
- evidence that the settlement agreement resulted from mediation.

To give effect to the Convention in Singapore, the Singapore Convention on Mediation Act came into force on 12 September 2020 to provide the legislative framework for a party to enforce or invoke an international settlement agreement in Singapore.

South Korea

Chapter 1: Introduction

Jiwon Kang, Shin & Kim, Seoul

Since the first edition of this report in Sept 2020, South Korea's economy has experienced significant fluctuations and changes due to various factors including the coronavirus crisis, rising interest rates, increased regulation on big tech companies on a global level and the Korean presidential election which took place in March 2022. At the beginning of 2025, we expect more stability in the market as elections in various countries will come to an end and we expect a gradual drop in the interest rate.

Since 2020, the South Korean shipping industry experienced record-breaking highs. We have seen a global expansion of Korean entertainment industry with the success of BTS, *Squid Game* on Netflix, and other popular music and film. The K-beauty and K-fashion industries have experienced significant growth and attracted substantial investments, with dedicated funds appearing in the market to mainly invest in K-beauty and K-fashion.

Additionally, robust venture capital funding and government financing programmes have significantly boosted South Korea's startup ecosystem in recent years. Venture capital investments in South Korea have more than tripled over the past decade, with the IT sector receiving the highest amount of investment. The number of South Korean 'unicorns' has risen from just three in 2017 to 23 in 2023. Companies like Coupang and Viva Republica (maker of the Toss app) have become major players.

We also saw increased interest in environmental, social and governance (ESG) issues. The Korean government established the ESG Infrastructure Expansion Plan in August 2021 to systematically respond to global ESG discussions. Since then, there has been a notable increase in ESG investments and initiatives by both public and private sectors. The National Pension Service is spearheading the ESG movement by broadening ESG investments and introducing its Integrated ESG Strategy Guidelines in November 2021. Major financial companies are also pushing ESG investments by setting specific targets, forming dedicated teams and joining the UN Principles for Responsible Investment (PRI). As a result, Korea's ESG investments have risen sharply since 2020. Leading companies like Samsung and SK have established ESG management strategies, integrating ESG practices into their supply chain management and broader operations. Listed companies are required to disclose corporate governance reports, and companies with assets surpassing KRW 1tn must provide sustainability management reports.

Notable new legislation since our first edition includes the Serious Accidents Punishment Act (SAPA), which came into force on 27 January 2022 and holds employers criminally liable in the event of serious industrial or public accidents. On 6 April 2023, the first court decision was rendered and a prison sentence of 18 months (with a three-year suspension of execution) on the representative director was imposed. Despite debates on SAPA's effectiveness in ensuring safety management and accident prevention – given that the annual number of fatal injuries did not decrease post-enforcement – the act has undoubtedly heightened workplace safety and health focus, driving companies to adopt more rigorous safety measures and management practices.

There has been notable regulatory movement in regulation on big tech companies. In 2022, the Personal Information Protection Committee fined Google and Meta KRW 69.2bn and KRW 30.8bn, respectively, for collecting personal information for online customised advertisements without the consent of users. This was the first sanction related to customised advertising. There are ongoing efforts by the Korean government to introduce a 'platform law' to effectively regulate big tech companies in the face of opposition from the industry.

M&A activities have slowed down since 2022 with fewer deals and smaller deal sizes, largely due to interest rate increases. While private equity (PE) firms remain active market players, the continuous rise in interest rates since 2022 has led cash-rich companies to dominate the M&A scene over PEs which rely on leveraged models. These companies seek deals that boost revenue growth and business innovation, driven by demands to address geopolitical issues and AI-driven technological advances. Consequently, there is a trend of these companies selling non-core assets to finance new acquisitions. An interesting trend in the M&A market is the increasing use of warranty and indemnity insurance (W&I insurance). Historically, W&I insurance was mainly used when sellers wanted a 'clean exit' to distribute sales proceeds to investors post-closing. However, concerns about a seller's future financial stability have now led investors to more broadly adopt W&I insurance to mitigate counterparty risk.

Lastly, the global emphasis on corporate governance is reshaping markets and companies. South Korea has made some recent strides in improving governance, with an increase in active investors. Still, South Korean companies were not bringing the adequate value back to its shareholders.

In response, early in 2024, Korea's Financial Services Commission (FSC) announced its Corporate Value-up Programme (CVP) initiative to improve corporate governance standards and enhance shareholder returns. This programme requires listed companies to voluntarily disclose important information that may influence their stock price and investors' decisions, including shareholder return, recapitalisation and long-term investments. Activist shareholders and institutional investors might use this opportunity to voice their opinions on management measures and boost shareholder proposals on shareholder return policies. Listed companies should be prepared to respond to minority shareholders and manage general shareholders' meetings accordingly.

Overall, the Korean market is navigating through economic uncertainties, but the government is actively implementing regulations and initiatives to stimulate the market and address the 'Korea Discount' issue. These efforts include fostering transparent corporate governance, enhancing market accessibility for foreign investors, and promoting sustainable growth strategies. With these measures, we are optimistic about seeing significant improvements in the near future.

Chapter 2: General business environment

Jeeseon Choi, Daeryook & Aju, Seoul

'The world's only divided country'; '[a] lonely peninsula encircled by four powerful nations: China, Japan, Russia, and the United States'; but at the same time, 'the country that achieved the 'Miracle on the Han River''. These phrases all refer to the Republic of Korea. South Korea, which had a national per capita income of only US$45 in the 1950s, has now seen this figure grow to over US$30,000, and today is ranked 12th in the world economic (GDP) rankings.

Furthermore, Korea ranked tenth among the 132 economies featured in the Global Innovation Index 2023 and second among the 16 economies in South East Asia, East Asia and Oceania. People who hailed the growth of Korea's economy as a miracle continue to tout the 'miracle of new investment' going forward. Why did Korea become such an attractive investment destination?

As an investment destination, there are three major advantages enjoyed by Korea.

Firstly, Korea has geographical advantages, which it has carefully exploited for its continued development as a logistics hub for Northeast Asia and Eurasia. South Korea is located in the heart of the Northeast Asian market, which accounts for about 25 per cent of global GDP, and lies between China and Japan, two of the world's largest economies. Along with this, Korea has an excellent logistics industry infrastructure, such as Incheon International Airport and Busan Port (both consistently achieving top global rankings), and a 'free trade agreement' network signed with 59 countries, making it an ideal investment destination for direct participation in the global market.

Secondly, South Korea is arguably the best 'test bed' market to predict global marketability. Although South Korea is small in territory, it boasts a diverse, savvy and dynamic consumer population of over 50 million that seeks efficiency and makes uniquely quick decisions as proud early adopters.

In practice, leading companies in various fields use the country as a test bed. In particular, global companies in the digital and IT fields, such as Google and Microsoft, actively use South Korea as a test bed for their product launches. This is because 5G, the revolutionary wireless mobile communication network, can be readily accessed anywhere by anyone in the country, and the world's fastest internet speeds are currently found in South Korea.

Thirdly, South Korea has excellent business infrastructure. As an example of South Korea's business environment, the expansion rate of Starbucks outlets has progressed rapidly compared with other countries, such that the number of directly managed stores reached 1,893 as of the end of 2023 (the fourth highest number globally).

A major reason why Starbucks has been able to expand its brand so rapidly is due to South Korea's 'e-government system', which provides government administration tasks to the public quickly by utilising modern information and communication technology. Other reasons for South Korea's sound business environment include its sizeable pool of highly skilled workers – a product of its emphasis on education, and evidenced by high university entrance rates – excellent living conditions marked by safe and orderly cities, convenient transportation infrastructure, accessible residential settings and affordable rates for food, healthcare and utilities (water and electricity).

On the other hand, because South Korea has achieved phenomenal growth in such a short period of time, the usually rosy portrayal is often marred by intense competition, squabbling among vested interests and discontent about societal ills, particularly wealth inequality. As a result, there are also multiple obstacles for investors to consider, such as corporate regulations and exceedingly worker-friendly regulations aimed at reducing income inequality.

With recent revisions to the labour law, labour costs have risen and the spectre of increased production costs has similarly risen. While the minimum wage has increased by approximately 52 per cent from 2017 (KRW 6,470) to 2024 (KRW 9,860), work hours have also been mandatorily reduced, with the 52-hour work week system having been implemented based on the number of employees. However, due to the excessive burden such changes are imposing on employers, in particular smaller businesses, it seems that there is considerable room for future policy changes.

Moreover, major legislative and policy changes are increasingly being implemented at breakneck speed. Most notably, in 2022, the SAPA came into effect, aiming to prevent serious accidents and protect the lives and physical safety by stipulating penalties (including criminal penalties) on business owners and corporations (etc) that have caused casualties in violation of their duties to take safety and health measures while operating businesses or places of business, or handling materials or products harmful to human bodies, the application of which has been extended to a sole proprietor or a business with five or more regular employees since 27 January 2024 despite considerable public opposition.

Looking at the penalties for the management of a company, this Act creates great concerns, particularly for smaller companies with limited resources to cope with its requirements. Investors need to be cautious and aware of how such legislation and policies might trend in the future, requiring careful preliminary review by those with expertise and experience in the relevant fields, including those who can help in successfully navigating the country's legal/ regulatory framework.

Overall, South Korea has a demonstrably good business environment that is conducive to investment, but there are various factors, such as the regulatory environment and changes in social mood, to bear in mind before deciding whether and how to invest. Risk checks for such factors should be made in advance in order to identify and adapt to the opportunities and threats both currently in place and anticipated going forward. As always, sound preparation with professional support will be key to investor success.

Chapter 3: Business and corporate structures

Jeeseon Choi, Daeryook & Aju, Seoul

Under Korean law, foreign investors may choose from a range of legal entities, including a joint stock company (*chusik hoesa*), limited company (*yuhan hoesa*), limited liability company (*yuhan chaekim hoesa*), general partnership (*hapmyung hoesa*) and limited partnership (*hapja hoesa*).

Among such choices, joint stock companies used to comprise the vast majority, accounting for over 90 per cent of corporations that filed a corporate tax return in 2018. As a result, they enjoy somewhat of an advantage in terms of general market perception. That said, foreign and domestic investors

are increasingly adopting the limited company or the limited liability company due to their distinct characteristics, including exemption from public reporting obligations that normally depend on the size of the relevant company.

In particular, the limited liability company, which was introduced in South Korea in 2011, is increasingly gaining interest from foreign investors – although it is less commonly used compared to joint stock companies or limited companies – in light of its exemption from public reporting requirements under the Act on External Audit of Stock Companies (the 'Act on External Audit'). Converting one legal entity into another (eg, conversion of a joint stock company into a limited company) is permissible under Korean law, subject to certain conditions and restrictions.

The following is a more detailed explanation of the three types of companies most commonly used by foreign investors.

3.1 Joint stock company (*chusik hoesa*)

3.1.1 Incorporation

For joint stock companies, investors are free to determine the amount of capital to be invested; however, in order to qualify as a 'foreign investment' under the Foreign Investment Promotion Act (which may enjoy certain benefits, such as cash grants and industrial site support), an investment of at least KRW 100m per investor is required. The overall incorporation procedures for a joint stock company consist of the following: (1) preparation of articles of incorporation (AoI); (2) election of one or more directors, representative directors and statutory auditors; (3) payment of the subscription price; and (4) registration with the court and the local business/tax office.

3.1.2 Management and statutory auditors

A minimum of one director is required (or if the registered capital is KRW 1bn or more, then a minimum of three directors are required, one of whom is the representative director), and there are no nationality or residency requirements. A board of directors is only essential if there are three or more directors (in which case the majority rules, in principle). As for the internal statutory auditor (which is different from an external auditor and does not need to be a certified accountant), at least one statutory auditor is required if the registered capital is KRW 1bn or more (or, as an alternative, an audit committee consisting of three or more directors is possible in lieu of the statutory auditor).

3.1.3 Shareholders

A minimum of one shareholder is required, and each share has one vote unless the articles of incorporation provides for shares that are wholly or partially (depending on the matter) non-voting. Shares may be freely transferred unless the articles of incorporation require the approval of the board of directors of the relevant company (or the shareholders if no board of directors exists).

3.1.4 Public reporting and audits

The annual balance sheet as approved by the shareholders must be published in accordance with the methods stipulated in the articles of incorporation. External audits are required for listed companies, companies that desire to be listed in the current or following fiscal year, and companies having total assets or total sales of KRW 50bn or more, or that otherwise satisfy certain criteria under the Act on External Audit.

3.2 Limited company (*yuhan hoesa*)

3.2.1 Incorporation

The incorporation procedures of a limited company are generally the same as those of a joint stock company, although electing a representative director (if so provided in the articles of incorporation) or a statutory auditor is optional. In addition, instead of 'shareholders', the investors are known as 'members', and instead of 'shares', a limited company has 'units of contribution'.

3.2.2 Management and statutory auditors

A minimum of one director is required; there are no nationality or residency requirements.

In principle, a director represents the company: if there are two or more directors, then a representative director should be elected, unless otherwise stipulated in the articles of incorporation. A board of directors for a limited company is not mandatory.

3.2.3 Members

The minimum number of members is one and the members may adopt a written resolution if all members of the company consent (such written resolutions are only permitted for a joint stock company with registered capital of less than KRW 1bn, and only if all shareholders consent). Each unit of contribution is counted as one vote, unless otherwise provided in the articles of incorporation. The transfer of units of contribution may be restricted if such a restriction is stipulated in the articles of incorporation.

3.2.4 Public reporting and audits

The publication of annual balance sheets is not required in principle. However, under the Act on External Audit, limited companies may also be subject to the requirements of publication of annual balance sheets and/or mandatory audit by an external auditor if they satisfy certain criteria thereunder, similar to those applicable to joint stock companies.

3.3 Limited liability company (*yuhan chaekim hoesa*)

3.3.1 Incorporation

The incorporation procedures for limited liability companies are substantially similar to those of a joint stock company. Like limited companies, instead of 'shareholders', the investors are known as 'members', and instead of 'shares', a limited liability company has 'units of contribution'.

3.3.2 Management and statutory auditors

In limited liability companies, a minimum of one manager should be elected under the articles of incorporation and assume the role of the representative director. It is noteworthy that a legal entity (as opposed to an individual person) may act as the manager of a limited liability company – something that is not allowed for a director of a joint stock company or a limited company – and both a member and a non-member may act as the manager. In addition, no board of directors and no statutory auditor are required.

3.3.3 Members

The minimum number of members is one; each member has one vote at the meetings of members. A new member may be registered through an amendment of the articles of incorporation, which requires the agreement of all the existing members. Members may not transfer their units of contribution without the approval of other members (in particular, if there is any member acting as the manager, then the approval of such a member, and if there is no member acting as the manager, then the approval of all the members), unless otherwise provided in the articles of incorporation.

3.3.4 Public reporting and audits

Limited liability companies are exempt from any mandatory publication of balance sheets and from external audits under Korean law (in particular, the Act on External Audit).

Chapter 4: Private M&A

Hyungsoo Lee, Lee & Ko, Seoul

Seung Hyo (Sam) Baek, Lee & Ko, Seoul

4.1 Restrictions or controls on foreign investment

Foreign investment in South Korean companies is regulated in certain industries, including telecommunications, broadcasting, banking, marine, aviation, agriculture and natural resources.

In these sectors, foreign ownership may be entirely restricted, allowed only up to a ceiling percentage, or be subject to regulatory approval. Foreign investment in a designated defence industry contractor or a company possessing national core technologies or national advanced strategic technologies may also be subject to regulatory review and approval.

As a procedural reporting requirement, foreign investment must be reported to the competent government authorities (eg, the Bank of Korea and Korea Trade-Investment Promotion Agency (KOTRA)) or designated institutions (eg, foreign exchange banks) under the Foreign Investment Promotion Act or the Foreign Exchange Transaction Act. However, if the foreign investment results in the acquisition of control over a Korean company engaging in one of the following activities, reporting under the Foreign Investment Promotion Act can only be completed once prior clearance from the Ministry of Trade, Industry and Energy has been obtained:

- producing or manufacturing of defence materials under the Defence Acquisition Programme Act;
- producing or manufacturing of goods, etc or holding of technologies, subject to permission or approval for exportation under Article 19 of the Foreign Trade Act;
- possessing or holding contracts classified as state secrets under Article 4(1)-2 of the National Intelligence Service Act; or
- possessing or holding national core technology.

4.2 Most commonly used acquisition structure

In South Korea, acquiring shares is the most common structure for acquisitions. Business or asset sales and purchases are less common and typically used only to purchase part of a company's assets or business. Mergers can be applied but are not commonly used in M&A (mergers and acquisitions) contexts between unrelated parties.

Generally, the share purchase structure is preferred due to its simplicity (ie, execution of a share purchase agreement and delivery of the share certificates between the seller and buyer, aside from any consent requirements due to change of control provisions). In contrast, business or asset transfers entail a more complicated closing procedure (ie, registering for the title transfer of assets; obtaining consent for the transfer of liabilities; reporting or registering the transfer of permits or licences; and transferring employees, business contracts, etc).

4.3 Sale via auction process

A sale through an auction process is frequently used in private M&A. The larger the deal size, the more common it is to use the bidding process. Although there are some variations, the bidding process generally used in South Korea includes the following steps:

1. distribution of a teaser and information memorandum;
2. preliminary bid;
3. selection of bidders to participate in the final bid;

4. due diligence by selected bidders;
5. final bid;
6. selection of a preferred bidder;
7. negotiation and execution of the definitive agreement; and
8. closing.

4.4 Key terms of the acquisition agreement

The key terms of a share purchase agreement in South Korea include:

1. purchase price and advance payment deposit;
2. price adjustment;
3. closing and closing deliverables;
4. representations and warranties (R&W);
5. covenants;
6. conditions to closing;
7. indemnification;
8. terminations;
9. non-competition; and
10. governing law and dispute resolution.

In South Korea, sellers occasionally request an advance payment deposit to secure certainty for deal closing and potential breach by the buyer. Various price adjustment mechanisms are often used (eg, net cash/debt, working capital adjustments, locked box and earn-outs). As the Korean Commercial Code requires the delivery of share certificates for title of shares to be transferred (in the case that the share certificates are issued), the closing procedure usually includes the delivery of share certificates and wiring the purchase price into the seller's bank account.

Regarding R&W of the target company, purchasers usually seek fairly extensive R&W (eg, capitalisation, permits and licences, financial statements, absence of undisclosed material liabilities, compliance with laws, taxes, no proceeding, material contracts, insurance, labour, anti-corruption and environmental issues). Specific coverage of R&W is one of the most heavily negotiated issues. Purchasers often request the right to access the target company's books, records and other information before closing, which sometimes raises a 'gun-jumping' issue, especially in acquisitions between competitors.

In relation to indemnification for a breach of R&W, various limitations, such as overall cap, deductible, basket, *de minimis* and time limits, are commonly utilised. Purchasers generally request that the sellers agree to a non-compete convent for a certain period after closing. Such a non-

compete covenant should be reasonable in scope, duration and geographic area, considering the total circumstances.

South Korean law is generally used as the governing law for M&A transactions in the country. Although parties may select a foreign governing law (eg, New York State law), the mandatory requirements of South Korean law, such as the method of transfer of title and regulatory approvals, still apply.

The key terms of a business or asset transfer are similar to those in a share purchase agreement, with some differences such as the transferred assets, liabilities, contracts, permits and licences, employees, and specific transfer methods.

4.5 Anti-competition report and clearance

If an M&A transaction meets certain thresholds, the acquirer must file a business combination report to obtain clearance from the Korea Fair Trade Commission (KFTC). In a share purchase transaction involving 20 per cent (15 per cent in the case of a listed company) of outstanding voting shares of a company, the requirement for a business combination report is triggered if one party to the transaction has total assets or annual turnover equal to or greater than KRW 300bn (including its worldwide affiliates), while the other party has total assets or annual turnover equal to or greater than KRW 30bn (including its worldwide affiliates).

If all the parties involved are foreign companies or the target company is a foreign company (regardless of whether the acquiring company is a domestic company), the above thresholds of KRW 300bn and KRW 30bn apply, but each foreign party also needs to have domestic sales of KRW 30bn or more (including those of its worldwide affiliates). The filing of the business combination report is generally required within 30 days from the closing date. Nevertheless, if one party to the transaction has total assets or annual turnover equal to or greater than KRW 2tn (including its worldwide affiliates), a pre-closing report will be required. In such a case, the parties will not be permitted to close the transaction until clearance relating to the report is obtained from the KFTC.

In a business or asset transfer, the business combination report requirements and procedures are similar to those in the case of a share transfer transaction, except that (1) the seller's total assets or annual turnover are calculated on a standalone basis (not including those of affiliates), and (2) there are additional requirements on the purchased business or assets. Specifically, the purchaser must acquire all or a substantial part of the business or assets of the seller. A substantial part is defined as one that: (1) can be operated as an independent business unit or can cause a significant decrease in the seller's revenue following the transfer, and (2) has a transfer price of at least ten per cent of the seller's total assets, or at least KRW 10bn (from 7 August 2024 – prior to this date, the minimum threshold for transfer price of the assets or business is KRW 5bn).

4.6 Employee-related issues

As a matter of law, there is no obligation to obtain consent from employees or labour unions for either a share sale or an asset or business transfer, unless specified in the employment contracts,

employment rules or collective bargaining agreements. In the case of a business transfer, employees working for the transferred business will transfer from the seller to the purchaser unless the employees object to the transfer. Practically, it is necessary to inform employees about the proposed transfer to ensure they have sufficient opportunity to consider opting out. Although there is no legal obligation for M&A transactions, employees and labour unions often request an M&A bonus, especially when the seller earns significant capital gains from the transfer. In some cases, M&A bonuses have been paid to encourage employee cooperation during due diligence and to ensure smooth closing procedures.

4.7 Taxes related to M&A transactions

The seller is responsible for paying the securities transaction tax at (1) 0.35 per cent of the transfer price for the sale of shares in a non-listed company or shares in a listed company traded over-the-counter and (2) 0.18 per cent of the transfer price for the sale of shares in a listed company traded on an exchange (reducing to 0.15 per cent from 2025). If the seller is a foreign entity with no permanent establishment in South Korea, the purchaser is required to withhold and pay the securities transaction tax on behalf of the seller. Also, if the purchaser acquires more than 50 per cent of the equity of a non-listed company holding real estate, a deemed acquisition tax is payable by the purchaser. This tax is calculated as 2.2 per cent of the book value of certain assets, such as real estate, proportional to the acquisition.

For business and asset sales, the purchaser is responsible for paying the acquisition tax on certain assets (eg, 4.6 per cent of the purchase price for real estate, but 9.4 per cent for real estate located in Seoul metropolitan areas; 3.4 per cent of the purchase price for mechanical equipment; and 2.2–8.2 per cent of the purchase price for vehicles). In addition, the purchaser may also be required to purchase housing bonds, depending on the value of the real estate. If an asset or business sale is a comprehensive business transfer, no VAT is imposed. Otherwise, the seller must collect and pay VAT at ten per cent of the purchase price allocated to the assets subject to VAT, including inventory, machinery, equipment, buildings and goodwill. Land and accounts receivable are exempt from VAT. The buyer can generally credit VAT paid against its VAT payable or obtain a refund if there is a shortfall when filing a VAT return.

If a seller earns capital gains from the M&A transaction, the seller is subject to taxes (corporate income tax for corporate entities). However, if the seller is a foreign entity with no permanent establishment in South Korea, it is subject to capital gains tax at the lower of 11 per cent of the transfer price or 22 per cent of the capital gains, including surtax unless otherwise set out in an applicable tax treaty. The purchaser is required to withhold and pay this capital gains tax on behalf of the seller unless the seller is exempt under an applicable tax treaty.

Chapter 5: Foreign investment

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5.1 Foreign investment control/restriction

5.1.1 Forms of foreign investment

ACQUISITION OF INTEREST IN A DOMESTIC COMPANY

The 'acquisition of interest in a domestic company' refers to a foreigner's purchase of interest (eg, stocks or shares) of a Korean corporation (including a corporation in the process of being established) or a sole proprietorship (while the relevant law states 'a domestic enterprise registered as a business entity', it means a sole proprietorship) through any one of the following means for the purpose of establishing continuous economic relations with the corporation or enterprise through participation in management activities:

- acquisition of newly issued stocks or shares of a Korean corporation or enterprise; or
- acquisition of existing stocks or shares of a Korean corporation or enterprise.

To be recognised as a foreign investment, the investment amount should be at least KRW 100m per foreigner and the foreigner should own at least ten per cent of either the total number of voting shares issued by a Korean company (in the case of a corporation, including a corporation in the process of being established) or an enterprise (including a sole proprietorship), or its total equity investment. Also, when a foreign investor of a registered foreign-invested company (ie, a company in which a foreign investor has invested, or a non-profit organisation (NPO) to which a foreign investor has contributed) makes an additional investment, no limit shall be imposed on the investment amount or investment ratio. If there are two or more foreign investors involved, each investor should satisfy the above conditions to be eligible as a foreign investor.

While no exceptions are recognised with regard to the investment amount, some exceptions may apply to the foreign investment ratio. Even if the foreign investment ratio is less than ten per cent with the amount of foreign investment being KRW 100m or more, the investment may be exceptionally recognised as foreign investment in the following case: where a foreign investor dispatches or appoints an executive to the domestic company concerned ('executive' refers to directors, representative directors, unlimited liability partners, statutory auditors or persons corresponding thereto holding the right to participate in important management decisions).

Long-term loans

Loans with a maturity of not less than five years (based on the loan maturity prescribed in the first loan contract) made to a foreign-invested company by the following entities are recognised as foreign investment:

- an overseas parent company of the foreign-invested company;
- a certain affiliate company of the overseas parent company;
- a foreign individual investor; or
- a certain affiliate company of a foreign individual investor.

Contributions to an NPO

A contribution to an NPO is recognised as foreign investment when the foreign contribution amount is at least KRW 50m and accounts for at least ten per cent of the total contribution amount; the NPO has independent research facilities in the field of science and technology; and the NPO meets any one of the following conditions:

- the number of research staff members who are full-time employees is five or more persons, consisting of persons with a master's degree or higher in the field of science and technology, or persons with a bachelor's degree in the field of science and technology with a research career of not less than three years; or
- the NPO's business should be classified as 'research and experimental development on natural sciences and engineering' under the Korean Standard Industrial Classification.

Other contributions to an NPO by a foreigner are recognised as foreign investment if they: (1) are not less than KRW 50m; (2) account for ten per cent or more of the total contribution amount; are recognised as foreign investment by the Foreign Investment Committee; and (4) meet one of the following conditions:

- an NPO established for the purpose of the promotion of science, art, medical services or education, and which continues to conduct its business with the objective to develop professionals in the relevant fields and to expand international exchanges; or
- an NPO that is a regional office of an international organisation that engages in cooperative international business between civilians or governments.

Usage of unappropriated retained earnings

A foreign-invested company's unappropriated retained earnings are recognised as foreign investment if the unappropriated retained earnings are used for one of the following purposes:

- for newly establishing or expanding factory facilities or workplaces (in this case, the business is other than the manufacturing business under the Korea Standard Industrial Classification); or

- for purchasing capital goods or research equipment necessary for performing the business of the foreign-invested company

5.1.2 Restrictions and prohibitions on foreign investment

Out of a total of 1,196 categories of business listed under the Korean Standard Industrial Classification, foreign investment is not permitted in 61 categories, including public administration, diplomacy and national defence (the 'unpermitted categories of business'). Among the 1,135 categories of business in which foreign investment is permitted, restrictions on the investment ratio apply to 30 categories (the 'restricted categories of business').

Meanwhile, prior authorisation from the Ministry of Trade Industry and Energy is required for foreign investment in the form of subscribing to newly issued shares or purchasing the existing shares of defence industry companies.

Unpermitted categories of business

The categories of business in which foreign investment is not permitted generally have public features. Some of the unpermitted categories of business are as follows:

- postal services, central banking, individual mutual aid organisations, pension funding, administration of financial markets and activities auxiliary to financial service activities;
- legislative, judiciary, administrative bodies, foreign embassies and extraterritorial organisations and bodies;
- education (eg, pre-primary, primary, secondary, higher education, universities, graduate schools and schools for the disabled); and
- artist, religious, business, professional, environmental advocacy, political and labour organisations.

Restricted categories of business

Some examples of restricted categories of business are as follows:

- nuclear power generation, radio broadcasting and over-the-air broadcasting – prohibited;
- hydroelectric/thermal/solar and sunlight/other power generation – the sum of power plant facilities purchased by foreigners from the Korea Electric Power Corporation or its subsidiaries must not exceed 30 per cent of the total domestic power plant facilities;
- farming of beef cattle, wholesale of meat, publication of newspapers, publication of magazines and periodicals and passenger/freight air transport – permitted where the foreign investment ratio is less than 50 per cent (less than 30 per cent for daily newspapers); and
- news agency business – permitted where the foreign investment ratio is less than 25 per cent.

5.1.3 Acquisition of real estate

With the exception of certain real estate that requires government permission for purchase (eg, land in a military base or a military facility protection area), a foreign individual, foreign corporation, foreign organisation, or a corporation or organisation with foreign shareholdings of 50 per cent or more ('foreign party') may acquire land in Korea by following certain procedures and reporting the acquisition to the appropriate authorities.

Reporting obligations under the Act on Report on Real Estate Transactions, etc

Where a foreign party has concluded a contract for the acquisition of real estate in South Korea, the contract shall be reported to the relevant city (*Si*) mayor, county (*Gun*) governor or head of the relevant *Gu* (district) office within 60 days of the contract's execution date. However, in the case of real estate sales contracts prepared by a practising licensed real estate agent, such a real estate agent should file the report.

Reporting obligations under the Foreign Exchange Transactions Act

Under the Foreign Exchange Transactions Act, non-resident foreigners must first notify the acquisition of real estate to a foreign exchange bank when bringing in funds for real estate acquisition. Afterwards, the real estate acquisition should be notified to the competent Si/Gun/Gu office (the same as reporting obligations under the Act on Report on Real Estate Transactions, etc above) and the transfer of ownership should be registered in accordance with the Act on Report on Real Estate Transactions.

5.2 Foreign exchange control

5.2.1 Capital injection/monetary loan

If a foreign parent company wants to increase the capitalisation of its Korean subsidiary through a capital increase: (1) a change of corporate registration must be filed with the court; (2) a foreign investment report must be filed with KOTRA or a foreign exchange bank; and (3) a change of foreign-invested company registration (or change of such a report and/or registration, if a foreign investment report has already been filed) must be filed with KOTRA or a foreign exchange bank.

If a foreign parent company wants to provide a loan to its Korean subsidiary with a maturity period of five years or longer, a foreign investment report must be filed with KOTRA or a foreign exchange bank (as stated above). Any other type of monetary loans to a Korean subsidiary or a Korean branch office requires the filing of a report of the borrowing of foreign currency funds with a designated foreign exchange bank within one month from the date of receipt of funds (but such report is exempted for certain types of guarantee agreement-related transactions). If the amount of borrowing exceeds US$50m (including the aggregate amount of borrowing during the period of one year prior

to the date of the report), such a report must be filed with the Ministry of Strategy and Finance via a designated foreign exchange bank.

5.2.2 Repatriation of funds/payment of dividends

With regard to: (1) proceeds from shares acquired by a foreign investor; (2) proceeds from the sale of shares; and (3) the principal, interest and service charges paid in accordance with the loan contract as prescribed by the Foreign Investment Promotion Act, their remittance to foreign countries shall be guaranteed in accordance with the details of the notified or authorised foreign investment at the time when the said remittance is made.

With regard to loans from a foreign parent company to a Korean subsidiary, the Korean subsidiary may pay the principal and interest back to the foreign parent company upon showing that the reporting requirements pursuant to the Foreign Investment Promotion Act or the Foreign Exchange Transactions Act had been fulfilled at the time of the initial loan transaction.

5.2.3 Settlement of funds in local/foreign currency

The payment currency for ordinary transactions between residents and non-residents (ie, agreements for trade in goods or services) may be decided by agreement between the parties. However, the payment currency for capital transactions (eg, cash loans or stock purchases) must be in accordance with the submission filed with and approved by either the Ministry of Strategy and Finance, the Bank of Korea or the relevant foreign exchange bank.

5.3 Applicable tax incentive or grant

5.3.1 Types of business that can benefit from tax incentives

Type A businesses are:

1. businesses accompanying new growth driver industry technology;
2. companies in a foreign investment zone, which is separately designated upon the individual requests of foreign investors; and
3. companies in areas that have undergone deliberation and received approval by the relevant government committees, such as free trade zones (FTZs), the Saemangeum project area, the Jeju advanced science and technology complexes, and the Jeju investment promotion zone.

Type B businesses are:

1. businesses in free economic zones and those in the Saemangeum project area, which satisfy certain criteria (eg, type of business and investment amount) stipulated under the Restriction of Special Taxation Act and its Enforcement Decree;

2. free economic zone development project entities and development project entities in the Saemangeum project area, which exceed a threshold investment amount or ratio stipulated under the Restriction of Special Taxation Act and its Enforcement Decree;

3. development project entities in the Jeju investment promotion zone, which exceed a threshold investment amount or ratio under the Restriction of Special Taxation Act and its Enforcement Decree;

4. companies in a foreign investment zone (complex type), which satisfy certain criteria under the Restriction of Special Taxation Act and its Enforcement Decree (eg, type of business and investment amount);

5. companies in an enterprise city development zone, which satisfy certain criteria under the Restriction of Special Taxation Act and its Enforcement Decree (eg, type of business and investment amount);

6. development project entities in enterprise city development projects, which exceed a threshold investment amount or ratio stipulated under the Restriction of Special Taxation Act and its Enforcement Decree; and

7. manufacturing businesses (investment amount: US$1m or more) and logistics businesses (investment amount: US$5m or more).

5.3.2 Tax reductions and exemptions

Corporate income tax

Corporate income tax reduction/exemption for foreign investment was repealed in 2019 (however, customs duty and local tax reduction/exemption are still in effect), and applies only to foreign-invested companies that applied for corporate income tax reduction/exemption on or before 31 December 2018.

Local tax

With regard to property acquired or held by a foreign-invested company, in order to engage in a business entitled to tax reduction or exemption, local tax is reduced or exempted, or deducted from the tax base as follows.

- *For Type A*: acquisition tax and property tax: the amount calculated by multiplying the computed tax amount on the properties concerned by the foreign investment ratio (tax amount subject to reduction or exemption) shall be exempted for five years from the date of commencing business, and reduced by 50 per cent for two years thereafter.

- *For Type B*: acquisition tax and property tax: the amount calculated by multiplying the computed tax amount on the properties concerned by the foreign investment ratio (tax amount subject to reduction or exemption) shall be exempted for three years from the date of commencing business, and reduced by 50 per cent for two years thereafter.

Customs duties, etc

Under the Restriction of Special Taxation Act, customs duties, individual consumption tax and VAT are exempted for the following capital goods that are used directly in a business that is subject to reduction or exemption of corporate income tax or income tax, and are notified as foreign investment through the acquisition of newly issued stocks or shares:

- capital goods brought in by a foreign-invested company in exchange for a foreign or domestic means of payment it obtained as equity investment from a foreign investor; or
- capital goods that are brought in by a foreign investor as an object of investment.

The above exemptions shall only be applied to capital goods for which an import declaration under the Customs Act has been completed within five years of the date on which the foreign investment notification was filed.

For businesses falling under Type A, customs duties, special excise tax and VAT shall be exempted. For businesses falling under Type B (excluding categories (5) and (6) under Type B in section 5.3.1 above), only customs duties will be exempted.

5.3.3 Cash grant

For foreign investment that satisfies certain conditions, the central and local governments of South Korea may provide cash grants for certain purposes, such as the establishment of a factory. The Korean government takes into account various factors, including the following:

- whether the relevant foreign investment involves new growth driver industry technology;
- the effect of technology transfer;
- the scale of job creation;
- whether the foreign investment overlaps with domestic investment; and
- the ownership of the location in which the foreign investment is to be made.

Qualifications

Foreign investment with a ratio of 30 per cent or higher falling under one of the following is eligible for a cash grant:

- where a new factory is installed or an existing factory is expanded (or a business establishment in the case of a non-manufacturing business) for the management of a business accompanying new growth driver industry technology or advanced technology and advanced products;
- where a new factory is built or an existing factory is expanded for the production of parts, materials, and equipment stipulated under the Act on Special Measures to Strengthen Competitiveness and Stabilise Supply Chain of Materials, Components, and Equipment Industry and satisfy one of the following conditions:

- parts, materials and equipment that contribute significantly to the added value of the final product;
- parts, materials and equipment that require advanced technology or core high technology and have a high technology spillover effect or create significant added value;
- parts, materials and equipment that act as the basis of an industry or have high inter-industry linkage effects; or
- parts, materials and equipment that cause difficulties for in main key industry-related production in the event of a supply shortage;

- where a foreign-invested company that creates new jobs in excess of a certain number opens a new factory (a business establishment in the case of non-manufacturing businesses) or expands an existing factory;
- where a research facility is newly opened or expanded for R&D activities for a business accompanying new growth driver industry technology, or where an NPO receiving a contribution that is considered foreign direct investment (FDI) newly establishes or expands a research facility. The research facility should have five or more full-time researchers with a master's degree in a relevant field or a bachelor's degree in a relevant field supplemented with at least three years of research experience; or
- where an investment that makes significant contributions to the domestic economy relative to the amount of investment meets one of the following conditions and is recognised by the Foreign Investment Committee as an investment that needs support in regard to the qualifications required for foreign investors:
  - where a foreign company establishes a regional headquarters having control over two or more countries in Korea (the regional headquarters should hire ten or more employees, invest KRW 100m or more, and obtain the recognition of the Foreign Investment Committee); also, the parent company's stake should be at least 50 per cent and the parent company's average annual sales for the past five years should be KRW 3tn or more (alternatively, the Foreign Investment Committee must determine that the parent company is a leading company in the global market upon considering factors such as its asset size and global market share);
  - where a foreign company is engaged in a local specialised industry as stipulated in Article 2(vi) of the Special Act on Local Autonomy, Decentralisation and Balanced Regional Development or a mega-region industry stipulated in Article 2(viii) of the same act, and where it is recognised that the relevant industry will contribute to the development of the local economy;
  - where it is recognised that the foreign investor will significantly contribute to the development of domestic industry and technology by researching and developing technologies referred to in Article 121-2(i)(1) of the Act on Restriction on Special Cases Concerning Taxation or advanced technologies or advanced products referred to in Article 5(i) of the Industrial Development Act; or

– where the foreign investor intends to replace the existing factory facilities with new facilities that fall under (1) facilities for commercialising national strategic technology, (2) factory facilities to run a business accompanying new growth driver industry technology, or (3) factory facilities to run a business utilising advanced technology and advanced products, and such replacement is deemed to meet the standards publicly notified by the Minister Ministry of Trade, Industry and Energy and to significantly contribute to the development of the domestic industry and technology.

Maximum amount of a cash grant

The maximum amount of a cash grant shall be decided by a committee comprised of five or more persons from the central government, local government, KOTRA and the private sector. The cash grant amount shall be decided within the maximum amount through negotiations with the foreign investor.

Usage of a cash grant

A foreign-invested company should use a cash grant only for the following purposes:

- to purchase or lease land or a building for the installation of a factory or research facility;
- to construct a factory or research facility;
- to purchase capital goods and research equipment to be used in a factory or research facility for business or research purposes;
- to install infrastructure facilities, including power/communication facilities, required for building a factory or research facility; or
- employment subsidies or education and training subsidies.

Chapter 6: Restructuring transactions

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This chapter seeks to provide a general overview of the following transaction structures, which are frequently utilised in restructurings in South Korea: merger, business transfer, spin-off, liquidation and sale of shares.

6.1 Merger

6.1.1 Overview

Similar to many other jurisdictions, a merger in Korea is effected such that one of the merged companies survives, and all assets and liabilities of the counterparty company are comprehensively transferred to the surviving company by operation of law.

In general, a merger is effected through: (1) a resolution of the board of directors and the general meeting of shareholders (GMS); (2) the execution of a merger agreement; (3) the exercise of appraisal rights by dissenting shareholders; (4) a one-month creditor protection procedure; (5) the GMS at which the merger is reported to the shareholders; and (6) the registration of a merger. The timeline for the entire process varies, but in general takes approximately two months for unlisted, private companies.

6.1.2 Transfer of legal relationships

In a merger all rights and obligations of the merged company are automatically transferred, without consent or a separate transfer process, to the surviving company by operation of law. However, if any contract of the surviving or the merged company provides for a consent right or a default (or termination) in respect of the merger, the consent of the contract counterparty would be required for the merger to proceed without breach of the relevant contract.

In principle, permits and licences are also automatically transferred to the surviving company. However, the relevant laws and regulations, or the permit or licence registration requirements, may require the transfer of permits or licences from the merged company to the surviving company to be reported and registered with the relevant authority.

6.1.3 Creditor protection procedure

Following the resolution and approval of the merger by the board of directors and shareholders of the surviving and merged companies, individual and public notices are required to be provided to creditors of the merger parties, and the creditors have the right to file an objection and receive repayment or collateral in respect of their claims against the merger companies for at least one month.

In practice, the merger companies typically discuss and commercially resolve the claims of potential objecting creditors prior to the statutory one-month creditor protection period, to avoid the burden and pressure brought by objections from large creditors.

6.2 Business transfer

6.2.1 Overview

Similar to many other jurisdictions, a business transfer involves the assignment and assumption of physical assets, liabilities and human resources, as well as the legal relationships concerning all or part of the business, of the transferor to the transferee.

A business transfer is effected through: (1) a resolution of the business transfer by the board of directors and/or the general meeting of the shareholders of the transferor and/or the transferee, depending on the size of assets and liabilities of the transferor or the transferee as compared against the assets and liabilities of the business transferred in the business transfer; (2) the execution of a business transfer agreement; (3) the exercise of appraisal rights by dissenting shareholders; and (4) the closing of the business transfer. The timeline for the entire process varies, but in general takes approximately two months for unlisted, private companies.

6.2.2 Transfer of legal relationships

A business transfer requires the transferor to transfer its individual assets, liabilities, contracts and personnel to the transferee. Unlike a merger, a business transfer does not benefit from the automatic transfer of assets, liabilities and contracts by operation of law. This means that counterparty consent is required for the transfer of contracts and obligations of the transferor, and the consent of transferor employees is required for their employment transfer to the transferee. Accordingly, a business transfer requires more time and resources to process and effect the transfer of assets, liabilities and contracts compared with transfers in the context of a merger or spin-off, where the legal titles and relationships are comprehensively transferred.

6.3 Spin-off

6.3.1 Overview

A spin-off may be effected in the form of: (1) a vertical spin-off, where the spun-off business becomes a wholly owned subsidiary of the existing company; or (2) a horizontal spin-off, where the spun-off business becomes a sister company of the existing company.

The spin-off is generally effected through: (1) a resolution of the board of directors and the GMS; (2) the public notice of a spin-off plan; (3) the one-month creditor protection procedure, which may be omitted if the existing company and the spun-off company bear joint and several liabilities for all liabilities of the existing company as of the time of the spin-off; (4) the GMS at which the spin-off

is reported to the shareholders; and (5) the registration of the spin-off. The timeline for the entire process varies, but in general takes approximately two months for unlisted, private companies.

6.3.2 Transfer of legal relationships

Similar to a merger, and unlike a business transfer, the transfer of individual assets, liabilities, contracts and personnel is effected by operation of law, subject to consent or other requirements under the individual contracts of the existing company.

Further, similar to a merger, the company should undergo a creditor protection procedure, unless the existing company and the spun-off company opt to bear joint and several liabilities for all liabilities of the existing company as of the time of the spin-off.

6.4 Liquidation

6.4.1 Overview

Liquidation refers to a process to dispose of and terminate a company's existing legal relationships to extinguish its legal personality. Liquidation is conditioned upon the company's ability to repay the existing debts in full. If the company is unable to repay its existing debts in full, the company will need to undergo an insolvency proceeding, as opposed to liquidation.

The liquidation of a company requires:

1. the resolution of dissolution by the board of directors and the GMS of the company, appointment of a liquidator, and registration and report thereof;
2. the public notice and individual notices (at least two months prior to liquidation) to creditors of the company to allow the creditors to file claims;
3. the survey and report of properties subject to liquidation;
4. the closure of the company's existing businesses, recovery of claims, repayment of debts and distribution of residual assets;
5. the submission and approval of report on final accounts; and
6. the registration of liquidation.

This process generally takes approximately three months.

6.4.2 Key liquidation issues

Termination of agreements

The termination of contracts of the liquidated company may trigger a prepayment or termination fee or compensation of damages. Accordingly, the liquidated company should consider in advance whether, separate and apart from monetary compensation, any affiliated company may offer to step into the shoes of the liquidated company to continue with the terms of the relevant contracts.

Labour

If the liquidation of a company requires the lay-off of existing employees, the company should comprehensively review and plan for the dismissal and/or early retirement programme of its employees (including any deemed employees, such as dispatched workers and in-house subcontractors) in compliance with applicable Korean labour laws and regulations, the rules of employment (ROE) of the company, any effective collective bargaining agreement and any applicable employment agreement.

Litigation

The liquidation of a company may not be completed and effected until all pending litigations are resolved. Accordingly, any company purporting to commence liquidation should review the status of its potential and pending litigations.

6.5 Key restructuring considerations

6.5.1 Transaction structure

The optimal restructuring transaction structure may vary depending on the purpose and background of the restructuring, targeted timeline, status of permits and licences, contractual relationships and (in the case of mergers and business transfers) dissenting shareholders or (in the case of mergers and spin-offs) creditors. Several factors and considerations are as follows:

- a merger filing (eg, the submission of a business combination report in Korea) may be required for a merger or business transfer depending on the total assets and sales revenue of the concerned companies. However, under the amended Monopoly Regulation and Fair Trade Act which became effective on 7 August 2024, a merger or business transfer between a parent and its subsidiary (with a shareholding of over 50 per cent), an affiliate merger with a merged affiliate entity whose assets and revenue are both less than KRW 30bn and a business transfer with a consideration of less than both ten per cent of the assets of the transferor and KRW 10bn, in each case is exempt from the Korea merger filing requirement;

- the transfer of a company's business or business permits and licences may require an approval of the supervisory governmental authority;
- based on the transaction structure, the transfer of employees would require one of the following: (1) consent from the transferred employees; (2) consultation with the transferred employees; or (3) automatic transfer of the relevant employees. For example:
  - in the case of a merger, the employment of the officers and employees of the merged company is comprehensively transferred without separate consent;
  - in the case of a spin-off, the consent of the transferred employees is not required, as long as the company engages in and completes 'sufficient consultation' with the transferred employees; and
  - in the case of a business transfer, the employees subject to the transfer have the right to refuse and reject the employment transfer;
- under applicable collective bargaining agreement or agreement(s) with the labour union, the transferred employees may have the right to consent, consult or claim compensation benefits; and
- the transfer of personal information to a transferee in the context of a business transfer, merger or spin-off requires an advance notice to the data subjects containing certain requisite information, including the occurrence of a transfer of personal information, certain information regarding the transferee and certain measures available to objecting data subjects. While a public notice containing such information on the transferor's website suffices in lieu of individual notices to data subjects where an individual notice is not possible (eg, unknown contact information of data subject), the prevailing practice is for the transferor to provide both a public notice on its website and individual notices to data subjects with known contact information.

6.5.2 Transaction with an insolvent company

The board of directors of a company seeking to transact with an insolvent company should conduct an enhanced review of the appropriateness and fairness of the proposed transaction, taking into account their fiduciary duties towards the company.

For example, the board of directors of a company seeking to merge with an insolvent company should carefully examine the business necessity and the fairness of the merger ratio for the proposed merger, given that the appropriateness of the merger and valuation of the merged companies are more likely to be challenged or questioned later in the process. Further, the business transfer (ie, the sale of a business) of an insolvent company is more likely to be subject to challenge, including legal action seeking to cancel or unwind the business transfer, for fraudulent conveyance.

6.5.3 Transaction involving a publicly listed company on the Korea Exchange

Restructuring transactions involving one or more publicly listed companies on the Korea Exchange is subject to additional requirements under the Financial Investment Services and Capital Markets Act (FSCMA) and the Korea Exchange (KRX) regulations, including the following:

- a publicly listed company on the KRX is subject to certain public disclosure requirements under the FSCMA and the KRX regulations for its board approval, execution of definitive agreement or closing of a business transfer, merger or spin-off which affects its management or assets. Further, the Korean government has recently announced its plan and initiatives to further strengthen and expand the public disclosures of such transactions to promote board accountability and protection of minority shareholders;
- The FSCMA sets forth certain standards and formula for calculating the transaction price (or merger or spin-off ratio) in a merger, business transfer or spin-off of a publicly listed company on the KRX to protect minority shareholders' interests, and requires a private (non-publicly listed) company to be valued by an independent valuation agency in a merger between a publicly listed company on the KRX and a private company. While the Korean government's recently announced plan to support and promote M&A includes an initiative to abolish the FSCMA-mandated merger price/ratio calculation formula in third-party mergers involving a publicly listed company, the FSCMA-mandated merger price/ratio determination is nonetheless proposed to be retained for affiliate mergers involving a publicly listed company; and
- A merger between a publicly listed company on the KRX and a private (non-publicly listed) company which results in a change of control of the publicly listed company and the public listing of shares of the private company is required to undergo a KRX review on whether the merger constitutes a backdoor listing transaction. If the KRX recognises the merger to constitute a backdoor listing, the KRX will conduct a full preliminary listing review and potentially delist the publicly listed company upon its determination that its listing criteria and requirements are not satisfied.

Chapter 7: Employment and labour law

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This chapter sets forth a brief overview of the key employment and labour law concepts vital to doing business in South Korea, from start to finish, with all the intricacies in-between.

7.1 Starting a business

If you plan to start a business in South Korea, you will need people to help you to execute the business. Accordingly, you should become familiar with the Korean Labour Standards Act (LSA). The LSA is the foundational document governing employment relationships in South Korea and prescribes various minimum conditions of work, including allowances and benefits, which supersede any provisions of employment contracts, work rules or collective bargaining agreements less favourable to employees.

However, many of the most onerous provisions to employers only apply when the workplace has five or more employees. Before that threshold, the employer has significant flexibility to structure the employment relationship as it sees fit, including with regard to the setting of working hours

and compensation for any overtime, provision of paid holidays and establishing standards for the termination of employment.

It is worth noting that a written employment agreement is not mandatory for full-time, regular employees; however, for certain specific provisions relating to wages/compensation, work hours, holidays, annual leave and so on, written terms must be provided to the employee at the time of entering into the employment arrangement. Therefore, it may be a helpful exercise to spend some time up front to draft a well-considered employment agreement, which is likely to make potential subsequent issues less confusing.

7.2 Winding up a business

Choosing to cease doing business in South Korea is a management prerogative. Therefore, liquidating a local entity and closing up shop also entitles the employer to terminate employment relationships with relative ease. Assuming there are no other contractual obligations, company policies or collective agreements to the contrary, an employer can terminate an employment relationship in connection with winding up a business by providing 30 days' advance notice or payment in lieu thereof.

Employers who did their homework up front by investing in a well-considered employment agreement would also know that termination of employment in South Korea (regardless of the reason for the termination) entitles employees to their retirement benefit. What kind of retirement benefit differs depending on what system was implemented earlier in the process (ie, company pension or statutory severance), but the benefit to the employee or cost to the employer is approximately one months' pay per year of service of the particular employee.

7.3 All the intricacies in-between

While it is not possible here to address all the issues that may arise in-between, the below is a helpful tool for understanding the top five action items for a business to maintain a healthy and compliant workplace.

7.3.1 Establish a retirement benefit

It is a legal requirement for all new companies to set up a retirement pension within one year of establishment. If this is not established, the default retirement benefit will be the traditional statutory severance (see section 7.2 above).

7.3.2 Prepare the ROE

Once the workplace reaches ten or more employees, the employer is obligated to prepare and file the ROE with the Ministry of Employment and Labour. The ROE is intended to be a set of work rules governing general working terms, such as the calculation and method of payment of wages, working hours, holidays, annual paid leave and severance pay. Under the LSA, an employment contract must not diverge from the work rules to the employee's disadvantage, and will be found invalid to the extent that it does.

7.3.3 Strictly observe disciplinary procedures and the 'just cause' standard for termination

Once the company reaches the five-employee threshold, it will no longer have the flexibility to terminate employees without 'just cause'. In practice, this is generally a very high standard to meet. In cases of dismissal for disciplinary reasons, labour authorities and courts consider the totality of the circumstances, including the severity and frequency of the alleged misconduct or poor performance, and whether or not the employee was given an opportunity to improve. Even where the substance of the wrongdoing is sufficiently severe, procedural failures (eg, did not provide due process rights or violated notice requirements) may prevent the finding of 'just cause'. The burden of proof rests with the employer to show just cause, if contested.

'Dismissal for managerial reasons' under the LSA is also contemplated (and 'just cause' is deemed to exist) if the situation satisfies special conditions, including the standard of 'urgent business necessity'. However, in practice, just like the 'just cause' standard, the 'urgent business necessity' standard is very difficult to achieve.

Accordingly, it would not be unusual for companies to negotiate mutual separation agreements and/or implement voluntary resignation programmes, often associated with additional remuneration (eg, retirement bonus), to resolve the complications posed by the 'just cause' and 'urgent business necessity' standards.

7.3.4 To maximise employment flexibility within the 'just cause' framework, evaluate alternative employment options and understand their limitations

Global organisations will be well accustomed to the use of a contingent workforce, also sometimes referred to as outsourced workers. While such equivalents do exist in South Korea, specific legal limitations may apply depending on the type of contingent workforce/outsourced worker being contemplated. Accordingly, it is very important to understand and apply the correct concept to your particular business. For example, are you referring to part-time employees, fixed-term contract employees, dispatched workers from manpower companies or independent contractors either from a subcontractor or as individuals?

Failure to satisfy the relevant requirements may render the contingent workforce/outsourced worker a regular employee entitled to rights and benefits under the LSA, as well as subject the involved companies to criminal penalties under applicable legislation.

7.3.5 Establish a labour management council

Once the company reaches the 30-employee threshold, it will be required to establish and conduct regular meetings of the labour management council. Unlike a union, which is established by the employees, a labour management council is intended to be a cooperative body shared between the employees and management. In the labour management council, the employee representatives shall be selected through a direct secret ballot by the employees in principle and by-laws will need to be filed with the Ministry of Employment and Labour.

Chapter 8: Tax law

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8.1 Taxes applicable to individuals

8.1.1 Income tax

Taxpayers

An individual is subject to income tax in South Korea on income derived from sources in South Korea, whether a resident or non-resident. Resident individuals are taxed on worldwide income. A resident is a person who maintains a domicile or has resided in South Korea for 183 days or longer during one taxable year. However, if the revised tax bill announced in July 2024 is passed by the National Assembly as is, starting with tax periods beginning on or after 1 January 2026, a person will be considered a resident even if they are present for more than 183 days over two tax periods.

Taxable income

Income tax is levied on items of taxable income specifically listed in the tax code. Income is categorised as global income (interest, dividends, business income, wages and salaries, pension income and other income), retirement income and capital gains. Global income is aggregated and taxed at regular individual income tax (IIT) rates. Dividend and interest income withheld domestically amounting to less than KRW 20m are taxed separately. Retirement income and capital gains are also taxed separately.

Non-resident taxpayers are required to file a Korean IIT return for income associated with a Korean place of business or Korean real estate. All other forms of Korea-sourced income attributable to non-resident individuals is subject to withholding tax at the source.

Tax rates

Global income is taxed at progressive tax rates, as follows:

- six per cent of the tax base up to KRW 14m (rate including local income tax: 6.6 per cent);
- 15 per cent of the excess over KRW 14m up to KRW 50m (16.5 per cent);
- 24 per cent of the excess over KRW 50m up to KRW 88m (26.4 per cent);
- 35 per cent of the excess over KRW 88m up to KRW 150m (38.5 per cent);
- 38 per cent of the excess over KRW 150m up to KRW 300m (41.8 per cent);

- 40 per cent of the excess over KRW 300m up to KRW 500m (44 per cent);
- 42 per cent of the excess over KRW 500m up to KRW 1bn (46.2 per cent); and
- 45 per cent of the excess over KRW 1bn (49.5 per cent).

8.1.2 Deductions/credits

Residents may be eligible for a credit based on their dependents. Additionally, residents are generally able to claim tax credit for wage and salary income, child tax credit and credit for contributions to eligible pension accounts. Individuals with business income may claim tax credit for casualty losses. A foreign tax credit is generally available for residents paying foreign taxes on global income or retirement income.

8.1.3 Withholding tax

Interest, dividends, wage and salary income, business and pension income that qualifies as personal services, 'other income', and pension income is subject to WHT, whether derived by a resident or non-resident. The withholding agent collects the tax at the time of payment and submits it to the district tax office by the tenth day of the following month.

8.2 Taxes applicable to businesses

8.2.1 Corporation

Domestic and foreign corporations are both subject to corporate income tax (CIT). A domestic corporation is defined as a corporation with its head or main office or place of effective management in South Korea. The place of effective management refers to the place where the key management and commercial decisions that are necessary for the conduct of the entity's business are made in substance. The determination of the place of effective management is based on all relevant facts and circumstances.

A foreign corporation is a corporation established outside South Korea with its head or main office in a foreign country. Domestic corporations are liable to corporate income tax on worldwide income. Foreign corporations are liable to corporate income tax on domestic source income. State and local governments are not subject to corporate income tax.

8.2.2 Types of legal entities

All of the below entities are generally taxed as separate legal entities. However, *hapmyong hoesa* and *hapja hoesa* can elect to be treated as transparent for Korean tax purposes, thereby becoming subject to the Korean partnership tax regime.

- *Chusik hoesa* – a corporation incorporated by one or more promoters, with each shareholder's liability limited to the amount of contributed capital. This is the type of entity most commonly used in Korea.
- *Yuhan hoesa* – a corporation incorporated by one or more members, with each member's liability limited to the amount of contributed capital.
- *Yuhan chaekim hoesa* – a corporation incorporated by one or more members, with each member's liability limited to the amount of contributed capital. A *yuhan chaekim hoesa* provides more flexibility and self-control than a *yuhan hoesa*.
- *Hapmyung hoesa* – a corporation incorporated jointly by more than two members who are responsible for corporate obligations if the assets of the corporation are not sufficient to fully satisfy such obligations.
- *Hapja hoesa* – a corporation composed of one or more partners with unlimited liability and one or more partners with limited liability.

8.2.3 Transparent entities

In Korea, entities that are not a corporation and have an agreed method of distributing profits between members (ie, association, foundation, *johap* under the Korean Civil Code (KCC), and *hapja johap* or *ikmyung johap* under the KCC) are tax-transparent entities. A *johap* is similar to a partnership in concept. Trusts formed by a contractual arrangement are generally treated as tax-transparent entities.

In addition, *hapmyung hoesa* and *hapja hoesa* – which are incorporated entities – may choose to be treated as partnerships that are transparent for tax purposes. Under Korean tax law, partnerships are exempt from tax at the partnership level, but each partner is subject to tax on earned income allocated from the partnership.

8.2.4 Consolidation

Consolidation (consolidated tax return) is available for a domestic parent company and its directly or indirectly wholly owned domestic subsidiaries. For fiscal years commencing on or after 1 January 2024, the shareholding requirement is eased to 90 per cent. A taxpayer may elect the consolidated tax filing regime upon approval from the tax authority, but such election cannot be revoked for five years.

8.2.5 Taxable income

In determining taxable income for CIT purposes, expenses (including depreciation and general administrative expenses, such as rental expenses) that are reasonably connected with a company's business can be deducted from the company's taxable revenue. Taxable income is based on the accounting profits, and adjustments are made for tax purposes, as required by the Korean Corporate Income Tax Law.

A foreign corporation is liable to tax on domestic source income recognised during the tax year. Domestic NPOs are liable to tax on revenue derived from profit-making activities during the tax year. Foreign corporations and NPOs are not subject to tax on liquidation income.

8.2.6 Tax rates

The applicable CIT rates are as follows:

- taxable income under KRW 200m: nine per cent (rate including local income tax: 9.9 per cent);
- taxable income of KRW 200m to KRW 20bn: 19 per cent (20.9 per cent);
- taxable income of KRW 20bn to KRW 300bn: 21 per cent (23.1 per cent); and
- taxable income over KRW 300bn: 24 per cent (26.4 per cent).

8.2.7 Basic rules on loss relief

Under Korean tax law, tax losses can be carried forward for 15 years, although annual utilisation is capped at 80 per cent of annual taxable income (with an exception granted for SMEs and distressed companies).

8.3 Other taxes

8.3.1 VAT

Value-added tax (VAT) is imposed on the supply of goods and services. The applicable VAT rate is generally ten per cent, but zero-rated VAT is available for exported goods and services rendered outside Korea and for certain services provided to a non-resident in a foreign currency. In addition, VAT is exempted on daily necessities, financial and insurance services, and personal services as prescribed by law. The difference between zero-rated and exemptions is that VAT on goods and services purchased for the supply of goods and services subject to the zero-rated rate is deductible, while VAT on goods and services exempted from the exemptions is not deductible. If a company carries on a VAT-able business in Korea, it must register its business under the VAT Act, file a quarterly VAT return and pay all VAT collected from its customers during the relevant quarter, minus any VAT credit to which it is entitled (input VAT).

8.3.2 Securities transaction tax

Securities transaction tax is imposed on the transfer of shares. The securities transaction tax rate for publicly traded shares is 0.18 per cent (the tax rate will be reduced to 0.15 per cent from 2025 onwards), and the tax rate for unlisted shares is 0.35 per cent.

8.3.3 Acquisition tax

Acquisition tax is imposed on the purchase price of real estate, motor vehicles, construction equipment, golf memberships, etc. The acquisition tax rate varies depending on the type of assets, ranging from 0.96 per cent to 4.6 per cent. Where an investor acquires shares in a company and becomes a controlling shareholder of such company (ie, the investor and its related parties collectively own, in the aggregate, more than 50 per cent of the shares of the company) as a result of the share acquisition, such investor is deemed to have acquired real estate, etc, held by the company and is generally subject to deemed acquisition tax of 2.2 per cent (including surtax).

8.3.4 Registration and licence tax

A taxpayer registering real estate, vessels, aircraft, automobiles and heavy equipment, and obtaining certain licences is subject to licence tax. The rate of the tax varies depending on the type of asset or licence.

8.3.5 Property tax

A taxpayer who owns real estate, vessels or aircraft is subject to property tax, which is due on 1 June each year. The rate of property tax varies depending on the type of asset.

8.3.6 Local income tax

Taxpayers who are subject to corporate income tax or IIT are also subject to local income tax. The tax base for local income tax is generally the same as for corporate income tax or IIT, and the rate is ten per cent of the corporate income tax or IIT amount.

8.3.7 Special excise tax

A special excise tax is levied on the production or trading of certain luxury items, alcohol and tobacco. In addition, property tax (a local tax) is charged on the statutory value of land, buildings, houses, vessels and aircraft, while comprehensive real estate holding tax (a national tax) is charged on the aggregate published value of land, buildings and houses exceeding a certain threshold.

8.4 Special incentives

8.4.1 Special incentives for inbound technology investments

The Special Tax Treatment Control Law provides various tax incentives to stimulate R&D activities. Tax credits are available for qualifying R&D expenditures used in the development of research and manpower. In addition, until the end of 2026, a 50 per cent CIT credit is provided for income resulting from the transfer of patents and eligible technology by SMEs. A ten per cent tax credit (up

to the value of acquired technology) is also provided to qualifying domestic companies merging or acquiring technology-innovative SMEs.

8.4.2 Integrated investment tax credit

Integrated investment tax credit provides a tax credit of one per cent of investment (five per cent for medium-sized enterprises and ten per cent for small and medium-sized enterprises) for fixed assets such as machinery and other fixed assets specified by law. A tax credit of three per cent of the investment (six per cent for medium-sized enterprises and 12 per cent for small and medium-sized enterprises) for new growth source technology commercialisation facilities and 15 per cent of the investment (25 per cent for small and medium-sized enterprises) applies for national strategic technology commercialisation facilities.

8.4.3 Other special incentives

In accordance with base erosion profit shifting (BEPS) initiatives, most direct tax incentives and benefits previously available for foreign direct investment were abolished by the Korean government under the 2019 tax reform. However, for foreign direct investments (excluding loan investments) stipulated by law, the application of a system where the central and local governments jointly pay a certain percentage of the investment amount in cash (up to 50 per cent according to the law, usually around 20 per cent) depending on the investment details and employment scale has been activated. In addition, the existing local tax and indirect tax incentives are maintained for qualifying foreign investors. Foreign investors are entitled to an exemption from acquisition tax and property tax on property acquired and owned for up to 15 years, and to an exemption from customs duties, VAT and individual consumption tax on imported capital goods.

8.5 Taxation of inbound investments

8.5.1 Withholding taxes

In general, interest, dividends and royalties paid to a non-resident company or individual are subject to 22 per cent withholding tax (inclusive of local tax). The rate may be reduced under applicable tax treaties. The Korean tax authority takes a conservative position in relation to the application of reduced treaty rates, which can differ depending on the beneficial owner of the Korean source income. As of July 2024, Korea has concluded double tax agreements with 95 countries. The Korean tax authority tends to challenge the use of treaty countries by non-treaty country residents by aggressively applying the substance-over-form principle to argue that entities established in favourable treaty countries are not the beneficial owners of the relevant Korean source income. A ‘beneficial owner’ is a person who bears legal or economic risk related to Korean source income and who, in substance, holds ownership rights over such income, including disposal rights.

8.5.2 Transfer pricing issues

The Korean tax authority closely monitors companies whose profitability suddenly drops or whose profits fluctuate over a number of years. The Korean tax authority is likely to scrutinise companies that have had significant business restructuring, as well as those paying substantial royalties or management service fees to foreign companies and companies with financial transactions with overseas-related parties. Korea is a member of the Organization for Economic Co-operation and Development (OECD) and generally follows the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations (OECD Guidelines). However, the OECD Guidelines do not have the force of law, while the Law for the Coordination of International Tax Affairs (which governs transfer pricing) does. Accordingly, the Korean tax authority might not accept a taxpayer's arguments if they are based solely on the OECD Guidelines.

Chapter 9: Intellectual property

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9.1 Overview of the intellectual property rights system

Intellectual property refers to knowledge, information or technology; expression of an idea or emotion; mark of a business or product; type or genetic source of an organism; or other intangible object created or discovered through human creative activity or experience whose value as property could be realised. Intellectual property rights refer to the rights to intellectual property that are recognised or protected under laws and regulations or treaties.

In Korea, intellectual property rights are broadly classified into industrial property rights, which are managed by the Korean Intellectual Property Office, and copyright, which is managed by the Ministry of Culture, Sports and Tourism. Meanwhile, well-known marks or trade secrets, which have become subject to protection as a result of the prohibition of unfair competition and trade secret infringement under the Unfair Competition Prevention and Trade Secret Protection Act (UCPA), are now being perceived as new types of intellectual property.

When conducting business in South Korea, it is crucial to understand the types of intellectual property and protected subject matter, protection requirements and protection periods to determine how to manage and use one's intellectual property (see Table 1).

	Protected subject matter	Protection requirements	Protection period
Patent rights **(utility model rights)**	Inventions (creation of a technical idea using the rules of nature)	Industrial applicability/novelty/ inventive step	From the registration of the establishment of patent rights to 20 years after the filing date of the patent application (for utility model rights, ten years after the filing date of the application for the utility model registration)
Design right	Designs (shape, pattern or colour of a product, or the combination thereof)	Industrial applicability/novelty/ creativity	From the registration of the establishment of design rights to 20 years after the filing date of the design application
Trademark rights	Trademarks (a mark that is used to distinguish one's products from the products of others)	Intention to use, distinctiveness and lack of reasons for trademark registration refusal	Ten years from the registration of the establishment of trademark rights (renewals are possible)
Other protected subject matter under the UCPA	Marks that are widely known in South Korea Trade secrets	Well-known Not generally known or readily ascertainable, independent economic value and maintain confidentiality	Period during which the protection requirements are satisfied
Copyright	Works (creative work expressing human idea or emotion), computer programs, edited works or databases	Creativity	During the author's lifetime and for 70 years after their death

Table 1: Types of intellectual property

Intellectual property rights aim to protect intellectual property by granting exclusive rights to the right holders. However, the Monopoly Regulation and Fair Trade Act (MRFTA) aims to prevent monopolies and promote competition, thereby conflicting with the purpose of intellectual property rights. In contemplating such a situation, Article 59 of the MRFTA stipulates that 'this Act shall not apply to any act that is deemed the legitimate exercise of any right under the Copyright Act, Patent Act, Utility Model Act, Design Protection Act or Trademark Act.'

9.2 Patents

9.2.1 Patentable subject matter and patentability requirements

As a patentable subject matter, an 'invention' refers to an advanced creation of a technical idea using the rules of nature. In order for an invention to be registered as a patent, it: (1) should be applicable to an industry (industrial applicability); (2) cannot be technology that is already publicly known before its patent application (novelty); and (3) cannot easily be invented from prior art, even if it differs from prior art (inventive step).

9.2.2 Employee inventions

Matters pertaining to employee invention schemes are prescribed under Korea's Invention Promotion Act. In Korea, the requirements for an invention conceived by an employee to be

recognised as an employee invention, the following requirements ought to be met: (1) an employee shall create an invention with respect to their 'duties'; (2) the relevant invention shall fall under the 'scope of work' of an employer (user) given its nature; and (3) the relevant act of inventing shall fall under the 'current or past duties' of said employee. The employee invention scheme under the Invention Promotion Act applies to inventions, utility models and designs created by employees.

The 'right to obtain a patent' originally belongs to the inventor upon the completion of an invention, and such a principle also applies to an employee who creates an invention in connection with his/her duties at the employer company. However, the employer company has a non-exclusive licence to the patent held by its employee by law and should provide proper compensation to the employee if it succeeds the employee's 'right to obtain a patent' or patent right, or if it obtains an exclusive licence to the patent of the relevant employee invention by contract or employment policy. In such a case, the appropriateness of the compensation is determined by considering, among others, benefits to be obtained by the employer from such an invention and the respective contribution levels made by the employer and the employee to the completion of such an invention.

In practice, Korean courts adopt the following basic formula for calculating employee's invention compensation:

> [Employee's invention compensation = Profits to be gained by the employer X Employee's level of contribution X Joint invention contribution rate]

9.2.3 Patent application and registration

If there are two or more patent applications for the same invention, only the first person to file the application may obtain the patent. However, a person who intends to obtain a patent should submit a patent application form, detailed description of the invention, specification setting forth the claims, required drawings and abstract. The scope of claim in applications shall include one or more claims to be warranted protection. These claims ought to be supported by explanation of the invention, and should be presented in a clear and concise manner. Also, the scope of claim ought to specify the structure, method, function, substance or their combination, as necessary to clarify the invention for clarification of any claim to be warranted protection.

The patent application will be examined only when a request for examination is made within three years from the date of application, and if no request for application is made within such a period, the application will be deemed to be withdrawn. Before refusing an application, the examiner notifies the applicant of the ground for refusal in order to provide the applicant with the opportunity to revise the application and submit an opinion, and determines whether or not to grant a patent by following this procedure. A person whose patent application has been refused may request a trial seeking the cancellation of the refusal decision by claiming the illegitimacy of such a decision at the Intellectual Property Trial and Appeal Board (IPTAB).

If a decision to grant a patent is rendered, the applicant should register the establishment of the patent right by paying the registration fee. Such a patent right will then be created.

The content of the application of the registered patent will be publicly disclosed via the patent registration gazette. Upon the registration of its patent, the patent holder will have the exclusive right to use the patent invention as a business from the date of patent registration until 20 years from the date of patent application.

9.2.4 Patent infringement and relief

If: (1) a valid patent right exists; (2) the infringing product or method falls under the scope of protection of the patent invention; and (3) the infringer uses the infringing product or method as a business, despite the fact that it lacks legitimate authority to use the patented invention, this constitutes patent infringement. If a patent dispute arises, the relevant parties may seek relief through various methods (ie, claim seeking damages, claim seeking restitution of unjust enrichment, claim seeking injunction or prevention against infringement, claim seeking restoration of creditworthiness, and claim seeking establishment of patent infringement offence under the Criminal Act).

A patent holder may argue that the infringing product falls under the scope of protection applicable to the patent that it owns and thereby request a positive confirmation trial for the scope of the right at the IPTAB. A relatively more proactive method would be to file a suit for injunction against patent infringement, which aims to suspend the act of patent infringement together with a suit for damages.

Under Korea's Patent Act, there exist various assumptive provisions given the substantial difficulty in proving the compensation amount in litigations seeking damages arising from patent infringement. In line with the amendments to the Patent Act in 2019, the 'punitive damages scheme' was introduced according to which a person who deliberately infringed another's patent was liable to compensate up to three times the damages amount. According to the Patent Act amended in 2024 and the UCPA, the compensation amount has increased up to five times the damages amount. Compared to other countries, Korea imposes the highest level of quintuple punitive compensation.

Meanwhile, a person accused of patent infringement may argue that its product does not fall under the scope of protection of the patent held by the counterparty and thereby request a defensive confirmation trial for the scope of the right at the IPTAB. A more proactive measure would be to request a patent invalidation trial by arguing that the relevant patent has been registered, despite its failure to satisfy the patent requirements.

9.2.5 International application system

The Patent Cooperation Treaty (PCT) is a multilateral treaty executed in 1970. The PCT came into effect in 1978 to unify and streamline the international application procedures for patents and utility models. As South Korea has been a contracting state to chapters I and II of the PCT since 1984 and 1990, respectively, a patent applicant who intends to obtain a Korean patent may file an international application with the World Intellectual Property Organization (WIPO) or directly with the Korean Intellectual Property Office.

When selecting South Korea (Republic of Korea) as the designated state, the applicant should be cautious not to select North Korea (People's Republic of Korea). There have been instances of applicants only becoming aware of such an error after the deadline for correcting the designated state has elapsed or after entering the South Korean procedure. In such a case, the application cannot be submitted again as a new application in South Korea because it has lost novelty.

9.3 Design

9.3.1 Concept of design and design rights

A 'design' is the shape, pattern or colour of a product (including a part or the font type of a product, image (ie, any shape or symbol indicated using digital technology or electronic methods)) or the combination thereof that creates an aesthetic impression. A person who registers a design – that is, a creative work related to the product appearance – may enjoy exclusive rights to such a registered design. The basic framework of design registration is similar to that of patents.

9.3.2 Registration requirements of a design

Similar to patents, the registration requirements of a design are industrial applicability, novelty and inventive step; the only difference is that a design also requires creativity. However, even if a design satisfies all such requirements, its registration would not be permitted for the reason of public interest if it contravenes public order or morality. Also, only those designs without any concern of causing confusion with a product related to another person's business may be registered. In addition, a design that consists solely of shapes essential for securing the function of a product cannot be registered.

Industrial applicability means the ability to produce the design using industrial methods. An artwork, for example, which cannot repeatedly be produced in a simple manner cannot be subject to a design right, and an abstract design, musical note, ore or scent, etc cannot be registered as a design right either.

Furthermore, a design should have a fixed form. It cannot be a continuously changing object, such as a neon advertisement and colours of a flame. In addition, a design should be creative. A design that can be easily created using a shape, pattern or colour, or the combination thereof, that is widely known domestically or internationally, cannot be registered as it lacks creativity.

9.3.3 Unique systems under the Design Protection Act

Related design system

This system pre-emptively prevents the infringement and imitation of a registered design by allowing a person who has already registered or filed an application for a design (principal design) to change

such a design by modifying the shape, pattern, colour and so on of the product and to register such a changed design as a related design.

Set item design system

To register a design, an application should be filed per design. However, in case two or more articles compose one set, the design of the entire set may be registered as one design if the design of the entire set constitutes a coordinated whole.

Secret design system

In the event that a patent applicant requests said design to be kept confidential from the date of application for registration of design until the date of payment of initial design registration fee, the secrecy of its design will be maintained without being disclosed through the design gazette for up to three years from the registration of the establishment of the design right.

9.4 Trademarks

9.4.1 Source indicator protection system

A 'trademark' is a mark used to distinguish one's own product from the products of others. Deceiving consumers through the unauthorised use of another person's source indicators, including trademarks and stealing the reputation and credibility of the owner of such a source indicator, violates the law and is therefore not permitted.

In order to prevent such conduct, the UCPA, which is the general law on the protection of source indicators, prohibits the act of confusing consumers by using a mark that is identical or similar to a well-known mark, thereby protecting well-known marks. On the other hand, the Trademark Act protects source indicators in a more efficient way by granting trademark right holders exclusive rights to their registered trademarks.

9.4.2 Registration requirements of a trademark

To obtain a trademark right under the Trademark Act, a trademark should be registered. The requirements of trademark registration are:

- the intention to use;
- distinctiveness; and
- the lack of reasons for trademark registration refusal.

The Trademark Act lists the following as marks lacking distinctiveness:

- common name of goods;
- mark customarily used on goods;
- mark describing the features of goods;
- mark consisting of a conspicuous geographical name and so on; and
- simple and commonplace names and signs.

Further, the reasons for trademark registration refusal include the following:

- trademark that includes the name of a famous person other than the applicant;
- trademark that is identical or similar to a well-known trademark; and
- trademark with an unlawful purpose.

While there is no need to prove the intention to use the trademark at the time of trademark application and registration, not using the registered trademark on the designated product for at least three consecutive years before an objection is raised may result in the cancellation of the trademark registration. Trials seeking the cancellation of unused trademarks are a commonly used solution against trademark brokers that register famous foreign trademarks in South Korea in advance.

9.4.3 Effect of a trademark and trademark infringement

A trademark right is created upon the registration of its establishment and is effective for ten years, which can be renewed. The holder of a registered trademark right has the exclusive right to use such a registered trademark on the designated product. Therefore, the act of using an identical or similar trademark on an identical or similar designated product constitutes trademark infringement, and the holder of the trademark right may file a suit for injunction against trademark infringement and a suit for damages.

However, the Trademark Act also stipulates the scope in which a registered trademark is ineffective. More specifically:

1. a trademark that indicates one's own name, trade name and so on pursuant to business practice;
2. a trademark that indicates the common name, place of production, quality and so on in a common manner;
3. a trademark with an undistinctive three-dimensional shape;
4. a trademark consisting of a geographical name; or
5. a functional mark is not subject to the effect of a trademark right and, therefore, does not constitute trademark infringement.

The Supreme Court of Korea has ruled that, where a person registers a trademark identical or similar to another's previously registered trademark and uses it without consent from the first-to-file trademark holder, this constitutes infringement. This is true even if the invalidation of the later-filed

trademark has not been finalised. This decision overrules previous judicial precedent, which held that the use of a later-filed trademark did not infringe the first-to-file trademark until the invalidation of the later-filed trademark was finalised. The Supreme Court also has held that this finding applies to patent rights, utility model rights and design rights.

Meanwhile, a concerned party may request a trademark registration invalidation trial even after a trademark has been registered, claiming that such a trademark does not satisfy the registration requirements.

9.4.4 Doctrine of the exhaustion of trademark rights

If the holder of a trademark right or a person authorised by such a right holder transfers products indicated with a trademark registered in South Korea, the trademark right on such products will be exhausted as it has achieved its purpose, and the effect of such a trademark right will not affect the use, transfer or lending of such products.

Meanwhile, as the scope of a non-exclusive licence, including the designated product, survival period and region, depends on the relevant non-exclusive licence agreement, the use of a trademark by a non-exclusive licensee exceeding such a scope may be deemed to be an unauthorised use of such a trademark. However, the Korean Supreme Court recently held that the doctrine of exhaustion of trademark rights cannot be deemed inapplicable to all cases where the non-exclusive licensee transfers products in breach of an ancillary condition under the agreement, which is an unauthorised use of a trademark.

However, notwithstanding the exhaustion doctrine, the lower court holds that trademark rights can be exercised if 'processing or repairs are made to the extent that it undermines the identicalness with the original product', considering it akin to actual production activity. In a related case where a repair service provider was asked by a customer to reform a luxury brand bag, transforming it into a bag and wallet completely different in size, shape and purpose of use from the original. The court determines that such action could be seen as 'processing or repair made to the extent that it undermines the identicalness with the original product'. Based on this, the court rules that the original trademark holder could exercise their trademark right, as exceptions to the exhaustion doctrine applies.

9.5 Protection under the Unfair Competition Prevention and Trade Secret Protection Act

9.5.1 Prohibition of acts of unfair competition

The Unfair Competition Prevention and Trade Secret Protection Act (USPA) protects source indicators, consumer trust and safety of transactions by stipulating and prohibiting certain types of conduct as acts of unfair competition, including those that cause confusion about the source or mislead consumers about the place of origin.

The acts of unfair competition prohibited by the UCPA are as follows:

- causing confusion with another person's products by using a mark identical or similar to another person's product mark or business mark that is widely known in South Korea or selling, distributing, importing or exporting products bearing such a mark;
- damaging the distinctiveness or reputation of another person's mark by using a mark identical or similar to another person's product mark or business mark or selling, distributing, importing or exporting products bearing such a mark, as mentioned above;
- falsely marking the place of origin on products or by means of advertisements, or misleading consumers about the place of origin related to a product's place of production, manufacture or processing;
- falsely assuming another person's products or advertising, or marking on products or advertisements thereof, in a way that misleads consumers about the product quality and so on;
- act by a current or former agent of the relevant trademark right holder under the Paris Convention using a trademark identical or similar to the relevant trademark without a justifiable reason;
- unfairly obtaining a domain name in advance;
- transferring, lending, displaying, importing or exporting products that imitate the shape/form of products produced by another person;
- unfairly using economically valuable information that includes a technical or business idea of another person obtained in the course of negotiating or transacting with the other person for its own or a third party's business benefit in breach of the purpose of provision;
- wrongfully using data;
- using personal identifiable marks, such as a portrait or name of a famous person, without authorisation (infringement of publicity right); and
- infringing the economic benefit of another person by the unauthorised use of output achieved as a result of the considerable effort and investment of the other person and so on for its own business in breach of fair business practice or competition order.

Based on the 2018 amendment of the UCPA, the 'overall appearance of a business place, including signs, exterior appearance and interior decorations' became expressly included in a 'mark indicating another person's business that is widely known in Korea' prescribed in Article 2(i)(b) and (c) of the UCPA. Therefore, it has become easier to impose legal sanctions against a competitor who copies trade dress, such as the interior of a business place, with the enforcement of the foregoing amendment of the UCPA.

Additionally, following the 2021 amendment, acts involving 'wrongful use of data' and 'unauthorised use of personal identifiable marks, such as a portrait or name of a famous person' are explicitly classified as types of unfair competition. The amendment to the UCPA enables the protection of data essential for learning in the development of artificial intelligence (AI). Furthermore, amidst continuing controversy surrounding the feasibility in the protection of publicity right, Korea's relevant statute is the first-ever to specify a clause on the feasible protection of publicity right.

9.5.2 Prohibition of trade secret infringement

The unauthorised use of intellectual property developed by an investment made by another person also falls under an act of unfair competition in a broad sense. Under the UCPA, 'trade secret' is defined as production methods, sales methods or any other useful technical or business information in other business activities that are not publicly known, have independent economic value and have been kept confidential.

In order to protect economically valuable technical or business information from competitors, after applying for and registering a patent, after which the information will be publicly disclosed, a company should decide whether to license the patent or maintain/manage the information as a trade secret. If the company decides to maintain and manage the information as a trade secret, for the company to maintain the confidentiality of the information, it is common practice to have employees who could access such information sign a non-disclosure agreement together with a non-compete agreement.

However, it should be noted that court precedents have held as follows: even if a non-compete agreement exists between an employer and its employees, if such a non-compete agreement excessively limits the employees' freedom to choose an occupation and right to engage in work guaranteed by the Korean Constitution or excessively restricts free competition, then such an agreement falls under juristic acts contrary to good morals and other social order under Article 103 of the Korean Civil Act and, therefore, is null and void. In order to determine the validity of a non-compete agreement, the following should be considered:

- the employer's benefits worthy of protection;
- the position of the employee before their resignation;
- the period, region and business type subject to the non-compete agreement;
- whether compensation was given to the employee;
- circumstances that led to the employee's resignation; and
- the public interest and the relevant circumstances.

9.5.3 Publicity right

Until recently, there were no regulatory provisions in Korea to serve as the basis for publicity rights, leading to divided court findings on whether to recognise publicity right and its legal basis on a case-by-case basis. In 2020, the court ruled that developing and reselling a photo book by using the names and photos of the popular boy band BTS without authorisation constituted an 'act infringing another's economic profit by unauthorised use of other deliverables that another generated based on their considerable investment or effort, for one's own business via means going against fair commercial trade practice or competitive order,' as prescribed as a supplementary general clause under the UCPA.

Under the UCPA amended in 2021, separate from portrait rights as personal rights, any act infringing 'identifiable marks, such as another's name, portrait, voice, or signature, etc that is widely known in Korea and possess economic value' (so-called publicity right) is classified as a type of unfair competition. Such infringement acts may be subject to a claim seeking injunctions, damages, or corrections, but are not subject to any criminal punishment.

9.6 Copyright

9.6.1 Concept and establishment of a copyright

A 'work' refers to a creative product that expresses human ideas or emotions. There is a wide variety of works, including literary works, music, art, architecture, cinematographic works and computer programs. A copyright is established once the author creates a piece of work, and no procedure or form is needed to establish such a right. Thus, although there is a separate system for registering copyrights, the registrant is merely presumed to be the copyright holder. Meanwhile, unlike inventions, the copyright to works is reserved to the employer company of the original creator of such works.

Copyright can be broadly classified into the author's economic rights and the author's moral rights. The author's moral rights, including the right of disclosure, right of attribution and right of integrity, cannot be transferred as they are personal rights attached to the author. On the other hand, the author's economic rights, including the right of reproduction, right of public performance, right of broadcasting, right of distribution, right of lending and right of the production of derivative works, are transferable and may be assigned or inherited.

9.6.2 Protection of programme formats

As the subject matter for copyright protection is limited to specific creative external expressions of human ideas or emotions using speech, letters, musical notes or colours, among others, ideas do not receive legal protection. However, it has been a seriously debated issue whether the law could prevent a third party committing the unauthorised use of a significant constituent element/component that forms the identity of the relevant company's representative game or television programme as a format and developing a work that copies the original with some modifications to the method of expression. The Korean Supreme Court has recently rendered a decision regarding this issue that increases the likelihood of such legal protection.

The Supreme Court ruled on a case where the plaintiff claimed that the defendant infringed on their copyright by imitating, producing, broadcasting and transmitting a video similar to the one created and broadcast by the plaintiff. The court founded that when determining the creativity of a reality TV programme, it is necessary to consider not only the creativity of each individual element comprising the programme but also how these elements are selected and arranged according to a specific production intention or policy. This combination should result in the programme having

a distinctive creative character that differentiates it from other programmes, thus qualifying it for copyright protection.

9.6.3 Responsibility of online service provider

An 'online service provider (OSP)' refers to '(i) a person who transmits or designates or provides connection of a route via an information and communications network, for the purpose of conveying copyrighted works, etc without any changes thereto as selected by a user between sections that the user designated' or '(ii) a person who provides services or who provides or operates relevant facilities to ensure that copyrighted works, etc are reproduced and transmitted by users through or by accessing an information and communications network.'

Pursuant to the Copyright Act, a person claiming copyright infringement through the services of an OSP can present such a fact and relevant evidences and request the OSP to stop the reproduction and/or transmission of copyrighted works. Upon receiving such a request the OSP is obligated to immediately halt the reproduction and/or transmission of the works. However, if the reproducer or transmitter being accused of copyright infringement, asserts that their act was justifiable and requests the resumption of reproduction or transmission to the OSP, the OSP must notify such fact and scheduled resumption date to the person alleging the copyright infringement and resume reproduction or transmission on said scheduled date, provided that the foregoing shall not apply where the person alleging the copyright infringement notifies the OSP on the filing of litigation prior to the scheduled date.

Meanwhile, the liability of an OSP for copyright infringement committed by users of its services, the court has that if the illegality of the infringing content posted on the OSP's internet space is evident, and the OSP has received specific and individual requests from the copyright holder to delete or block such content, the OSP is obligated to take appropriate actions. This obligation applies even if the OSP has not received direct requests from the copyright holder, provided that the OSP was aware of the circumstances of the posting or the existence of the infringing content was clearly apparent. Furthermore, if it is technically and economically feasible for the OSP to manage and control such content, the OSP must delete the infringing content and take measures to prevent similar content from being posted in the future. Failure to do so, thereby facilitating the copyright infringement, can result in the OSP being held jointly liable as an accomplice by omission for the infringing acts committed by the user who posted the content.

9.6.4 Effect and limitation of a copyright

A copyright is protected during the lifetime of the author and for 70 years after their death. During such a period, the copyright holder reserves the exclusive right to use the work.

However, the author's economic rights are not limitless there exist certain limitations as set forth below. In each of the following cases, a user may use a work without having to obtain the author's permission, and such use will not constitute a copyright infringement:

- use for the purpose of a trial proceeding, political speech, school education, press release and so on;
- reproduction of current event articles and commentaries;
- quotation of publicly disclosed works – in the case in which works are being quoted for the purpose of media reporting, review, education and research within a legitimate scope pursuant to fair practices;
- performance or broadcasting for a non-profit purpose;
- reproduction for private use;
- reproduction at a library, reproduction as test questions or reproduction for the visually or hearing impaired and so on; or
- temporary audio/video recording by a broadcaster or temporary reproduction during the process of using the works.

Aside from the foregoing provisions, comprehensive fair use of works provisions were incorporated in the Korean Copyright Act (Article 35-5) during the process of executing the United States–Korea Free Trade Agreement in 2011. Such provisions provide the following standards for determining fair use: (1) purpose and nature of use; (2) type and purpose of the work; (3) proportion of the used part from the entire work and importance thereof; and (4) impact that the use of the work will have on the current or potential market, or value of such a work.

Therefore, if the defendant in a copyright case produced or handled a work that is identical or substantially similar to the works of the plaintiff without obtaining the permission of the plaintiff – that is, the copyright holder – there is no legitimate reason for the limitation of rights to take effect, and the defendant will be deemed to have committed copyright infringement if it cannot prove that it independently produced the work. In such case, the plaintiff may file for an injunction and claim damages against the copyright infringer, and even file a criminal complaint.

Chapter 10: Financing

Kyung Hwa Moon, Shin & Kim, Seoul

10.1 Banking and finance

10.1.1 Financial regulatory framework

In order to conduct financial business in South Korea, a financial business licence or financial business registration is required. Korean financial institutions are subject to the supervision of the FSC and its administrative body, the Financial Supervisory Service.

10.1.2 Banking regulations

The primary statute governing the banking industry in South Korea is the Bank Act, which provides for licensing requirements for and regulations on the banking business. A Korean bank must comply with prudential regulations on its banking activity, including capital adequacy, loan loss provisions, limitations on credit exposure to a single customer, loan-to-deposit ratios, and liquidity and risk management. Currently, there are no legal controls on interest rates on bank loans, except for the cap of 20 per cent per annum on interest rates under the Act on Lending Business.

10.1.3 Types of financial products

Under the FSCMA, financial products are broadly classified into two categories – securities and derivatives – depending on the nature of the risk of loss involved. A security is an investment product that carries a possibility of loss up to the amount of the investment principal. A derivative is an investment product that carries a possibility of loss over and above the amount of the investment principal.

10.1.4 Foreign exchange regulations

All transactions between residents and non-residents of South Korea are subject to regulations under the Foreign Exchange Transaction Act, and depending upon the nature of the relevant transaction:

such a transaction can be freely made without any approval or reporting requirements (eg, a Korean won-denominated or foreign currency-denominated loan from a Korean bank to a resident of South Korea, or a foreign currency-denominated loan from a Korean bank to a non-resident of South Korea without any guarantee or collateral provided by a resident); or

a report to a foreign exchange bank, the Bank of Korea or the Ministry of Finance and Economy (eg, a foreign currency-denominated loan from a Korean bank to a non-resident with a guarantee or collateral for the benefit of such non-resident borrower, a Korean won-denominated loan from a Korean bank to a non-resident in an amount exceeding KRW 1bn (equivalent to US$750,000) or the issuance of securities by a non-resident of South Korea).

10.2 Equity financing

10.2.1 Public offering

The FSCMA defines the ‘public offering’ of securities as the offering of securities to 50 or more offerees (including the total number of offerees for the same kind of securities privately placed during the past six months). The number of offerees does not include certain related persons of the issuer and professional investors as designated under the FSCMA. Even if the number of offerees is less than 50:

1. the offering of newly issued shares of a Korean issuer will be deemed as a public offering of securities where: (i) the issuer has conducted the public offering of the shares in the past; or (ii) the shares of the issuer are listed on KRX; and

2. the offering of newly issued securities of a non-Korean issuer will be deemed as a public offering in the case where: (i) the securities (including shares and debt securities) issued by the issuer are listed on the KRX; or (ii) Korean residents own 20 per cent or more of the total issued shares of such an issuer as of the most recent fiscal year end.

A public offering of securities with an aggregate offering amount of KRW 1bn or more, including (1) the total amount of the same kind of securities publicly offered without filing a registration statement during the past year; and (2) the total amount of the same kind of securities privately offered during the past six months, requires the filing of a registration statement with the FSC. A failure to file the registration statement may result in the imposition of an administrative sanction and/or criminal sanction, including imprisonment or the imposition of a criminal fine.

10.2.2 Listing

A company must apply to list its shares on the KRX. In the case of a non-Korean company, it should conduct a prior consultation with the KRX at least one month prior to filing the application for a preliminary eligibility review.

As part of the consultation process, the non-Korean applicant must submit its constitutive document incorporating certain mandatory matters under Korean law as prescribed in the KRX rules for investor protection. KRX sends the notice of eligibility clearance within three months (65 business days) in case of an application being filed by a foreign applicant in case of an IPO, but within two months (45 business days) in case of secondary listing of the applicant which is already listed on one of the overseas markets designated by KRX.

If the applicant satisfies the preliminary eligibility review requirements (including the quantitative and qualitative criteria), it can proceed with the public offering of the shares and submit the primary listing application to the KRX. The shares of the applicant will be traded on the KRX once the KRX grants its listing approval. The company, the shares of which are listed on the KRX, will be subject to various disclosure requirements under the FSCMA and the KRX rules.

Chapter 11: Privacy laws and data protection

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The legal framework of privacy in South Korea consists of the Personal Information Protection Act (PIPA) as the overarching law, accompanied by various industry-specific laws, including the following key legislation:

- the Credit Information Use and Protection Act, which specifically regulates credit-related information of a person and industries that process such information.
- the Act on the Protection, Use, etc of Location Information, which regulates location information of things and natural persons; and
- the Act on Promotion of Information and Communications Network Utilisation and Information Protection (the 'IT Network Act'), which regulates transmission of advertising information and accessibility functions on mobile device, etc.

Unless otherwise provided for in industry-specific laws, the protection of personal information is governed by the PIPA. In early January 2020, the first wave of major amendments to the Korean data privacy laws were passed, which took effect on 5 August 2020, and the second wave on March 2023 vastly amended the PIPA, which came into effect on 15 September 2023. As the specific rules and regulations pertaining to the amendments have recently become available, close monitoring of the legal developments on this front is necessary for a full appreciation of the practical implications of these amendments.

11.1 Personal Information Protection Act

The PIPA applies generally to the collection and processing of personal data. The term 'personal data' refers to any information pertaining to a living person (ie, a data subject), such as the name, resident registration number and images by which the individual in question may be identified (including information by which the individual in question cannot be identified alone, but can be identified through a simple combination with other information) (Article 2.1, PIPA).

11.2 Key principles

11.2.1 Lawful bases for collection and processing

The collection and processing of personal data must have a lawful basis, and this generally means explicit, opt-in consent unless another lawful basis is applicable. To be valid as consent, the consent must meet both formal and substantial requirements. Formal requirement wise, the data subjects must be notified of and consent to the following prior to the collection and processing of their personal data:

1. the purpose for which the data will be collected and used;
2. the items of personal data to be collected;
3. the length of time the personal data will be retained and used; and
4. the fact that data subjects have the right to refuse consent to having their personal data collected and used and the consequences of refusing consent.

Substantially:

1. the data subject must be able to decide whether to consent based on their free will;
2. the content of the consent must be specific and clear;
3. plain and easy-to-understand language must be used; and
4. a method must be provided which allows the data subject to clearly indicate their consent or refusal.

Other instances of lawful bases include where:

1. the collection is necessary to enter into or to perform a contract with the data subject;
2. the collection is necessary to protect the data handler's legitimate interests (which take precedence over the data subject's rights), provided that the information is substantially relevant to the data handler's legitimate interests and the scope of the collection is reasonable;
3. the collection is necessary to comply with law or to fulfil a legal obligation; or
4. the collection of personal data is clearly necessary for the protection of life, personal or proprietary interests of the data subject or a third party, but where it is not possible to obtain informed consent from the data subject or their legal guardian due to:
   (i) the data subject's inability to express their intentions; or
   (ii) the data subject's address is unknown and so on (Article 15.1, PIPA).

Separate consent is required for collection and use, transfer to third party, use or transfer outside of the original scope of consent, processing of sensitive information and processing of unique identifying information. Separate consent is also required for promoting or soliciting the sale of goods or services, and for any third-party transfer of personal data from the data handler to the recipient, for which consent must be obtained after notifying the data subject of the following:

1. the name or title of the third party;
2. the purpose of the transfer of personal data;
3. the items of personal data to be transferred;
4. the length of time the personal data will be retained and used by the third party; and
5. the right of refusal by the data subject and the consequences of refusal.

11.2.2 Purpose limitation

A data handler must clearly identify the purpose of data processing (Article 3.1, PIPA). At the time of the collection of personal data, the data handler must inform the data subject of the purpose of the collection and obtain the data subject's consent thereto (Article 15.2, PIPA). In order to use personal data outside the scope of the intended purpose or to transfer personal data to a third party, the data handler must inform the data subject of such a purpose and obtain the data subject's consent thereto.

11.2.3 Retention

Prior to collecting and using any personal data, the data handler must notify the data subject of the purpose of the collection and use of the collected data, as well as the period during which such data would be retained by the data handler. Upon the achievement or exhaustion of the specific purpose, or the expiration of the retention period for the collected data, the data handler must destroy the personal data without delay.

11.3 Major amendments to data privacy laws in 2020

At the start of 2020, South Korea passed major amendments to key statutes governing the protection of personal data, which enabled and largely freed up the use of pseudonymised personal data, helped further clarify the latitude for the use of personal data, enhanced the right of the data subject and provided consolidation of the regulatory authority. These amendments took effect on 5 August 2020.

11.3.1 Consolidation of the related laws

The majority of data protection-related provisions in the IT Network Act were consolidated into the PIPA, thereby making the PIPA the primary data privacy law applicable to the handling of personal data by IT service providers.

11.3.2 Use of pseudonymised personal data

The amended PIPA allowed pseudonymised personal data to be used – without the need for the individuals' consent – for the purpose of generating statistical information, scientific research or public record-keeping. The statute also allowed the compilation of pseudonymised personal data (sourced from different data controllers) by specialised institutions, designated for such purposes by the Personal Information Protection Commission and other central government agencies.

Meanwhile, it should be noted that the amended PIPA did not expressly allow for the use of pseudonymised personal data for commercial purposes.

11.3.3 Expanded latitude for the use of personal data

Filling what had been a significant gap in the PIPA framework, the amendments provided that personal data may be used without need of further consent from the data subject, 'within a scope reasonably related to the original purpose of collection' of the personal data, subject to factors including the absence of detriment to the data subject, the taking of necessary security measures (eg encryption) and other criteria. These provisions were modelled after Article 5(1)(b) and Article 6(1)(f) of the EU General Data Protection Regulation (GDPR).

11.3.4 Consolidation of the regulatory authority

The regulatory oversight of data protection was divided among the Ministry of Interior and Safety, the Korea Communications Commission and the Personal Information Protection Commission (PIPC). This included such functions as monitoring and policing compliance, and promulgating the recommended practices and privacy policy terms. Under the amended PIPA, however, these functions were all entrusted to the PIPC. The nine-member PIPC comprise of government officials and various law and policy experts. This change in the regulatory apparatus was evidently intended in part to meet GDPR standards for an 'independent regulator', so as to help obtain an 'adequacy' decision from the European Commission, which would relax the data flow from the EU to South Korea.

11.3.5 Data subject prerogatives augmented, including data portability

Individual data subjects were granted portability rights, including to require financial institutions (as well as public sector bodies) to transfer their credit personal data to various kinds of credit personal data management companies and other financial institutions, or to the data subjects themselves. Aiming to bolster data subjects' autonomy when it comes to personal data, the law introduced a right to respond to automated assessments, including requiring the financial institution to explain the results and to furnish, correct or delete relevant data. The amended framework in this respect still requires a host of ensuing rules and standards. Giving effect to these data subject prerogatives also resulted in a considerable scope of expense and technical/system implementation, including, for example, protocols and tools to minimise bias/error in AI-based assessment processes.

11.4 Major amendments to PIPA in 2023

11.4.1 Deletion of special provisions for information and communications service providers

The special provisions for telecommunication service providers have mostly been deleted under the principle of 'same activity, same regulation'. Previously, the PIPA had special provisions for telecommunication service providers with regards to consent to collection, notification of leakage, protection measures, deletion of data and overseas transfers, etc. As the regulations have been unified, the special provisions have been integrated and refined into general regulations and expanded to apply to all processors.

11.4.2 Expansion of the upper limit and scope of penalties

In the same context as above, the special provisions concerning penalties that were previously applied exclusively to telecommunication service providers have been deleted and generalised to apply to all data controllers.

Further, the most severe administrative sanction available for primary types of violations, such as collecting or transferring personal information without the required consent, has been an administrative fine of up to three per cent of the data controller's revenues 'relating to the violative conduct', normally meaning revenues relating to the affected service in Korea.

Under the amended PIPA, this maximum penalty has been strengthened to three per cent of the data controller's total revenues altogether – in other words, worldwide and across its entire range of revenues – provided that the total revenue excludes any portions that the PI controller proves are irrelevant to the violation.

11.4.3 Conditions and regulations for overseas transfers

The amended PIPA has broadened the conditions for overseas transfers of personal information by including cases (1) when specific provisions in laws, treaties, or other internation agreements exist, (2) when necessary for the conclusion or performance of a contract with the data subject, (3) when the recipient has received personal information protection certification and (4) when the country or international organisation to which the personal information is being transferred has a level of personal information protection that is substantially equivalent to that of domestic law.

At the same time, the Act imposed stricter regulations for violations by authorising the PIPC to order the suspension of overseas transfers.

11.4.4 Strengthening the rights of data subjects

Data subjects can request the transfer of their personal information to themselves or a third-party meeting certain safety standards. This applies to personal information processed by information devices but not to information separately generated from the collected data by the data processor.

Data subjects now have the right to refuse their personal information from being subject to fully automated decision-making (ie AI-powered decisions), when their rights or obligations are significantly affected. Additionally, data subjects can also demand explanations of automated decisions once such decisions have taken place.

Chapter 12: Competition law

Seung Hyuck Han, Yulchon, Seoul

12.1 Business establishment: merger control

Under the MRFTA, the merger filing obligation to the KFTC is triggered if the following thresholds are satisfied:

- The type of transaction caught:
  - a merger with another company;
  - acquisition of all, or a substantial part, of another company's business or assets for business;
  - acquisition of 20 per cent (or 15 per cent for domestic listed companies) or more of voting shares;
  - share acquisition whereby a company, having 20 per cent or more of shares in another company (or 15 per cent for a domestic listed company), becomes the largest shareholder in that company;
  - participation in the joint establishment of a new company (ie, establishment of a joint venture); or
  - creation of an interlocking directorate relationship.
- The size-of-party test:
  - worldwide assets or turnover of at least one of the parties (including its affiliates) is KRW 300bn (approximately €229.8m/US$257.2m) or more; and
  - worldwide assets or turnover of the other party (including its affiliates) is KRW 30bn (approximately €22.9m/US$25.7m) or more,
- The size-of-transaction test:
  - the transaction value test: the transaction value is KRW 600bn or more; and
  - the Korean nexus text: (1) within the three years preceding the transaction, the target sold products or provided services to at least one million people in Korea in a single month during the period, or (2) within the three years preceding the transaction, the target (i) has leased Korean R&D facilities or has utilised Korean research personnel, and (ii) had an annual 'related budget' of at least KRW 30bn as spent and recognised as such on its financial records in any of the three years.
- For transactions involving a foreign company, the following local nexus test must additionally be met:
- the local nexus test: if both parties to the transaction are foreign companies, or if the notifying company is a Korean company while the counterpart company is a foreign company, each foreign party's turnover in South Korea must be KRW 30bn (approximately €22.9m/$25.7m) or more.

The MRFTA prohibits a merger that substantially restricts competition in a certain market. According to the voluntary merger remedy procedure, during the KFTC's merger review process, the merging parties may submit a written proposal to the KFTC outlining a remedy aimed at addressing any anti-competitive concerns stemming from the merger.

12.2 Conducting business operations

12.2.1 Cartel

A company shall not agree with other companies by contract, agreement, resolution or any other means to jointly engage in, or solicit any other companies to perform, any of the following conduct, if such conduct unfairly restricts competition:

- fixing, maintaining or changing prices;
- determining terms and conditions of trade;
- restricting production or distribution of goods or services;
- market allocation;
- interfering with or restricting the establishment or expansion of facilities or installation of equipment necessary for manufacturing products or providing services;
- restricting the types or specifications of products manufactured or services offered;
- jointly carrying out the main parts of a business, or jointly establishing a company for the same purpose;
- bid rigging; and
- any other practices that substantially restrict competition in a particular market by interfering with other companies' businesses or exchanging price, output or other information, including cost, inventory, sales volume and trade terms, terms of payment, as prescribed by the Presidential Decree.

The KFTC may impose penalties for any cartel activities, such as remedial orders, administrative fines (up to ten per cent of the sales of the relevant goods or services), or may make a criminal referral against an individual or company that engages in such activities.

12.2.2 Abuse of dominance

A company with a dominant market position must not engage in any of the following:

- unfairly determining, maintaining or changing the price of goods or services;
- unfairly controlling the sale of goods or the provision of services;
- unfairly interfering with the business activity of any other company;

- unfairly interfering with market entry of another company;
- unfairly excluding competitors; or
- other business activity that may substantially undermine consumer interests.

A market dominant position is presumed if (excluding a business entity with annual sales or purchases of less than KRW 8bn in a particular business area):

- a single company owns more than a 50 per cent market share; or
- three or fewer companies collectively own more than a 75 per cent market share.

Otherwise, dominance is determined based on factors such as: (1) concentration of the market;

(2) entry barrier; (3) possibility of collusion among competitors; (4) similarity between products or adjacent markets; and (5) relative size of competitors.

The KFTC may impose penalties for any abuse of dominance, such as remedial orders, administrative fines (up to three per cent of the sales of the relevant goods or services), or may make a criminal referral against an individual or company that engages in such activity.

Prohibitions on abuse of market dominance by online platform operators

Prohibitions on abuse of market dominance by online platform operators are governed by the KFTC's Review Guidelines on Abuse of Dominance by Online Platform Operators (the 'Online Platform Review Guidelines').

Applicability

- 'Online platform operators,' include (1) online platform mediation services, (2) online search engines, (3) SNS, (4) digital content providers, (5) OS providers and (6) online advertisement service providers.
- This extends to actions by foreign entities conducted overseas that impact the domestic (Korean) market.

Assessment

- Relevant market: the KFTC considers unique aspects of online platforms such as multi-sided markets, provision of 'free' services, and dynamic market conditions when defining the relevant market, in addition to standard relevant market considerations.
- Dominance: in assessing market dominance of online platform operators, the KFTC examines barriers to market entry due to cross-network effects, their role as gatekeepers, data collection, retention, use capacities, and potential for developing new services.
- Anticompetitive effects: when assessing the anticompetitive impact of online platform conduct, the KFTC considers:

- unique aspects of online platforms;
- factors beyond changes in prices and production volumes, such as decreases in quality and increases in user costs;
- the effects of bundling or tying products/services;
- relationships between user groups in different relevant markets; and
- impacts on innovation.

The Online Platform Review Guidelines also set out the following representative types of anticompetitive conduct by online platform operators:

- restricting multi-homing: any direct or indirect interference with the use of competing online platform services by users;
- demanding most favoured nation (MFN) treatment: requiring equally favourable or most favourable terms and conditions for its online platform services as offered for competing online platforms;
- self-preferencing: providing direct or indirect preferential treatment for its proprietary products and services on its online platform; and
- tying: conditioning the use of its online platform services on the use or purchase of another product or service.

12.2.3 Resale price maintenance

No company may engage in resale price maintenance, except for the maximum price maintenance with justifications.

12.2.4 Unfair trade practice

A company shall not engage in the following unfair trade practices:

- unfairly refusing to transact or do business with others or discriminating against certain companies;
- unfairly excluding competitors;
- unfairly soliciting or coercing customers from other companies;
- unfairly abusing one's superior bargaining position in a transaction;
- imposing unfair terms and conditions that restrict the business activity of another company or otherwise disrupting the business activity of another company;
- providing funds, assets, manpower and so on to other companies or specially related companies under commercially unreasonable terms and conditions; or
- other business activity that may restrain competition and fair trade.

Special regulations may apply prior to the MRFTA for abuse of superior bargaining power among certain business relationships:

- Fair Transactions in Subcontracting Act (applies to a subcontract transaction with small to medium-sized subcontractors);
- Franchise Business Promotion Act (applies to franchisor–franchisee relationships and transactions);
- Act on Fair Transactions in Large Retail Business (applies to transactions between a large retail business and a supplier); and
- Fair Agency Transactions Act (applies to transactions between a supplier and an agency).

Chapter 13: Initiating and conducting a civil action

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Civil litigation is the most favoured method of dispute resolution for sizeable commercial disputes in South Korea, notwithstanding the fact that various alternative dispute resolution (ADR) methods have grown increasingly popular in recent years. This chapter on dispute resolution seeks to provide a brief overview of initiating and conducting civil litigation in South Korea.

13.1 General overview

13.1.1 Legal system

Originally modelled on the German legal system, South Korea adopts a civil law litigation procedure designed primarily to be adversarial, although it also has some inquisitorial components. For instance, Article 136(1) of the Civil Procedure Act explicitly allows a judge to assume an active and inquiring role by directly asking parties questions on or requesting them to prove factual or legal matters.

13.1.2 Court structure and composition

South Korea has a three-tiered judicial system: (1) the courts of first instance; (2) the courts of the appellate level; and (3) the Supreme Court. As South Korea is not a federal state, it has a single judicial system across the nation. The district and high courts of appeal are subdivided into individual courts that hear civil, criminal, family, juvenile, administrative, intellectual property and bankruptcy matters.

13.2 Pre-action conduct

Compared to courts in other jurisdictions, South Korean courts are known to be more willing to allow interim measures such as preliminary attachments and provisional injunctions.

13.2.1 Preliminary attachment

An applicant requesting a preliminary attachment, which is a widely sought form of measure, must satisfy the following: (1) establish a *prima facie* case; (2) prove that the assets are owned by the debtor; and (3) prove that the enforcement of the judgment would be difficult, if not impossible, unless the order is granted by the court.

13.2.2 Summary motion

Pre-action motions, such as a motion for summary judgment or motion to dismiss, are not available in South Korea.

13.3 Initiation of a civil action

13.3.1 Process

As in most jurisdictions, a civil action in South Korea commences with the filing of a complaint with the court that has jurisdiction over the case. It should be noted that class actions are not available in South Korea, except under the Securities-Related Class Action Act for disputes involving securities transactions. Save for the aforementioned exception, each claimant, therefore, should file an individual action.

Service of process is carried out only by the court. Unless served via public notice, a defendant is allowed 30 days from the receipt of the complaint to file a statement of defence.

13.3.2 Fees and third-party funding

Court costs generally consist of the following: (1) stamp fees or filing fees (approximately 0.5 per cent of the total claim amount); (2) service of process fees; (3) other out-of-pocket expenses such as *per diem* fees for witnesses; and (4) attorneys' fees.

There are currently no Korean laws or regulations on third-party funding. It should, however, be noted that Article 32 of the Attorney-at-Law Act prohibits an attorney from becoming an assignee of any right in a legal dispute.

13.4 Conduct of a civil action

13.4.1 Evidence gathering

Compared with the discovery process in common law jurisdictions (eg, the United States), the discovery process in South Korea is extremely limited in its manner and method. For instance, a party seeking certain documents should make an application to the court rather than making requests through direct *inter partes* communication. Further, a party cannot make general applications for documents, but should identify specific documents sought. For instance, Article 345 of the Civil Procedure Act provides that a document production request should include the following: '(i) indication of the document; (ii) purport of the document; (iii) holder of the document; (iv) facts to be proved; and (v) causes of an obligation to submit the document'.

After such a specific request has been submitted, the presiding judge has full discretion to accept or reject the application, and determine the scope and method of discovery, if such an application is accepted. In this way, all the discovery process is conducted under the direct supervision of the court.

13.4.2 Evidentiary standard

The evidentiary standard in a civil litigation in South Korea is 'preponderance of evidence', while the 'beyond reasonable doubt' standard is used for criminal cases.

13.4.3 Hearing

In lieu of concentrated hearings (ie, hearings for a set period of consecutive days or weeks), a civil action in South Korea proceeds by holding multiple hearings generally in four-week to six-week intervals. As the entity with sole and exclusive authority to manage a litigation case, South Korean courts determine the procedural timetable of a given case, including the submission dates of various briefs and court hearings. Generally, a written judgment is rendered approximately four to eight weeks after the closing of the last hearing.

13.4.4 Confidentiality

Save for exceptional instances in which a court determines that a public hearing would be detrimental to national security or public policy, all civil case hearings are not confidential and are open to the public.

13.4.5 Jury trial

A limited number of criminal cases have adopted some aspects of a jury trial. As for civil actions, however, there is no jury trial.

13.4.6 Duration of a civil action

The duration of a civil action understandably depends on the nature and complexity of the given case. Generally speaking, the timeframe could be estimated as follows: (1) six to 18 months at the first instance court; (2) six to 12 months at the appellate level; and (3) four months to two years at the Supreme Court level.

13.5 Grounds and standard of review for appeals

Korean civil procedure allows for broad grounds for appeals.

13.5.1 An appeal to a High Court of Appeal

An appeal to a High Court of Appeal could be made on both points of law and fact. During the appeal, parties are allowed to submit new evidence and arguments. As to the standard of review, the appellate level reviews the judgment rendered by the court of first instance *de novo*.

13.5.2 An appeal to the Supreme Court

The judgment of the appellate level, on the other hand, can only be brought before the Supreme Court on questions of law.

13.6 Judgment and enforcement

13.6.1 Available final remedies

In a civil action in South Korea, the parties can seek and the courts can grant the following remedies: (1) specific performance; (2) expression of intention constituting a juridical act; (3) damages; (4) injunction; and (5) declaratory relief.

13.6.2 Allocation of costs

South Korean courts determine the allocation of costs incurred by the parties in a civil action. In principle, the court orders the losing party to bear all litigation costs.

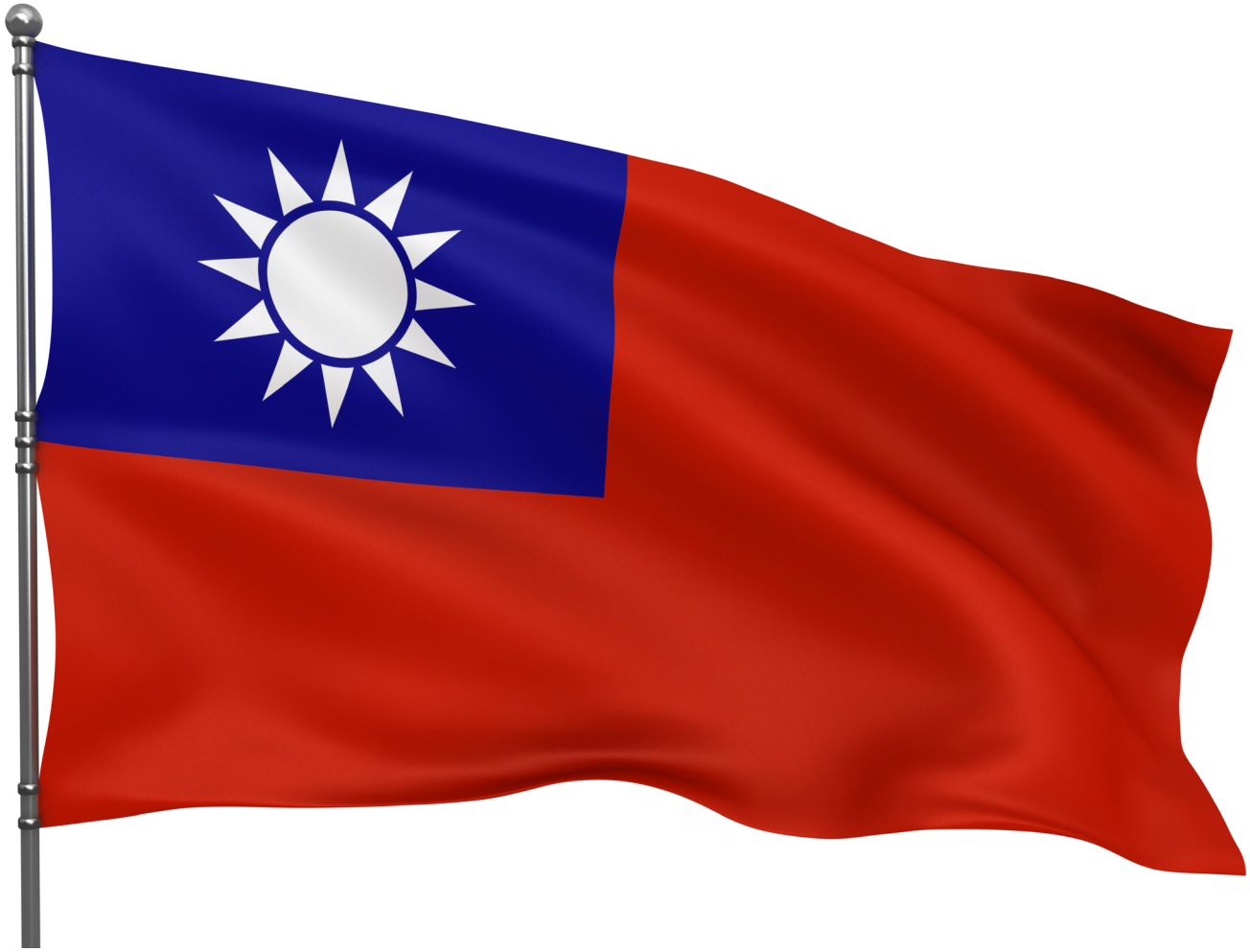
13.6.3 Enforcement

After the issuance of a final judgment on monetary claims, the prevailing party can enforce the judgment against the property or assets of the losing party by requesting the court to place the property or assets in a public auction and to distribute the proceeds from the foregoing process.

13.7 Settlements

Both out-of-court and in-court settlements are available. Parties may opt for settlement at any stage of the civil proceedings. In the event that the parties settle their dispute through an in-court settlement, it will be recorded in the court protocol. Having the identical effect of a final judgment, the recorded settlement becomes fully enforceable.

Taiwan



Chapter 1: Introduction

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Situated at the centre of the Asia–Pacific region, Taiwan has a strategically advantageous economic position. It is geographically linked to Japan, the world's third-largest economy, to the north; to ten ASEAN nations and India to the south; the United States, the world's largest economy, to the east; and Mainland China, the world's second-largest economy, to the west. Taiwan's well-developed infrastructure, robust industrial clusters and exceptional human resources have laid a solid foundation for its industrial development.

With an area of approximately 36,000 square kilometres and a population of around 23 million, Taiwan boasted a GDP per capita of TWD 36,833 in 2023, ranking 21st in the world. Its purchasing power parity (PPP) was approximately TWD $74,000 per person, placing it 20th in the world. Taiwan's exceptional economic freedom and competitive investment environment have earned international recognition. According to the 2021 Index of Economic Freedom by the Heritage Foundation, Taiwan ranks fourth globally. Additionally, the International Institute for Management Development (IMD) places Taiwan sixth in the world for competitiveness. Furthermore, in the Investment Environment Risk Assessment Report by Business Environment Risk Intelligence (BERI), Taiwan ranks 14th globally and fifth in the Asia–Pacific region.

Taiwan is globally renowned for its research and development (R&D), manufacturing and operational capabilities in the technology industry. Reports indicate that Taiwan's output in terms of the global foundry market is NTWD 80bn, accounting for a significant 77.9 per cent share (excluding integrated device manufacturers). Among these, TSMC or Taiwan Semiconductor Manufacturing Company Limited, holds a dominant 60 per cent of the global market share, solidifying its leading position. UMC and GlobalFoundries follow each holding about six per cent, securing third place. In the integrated circuit (IC) packaging and testing sector, Taiwan's output value reaches TWD$18.7bn, representing 52.6 per cent of the global market. For IC design, Taiwan's output value is TWD$35.2bn, accounting for 21.3 per cent of the global market, ranking second.

Recently, the Covid-19 pandemic has accelerated the global development of artificial intelligence (AI), leading to its widespread application across various industries. Taiwan, a critical production base for AI servers, plays an indispensable role in the AI arena. Enterprises such as TSMC, ASUS, Foxconn, ASE Group and Wiwynn all play crucial roles in the AI industry value chain, involved in diverse areas from chip manufacturing to the provision of server original equipment manufacturer (OEM)/original design manufacturer (ODM) services. With the booming AI market, Taiwan's prominence and influence have grown significantly, attracting investments from major international players like AMD, NVIDIA and Google.

Thanks to Taiwan's robust public health infrastructure and effective pandemic prevention policies, the island's economy was less affected by the Covid-19 outbreak than some other countries. To seize opportunities in the post-pandemic era and enhance Taiwan's role in the global economy,

the government has launched the 'Six Core Strategic Industries' policy. Building upon established industrial innovation programmes. such as those relating to 'Smart Machinery', 'Asia Silicon Valley', 'Green Energy Technology', the 'Biomedical Industry', 'National Defence Industry', 'New Agriculture' and the 'Circular Economy', this new policy encompasses emerging sectors, such as information and digital technology, cybersecurity, precision health, green and renewable energy, national defence and the strategic stockpile. The new government, inaugurated on 20 May 2024, has also prioritised the development of five key industries over the next four years: semiconductors, AI, defence technologies, security and next-generation communications. This strategy aims to reinforce Taiwan's pivotal position in global supply chains, while continually improving the investment environment.

Taiwan ranks second globally in regard to higher education attainment, providing a talent pool for developing high-tech industries. The country maintains a nationwide unemployment rate below 3.5 per cent, supported by a favourable public security environment. The New Taiwan dollar's exchange rate against the US dollar shows relatively stable fluctuations compared to Japan and South Korea, enhancing stability in foreign exchange and currency markets. Taiwan's stock market, tracked by the Taiwan Stock Exchange Capitalisation Weighted Stock Index (TAIEX), has reached new highs in 2024, peaking at 22,504 points in mid-June, reflecting positive economic prospects.

Chapter 2: The business environment

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2.1 Governance and political structure

Taiwan is a free and democratic country governed by the rule of law. Its central government comprises five branches, namely the President, Executive Yuan, Legislative Yuan, Judicial Yuan, Examination Yuan and Control Yuan, each exercising constitutional powers. The President and legislators are elected by the people, while the President of the Legislative Yuan is elected by and from among the legislators. The Premier of the Executive Yuan is appointed by the President. The presidents of other three yuans are nominated by the President and appointed with the consent of the Legislative Yuan. The Democratic Progressive Party (DPP) and the Kuomintang are Taiwan's two major political parties, with the DPP currently in power. Local county or city heads and councillors are directly e lected by the people for four-year terms, with county or city heads eligible for re-election once.

2.2 Legal system

Taiwan is a civil law jurisdiction, relying on codified laws. Its judicial system is widely recognised as highly independent and fair. At the top of this system is the Judicial Yuan, which is responsible for adjudicating constitutional disputes. Criminal and civil cases follow a 'three-level

and three-instance' structure, progressing through district courts, high courts and ultimately the Supreme Court. The Intellectual Property and Commercial Court specialises in cases concerning intellectual property rights and significant commercial disputes. The administrative court system, following a 'three-level and two-instance' structure, handles public law cases.

2.3 Foreign investment in Taiwan: an overview of the procedures and regulations

2.3.1 Foreign investment in Taiwan's listed and over-the-counter companies

Foreign investors investing in Taiwan's listed, over-the-counter (OTC) or emerging stock companies should register with the Taiwan Stock Exchange (TWSE), if acquiring less than a ten per cent equity stake in a single transaction, in accordance with the Regulations Governing Investment in Securities by Overseas Chinese and Foreign Nationals. If the transaction results in the acquisition of a ten per cent or higher equity stake, foreign investors should apply in advance to the Department of Investment Review (DIR) that sits within the Ministry of Economic Affairs (MOEA) by submitting an application form and relevant documents, in accordance with the Statute for Investment by Foreign Nationals (the 'Foreign Investment Statute'). Investors from Mainland China ('PRC Investors', as defined in Chapter 5) must comply with the Act Governing Relations between the People of the Taiwan Area and the Mainland Area and the Regulations Governing Investment in Securities and Futures by Mainland Area Investors.

2.3.2 Foreign investment in Taiwan's unlisted companies

Foreign investors ('non-PRC Investors') investing in Taiwan's unlisted companies must obtain approval from the DIR, in accordance with the Foreign Investment Statute. In cases involving the establishment of a new company, foreign investors are also required to apply to the MOEA for company incorporation registration after obtaining investment approval from the DIR. If the intended business activities of the new company concern a regulated industry, such investors must obtain permission from the relevant competent authority before applying for company incorporation registration. PRC Investors must comply with the Act Governing Relations between the People of the Taiwan Area and the Mainland Area and the Regulations Governing Investment in Taiwan by Mainland China Investors (the 'PRC Investment Regulations').

Chapter 3: Business and corporate structures

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3.1 Commonly adopted legal forms by foreign investors in Taiwan

According to the Taiwan Company Act, the different types of companies include: (1) unlimited companies, (2) unlimited companies with limited liability shareholders, (3) limited companies and (4) companies limited by shares. Commonly adopted legal forms by foreign investors wishing to conduct business activities in Taiwan are discussed below.

3.1.1 Companies limited by shares

A company limited by shares may be established by a single government or corporate shareholder. If there are no government or corporate shareholders, it must be established by at least two individual shareholders. The total capital is divided into shares, with each common share having one voting right. The company may also issue preferred shares, which may have no voting rights or multiple voting rights. Shareholders' liability is limited to their subscribed shares. Additionally, Taiwan also recognises 'close companies', which are privately held companies with fewer than 50 shareholders and that have specific restrictions on share transfers stipulated in their articles of incorporation, as regulated by Article 356-1 and subsequent provisions in the Company Act.

3.1.2 Limited companies

A limited company is organised by one or more shareholders, who are liable in regard to the company to the extent of their capital contributions.

3.1.3 Branch offices

A branch office is not an independent legal entity. It is a branch institution controlled by a parent company. Foreign companies may incorporate a branch office to conduct business in Taiwan.

3.1.4 Representative offices

If a foreign company does not intend to set up a branch office for revenue-generating operations in Taiwan, but needs to conduct limited business activities, it may appoint a representative to incorporate a representative office in Taiwan. A representative office, however, is not an independent legal entity and is typically limited to carrying out certain specific activities, such as signing contracts, bidding, quoting, purchasing, negotiating prices and collecting market information.

3.2 Incorporation processes and requirements

Depending on the type of legal entity defined in the Company Act, the incorporation process varies. Additionally, Taiwanese authorities have adopted special regulations in regard to PRC Investors.

3.2.1 Requirements for incorporating a company

The general process for incorporating a company includes the following steps:

- checking and confirming the Chinese company name and scope of business;
- applying for foreign investment approval from the DIR;
- remitting the required capital, as approved by the DIR; and
- directing a certified public accountant to audit the remitted capital and submit the relevant application documents (eg, the application form for company registration, copies of the articles of incorporation and consent forms issued by the directors to act as a director, etc) with the competent authorities to complete the company registration.

3.2.2 Requirements for incorporating a branch office

Incorporating a branch office follows a process similar to that of incorporating a company, except that the foreign investment approval from the DIR is not required provided that the foreign investor is not a PRC Investor.

A foreign company may not conduct business in Taiwan under its own name without registering a branch office. Companies incorporating a branch office in Taiwan must allocate funds for its operations and appoint a representative as the responsible person in Taiwan. A failure to comply with these regulations may result in civil and criminal liabilities.

3.2.3 Requirements for incorporating a representative office

To incorporate a representative office, a foreign company must register with the Administration of Commerce of the MOEA (AOC). The required documents include:

- the application form;
- approval letters from the competent authorities (if applicable);
- a certificate of incorporation;
- an authorisation letter for the company's representative in Taiwan, along with their identification documents; and
- a consent letter from the landlord allowing the use of the leased premises as the registered office, and proof of ownership of the leased office by the landlord, etc.

3.2.4 Requirements for PRC Investors

If the investor intending to incorporate a company or branch office is a PRC Investor, the PRC Investment Regulations must be followed. The required procedures involve, among others, filling out an investment application form, attaching a detailed investment plan, providing a certificate of incorporation related to the investor (or its parent company in the case of setting up a branch office) and other relevant documents, and submitting them to the DIR for prior approval. Furthermore, investments to incorporate companies or branch offices are limited to industries listed in the 'List of Industries for Investment by Mainland Area Investors in Taiwan' (the 'List of Permitted Industries for PRC Investors'), as required by the PRC Investment Regulations.

If a PRC Investor intends to incorporate a representative office in Taiwan, it must apply for permission and register the representative office, according to the Measures Governing the Permit for the Incorporation of Branch Offices or Representative Offices in Taiwan by Profit-Seeking Enterprises of the Mainland Area, with the AOC.

3.3 Reporting requirements for changes to company registration details

For any changes to company registration details (eg, company relocation, changes in directors or supervisors, amendments to the articles of incorporation, increase or reduction in capital, etc), an application for change registration must be submitted to the competent authority within 15 days after the change has taken place. Non-compliance may result in administrative fines.

3.4 Management structure and corporate governance

3.4.1 Management structure

For a limited company, at least one director must be appointed to conduct business and represent the company, with a maximum of three directors permitted. For a company limited by shares, at least three directors and one supervisor are required. However, the articles of incorporation may specify the absence of a board of directors and instead appoint one or two directors, while still requiring a supervisor. For a company limited by shares organised by a single government or corporate shareholder, the articles of incorporation may allow for no board of directors, appoint one or two directors and dispense with the supervisor. Public companies and listed companies are subject to additional regulations by the TWSE or the Taipei Exchange (TPEx) concerning the composition of the board of directors, supervisors or audit committee.

Directors and supervisors must be elected at the shareholders' meeting. Foreign nationals are eligible to serve as directors or supervisors in a Taiwanese company. However, if a company should have a supervisor or supervisors as mandated by the relevant laws, at least one supervisor must have a domicile in Taiwan, while directors are not subject to this requirement.

The shareholders' meeting is the highest authority in the company. The board of directors manages daily operations by making resolutions or delegating authority to representatives. The board must

perform its duties in accordance with the relevant laws, the company's articles of incorporation and resolutions adopted at the shareholders' meetings.

3.4.2 Minority shareholders' protection

The Company Act includes several mechanisms to protect the interests of minority shareholders. Shareholders holding at least one per cent of the total shares issued are entitled to propose agenda items for the shareholders' general meeting. Additionally, shareholders who own at least three per cent of the total shares issued continuously for over one year may, in writing, specify proposed matters and reasons to request the board to convene a special shareholders' meeting. Under certain conditions, shareholders holding at least three per cent of the total shares issued may apply to the competent authority for permission to convene a shareholders' meeting independently.

3.4.3 Legal responsibilities of directors

According to Article 23 of the Company Act, a responsible person (including directors) in regard to the company owes a duty to faithfully and loyally conduct the company's business and to exercise the care of a good administrator in regard to business operations. If this duty is breached, resulting in damages to the company, they may be held liable for civil damages. Furthermore, they may be subject to criminal liability for breach of trust.

Additionally, directors are subject to several restrictions under the Company Act. Directors are prohibited from engaging in competitive activities in regard to the company, which includes conducting transactions on behalf of themselves or third parties that fall within the scope of the company's business activities. They are also restricted from participating in 'self-dealing', meaning that they cannot enter into transactions where the director or the juristic person they represent is a contracting party with the company. Moreover, if a director (or the legal entity they represent) has a conflict of interest in regard to an agenda item, the director shall disclose this interest and, under certain circumstances, abstain from voting on that agenda item.

If a company is a listed company, it must also comply with the Corporate Governance Best Practice Principles for TWSE/TPEx Listed Companies and related regulations stipulated by the TWSE and TPEx.

3.4.4 Remuneration of directors

According to the Company Act, the remuneration of directors, if not prescribed in the articles of incorporation, shall be determined at shareholders' meetings. Additionally, the Securities and Exchange Act (SEA) provides that all listed companies shall set up a remuneration committee comprising at least three members. This committee is responsible for regularly reviewing matters related to the performance and remuneration of directors, independent directors and managers.

3.4.5 Shareholders' liability

The parent company bears full liability for its branch office. In both companies limited by shares and limited companies, shareholders' liability in regard to the company is typically limited to their fully paid-up shares or capital contributions. However, if a shareholder significantly abuses the company's legal entity status, causing the company to incur debts that it would have difficulty repaying, the principle of 'piercing the corporate veil' will apply. In such cases, the shareholder shall be liable beyond their capital contributions or shares.

Chapter 4: Takeovers (friendly M&A)

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This chapter mainly outlines the regulations that foreign companies need to pay attention to when conducting friendly mergers and acquisitions (M&A) in Taiwan. It introduces the Business Mergers and Acquisitions Act (the 'M&A Act'), public tender offers, private placements and mergers, as well as practical considerations for foreign companies merging in Taiwan.

4.1 The Business Mergers and Acquisitions Act

4.1.1 Overview of Taiwanese M&A regulations

The early Taiwanese M&A regulations were scattered across various laws. With Taiwan's economic development and the increasing corporate demand for M&A, the government enacted the M&A Act in 2002, as the main legal framework for corporate mergers. Other relevant regulations are found in the Company Act, SEA and Fair Trade Act. Additionally, mergers involving listed or OTC companies must comply with the Taiwan Stock Exchange Operating Rules and the Taipei Exchange Rules Governing Securities Trading on the TPEx. Mergers involving financial institutions must meet the requirements in the financial institution merger regulations.

4.1.2 Types of mergers under the M&A Act

The M&A Act regulates mergers, acquisitions and spin-offs, each with its own definitions and required statutory procedures. Only M&A activities that meet the criteria and follow the procedures outlined in the M&A Act can benefit from the streamlined processes and tax benefits. Both branches and subsidiaries of foreign companies in Taiwan are eligible, provided that at least one party to the M&A transaction is a Taiwanese company. For instance, the M&A Act would not apply to M&A transactions between two Taiwanese branches of foreign companies, due to overseas group restructuring.

4.1.3 Consideration for M&A transactions

According to the M&A Act, considerations for M&A transactions can be cash, shares or other assets. Share swaps can also be conducted using cash, facilitating the buyout of minority shareholders.

4.1.4 Employee-related matters

Under Taiwanese labour law, companies can only dismiss employees if one of the statutory grounds detailed in the law is met. The M&A Act stipulates that the surviving, newly established or transferee company must notify the employees of the target company who it wishes to retain and inform them of the relevant employment terms at least 30 days prior to the effective date of the transaction. Employees who receive retention notices must inform the new employer (ie, the acquirer) in writing, within ten days, whether they agree to the retention. For employees who accept the retention, including those who do not respond and are thus believed to be in agreement with the retention, their past service tenure with the target must be recognised by the acquirer. Employees who are not retained or who decline retention may receive a pension payment or severance pay from the target company, as the case may be.

The M&A Act does not apply to cases where cross-border group restructuring involves the merger of two Taiwanese branches of foreign companies. In such cases, according to the rulings promulgated by the Ministry of Labor, it is necessary to assess whether the case qualifies as the termination ground involving 'business unit reorganisation or transfer' under the relevant labour laws. Employees can only be terminated if this statutory ground is met.

Regarding the labour pension reservation fund, if there is an amount remaining after paying the pension payment or severance pay to non-retained employees, the target company and the acquirer can negotiate the transfer of the remaining funds from the target company's pension reserve account to the acquirer's pension reserve account to protect the employees' rights.

4.2 Private placements

4.2.1 Purpose

To expand corporate financing channels and facilitate strategic investments and rapid transformations through M&A, the SEA allows publicly traded companies to conduct private placements of securities without undergoing cumbersome capital increase procedures. Companies can raise funds through private placements in regard to specific entities and must report to the competent authority within 15 days of payment completion.

4.2.2 Eligibility criteria and procedures for private placements

Publicly traded companies conducting private placements must follow the procedures stipulated in the Directions for Public Companies Conducting Private Placements of Securities (the 'Directions for Private Placements'). Companies with after-tax profits and no accumulated losses may conduct

private placements under the specified conditions listed in the Directions for Private Placements; otherwise, they must issue securities through public offerings.

Eligible private placement subscribers are limited to: (1) banks, bills-related finance enterprises, trust enterprises, insurance enterprises, securities enterprises or other entities approved by the competent authority (collectively, 'Professional Institutional Investors'), (2) individuals, legal entities or funds meeting specified conditions and (3) directors, supervisors and managers of the company or its affiliates. If subscribers do not fall under the category of Professional Institutional Investors, the total number of subscribers must not exceed 35. In cases where insiders or related parties are subscribers, the issue price of privately placed securities must not be less than 80 per cent of the reference or theoretical price.

Private placements involving equity or equity-linked securities require approval from the shareholders' meeting and cannot be proposed as a temporary motion. The shareholders' meeting notice must list the rationale behind the pricing and its reasonableness, the criteria for selecting subscribers, their relationship with the company and the necessity of conducting the private placement.

4.2.3 Restrictions on private placements

Investors acquiring privately placed securities are generally required to hold them for three years before they can be freely transferred. Exceptions specified by the SEA allow for transfers within the three-year period under certain circumstances. However, any subsequent transfers by the transferees remain subject to the transfer restrictions outlined in the SEA.

4.3 Public tender offers

4.3.1 Applicable regulations

Public tender offers are primarily regulated by the SEA and the Regulations Governing Public Tender Offers for Securities of Public Companies.

4.3.2 Mandatory public tender offers

Any individual or entity intending to acquire more than 20 per cent of a public company's total issued shares within 50 days, either independently or jointly, must do so through a mandatory public tender offer, extending the same acquisition terms to all shareholders.

4.3.3 Acquisition targets, considerations and periods

In a public tender offer, the acquirer may extend offers to purchase not only the ordinary shares and preferred shares of the target company, but also any securities with equity characteristics (eg, warrants, convertible bonds, corporate bonds with warrants, depository receipts, etc).

Consideration for the tender offer can be in the form of cash, securities of other listed companies, or the acquirer's stocks or bonds. While the regulations allow the use of foreign securities as consideration in public tender offers, the practical difficulties faced by the shareholders of Taiwanese target companies in holding foreign securities usually result in cash being the preferred choice. With few exceptions, the acquirer must provide proof of its ability to pay the acquisition consideration, such as certification from a financial institution confirming the availability of sufficient funds.

The tender offer period shall generally be no less than 20 days and no more than 50 days. However, in the case of a competing tender offer for the same target or other legitimate reasons, the acquirer may apply to the competent authority for an extension of up to 50 days, with only one extension allowed. Hence, the maximum tender offer period cannot exceed 100 days.

4.3.4 Reporting requirements for tender offers

Since 2002, Taiwan's tender offer regime has transitioned from an approval-based to a reporting-based regime. Unless the target company operates in a regulated sector (eg, financial institutions) or the acquirer is a PRC Investor, prior approval from the competent authority is not required. Instead, the acquirer must submit a filing with the Financial Supervisory Commission and make a public announcement before proceeding. To prevent information leaks that could impact stock prices, filings and announcements are typically made simultaneously. The filings must include the required documents as per the Regulations Governing Public Tender Offers for Securities of Public Companies and other applicable regulations. If additional regulatory approvals are needed (eg, merger clearance by the Fair Trade Commission), these necessary filings or applications must be submitted concurrently, and all approvals should be obtained before closing.

Chapter 5: Foreign investment

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5.1 Overview of Taiwan's foreign investment environment

In the past, Taiwan's foreign investment affairs were managed by the Investment Review Committee (IC). In response to a significant increase in reviews involving foreign and mainland Chinese investment cases and the need to enhance scrutiny, the Taiwan government undertook a restructuring process in 2023. This restructuring involved integrating the IC into the MOEA and establishing the DIR to replace the IC. Hence, the DIR now serves as Taiwan's foreign investment affairs watchdog, overseeing all foreign investment activities, in accordance with the Foreign Investment Statute and other relevant regulations. In recent years, Taiwan has experienced significant growth in foreign investments. In 2023 alone, a total of 2,310 cases involving foreign direct investments were approved, amounting to US$11.255bn in investment. Over the past

eight years (2016–2023), despite challenges such as the Covid-19 pandemic and global economic uncertainties, foreign direct investment has continuously increased, nearly doubling the average annual investment compared to the period from 2008 to 2015.

5.2 Methods of foreign investment

Foreign investors must comply with the regulations stipulated in the Foreign Investment Statute if they intend to establish a subsidiary in Taiwan, hold shares or capital contributions in a Taiwanese company (including acquiring ten per cent or more of the shares in listed, OTC or emerging stock companies in a single investment), establish a branch office, sole proprietorship, or partnership in Taiwan, or provide loans for over one year to the aforementioned enterprises.

Investment can be made in the form of cash, the provision of machinery, equipment, or raw materials, the licensing of specialised technology or intellectual property rights, or through the restructuring of claims, mergers, acquisitions and equity splits, as recognised by the competent authority.

For the aforementioned types of investments, foreign investors must first apply to and obtain approval from the DIR. However, foreign investors (excluding PRC Investors) intending to establish a branch office in Taiwan do not require prior approval from the DIR. They only need to register their branch office with the MOEA or the local competent authority.

5.3 Prohibited or restricted areas of investment

Taiwan adopts a friendly stance toward foreign investors and encourages their investment in the country. However, similar to many other nations, Taiwan imposes restrictions on foreign investment in specific industries. By issuing a negative list, Taiwan outlines ten categories of industries where foreign investment is completely prohibited (such as military chemicals and weaponry manufacturing, and public transportation) and 16 categories where investment is generally permitted but subject to certain conditions (such as telecommunications, electricity and gas supply industries).

5.4 Applicable incentives and protections

5.4.1 Tax incentives

Taiwan offers various tax incentives to attract foreign investors. For example, companies engaged in advanced R&D activities can benefit from R&D tax credits, allowing them to deduct R&D expenses from their corporate income tax. Additionally, companies importing machinery and equipment that is not locally produced may qualify for import duty exemptions.

Entities that reinvest undistributed earnings into substantial investments may also enjoy corporate income tax exemptions, subject to certain conditions. Furthermore, foreign professionals with specific expertise may qualify for a tax exemption on part of their salary income, subject to certain conditions. Companies in specific industries, such as biotechnology and pharmaceuticals,

emerging technologies, and those involved in private-sector participation in public infrastructure projects, can also enjoy corresponding tax benefits.

5.4.2 Legal protections for foreign investors

Taiwan offers foreign investors the same legal protections as domestic businesses, including comprehensive protection of intellectual property rights. Foreign investors legally investing in Taiwan are entitled to apply for the remittance of annual dividends or profits and a one-time remittance upon divestment. Additionally, for investments where foreign investors hold a 45 per cent stake or more, the law explicitly states that these businesses will not be subject to expropriation or acquisition by the government for military or other reasons.

5.5 Foreign exchange control

Taiwan implements foreign exchange controls on the New Taiwan dollar (TWD) to maintain stability in the foreign exchange market and safeguard national financial security. For foreign currency transactions involving TWD exchanges, any foreign exchange transaction amounting to TWD 500,000 or more per transaction must be reported in accordance with the Regulations Governing the Declaration of Foreign Exchange Receipts and Disbursements or Transactions.

Companies with an annual cumulative exchange amount not exceeding US$50m, individuals (or groups) not exceeding US$5m and non-residents not exceeding US$100,000 per transaction. can directly proceed with exchanges through designated foreign exchange banks without prior approval. Transactions exceeding these amounts require supporting documents and approval from the Central Bank of China, Taiwan, via designated foreign exchange banks. Foreign currency transactions not involving TWD exchanges can freely flow in and out of Taiwan.

5.6 Mainland China capital investment

5.6.1 Regulations and definition of PRC investment

Given the unique relationship with Mainland China, Taiwan has specific regulations governing investments by Mainland Chinese investors ('PRC Investors'), primarily stipulated in the PRC Investment Regulations. In the PRC Investment Regulations, 'PRC Investor' refers to PRC individuals, legal entities, organisations or other institutions or their 'third-area companies'. A third-area company is deemed as a PRC Investor if more than 30 per cent of its shares are held by a PRC individual, legal entity, organisation or any other institution, or if the PRC individuals or entities have control over the said third-area company. Currently, investors from Hong Kong and Macau (including individuals and legal entities) are not categorised as PRC Investors under the PRC Investment Regulations. They are generally governed by the provisions in the Foreign Investment Statute, unless any PRC Investors hold more than 30 per cent of their shares (either directly or indirectly) or have control over them.

5.6.2 Restrictions on industries invested in by PRC Investors

For investments in Taiwan involving PRC Investors, whether establishing a company, a commercial partnership or a branch office, it is necessary to apply for investment approval from the DIR. Unlike the negative list approach used for general foreign investments (ie, non-PRC investments), which excludes certain investment items, Taiwan adopts a positive list approach for PRC investments, meaning that a PRC Investor is only allowed to invest in business items specified in the List of Permitted Industries for PRC Investors that have been approved and announced by the competent authority.

As of 2024, according to the latest List of Permitted Industries for PRC Investors published in 2012, Taiwan has 404 items available for PRC investment. These include categories in manufacturing, services and public infrastructure. Nonetheless, even if PRC Investors apply for investment in business items listed on the List of Permitted Industries for PRC Investors, approval from the DIR is not guaranteed. The DIR will still review each case based on its specific circumstances.

Chapter 6: Restructuring and insolvency

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This chapter focuses on reorganisation, liquidation and bankruptcy procedures in Taiwan.

6.1 Reorganisation procedures

6.1.1 Criteria for reorganisation

In 1966, the Taiwan Company Act first introduced reorganisation procedures. These procedures are only applicable to companies that have publicly issued shares or corporate bonds.

Under the Company Act, if a company that has publicly issued shares or corporate bonds has suspended its business due to financial difficulties or there is apprehension regarding such suspension, but there is a possibility for the company to be restructured or rehabilitated, the company's board of directors or interested parties (including shareholders holding ten per cent or more of the company's issued shares for over six months, creditors with claims equivalent to ten per cent or more of the company's total capital, labour unions or more than two-thirds of the company's employees) may file for reorganisation with the court.

6.1.2 Factors considered by courts in regard to reorganisation applications

Upon receiving a reorganisation application, the court shall assess the possibility of restructuring or rehabilitating the company. The court will seek opinions on the proposed reorganisation from the relevant authorities and the taxation authority. Additionally, the court may appoint an inspector with specialised knowledge or experience in the company's operations, who has no interest in or relationship with the firm, to conduct examinations and submit a report to the court. If the court determines there is no possibility for restructuring or rehabilitation and the company does not qualify for reorganisation, but the conditions for bankruptcy are met, it may dismiss the reorganisation application and declare the company bankrupt *ex officio*.

6.1.3 Emergency preservation measures in terms of company reorganisation

To ensure the company's financial condition remains viable during the reorganisation process, from the filing of the application to court approval, the court may impose emergency preservation measures. These include measures:

1. for the preservation of company assets;
2. that impose restrictions on business operations;
3. that impose limitations on obligations and claims against the company;
4. for the suspension of proceedings for bankruptcy, settlement or compulsory enforcement;
5. that prohibit the transfer of registered share certificates; and
6. for the determination of liabilities for damages of the company's responsible persons and the preservation of their assets.

6.1.4 Application of the equitable subordination rule (the 'Deep Rock Doctrine')

Article 369-7 of the Taiwan Company Act incorporates principles akin to the 'Deep Rock Doctrine' in US law. It addresses situations where a controlling company of an affiliated enterprise causes (directly or indirectly) its subordinate to engage in any abnormal or unprofitable business activities. If the controlling company makes a claim against the subordinate company, whether with or without a priority right, such claims will be settled in the order following all other obligatory claims during the subordinate company's bankruptcy or settlement proceedings under the Bankruptcy Act, or the reorganisation or special liquidation proceedings under the Company Act.

6.1.5 The effect of reorganisation

Upon the completion of a company's reorganisation: (1) any declared but unpaid claims, except those handled and assigned to the reorganised company in accordance with the reorganisation plan, will expire (including the undeclared ones); (2) any changes or reductions in the shareholders' shareholding resulting from the reorganisation will expire; and (3) bankruptcy, settlement, compulsory enforcement and relevant litigation procedures involving the company will become ineffective.

6.2 Liquidation procedures

In Taiwan, liquidation must follow the procedures stipulated by the Company Act, as there are no arbitrary liquidation procedures. For the liquidation of unlimited companies, limited companies and unlimited companies with limited liability, any dividends or bonuses will be declared and losses covered, according to their articles of incorporation after settling their liabilities. For companies limited by shares, the Company Act distinguishes between ordinary liquidation procedures and special liquidation procedures. The following situations will introduce these two liquidation procedures for companies limited by shares.

6.2.1 Ordinary liquidation procedures

Ordinary liquidation procedures are primarily led by the liquidator. If there are no special provisions in the company's articles of incorporation or if the shareholders' meeting does not appoint a liquidator, all directors of the company will serve as liquidators, according to the Taiwan Company Act. If a liquidator cannot be determined through the company's articles of incorporation, the shareholders' meeting or statutory methods, any interested party may petition the court to appoint a liquidator.

After the dissolution of a company limited by shares, ordinary liquidation procedures must first be carried out. If significant obstacles arise during the liquidation procedure (eg, the company has numerous interested parties or complex creditor–debtor relationships) or if there is suspicion that the liabilities of the company exceed its assets (eg, a company has fraudulent debts), the court may, upon petition by the liquidator, creditor or shareholder, or *ex officio*, order the company to initiate special liquidation procedures.

6.2.2 Special liquidation procedures

Compared to ordinary liquidation procedures, special liquidation procedures are court-led and impose restrictions on the powers of the liquidator. These procedures include a 'creditors' meeting' system, composed of all creditors, who can express their opinions on the reports compiled by the liquidator and the methods for implementing the liquidation. Under special liquidation procedures, many of the liquidator's powers generally require approval at the creditors' meeting (eg, disposing of company assets, borrowing money, initiating legal action, entering settlement or arbitration agreements, and waiving rights). Additionally, the creditors' meeting may adopt a debt settlement agreement if attended by more than half of the creditors and approved by creditors representing three-fourths or more of the total amount of claims. This resolution shall be approved by the court. Unless otherwise stipulated by law, the terms of the settlement agreement shall be equitable among all the creditors.

In regard to special liquidation procedures, the court has greater intervention power. This includes the authority to order the liquidator(s) to report on the progress of the liquidation procedures and the status of the company's assets, conduct necessary investigations for supervising the liquidation at any time, implement asset preservation measures or prohibit the transfer of shares when deemed

necessary, and remove a liquidator for significant reasons. Furthermore, if it becomes impossible to reach a debt settlement agreement with creditors during special liquidation procedures or if such agreement cannot be effectively implemented, the court shall *ex officio* declare the company bankrupt and convert the liquidation procedure into a bankruptcy procedure.

6.2.3 Liquidation procedures involving a foreign company's Taiwan branch office

The Taiwan branch office of a foreign company wishing to close its business must undergo and complete liquidation before deregistration. The branch office must settle all its debts and obligations arising from its operations within Taiwan. Any unsettled debts shall be paid by the foreign company. Typically, the liquidator is either the foreign company's responsible person in Taiwan or the manager of the Taiwan branch office.

Additionally, a foreign company's property within Taiwan cannot be moved out of the country during the liquidation process and may only be disposed of by the liquidator for the purposes of liquidation.

6.3 Bankruptcy procedures

According to the Company Act, if a company's assets are clearly insufficient to offset its debts, the board of directors shall petition the court to declare the company bankrupt, unless there is a possibility of restructuring and rehabilitation and a reorganisation procedure is undertaken. During the liquidation process, if the company's assets are insufficient to pay off its debts, the liquidators shall also petition the court to declare the company bankrupt. Additionally, if a debtor is unable to repay his/her debts, creditors may petition the court to declare the debtor bankrupt.

When the court grants a bankruptcy declaration, it will appoint a bankruptcy administrator to oversee the proceedings, in accordance with the Bankruptcy Act. This includes convening creditors' meetings, managing the bankruptcy estate and proposing distribution for repayment. Once the bankruptcy process is concluded, all the debts of the bankrupt party will be released.

Chapter 7: Employment, industrial relations, and work health and safety

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The Labor Standards Act (LSA) establishes the essential government regulations that set the minimum standards and requirements for all employment relationships. These regulations are mandatory for employers whose business falls within the scope of the LSA. The terms and conditions of an employment contract must meet or exceed the minimum standards outlined in the LSA. The key requirements of the LSA and related labour laws and regulations are detailed below.

7.1 Employee statutory entitlements

7.1.1 Minimum wage

An employer must pay the wages as agreed upon by the employee and the employer, with the condition that the wages do not fall below the basic wage.

7.1.2 Regular working hours

The regular working hours cannot exceed eight hours per day and 40 hours per week. With the consent of the labour union, or the labour management conference if there is no labour union, the working hours of a workday within any two-week period can be spread over the same two-week period, as long as the total number of working hours in each workday over the same two-week period does not increase by more than two hours. For government-designated entities, the working hours can be spread over a four- or eight-week period. Employers are required to maintain sign-in books or timecards for workers to record their attendance, on a daily basis, down to the minute. These records must be kept on file for at least five years.

7.1.3 Overtime

An employer may request employees to work overtime after obtaining consent from the labour union or the labour management conference if there is no labour union. The maximum number of working hours per day, including regular working hours and overtime, cannot exceed 12, and the total extended working hours cannot exceed 46 per month. With the approval of the labour union or the labour management conference, the maximum number of overtime hours per month can be increased to 54, but not exceeding 138 (46 multiplied by three) per quarter. Additionally, if an employer has more than 30 employees, they must report to the local competent authority.

Employers are required to compensate employees for overtime work, according to statutory rates. For a worker's overtime work, work hours and wages on rest days will be calculated based on the actual hours worked. When calculating the maximum number of overtime hours, all hours worked on a rest day must be included, except for overtime hours in the event of a natural disaster, accident or other emergency. If an employee chooses to receive compensatory time off instead of overtime pay and the employer agrees, the hours of the compensatory time off will be based on the actual hours of overtime worked by the employee. The ratio of overtime hours to compensatory leave is 1:1. The timeframe for taking compensatory time off can be discussed and agreed upon by both parties. However, if an employee does not use all their compensatory leave during the agreed period, or if the employee is terminated before using all the time off, the unused hours of compensatory time off must be compensated through the payment of a salary, calculated based on the statutory rates for overtime pay and the employee's wages at the time the overtime work was performed.

7.1.4 Regular rest day(s) and fixed day(s) off

Employees are entitled to two days off every seven days, consisting of one fixed day off and a rest day. For employers who have adopted a four-week flexible working-hour system, they may provide two fixed days off every two weeks. The specific days for the fixed day off and rest day should be agreed upon by both the employer and the employees. Typically, Sundays are set as the fixed day off and Saturdays as rest days.

Employers have some flexibility in arranging the weekly fixed day off. Even if an employer is not eligible for the four-week flexible working-hour system, they may adjust the fixed day off every seven days, provided that (1) the approval of the relevant authority is obtained, (2) the employer is in an industry designated by the Ministry of Labor (MOL) and (3) the union or labour management conference (or a report to the local competent authority for employers with more than 30 employees) approves the adjustment. This means that the fixed day off can be freely assigned within a given seven-day period with such an adjustment.

7.1.5 Annual leave

The following rules apply to annual leave in Taiwan:

- workers who have been employed for more than six months but less than one year are entitled to three days of annual leave;
- workers who have been employed for one year or more, but less than two years, are entitled to seven days of annual leave;
- workers who have been employed for two years or more, but less than three years, are entitled to ten days of annual leave;
- workers who have been employed for three years or more, but less than five years, are entitled to 14 days of annual leave;
- workers who have been employed for five years or more, but less than ten years, are entitled to 15 days of annual leave; and
- workers are entitled to one additional day of annual leave for each year of seniority over ten years, up to a maximum of 30 days.

Employees have the right to determine when to take their annual leave, but employers may negotiate this arrangement with workers in cases involving urgent operational demand or for personal reasons. Employers must inform employees when they become eligible for annual leave and help them schedule it. Unused annual leave can be carried forward to the next year, subject to negotiation and agreement between employers and employees. If any portion of the carried-over annual leave remains unused at the end of the next year or if the employment contract terminates before the leave is used, the employee is entitled to compensation based on their salary at the end of the year in which the leave was accrued. When an employee requests time off, the annual leave carried forward into the following year must be used first. Employers must document the amount of annual leave each employee is entitled to and notify their employees of this information in writing every year.

7.2 Employer's obligations with respect to occupational injuries

If an employee dies or is injured, becomes disabled or ill due to an occupational hazard, they or their heirs are entitled to certain compensation, as follows:

- medical expenses compensation: the amount must be based on the expenses incurred;
- salary compensation during the medical treatment period: an employee who is unable to work while undergoing medical treatment is entitled to receive their regular salary before the incident occurred. If an employee does not recover after two years of medical treatment, has lost the ability to perform their previous duties and is not eligible for the disability compensation detailed below, the employer may provide the employee with compensation equivalent to 40 months' average salary and will thereafter be exempt from paying the employee salary compensation;
- disability compensation: an employee who is verified to be disabled upon termination of the medical treatment period is entitled to disability compensation, payable according to the Labor Insurance Act; and
- death compensation: the heirs of the deceased are entitled to receive death compensation equivalent to 40 months' average wages, plus compensation for funeral expenses, equivalent to five months' average wages.

7.3 Statutory causes for termination of an employee's employment contract

Under the LSA, an employer cannot unilaterally terminate an employee's employment contract unless one of the statutory causes provided in Article 11 or Article 12 exists. If the employer terminates the employment contract under Article 11 of the LSA (ie, lay-off), they must provide severance pay and give advance notice, according to the statutory notification period. If the termination falls under Article 12 of the LSA (ie, dismissal), the employer is not obligated to provide severance pay and/or give advance notice.

7.4 Retirement

An employee is eligible for retirement if they meet one of the following conditions: (1) has worked for at least 15 years and is at least 55 years old, (2) has worked for 25 years, or (3) has worked for at least ten years and is 60 years old. An employee may be required to retire upon reaching the age of 65 or if they are unable to perform their duties due to mental or physical disability.

7.4.1 The old pension scheme

Retirement benefits under the old pension scheme, as provided in accordance with the LSA, are calculated as follows: (1) for the first 15 years of service, 200 per cent of the eligible employee's average monthly wage for each full year of service accrued under the old pension scheme; (2) for each additional year of service, 100 per cent of the eligible employee's average monthly wage for each full year of service; (3) any fractional year of service of less than six months is counted as half a

year, and reaching six months or more is counted as a full year; and (4) the pension is capped at 45 times the average monthly wage. An employer is required to contribute on a monthly basis to the old pension scheme as a reserve fund for retirement benefits for employees.

7.4.2 The new pension scheme

Under the Labor Pension Act (effective from 1 July 2005), an employer must contribute at least six per cent of each employee's monthly pensionable salary to their individual pension fund accounts each month, along with any voluntary contributions made by employees (up to six per cent of their monthly pensionable salary).

Chapter 8: Tax law

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Taiwan does not adopt a single tax code system; instead, it employs separate tax acts to collect various taxes. This chapter provides a high-level introduction to the principal taxes in Taiwan.

8.1 Income tax

Generally, domestic corporations in Taiwan are taxed on their worldwide income, while foreign corporations are taxed only on income sourced in Taiwan. Taiwan resident individuals are taxed solely on their Taiwan-sourced income, while non-Taiwan resident individuals are subject to withholding tax on their Taiwan-sourced income. Corporate income is taxed at a flat rate of 20 per cent on taxable income, whereas individual income is taxed at a progressive rate of five per cent, 12 per cent, 20 per cent, 30 per cent and 40 per cent.

Additionally, income tax is supplemented by a basic income tax (also known as the alternative minimum tax or AMT). If the regular tax amount for a Taiwan resident individual or enterprise equals or exceeds the basic tax amount, the income tax for that individual or enterprise must be calculated according to the Income Tax Act (ITA) and other relevant laws. However, if the regular income tax amount is less than the basic tax amount, the income tax payable must include the balance of the basic tax amount and regular income tax, in addition to the amount calculated in accordance with the ITA and other relevant laws.

Taiwan does not impose capital gains tax. Typically, capital gains are subject to income tax, with the exception of gains from the sale of land and Taiwan securities and futures.

8.1.1 Capital gain from the sale of land

Although capital gain from the sale of land is not subject to income tax, it is still liable to land value increment tax (LVIT). The LVIT rate is 20 per cent, 30 per cent or 40 per cent of the increase in government-assessed value (usually lower than the actual transaction value) during the period from the date of the purchase to the date of the sale of the land. Starting from 1 January 2016, capital gain from the sale of the following buildings and/or land is subject to income tax: (1) buildings and/or land acquired after 1 January 2016 and (2) buildings and/or land acquired after 1 January 2014 and owned for less than two years prior to sale.

8.1.2 Capital gain from securities transactions

Starting from 1 January 2016, capital gains from the sale of Taiwan shares are not subject to income tax, regardless of the seller's status (individuals, Taiwan business entities, foreign business entities with or without a branch or business agents in Taiwan) and the type of securities sold. However, domestic and foreign corporations with a fixed place of business or a business agent in Taiwan may be liable for the AMT. Similarly, capital gains from the sale of bonds are exempt from income tax, regardless of the seller's status. However, domestic and foreign corporations with a fixed place of business or business agents in Taiwan may be subject to the AMT. For a foreign company without a branch or business agent in Taiwan, capital gains from such sales are exempt from income tax and AMT.

8.2 Sales tax

According to the Value-added and Non-value-added Tax Act (BTA), business tax is levied on the sale of goods or services within the territory of Taiwan and the importation of goods. There are two types of business tax: (1) value-added tax (VAT) and (2) gross business receipts tax (GBRT). The current rate of VAT is five per cent for most VAT operators. Trust and investment enterprises, securities and futures enterprises, short-term bills and commercial paper enterprises, and pawn shops are subject to a GBRT rate of two per cent on their exclusively authorised business income and five per cent on their non-exclusively authorised business income. Banking and insurance enterprises are subject to a five per cent GBRT rate on their revenue, except that the business tax rate for the reinsurance premium income of insurance enterprises is one per cent. However, non-life insurance enterprises can deduct the amount of retained claims from their exclusively authorised business income when calculating the five per cent business tax.

Businesses are obligated to provide government uniform invoices (GUIs) to their buyers when selling goods or services, as per the Table of Limitations for Issuing Sales Invoices by Businesses under the BTA. However, businesses with special operations or those classified as small businesses may be exempt from issuing GUIs and can instead issue ordinary receipts for sales. A business entity must, by the 15th day of each alternate month (January, March, May, July, September and November), declare to the tax office in its location the sales amount for the previous two months and the business tax payable or overpaid during that time. Any outstanding business tax must be paid to the National Treasury first; the receipt for the tax payment can then be submitted to the tax office for review. Business tax on imported goods is levied by customs. The collection procedures and administrative

relief for business tax are governed by the provisions in the Customs Act and the Customs Smuggling Prevention Act.

8.3 Land and building tax

Landowners registered with the Land Registry Office as of 31 August of each year must pay an annual land tax. This tax is assessed in November of each year and is based on the total declared land value of the land owned by the landowners in the same city or county, as well as the starting cumulative value of land in that city or county.

Building owners must pay an annual building tax based on the number of months of building ownership in the taxable year. This tax is assessed in May of each year and is calculated using the government-assessed current building value (after depreciation) of the building. The city or county land authorities determine the rate, ranging from three per cent to five per cent for commercial buildings and one per cent to 4.8 per cent for residential buildings.

8.4 Estate and gift tax

If a deceased person was a Taiwan citizen and had constant resided in Taiwan, estate tax is payable on their estate, regardless of whether the estate is located within or outside of Taiwan. If the deceased was a Taiwan citizen but did not reside in Taiwan constantly or was not a Taiwan citizen, estate tax is payable only on the estate located within Taiwan. Estate tax is payable at a progressive rate of ten per cent, 15 per cent and 20 per cent based on the net amount of an estate after subtracting any and all deductions and exemptions.

Gift tax is payable on any gift from a donor who is a Taiwan citizen and resides in Taiwan constantly, regardless of whether the gift is located within or outside of Taiwan before being given. If the donor is a Taiwan citizen but resides outside of Taiwan constantly or is a non-Taiwan citizen, gift tax is payable only if the gift is located within Taiwan before being given. Gift tax is payable at progressive rates based on the total value of the gifts, with an annual exemption of TWD2,440,000 that can be deducted from the total value of gifts for each donor.

8.5 Commodity tax and customs duty

All commodities, whether manufactured domestically or imported, that are listed in the Commodity Tax Act are subject to taxation at rates established by the law. For domestically manufactured taxable goods, the respective manufacturers or producers are responsible for paying the tax. Additionally, consignees or holders of bills of lading for imported taxable goods are also considered taxpayers.

Customs duty is only applicable to specific imported goods. Consignees and holders of bills of lading or commodities are accountable for paying import duty and dues. Unless goods or importers are eligible for a duty exemption, import duty and dues are calculated based on the duty-paying value, according to the prescribed tariff rates. The ‘duty-paying value’ is, in general, calculated based on the transaction price of the imported goods. The ‘transaction price’ is the price actually paid or payable on imported goods that are sold in, or exported to, Taiwan.

Chapter 9: Intellectual property

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9.1 Patents and industrial know-how

The Patent Act was enacted in 1944 and most recently revised in 2022. There are three types of patents: inventions, utility models and design patents. An 'invention patent' can refer to either an invention that is an object or a method/process invention that involves high-level technical concepts utilising natural rules. A 'utility model patent' involves the creation or improvement of an object's form, construction or fitting. A 'design patent' refers to the creation of the shape, pattern, colour or combination thereof, which can be visually appraised.

Inventors, utility model creators, designers, or their assignees or successors are eligible to file a patent application. An employer can apply for and own a patent for an invention completed by its employee through the performance of their duties, unless otherwise specified in contracts. The term of exclusive rights granted to each type of patent is 20 years for invention patents, ten years for utility model patents and 15 years for design patents.

According to the Foreign Investment Statute, a foreign investor may invest in a company incorporated in Taiwan that has industrial patent rights and/or know-how, including industrial information, methods or knowledge that can improve the invested company's abilities in regard to research and development, management, production, manufacturing or sales. Patent licensing can be exclusive or non-exclusive, and sublicensing is permitted. A licence or sublicence cannot be enforced against a third party if it is not recorded with the Intellectual Property Office (TIPO). Similar to the patent holder, an exclusive licensee may demand that a person who infringes or is likely to infringe on the patent right stop or prevent such infringement and claim damages for any losses.

9.2 Trademarks and trade names

The Trademark Act was enacted in 1930 and most recently revised in 2023. According to the Trademark Act, a trademark is defined as any word, device, symbol, colour, sound, three-dimensional shape or combination thereof. Additionally, a trademark must be distinctive enough for consumers of goods or services to recognise it as a mark indicating those goods or services and to distinguish them from goods or services provided by others. A trademark registered with the TIPO is protected under the Trademark Act. A party seeking trademark rights to indicate its goods or services must apply for trademark registration with the TIPO. The TIPO typically takes between eight to 12 months to decide on a trademark registration application. The Trademark Act allows a trademark rightsholder to license another party to use its trademark related to all or part of the designated goods or services. The Trademark Act also requires that licences are registered with the TIPO and the same applies when a licensee sublicenses a trademark to another party with the consent of the trademark rightsholder. Even if a licence is not registered with the TIPO, it is still

valid and effective between the parties before registration. However, the licensee cannot assert its rights against third parties.

A trade name or corporate name is the official name under which a company conducts business. In Taiwan, an application must be filed with the MOEA to reserve a Chinese corporate name and scope of business before establishing a company. According to the Regulations Governing Review of Applications for Reservation of Corporate Names and Scopes, no business may use a corporate name that is the same as another's registered trade name. Whether two corporate names are the same depends on an overall view of the 'specific parts' of the two names. If the 'specific parts' of the two names are not the same, they will be considered different. However, even if two corporate names contain the same 'specific parts', they will still be regarded as different if one corporate name contains other characters indicating a different type of business or any characters distinguishing one corporate name from the other. When reserving a corporate name, the MOEA will not check whether the proposed name is identical to a registered trademark. In other words, a company may reserve and register a trade name identical to another trademark. However, if a trademark is a well-known mark, such action may constitute a trademark infringement or a violation of the Fair Trade Act (FTA).

Both the Trademark Act and the FTA provide specific protection for well-known marks, including the right to prevent another from registering a similar mark that will likely cause confusion or diminish the distinctiveness or reputation of the well-known mark, the right to prevent another from using a similar mark that will likely cause confusion or diminish the distinctiveness or reputation of the well-known mark, and the right to prevent another from using the distinctive elements of a well-known mark as the corporate name, trade name, domain name or other indication of source if such use will likely cause confusion or diminish the distinctiveness or reputation of the well-known mark. Taiwan does not maintain a separate register of 'well-known marks'. Instead, the determination of whether a trademark is a well-known mark is made on a case-by-case basis by the TIPO, the courts, the Fair Trade Commission (FTC) and so on.

9.3 Copyright

The Copyright Act was enacted in 1928 and most recently revised in 2022. The term 'work' under the Copyright Act refers to a creation within the literary, scientific, artistic or other intellectual domain. The protection of works is based on 'creation' rather than registration, as the copyright registration system has been abolished in Taiwan. An author has moral rights and economic rights to their work and will enjoy copyright protection upon completion of the work without any form of registration. Economic rights last for the author's lifetime and 50 years after the author's death. Economic rights to works authored by a juristic person last for 50 years after the work's public release.

The economic rightsholder can license others to exploit the work. This licence can be exclusive or non-exclusive. Based on the principle of freedom of contract, the economic rightsholder (ie, licensor) is free to negotiate with the licensee on the territory, terms, content, method of exploitation and other details of the licence (such as the amount of the royalties and reports from the licensee on the sales of the licensed product(s) for royalties calculations) in a licence agreement. If any right is not clearly covered in the agreement, it is assumed not to have been licensed. A non-exclusive

licensee may not sublicense the rights inherent in the licence to any third party for exploitation without the licensor's consent. An exclusive licensee may, within the scope of the licence, exercise rights as an economic rightsholder and may perform litigious acts in its own name. The licensor may not exercise rights within the scope of an exclusive licence.

Chapter 10: Financing

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In Taiwan, companies can receive funding through various methods as outlined below.

10.1 Shareholders' fund

Shareholders can inject funds into a company by providing equity (increasing capital by issuing new shares), credit/financing facilities (such as shareholders' loans) or quasi-equity (like convertible bonds).

A decision to increase the share capital must be approved by more than half of the total shareholders of a limited company or by a majority vote at a board meeting attended by two-thirds or more of the directors of a company limited by shares. Unless otherwise specified by law or approved by a competent authority, a company limited by shares must set aside ten per cent to 15 per cent of the newly issued shares for its employees. Existing shareholders have the right to subscribe to the new shares in proportion to their current shareholding.

There are no specific requirements for a shareholders' loan, except if the offshore loan exceeds US$50m in a calendar year, in which case approvals from the DIR and the Central Bank of Taiwan are necessary. To issue corporate bonds, a board resolution must be adopted by a majority vote at a board meeting attended by two-thirds or more directors. However, the company may not issue corporate bonds in certain adverse financial situations, such as when in breach of contract or in default. The total amount of secured corporate bonds cannot exceed the company's total assets after deducting the total liabilities and intangible assets, while the total amount of unsecured corporate bonds may not exceed 50 per cent of this remainder.

10.2 Third-party loans

Businesses can obtain short-term, medium-term and long-term loans, as well as other credit facilities from banks, often requiring personal guarantees or collateral, such as real estate. However, if a company wishes to borrow from another Taiwanese company, the lending company can only do so under the following circumstances: (1) when an intercompany business transaction necessitates the lending arrangement or (2) when an intercompany short-term financing facility

(less than one year) is needed, as long as the amount does not exceed 40 per cent of the net asset value of the lending company.

10.3 Capital market

A company that has publicly offered shares or is listed on the TWSE or TPEx can raise capital from capital markets by issuing shares or bonds. The Financial Supervisory Commission (FSC) is the regulator for the securities market.

The TWSE, established in 1961, is the primary equities market in Taiwan, known for maintaining an orderly market and cost-effective trading capabilities. TPEx, founded in 1994, has actively assisted emerging and high-tech industries, as well as small to medium-sized enterprises, in regard to listings and fundraising, expanding Taiwan's securities market. To apply for a public offering or listing of shares, a company must comply with the TWSE/TPEx listing rules, the SEA and other applicable laws and regulations issued by the FSC. Only after obtaining public offering status can a company issue shares or bonds to public investors through a public offering or private placement.

Chapter 11: Privacy laws and data protection

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The Personal Data Protection Act (PDPA) is the main law that governs the collection, processing and use of personal data in Taiwan. Originally known as the Computer-Processed Personal Data Protection Act, it was first enacted in 1995 and underwent an overhaul in 2010, with the amendments taking effect on 1 October 2012. The PDPA Enforcement Rules offer further guidance on interpreting and implementing the PDPA. The PDPA's framework is similar to the data protection laws in the European Union (EU), as the 2010 amendments were primarily influenced by the Data Protection Directive (Directive 95/46/EC), enacted in 1995.

The PDPA currently lacks an independent supervisory authority dedicated to personal data protection, which is enforced by various ministries, commissions and local governments. However, in order to establish an independent supervision mechanism for data protection by August 2025 (as mandated by the Constitutional Court's *111-Hshien-Pan-13* judgment), the Legislative Yuan passed amendments to the PDPA on 16 May 2023. Article 1-1 of the amended PDPA specifies that the Personal Data Protection Commission (PDPC) will serve as the competent authority for the PDPA and will consolidate the enforcement powers currently held by ministries, commissions and local governments from the date of the PDPC's establishment.

After six months of preparation, the Preparatory Office of the PDPC was set up on 5 December 2023. In addition to finalising the enactment of the PDPC's organic statute and officially establishing the PDPC, the Preparatory Office of the PDPC is also responsible for initiating the Phase 2 amendments

in the PDPA. Like the 2010 amendments, the Taiwan government continues to look to the EU's data protection legislation, specifically the General Data Protection Regulation (GDPR), as a significant point of reference for drafting amendments to the PDPA. While the Preparatory Office of the PDPC has not yet released the draft bill for public comment, it is anticipated that the amended PDPA will be more closely aligned with the GDPR.

This chapter provides a high-level summary of the main requirements set out in the PDPA.

11.1 Legal bases for processing

Under the PDPA, a data controller may collect and process personal data only if (1) the data is necessary for serving a specific purpose and (2) such collection or processing is based on a statutory ground (eg, a contractual relationship exists between the data collector and the data subject, or informed consent has been obtained from the data subject). Furthermore, the PDPA prohibits the processing of personal data with regard to a data subject's medical history, medical treatments, genealogy, sex life, health check results and criminal record, except in specific exceptional circumstances.

11.2 Transparency requirements

Under the PDPA, a data controller must inform a data subject of the following details at the time of data collection:

1. the entity collecting their personal data;
2. the purpose(s) for which the data is being collected;
3. the type of personal data to be collected;
4. how, where, by whom and in what manner the data will be used and for how long;
5. the rights the data subject may exercise regarding their personal data and how to do so; and
6. how their rights or interests would be impacted if they choose not to provide the data. In practice, data controllers typically include such information in their privacy policy or statement, thereby meeting the transparency requirements outlined above.

11.3 Data security

The PDPA mandates that data controllers implement appropriate measures to prevent personal data from being stolen, altered, damaged, destroyed, lost or disclosed. The PDPA Enforcement Rules further provide specific technical and organisational measures that data controllers may consider adopting based on the principle of proportionality, taking into account the quality and quantity of the personal data involved.

Strictly speaking, neither the PDPA nor the PDPA Enforcement Rules require data controllers to have specific security measures in place. It is at the discretion of data controllers whether to adopt

a particular security measure. However, the PDPA empowers central competent authorities to designate one or more industry sectors under their supervision and require them to establish a security maintenance plan for personal data files by promulgating data security regulations, which would include more detailed security requirements. The designated business operators would then be obligated to implement specific security measures.

11.4 Supervision of data processors

Pursuant to the PDPA Enforcement Rules, if a data controller wishes to engage a data processor to collect, process or use personal data on its behalf, the data controller must implement appropriate supervision measures in regard to the data processor. Additionally, the data controller must regularly verify that the data processor is implementing these measures and maintain a record of the results of such verification.

11.5 Cross-border data transfers

The PDPA generally allows for the cross-border transfer of personal data without needing an additional legal basis. There is also no requirement for data localisation under the PDPA. However, the PDPA grants central competent authorities the power to restrict cross-border data transfers by issuing announcements in specific circumstances.

For instance, the National Communications Commission (NCC) issued a blanket order, on 25 September 2012, prohibiting telecoms and broadcasting operators from transferring their subscribers' personal data to the People's Republic of China (PRC) due to inadequate personal data protection laws in the PRC. Similarly, the Ministry of Health and Welfare (MOHW) and the MOL issued blanket orders on 21 January 2022 and 20 February 2023, respectively, prohibiting social worker offices and human resources agencies from transferring personal data to the PRC for the same reason.

Chapter 12: Competition law

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The FTA is the primary competition legislation in Taiwan, which regulates enterprises' restrictive business practices and unfair trade practices. Restrictive business practices include monopolies and the abuse of dominance, combination (merger control), concerted actions (cartel), the fixing of resale prices and other such practices (eg, boycotts, discriminatory treatment, solicitation of trading counterparts by improper means, tying and other restrictions imposed on trading counterparts' business activities without justifiable reasons). Unfair trade practices cover counterfeiting, false advertisements, damage to business reputation, illegal multi-level sales, and other deceptive or obviously unfair conduct capable of affecting trading.

12.1 Monopolies

The FTA defines a monopoly as a situation in which an enterprise faces no competition or possesses such significant market power that it can inhibit competition in a relevant market. If two or more enterprises do not engage in price competition as a whole, they will be considered monopolistic enterprises.

An enterprise meeting any of the following criteria may be deemed monopolistic, unless its market share is below ten per cent or its total sales in the preceding fiscal year are less than the amount announced by the FTC: (1) the enterprise's market share in a relevant market reaches 50 per cent; (2) the combined market share of the enterprise and other enterprises in a relevant market reaches two-thirds of the total; or (3) the combined market share of the enterprise and two other enterprises in a relevant market reaches 75 per cent. An enterprise that does not meet any of the above criteria may still be considered monopolistic if its establishment, goods or services are subject to legal or technological restraints, or if other circumstances affect the market's supply and demand and impede others' ability to compete.

While being a monopolistic enterprise is not illegal per se, it is prohibited from abusing its dominant position by using unfair practices to exclude other enterprises from the market, improperly determining, maintaining or changing prices, requiring preferential treatment without proper cause, or engaging in any other acts that abuse its dominant market position.

12.2 Mergers and combinations

Under the FTA, a pre-combination notice must be submitted to the FTC if a combination meets the thresholds specified in the FTA.

12.2.1 Types of notifiable combination

Pursuant to Article 10 of the FTA, a 'combination' includes:

1. a merger;
2. holding or acquiring at least one-third of the total voting shares of, or interest in, another enterprise;
3. transferring or leasing all, or a substantial part of, an enterprise's business or assets;
4. having an arrangement with another enterprise for joint operation on a regular, ongoing basis, or managing another enterprise's business based on a contract of entrustment; or
5. having direct or indirect control over the operation or personnel of another enterprise.

12.2.2 Filing thresholds

According to Article 11 of the FTA, if any or all of the parties to a combination meet any of the following thresholds, a pre-combination notification must be filed with the FTC before the proposed transaction closes: (1) as a result of the combination, any of the enterprises will acquire at least one-third of the market share; (2) any of the enterprises participating in the combination holds a market share of at least one-fourth of the total before the combination; or (3) the preceding fiscal year's turnover of an enterprise participating in the combination exceeded the amount set forth by the FTC.

12.3 Concerted actions (cartel)

Concerted actions refer to the coordinated behaviour of any competitive enterprises at the same stage of production and/or marketing, achieved through contracts, agreements or other forms of mutual understanding. This coordination is aimed at jointly determining the price of goods or services, or imposing limits on the quantity, technology, products, facilities, trading partners or trading territory related to such goods or services. As a result, it restricts the business activities of the involved enterprises, impacting the market's functioning in terms of production, trade in goods, or supply and demand for services.

The existence of a mutual understanding in regard to a concerted action can be inferred from various factors that provide credible evidence, including market conditions, the nature of the product or service, consideration of the costs and revenue and the economic rationale of the enterprises. The FTA prohibits all concerted actions, except those that are beneficial to the national economy and public interest, or those that fall within certain categories approved by the FTC.

12.4 Unfair trade practices

Articles 20 to 25 of the FTA impose criminal and administrative penalties on enterprises engaged in unfair competition practices. These practices include causing harm to another enterprise by discontinuing supplies, purchases or other business transactions; imposing improper restrictions on trading counterparties; using names or symbols that cause confusion with other entities; engaging in false or misleading advertising; and other deceptive or obviously unfair acts that are sufficient to impact trading order.

Certain restrictive trade practices are not only subject to legal consequences under the FTA, but are also punishable under the Criminal Code. For instance, individuals who obstruct the transportation or sale of agricultural or industrial products, leading to a shortage in market supply, may face penalties under Article 251 of the Criminal Code. Additionally, misrepresentation on a commodity label is subject to penalties under Article 255 of the Criminal Code, while spreading rumours or using fraudulent means to damage another person's credit can result in penalties under Article 313 of the Criminal Code.

Chapter 13: Dispute resolution

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Taiwan follows a 'three-level and three-instance' system for civil proceedings, with the District Court, High Court and Supreme Court comprising the three levels. Cases are initially heard at the District Court (first instance) and may be appealed to the High Court (second instance) and further to the Supreme Court (third instance), if applicable. The first and second instances address a case's factual and legal issues, while the third instance only reviews erroneous applications or violations of laws and regulations. Appeals to the Supreme Court are limited to cases where the judgment is in violation of laws and regulations and are subject to a value threshold in terms of the subject matter.

Arbitration and mediation are the most commonly adopted alternatives for civil dispute resolution. Mediation may be initiated as a result of a party's motion or the court's recommendation before or during litigation proceedings. Nonetheless, for certain matters like labour disputes, mediation is legally required before the commencement of litigation proceedings. The Code of Civil Procedure (CCP) is the main law governing civil court proceedings in Taiwan, covering general commercial disputes and personal affairs. such as marriage, family relationships, guardianship and declarations of death. Different procedural requirements apply based on the plaintiff's claims, and the CCP also provides rules on provisional measures and judgment enforcement. The Compulsory Enforcement Act and other supplemental regulations also apply to civil court procedures.

Taiwan's court system accommodates foreign companies and individuals. For instance, if a foreign party does not understand Mandarin, the court must provide an interpreter to safeguard the party's rights and benefits. Nevertheless, all briefs and documents submitted to the court must be in traditional Chinese.

13.1 Interim remedies and court proceedings

Interim remedies, such as provisional attachments, provisional injunctions and injunctions for maintaining a temporary status quo, are available before a trial. A provisional attachment is used for monetary claims or those that can be converted to monetary claims, while a provisional injunction is for non-monetary claims. An injunction for maintaining a temporary status quo is used to prevent material harm, imminent danger or similar events.

Under the CCP, the court will only grant a provisional attachment or a provisional injunction if it is impossible or extremely difficult to satisfy the claim through compulsory execution in the future. In cases of preventing material harm, imminent danger or similar circumstances, a petition may be filed for an injunction to maintain a temporary status quo in a legal dispute. To obtain these interim remedies, the applicant must meet specific requirements, including concerning the type of claim and the urgency and necessity of securing the claim.

The CCP also includes provisions for interim measures for evidence preservation. If evidence is at risk of being lost, destroyed or difficult to be adduced for the court, a party can request the court to preserve the evidence with the opposing party's consent. Additionally, to protect legal rights and interests, a party can request expert testimony, inspection or preservation of documentary evidence to determine the current status of a matter or object. The request for evidence preservation can be made before or after filing a lawsuit.

There are no specific time limits for the court to conclude litigation, interim measures or appeals. Typically, it takes approximately 12 to 24 months to complete litigation proceedings for the first and second instances, and 12 to 18 months for third-instance proceedings. Obtaining interim measures usually takes around two to three weeks for a provisional attachment and one to two months for a provisional injunction and an injunction for maintaining a temporary status quo. However, the duration can vary, based on the complexity of the case.

13.2 Recognition of foreign judgments

A Taiwanese court can recognise and enforce a final and irrevocable foreign court judgment or decree. According to Article 402 of the CCP, a foreign court's final and binding judgment will be recognised unless the following circumstances apply:

- the foreign court lacks jurisdiction under Taiwan law;
- a default judgment is rendered against the losing defendant, unless the notice or summons on the initiation of action had been legally served in a reasonable time in the foreign jurisdiction, or had been served through judicial assistance provided under Taiwan law;
- the content of the judgment or the related litigation procedure is contrary to Taiwan's public order or good morals; or
- there is no mutual recognition between the foreign jurisdiction and Taiwan (ie, where judgments given by the courts in Taiwan are not reciprocally recognised by the concerned foreign courts).

In Taiwan, the principle of reciprocity is generally applied by the courts. The presence of diplomatic relations is not the sole determining factor for reciprocal recognition. The recognition and enforcement of foreign judgments in Taiwan are contingent upon the court trial process.

The Philippines

Chapter 1: Introduction

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The Republic of the Philippines is an archipelago in Southeast Asia comprising over 7,000 islands, with a total area of approximately 300,000 square kilometres. The Philippines is geographically divided into three major island groups from north to south, namely Luzon, Visayas and Mindanao, and its capital city is Manila. The official languages are Filipino and English.

The Philippine legal system is a hybrid of the civil law and common law traditions, originating from the country's Spanish and American colonisation. The civil law tradition applies in areas such as family relations, property, succession, contract and criminal law. Meanwhile, principles of common law are apparent in constitutional law, procedure, corporation law, taxation, insurance, labour relations, banking and currency.

Chapter 2: The business environment

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2.1 Government structure

The Philippines is a unitary presidential constitutional republic, with the President of the Philippines acting as both the head of state and the head of government.

There are three branches of government in the Philippines: the executive branch, headed by the President; the legislative branch, composed of a bicameral Congress (the Senate and House of Representatives); and the judicial branch, headed by the Supreme Court of the Philippines.

Congress has the legislative power to make laws with respect to foreign investment. This power is limited by the 1987 Constitution of the Philippines, which states that it is the policy of the state to pursue independent foreign policy. The state is also enjoined by the Constitution to protect Filipino enterprises against unfair foreign competition and trade practices.

2.2 Legal system

The primary sources of law in regard to the Philippine legal system are the following: the Constitution, statutes, international treaties and conventions, and judicial decisions that interpret the aforementioned laws.

Chapter 3: Business and corporate structures

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3.1 Common forms of legal entities

Common forms of legal entities in the Philippines include corporations, branches of foreign corporations, partnerships, associations, joint ventures and sole proprietorships. Subject to certain limitations on foreign ownership, foreign investors are allowed to establish any of these legal entities.

The recently enacted Revised Corporation Code (RCC) also allows for the creation of a one-person corporation (OPC), with a single stockholder. However, only a natural person, trust or estate may form an OPC.

3.2 Incorporation process

The Securities and Exchange Commission (SEC) has jurisdiction and supervision over all corporations, partnerships and associations. The SEC has the power to grant franchises and give legal existence to these entities. The SEC has promulgated rules and regulations governing the incorporation process.

3.3 Ongoing reporting and disclosure obligations

All corporations must annually submit a General Information Sheet to the SEC, in the form prescribed by the SEC, within 30 calendar days from the date of the issuance of their SEC licence (for branches of foreign corporations) or within 30 calendar days from the actual annual stockholders' meeting (for domestic corporations).

In addition, all corporations must submit their audited financial statements annually to the SEC, stamped 'received' by the Bureau of Internal Revenue (BIR) or its authorised banks, unless the BIR allows an alternative proof of submission in regard to its authorised banks (eg, bank slips). Corporations must file their audited financial statements on the dates designated by the SEC, based on the memorandum circular that the SEC issues annually.

3.4 Management structures

In the Philippines the general rule is that the board of directors exercises corporate power, conducts all business and controls all properties of the corporation. Under the previous Corporation Code, corporations were required to have a minimum of five directors on the board and a maximum of 15. Under the RCC, however, a corporation may provide for only two directors on the board, while the maximum remains 15.

Directors are elected for a term of one year from among the holders of stocks registered in the corporation's books. Each director is to hold office until their successor is elected and qualified. A director must own at least one share of stock to qualify to be a director.

Certain corporations vested with public interest are required to have independent directors constituting at least 20 per cent of their board. These include, among others, banks, quasi-banks, and public and publicly listed corporations pursuant to the Securities Regulation Code (SRC).

A Philippine corporation must have a president, corporate secretary and treasurer, all voted upon by the board of directors immediately after their election. A corporation may also have other officers as provided in its by-laws. The president must also be a director, but cannot concurrently be the treasurer or corporate secretary. The treasurer must be a Philippine resident, while the corporate secretary must be both a resident and citizen of the Philippines.

In an OPC, the single stockholder is also the president and sole director of the corporation. Furthermore, within 15 days from its incorporation, an OPC may appoint a treasurer, corporate secretary and other officers as it deems necessary and must notify the SEC within five days from the appointment. The single stockholder must also designate a nominee and an alternate nominee who, in the event of the single stockholder's death or incapacity, is to take the place of the single stockholder as director and manage the corporation's affairs.

3.5 Director, officer and shareholder liability

Under the RCC, the directors/trustees or officers of a corporation who act within their authority and in good faith do not become personally liable for the acts of the corporation, except in the following instances:

- they vote or assent to patently unlawful acts of the corporation;
- they act in bad faith or are guilty of gross negligence in directing the affairs of the corporation;
- they have conflicting interests with the corporation, in violation of their duties as directors;
- they consent to the issuance of watered stocks or, despite having knowledge of this, do not file their written objection with the corporate secretary;
- they consent to being held personally liable; or
- by a provision in law, the directors are made to be liable for the acts of the corporation.

Except in instances of fraud or alter ego piercing,[1] Philippine law generally considers a corporation to have a separate and distinct personality from its shareholders. Shareholders enjoy limited liability and are exposed to the corporation's liability only to the extent of their shareholdings.

Chapter 4: Takeovers (friendly M&A)

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The RCC states that a private corporation may invest its funds in any other corporation or business, or for any purpose other than the primary purpose for which it was organised, when approved by the majority of the board of directors or trustees and ratified by the stockholders representing at least two-thirds of the outstanding capital stock, at a meeting duly called for the purpose. Notice of the proposed investment and the time and place of the meeting is to be addressed to each stockholder at the place of residence as shown in the books of the corporation, and deposited to the addressee at a post office with postage prepaid, served personally or sent electronically in accordance with the rules and regulations of the SEC on the use of electronic data messages, when allowed by the corporation's by-laws or conducted with the consent of the stockholders. However, where the investment by the corporation is reasonably necessary to accomplish its primary purpose as stated in the articles of incorporation, the approval of the stockholders is not necessary. There are no board or stockholder approval requirements for the investee corporation.

As for mergers and consolidations, the RCC provides that two or more corporations may merge into a single corporation, which will be one of the constituent corporations, or may consolidate into a new single corporation, which will be the consolidated corporation.

The board of directors of each corporation, and party to the merger or consolidation, must first approve the plan for the merger or consolidation, setting forth:

- the names of the corporations involved in the proposed merger or consolidation, referred to as the 'constituent corporations';
- the terms of the merger or consolidation and the mode of putting it into effect;
- a statement of the changes, if any, in the articles of incorporation of the surviving corporation in the case of a merger and, in the case of consolidation, all the statements required to be set forth in the articles of incorporation under the RCC; and
- any other provisions with respect to the proposed merger or consolidation as are deemed necessary or desirable.

1 Alter ego piercing is when a corporation's separate juridical personality is disregarded when a corporation is found to be an alter ego of a person or of another corporation (ie, organised, controlled and its affairs conducted so as to make it merely an instrument or conduit of another person or corporation) and is used to commit fraud, illegal acts or inequity against third parties.

Upon approval of the merger or consolidation plan by the majority vote of the board of directors of the constituent corporations, the plan will be submitted for approval by the stockholders of each corporation at separate corporate meetings, duly called for the purpose. Notice of the meetings must be given to all stockholders in the respective corporations. The notice shall state the purpose of the meeting and include a copy or summary of the plan for the merger or consolidation.

The affirmative vote of stockholders representing at least two-thirds of the outstanding capital stock of each corporation is necessary for the approval of the planned merger or consolidation.

After receiving approval from the stockholders, articles of the merger or articles of the consolidation will be executed by each of the constituent corporations, to be signed by the president or vice-president and certified by the secretary or assistant secretary of each corporation, setting forth:

- the plan for the merger or the plan for the consolidation;
- the number of shares outstanding;
- for each corporation, the number of shares or members voting for or against the plan, respectively;
- the carrying amounts and fair value of the assets and liabilities of the respective companies as of the agreed cut-off date;
- the method to be used in the merger or consolidation of accounts of the companies;
- the provisional or pro forma values, as merged or consolidated, using the accounting method; and
- other information that may be prescribed by the SEC.

The articles of the merger or consolidation, signed and certified, are then submitted to the SEC for its approval. However, in the case of the merger or consolidation of banks or banking institutions, loan associations, trust companies, insurance companies, public utilities, educational institutions and other special corporations governed by special laws, the favourable recommendation of the appropriate government agency must first be obtained.

If the SEC is satisfied that the merger or consolidation of the corporations concerned is consistent with the provisions of the RCC and existing laws, it will issue a certificate approving the articles and plans for the merger or consolidation, at which time the merger or consolidation will be effective.

Where the entity to be acquired is a public company,[2] tender offers may apply pursuant to the SRC and its implementing rules, as follows:

- any person or group of persons acting in concert, who intends to acquire 15 per cent of equity securities in a public company in one or more transactions within a period of 12 months, must file a declaration to that effect with the SEC;

2 A public company is defined as a company which (1) has sold a class of its securities to the public pursuant to a registration statement under Section 12 of the SRC; (2) has a class of securities listed for trading on an exchange; (3) has assets of at least PHP 50m and has 200 or more shareholders, each holding at least 100 shares of a class of its equity securities.

- any person or group of persons acting in concert, who intends to acquire 35 per cent of the outstanding voting shares or such outstanding voting shares that are sufficient to gain control of the board in a public company in one or more transactions within a period of 12 months, must disclose such an intention and contemporaneously make a tender offer for the percentage sought to all holders of such securities within the said period. If the tender offer is oversubscribed, the aggregate number of securities to be acquired at the close of such tender offer must be proportionately distributed among the selling shareholders with whom the acquirer may have been in private negotiations, and other shareholders. For the purposes of the rules of the SRC, the last sale that meets the threshold must not be consummated until the closing and completion of the tender offer;
- any person or group of persons acting in concert, who intends to acquire 35 per cent of the outstanding voting shares or such outstanding voting shares that are sufficient to gain control of the board in a public company through the Philippine Stock Exchange (the 'Exchange') is not required to make a tender offer, even if such a person or group of persons acting in concert acquire the remainder through a block sale if, after acquisition through the Exchange trading system, they fail to acquire the target of 35 per cent or such outstanding voting shares that are sufficient to gain control of the board;
- any person or group of persons acting in concert, who intends to acquire 35 per cent of the outstanding voting shares or such outstanding voting shares that are sufficient to gain control of the board in a public company directly from one or more stockholders is required to make a tender offer for all the outstanding voting shares. The sale of shares pursuant to the private transaction or block sale must not be completed prior to the closing and completion of the tender offer; and
- if any acquisition would result in the ownership of over 50 per cent of the total outstanding equity securities of a public company, the acquirer is required to make a tender offer under the rules of the SRC for all the outstanding equity securities to all the remaining stockholders of the said company at a price supported by a fairness opinion provided by an independent financial adviser or equivalent third party. The acquirer in such a tender offer is required to accept all the securities tendered.

Chapter 5: Foreign investment

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5.1 Foreign investment control/restriction

The Foreign Investments Act classifies industries into the following: nationalised industries (no foreign ownership is allowed), partially nationalised industries (foreign ownership is limited or subject to certain ceilings) and liberalised industries (which may be 100 per cent owned by foreign investors).

A negative list is published from time to time by the government, which enumerates the nationalised and partially nationalised industries. List A is comprised of industries where foreign equity is limited by mandate of the Constitution or by law. List B is composed of industries where foreign equity is limited to safeguard the following national interests: security, defence, health, morals, and the protection of small and medium-sized enterprises. While List A may be amended anytime to reflect changes in the law, List B may be amended no more than once every two years. The latest, or 12th, negative list was signed into law in June 2022.

The following are some of the industries where foreign ownership is restricted (ie, nationalised industries and partially nationalised industries):

List A:

1. Nationalised industries (no foreign equity)

    - mass media, except recording and internet businesses;
    - the practice of professions, except in cases specifically allowed by law;
    - retail trade enterprises, where the paid-up capital is less than PHP 25m;
    - cooperatives;
    - private security agencies;
    - small-scale mining;
    - the utilisation of marine resources;
    - the ownership, operation and management of cockpits;
    - the manufacture, repair, stockpiling and/or distribution of nuclear weapons, biological, chemical, radiological, and anti-personnel mines; and
    - the manufacture of firecrackers and other pyrotechnic devices.

2. Partially nationalised industries (limited foreign equity)

    Up to 25 per cent foreign equity

    - private recruitment, whether for local or overseas employment; and
    - contracts for the construction of defence-related structures.

    Up to 30 per cent foreign equity

    - advertising.

    Up to 40 per cent foreign equity

    - the procurement of infrastructure projects;
    - the exploration, development and utilisation of natural resources;

- the ownership of private land;
- the operation of public utilities;
- educational institutions, except those established by religious groups and mission boards, for foreign diplomatic personnel and their dependents, and other foreign temporary residents;
- culture, production, milling, processing, trading, except retailing, of rice and corn and acquiring rice corn and their by-products;
- contracts for the supply of materials, goods and commodities to state-owned and municipal corporations;
- facility operators of infrastructure or development facilities requiring a public utility franchise;
- the operation of deep sea commercial fishing vessels;
- the ownership of condominium units; and
- private radio communication networks

List B:

Up to 40 per cent foreign equity

- the manufacture, repair, storage and/or distribution of products and/or ingredients requiring Philippine National Police (PNP) clearance: (1) firearms (from handguns to shotguns), parts of firearms and ammunition, instruments or implements used or intended to be used in the manufacture of firearms; (2) gunpowder; (3) dynamite; (4) blasting supplies; (5) ingredients used in making explosives; and (6) telescopic sights, sniper scopes and other similar devices. However, the manufacture or repair of these items may be authorised by the Chief of the PNP to non-Philippine nationals, provided that a substantial percentage of the output is exported, and the extent of foreign equity ownership allowed will be specified in the said authority/clearance;
- the manufacture and distribution of dangerous drugs;
- sauna and steam bathhouses, massage clinics and other similar activities regulated by law because of the risks posed to public health and morals, except wellness centres;
- all forms of gambling, except those covered by investment agreements with the Philippine Amusement and Gaming Corporation (PAGCOR);
- micro and small domestic market enterprises with paid-in equity capital of less than the equivalent of US$200,000; and
- micro and small domestic market enterprises: (1) that involve advanced technology as determined by the Department of Science and Technology (DOST), or (2) that are endorsed as a startup or a startup enabler by the lead host agencies, namely the Department of Trade

and Industry, the Department of Information and Communications Technology, pursuant to RA No 11337, otherwise known as the Innovative Startup Act, or (3) that have a majority of their direct employees as Filipinos, but in no case will the number of Filipino employees be less than 15, with paid-in equity capital of less than the equivalent of US$100,000.

5.2 Foreign exchange control

The Bangko Sentral ng Pilipinas (BSP) is the central bank and monetary authority of the Philippines. It is the entity that regulates the injection and repatriation of foreign exchange in the Philippines. The Manual of Regulations on Foreign Exchange Transactions (the 'ForEx Manual') issued by the BSP consolidates the rules governing foreign exchange transactions. In summary, foreign investors consider the following in dealing with foreign exchange transactions in the Philippines:

- investments in foreign currency need not be registered with the BSP, as long as no foreign currency will be sourced from the Philippine banking system for the purpose of repatriating funds. While foreign currency may be sourced either from the Philippine banking system or from non-banking institutions, such as foreign exchange dealers, the sources of foreign currency outside the Philippine banking system may be subject to greater exchange rate volatility and liquidity constraints;
- portfolio investments (eg, peso-denominated securities issued onshore by the national government and other public sector entities; the securities of resident enterprises listed with the Exchange; peso time deposits with a local bank with a maturity of at least 90 days; and other peso-denominated debt instruments issued onshore by a private resident and that do not constitute loans requiring BSP approval under the ForEx Manual) must be registered with the BSP through BSP-authorised agent banks; and
- applications for the registration of foreign currency funding for the purpose of foreign direct investment must be filed with the BSP within one year from the date of inward remittance to the Philippines.

5.3 Applicable tax incentives or grants

The fiscal incentives granted to foreign investors depend on the industry and the type of vehicle that the foreign investor invests in, which can fall under incentive regimes established by the following laws:

- Executive Order No 226, or the Omnibus Investments Code of 1987, as amended, by registering with the Board of Investments (BOIs), that is, by becoming a BOI-registered enterprise, or by establishing regional or area headquarters (RHQs) or regional operating headquarters (ROHQs);
- Republic Act No 7916, or the Special Economic Zone (SEZ) Act of 1995, as amended, by registering with the Philippine Economic Zone Authority (PEZA) and being located in a PEZA Economic Zone;

- Republic Act No 7903, by being located in the Zamboanga City SEZ, Republic Act No 7922 by being located in the Cagayan SEZ, Republic Act No 9490, as amended by Republic Act No 10083, by being located in the Aurora Pacific Economic and Freeport Zone and Republic Act No 9728, by being located in the Freeport Area of Bataan;
- Republic Act No 7227, or the Bases Conversion and Development Act of 1992, as amended, by being located in the Subic Bay SEZ, the Clark SEZ, the John Hay SEZ or the Poro Point Freeport Zone;
- Republic Act No 9593, or the Tourism Act of 2009, as amended, by registering with the Tourism Infrastructure and Enterprise Zone Authority and being located in a Tourism Enterprise Zone;
- Republic Act No 7844, or the Export Development Act of 1994, by registering with the Export Development Authority; and
- other special laws that create SEZs or that grant incentives for certain priority industries.

Chapter 6: Restructuring and insolvency in the Philippines

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6.1 Governing law on rehabilitation and insolvency

The Financial Rehabilitation and Insolvency Act of 2010 (FRIA) sets out the rules on insolvency for individuals, sole proprietorships, partnerships and corporations. Banks, insurance companies, pre-need companies and government agencies or units are excluded from the coverage of the FRIA.

The FRIA encourages debtors and their creditors to collectively and realistically resolve and adjust competing claims and property rights.

6.2 Insolvency

The Supreme Court defines 'insolvency' simply as the inability to pay one's debts as they fall due. Under the FRIA, a person is considered 'insolvent' when, as a debtor, the person is unable to pay liabilities as they fall due in the ordinary course of business or when the person has liabilities greater than their assets.

An insolvent individual or entity may avail of several remedies, including court-supervised rehabilitation, pre-negotiated rehabilitation and out-of-court restructuring or rehabilitation.

6.3 Restructuring and rehabilitation as a remedy for insolvency

An insolvent debtor may avail themself of out-of-court restructuring or rehabilitation. The Supreme Court defines restructuring, as applied to debts, as a postponement of the maturity and a modification of the essential terms of the debt to make the debtor solvent.

An out-of-court or informal restructuring/workout agreement or rehabilitation plan outlines possible means to restore the economic viability of the debtor and return them to a state of solvency. This agreement requires the consent of the debtor and must be approved by creditors representing a percentage of the obligations and total liabilities of the debtor. For the purpose of finalising negotiations, the debtor and the creditors may agree on a standstill period.

Rehabilitation may also be court supervised or pre-negotiated.

Court-supervised rehabilitation may be initiated by the debtor or a creditor based on specific grounds. After a verified petition for rehabilitation is filed, the court issues a commencement order if the petition is sufficient and, thereafter, initiates the proceedings. The order will state, among others, a declaration that the debtor is under rehabilitation and the appointment of a rehabilitation receiver.

Pre-negotiated rehabilitation may be secured by an insolvent debtor solely or jointly with any of its creditors, by filing a verified petition with the court for the approval of a pre-negotiated rehabilitation plan. The plan must be endorsed or approved by the creditors holding at least two-thirds of the total liabilities of the debtor. If the petition is sufficient, the court will issue an order declaring the debtor to be under rehabilitation and may subsequently approve the rehabilitation plan.

6.4 Scope and effect of stay or suspension order

Under the FRIA, the court may issue a stay or suspension order, which is intended to provide the debtor ample time and opportunity to carry out its restructuring or rehabilitation efforts and emerge from insolvency.

A stay or suspension order cannot be granted in the following instances:

- cases already pending appeal before the Supreme Court as of the commencement date;
- cases pending or filed at a specialised court or quasi-judicial agency capable of resolving the claim more quickly, fairly and efficiently than through a stay of suspension order;
- in relation to the enforcement of claims against sureties and other persons solely liable with the debtor and third party or accommodation mortgagors, as well as issuers of letters of credit;
- any form of action by customers or clients of a securities market participant to recover or otherwise claim money and securities entrusted to the latter in the ordinary course of the latter's business;
- in relation to actions by a licensed broker or dealer to sell pledged securities of a debtor pursuant to a securities pledge or margin agreement for the settlement of securities transactions;

- in relation to the clearing and settlement of financial transactions through the facilities of a clearing agency or similar entities and reimbursements from regulatory agencies for any transactions settled for the debtor; and
- any criminal action against the individual debtor or owner, partner, director or officer of a debtor.

A stay or suspension order has the effect of:

- suspending all actions or proceedings, in court or otherwise, for the enforcement of claims against the debtor;
- suspending all actions to enforce any judgment, attachment or other provisional remedies against the debtor;
- prohibiting the debtor from selling, encumbering, transferring or disposing, in any manner, of any of its property, except in the ordinary course of business; and
- prohibiting the debtor from making any payment in regard to its outstanding liabilities as of the commencement date, except as may be provided in the order.

6.5 Liquidation

Liquidation, which is the process of converting assets into cash, is often the last resort in terms of the insolvency framework. Debtors and creditors undergo this process when there is no substantial likelihood that the debtor may be rehabilitated.

Philippine law on liquidation provides for both voluntary and involuntary liquidation of both individual and juridical debtors. In certain instances, liquidation may be the result of rehabilitation proceedings if there is a failure or non-feasibility of rehabilitation.

6.5.1 Voluntary liquidation

Voluntary liquidation commences as a result of the insolvent debtor's own initiative, either through a separate filing of a verified petition or the submission of a verified motion in ongoing rehabilitation proceedings.

A juridical entity that has become an insolvent debtor may apply for liquidation by filing a petition for liquidation with the court. The petition must be verified, establish the insolvency of the debtor and contain the following:

- a schedule of the debtor's debts and liabilities, including a list of creditors with their addresses, the amount of the claims and collateral or securities, if any;
- an inventory of all the assets, including receivables and claims against third parties; and
- the names of at least three nominees to fulfil the position of liquidator.

An individual may also file for liquidation. Under the FRIA, an individual debtor who, possessing sufficient property to cover all their debts, but foreseeing the impossibility of meeting them when they fall due, may file a verified petition that they are declared in the state of suspension of payments by the court.

The individual must attach to the petition: (1) a schedule of their debts and liabilities; (2) an inventory of the assets; and (3) a proposed agreement with their creditors. With the agreement of the creditors, the court may then order the liquidation of the individual's assets.

6.5.2 Involuntary liquidation

Involuntary liquidation is instigated by the insolvent debtor's creditors. It requires the concurrence of three or more creditors with an aggregate claim of at least PHP 1m or representing at least 25 per cent of the capital stock or partner's contribution, whichever is higher.

This process is commenced through the same means as voluntary liquidation. The petition or motion must show that (1) there are no genuine issues of fact or law in regard to the claims of the petitioner and that the due and demandable payments involved have not been made for at least 180 days or that the debtor has failed generally to meet their liabilities as they fall due and (2) that there is no substantial likelihood that the debtor can be rehabilitated.

In both instances, if the petition or the motion is sufficient in form and substance, the court will issue a liquidation order.

Chapter 7: Employment, termination, occupational safety and health

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7.1 Management prerogative

Employers are free to regulate all aspects of employment, such as hiring practices, working hours, discipline and dismissal, and are allowed to exercise their management prerogatives, provided they do so in good faith and without infringing employees' rights.

7.2 Termination of employment

The Labor Code grants both the employee and employer the right to terminate the employer–employee relationship under certain conditions.

7.2.1 Employee-initiated termination

An employee may terminate their employment by resigning with or without just cause. Should an employee resign without just cause, they must serve written notice on the employer at least one month in advance. Otherwise, the employer may hold the employee liable for damages. The notice requirement, however, need not be observed if the employee resigns for any of the following just causes:

- a serious insult by the employer or their representative has occurred impacting on the honour and person of the employee;
- inhuman and unbearable treatment has occurred in regard to the employee by the employer or their representative;
- the commission of a crime or offence by the employer or their representative has occurred against the person of the employee or any of their immediate family members; or
- other analogous causes.

7.2.2 Employer-initiated termination

On the other hand, an employer may terminate an employee only for just or authorised causes, in accordance with the constitutionally protected right of workers to security of tenure. Procedural due process must always be observed by the employer when terminating an employee's employment. The failure to comply with these requirements constitutes illegal dismissal. An employee who is illegally dismissed is entitled to full back pay and reinstatement, without loss of seniority.

If reinstatement is not possible, the employee is granted separation pay in lieu of reinstatement. Additionally, the employer is liable for damages and attorney's fees.

Termination for just cause occurs when an employee has committed any of the following:

- serious misconduct or wilful disobedience of the employer's lawful orders in connection with the employee's work;
- gross and habitual neglect of their duties;
- fraud or wilful breach of trust;
- the commission of a crime or offence by the employee against their employer, the employer's immediate family or duly authorised representatives; or
- other analogous causes.

Dismissal due to a just cause is valid if it complies with the procedural due process requirement of two written notices. The first written notice must specify: (1) any of the just causes under the Labor Code, (2) a detailed statement of the facts and circumstances forming the basis for the charge against the employee, and (3) a directive allowing the employee to submit a written explanation within a reasonable period of time, which cannot be less than five days from receipt of the notice.

Subsequently, the employer must afford the employee sufficient opportunity to be heard. A formal hearing or conference becomes mandatory only if requested by the employee in writing, in cases of substantial evidentiary dispute, in accordance with a company rule or practice, or under similar circumstances warranting a formal hearing or conference.

The second written notice should confirm that all the relevant circumstances involving the charge have been considered and that sufficient grounds have been established to justify the termination of employment.

An employee dismissed for just cause is typically not entitled to separation pay unless provided for in a company policy or a collective bargaining agreement.

Termination for authorised causes refers to the grounds in the Labor Code that employers may invoke, even if the employee has not committed any wrongful acts or omissions. This type of termination entitles the employee to separation pay.

Authorised Cause	Amount of Separation Pay
Installation of a labour-saving device	At least one month of pay or at least one month of pay for every year of service, whichever is higher; a fraction of six months' service is considered as one year.
Redundancy	
Retrenchment to prevent losses	One of month pay or at least one-half of a month of pay for every year of service, whichever is higher; a fraction of six months' service is considered as one whole year.
Closure or cessation of the business	If the closure or cessation of business operations is not due to serious business losses, the employee is entitled to separation pay equivalent to one month of pay or at least one-half of a month of pay for every year of service, whichever is higher; a fraction of six months' service is considered as one whole year. If the closure is due to serious business losses or financial reverses, no separation pay is required to be paid.
Disease that a competent public health authority has certified as incurable within six months, even with proper medical treatment, and where continued employment is prohibited by law or prejudicial to the employee's health, as well as to the health of co-workers	At least one month's salary or one-half of a month's salary for every year of service, whichever is higher; a fraction of six months' service is considered as one whole year.

Termination for an authorised cause must be in good faith and must be supported by facts and circumstances that substantiate the actual existence of the conditions necessitating the dismissal. Such terminations are regarded as measures of last resort, requiring the employer to demonstrate that no viable alternatives, including cost-cutting measures, remain feasible.

Due process for authorised causes is satisfied when the employee and the appropriate Regional Office of the Department of Labor and Employment (DOLE) are served with a written notice specifying the grounds for termination at least 30 days before the termination comes into effect.

Under DOLE Department Order No 147-15, the 'Last-In, First-Out Rule' applies in cases involving the installation of labour-saving devices, redundancy and retrenchment, unless an employee volunteers to be terminated from their employment. However, it is worth noting that this rule is not mandatory as the employer still retains the prerogative to determine whose employment to terminate, so long as it is not done arbitrarily.

7.3 Telecommuting

Telecommuting refers to work that takes place from an alternative workplace with the use of telecommunications or computer technologies. The terms and conditions relating to telecommuting arrangements must be mutually agreed upon by both parties, ensuring they meet or exceed the minimum labour standards mandated by law. These terms encompass working hours, entitlement to leave and social welfare benefits, and security of tenure. Employers must ensure that telecommuting employees receive equitable treatment compared to on-site employees and that they are subject to the same company rules and policies, or by an existing collective bargaining agreement.

7.4 Occupational health and safety standards

The Occupational Safety and Health Standards (the 'OSH Standards') Law, or Republic Act No 11058, mandates that employers, their contractors and their subcontractors provide their workers with a place of employment that is free from hazardous conditions that are causing or are likely to cause death, illness or physical harm. Employers are required to register their business with the Regional Labor Office 30 days before operations commence. They must also implement an occupational safety and health programme, which includes specific policies, guidelines and information, depending on the number of workers employed by the establishment. Additionally, employers are required to submit various safety and health reports and notifications to the DOLE, such as annual medical reports, OSH committee reports and work accident or injury reports. Failure to comply with the OSH Standards may result in fines ranging from PHP 20,000 to PHP 100,000 per day until the violation is corrected, with additional penalties for repeated or multiple violations.

Chapter 8: Tax law

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8.1 Tax reform legislation

The Philippines has introduced major tax reform legislations in the last six years:

- in 2018, the Tax Reform for Acceleration and Inclusion or the 'TRAIN Law' was passed to introduce reforms on individual income, estate and donor's tax, value-added tax (VAT) and excise taxes;
- in 2021, the Corporate Recovery and Tax Incentives for Enterprises Act or the 'CREATE Law' paved the way for reforms to corporate income tax and the rationalisation of tax incentives, among other amendments to the Tax Code. More specifically, the CREATE Law lowered the income tax rate, widened the tax base, and reduced tax distortions and leakages; and

- in 2024, the Ease of Paying Taxes or the 'EoPT Law' was signed into law, with the aim of modernising tax administration and improving its efficiency and effectiveness by providing mechanisms that encourage full and easy compliance.

8.2 Income tax applicable to individuals

The Philippines imposes income tax on resident citizens based on their worldwide income. However, income earned outside the Philippines by overseas Filipino workers is exempt. Non-resident citizens and foreigners, whether resident in the Philippines or not, are taxed only on income from sources within the Philippines.

8.2.1 Compensation income earners

Individuals earning purely compensation-related income are subject to tax, in accordance with the following tax schedule:

Income in Philippine pesos (PHP)*	Tax due and tax rate
Under 250,000	0 per cent
Over 250,000, but under 400,000	15 per cent of the excess over 250,000
Over 400,000, but under 800,000	22,500 + 20 per cent of the excess over 400,000
Over 800,000, but under 2,000,000	102,500 + 25 per cent of the excess over 800,000
Over 2,000,000, but under 8,000,000	402,500 + 30 per cent of the excess over 2,000,000
Over 8,000,000	2,202,500 + 35 per cent of the excess over 8,000,000

*Approximately USD 1.00 = PHP 59.00.

The compensation received by an employee is subject to withholding tax, using the graduated income tax rates displayed above. The employer acts as the withholding agent.

8.2.2 Self-employed individuals

Self-employed individuals and professionals have the option to avail themselves of an eight per cent tax on gross sales and other non-operating income in excess of PHP 250,000 in lieu of the graduated income tax rates and percentage tax.

8.2.3 Mixed-income earners

Taxpayers earning both compensation-related income and income from a business or the practice of a profession are subject to the following taxes:

- all income in the form of compensation, according to the applicable graduated income tax rates; and

- all income from the relevant business or the practice of a profession:
  - if the total gross sales and other non-operating income do not exceed the VAT threshold, the graduated rates prescribed on taxable income or eight per cent income tax based on gross sales or gross receipts and other non-operating income in lieu of the graduated income tax rates and the percentage tax may be applied; or
  - if the total gross sales and other non-operating income exceeds the VAT threshold, the graduated income tax rates apply.

8.3 Income tax applicable to corporate entities

The income taxes applicable to businesses depend on the type of business entity.

8.3.1 Domestic corporation

A domestic corporation is taxed on its income derived from sources within and outside the Philippines. Among the principal income taxes imposed on domestic corporations are:

- corporate income tax (CIT) of 25 per cent on net taxable income or 20 per cent if the total assets do not exceed PHP 100m and the total net taxable income does not exceed PHP 5m;
- a minimum corporate income tax (MCIT) of two per cent of the gross income is imposed on corporations regardless of their actual net income;
- capital gains tax (as discussed below); and
- withholding taxes, which are collected in regard to certain payments received or paid. Dividends received by a domestic corporation from another domestic corporation are not subject to tax.

8.3.2 Resident foreign corporations

Generally, a resident foreign corporation is taxable in the same manner and at the same rates as a domestic corporation. However, the tax base for income earned by resident foreign corporations is limited to income derived from sources within the Philippines. Branch offices of foreign corporations, including regional operating headquarters (ROHQs), are generally considered resident foreign corporations.

Profits remitted abroad by a branch office, including ROHQs, are subject to a 15 per cent tax rate, based on the total profits applied or earmarked for remittance. However, profits from qualified activities remitted by a branch office or an ROHQ registered with the Philippine Economic Zone Authority (PEZA) are exempt from taxes.

8.3.3 Non-resident foreign corporations

A non-resident foreign corporation not engaged in trade or business in the Philippines is taxable in regard to dividends, interest, royalties, rent and business income derived from all sources within the Philippines. Income received by non-resident foreign corporations is subject to a final withholding tax (as discussed below).

8.3.4 Representative offices (ROs) and regional or area headquarters (RHQs)

By their nature as support or administrative centres, ROs and RHQs do not derive income in the Philippines, hence they are not considered taxable corporations or entities under the Tax Code.

8.4 Other taxes

8.4.1 Capital gains tax (CGT)

Capital gains tax is a tax imposed on the gains presumed to have been realised by the seller from a sale, exchange or other disposition of capital assets located in the Philippines.

The sale of real property is generally subject to six per cent CGT. If the seller of shares (not listed on the stock exchange) is an individual or corporation (domestic, resident or non-resident foreign corporation), the sale is subject to 15 per cent CGT, based on the capital gain regardless of the amount.

8.4.2 Income tax on passive income

Final withholding tax (FWT) is generally a tax on passive income and constitutes a full and final payment of the income tax due. The payee is not required to file an income tax return for the particular income subject to FWT, as the liability for the payment of tax rests primarily on the payor as the withholding agent. The following are types of income subject to FWT:

- dividends;
- interest;
- royalties;
- rent; and
- capital gains on the sale of real property.

Business profits received by a non-resident foreign corporation are subject to 25 per cent FWT. Dividends are subject to FWT ranging from 15 to 25 per cent, while FWT rates for interest and royalties range from 20 to 25 per cent. Rent from sources within the Philippines paid to a non-resident foreign corporation are also subject to 25 per cent FWT.

A tax exemption or reduction in the tax rate may be available based on a tax treaty signed by the Philippines with over 40 countries and tax jurisdictions.

8.4.3 Value-added tax (VAT)

VAT is a tax on consumption levied on the sale, barter, exchange or lease of goods or properties and services in the Philippines and on the importation of goods into the Philippines. The current VAT rate is 12 per cent of the purchase price or consideration.

VAT is an indirect tax which may be shifted or passed on to the buyer, transferee, or lessee of goods, properties or services. Any person or entity who, in the course of trade or business, sells, barters, exchanges, or leases goods or properties and renders services, is subject to VAT, if the aggregate amount of annual gross sales or receipts exceeds PHP 3m, and as such is required to file and pay VAT.

The law provides that certain goods and services may be VAT zero-rated or VAT exempt.

8.4.4 Excise tax

Excise taxes are charged for specific goods and services, such as alcohol, tobacco, fuel and airline tickets.

8.4.5 Documentary stamp tax (DST)

DST is an excise tax levied on documents, instruments, loan agreements and papers evidencing the acceptance, assignment, sale or transfer of an obligation, right or property incident. The amount of tax is either fixed or based on the par or face value of the document or instrument. The tax is paid by the person making, signing, issuing, accepting or transferring the documents. However, whenever one party to the taxable document enjoys an exemption from this tax, the other party who is not exempt is directly liable for the tax.

8.4.6 Customs duty

Goods imported into the Philippines are generally subject to customs duty, plus 12 per cent VAT on the importation or excise tax in regard to the importation of certain goods.

8.4.7 Local taxes

Local taxes, fees and charges are imposed by local government units (ie, province, municipality, city or barangay), subject to guidelines and limitations provided by Congress. Local taxes normally include business, community and real property taxes.

Chapter 9: Intellectual property

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9.1 Patents

Philippine law, primarily the Intellectual Property Code of the Philippines (Republic Act No 8293 or the 'IP Code'), grants protection and exclusive rights to an inventor over any technical solution to a problem which is new, involves an inventive step and is industrially applicable. Such technical solution (an 'invention') may be a product, process or an improvement thereof.

An invention that is patented is granted protection and exclusive rights for a period of 20 years from the filing date of the patent application. During the life of the patent, patent owners have the right to prevent others from making, using or selling their invention (if the invention is a product) or from using the process or from manufacturing, dealing in, using, selling or offering for sale, or importing any product obtained directly or indirectly from such process (if the invention is a process). Patent owners also have the right to assign, transfer or license the patent.

The application process for a patent involves the following stages:

1. filing the application;
2. a formality examination;
3. a prior art search;
4. publication for opposition;
5. a substantive examination; and
6. the granting of a patent.

The average processing time taken by the Intellectual Property Office of the Philippines (IPOPHL) for the issuance of a patent is 48 months.

9.2 Trademarks

The IP Code likewise grants protection and exclusive rights to the owner of a trademark. A trademark as defined under the IP Code is any visible sign capable of distinguishing the goods or services of a business.

Generally, a trademark is registrable in the Philippines if it is distinct and is not immoral, deceptive nor misleading.

A registered trademark is granted protection and exclusive rights during the period of its registration. The term of registration is ten years from the date of registration and is renewable for a

period of ten years at a time. However, to maintain the registration, a Declaration of Actual Use must be submitted, in accordance with the following schedule:

- within three years from the filing of the application for the registration of the trademark, the international registration date or subsequent designation date, as the case may be;
- within one year from the fifth anniversary of the registration of the mark or the statement on the granting of protection;
- within one year from the date of renewal of the registration; and
- within one year from the fifth anniversary of each renewal.

The owner of a registered trademark has the right to prevent others from using trademarks which are identical or similar to the registered trademark if such use would result in a likelihood of confusion. Philippine jurisprudence recognises that the scope of protection in terms of registered trademarks extends to market areas within the normal expansion of business of the trademark owner.

The owner of a registered trademark also has the right to assign, transfer or license the registered trademark.

The application for the registration of a trademark involves the following stages:

1. filing the application;
2. a formality and substantive examination;
3. publication for opposition; and
4. the issuance of a certificate of registration.

The average processing time taken by the IPOPHL in regard to an application for the registration of a trademark is between three and four months.

9.3 Copyright

The IP Code likewise governs copyright. Under the IP Code, protection granted to authors, artists and other types of creators over their original work is granted automatically from the moment of creation of such work. As such, registration of an original work is not necessary. Creators of copyrightable work, however, may opt to apply for registration of their original work with the IPOPHL. 'Original work' refers to an intellectual creation in the literary, scientific or artistic domain and includes computer programs and mobile apps.

The term of protection of copyright is generally the lifetime of the author, artist or creator plus 50 years. Owners of copyright have the exclusive right to use the original work or to authorise others to use such work based on agreed terms. They likewise have to right to authorise or prohibit others from reproducing their original work in other forms.

Copyright transfers and assignments may likewise be registered with the IPOPHL.

9.4 Utility model

The IP Code also governs utility models. A utility model is any technical solution to a problem which is new and is industrially applicable. In contrast to an invention, a utility model may not include an inventive step.

A registered utility model is granted protection for a period of seven years from the filing date of the application, without the possibility of renewal.

The application for registration of a utility model involves the following stages:

1. filing the application;
2. a formality examination;
3. publication of the application; and
4. the issuance of a certificate of registration.

The average processing time taken by the IPOPHL in regard to an application for the registration of a utility model is two months.

9.5 Industrial designs

The IP Code also governs industrial designs. An industrial design is any composition involving lines or colours or any three-dimensional form that gives a special appearance to and can serve as a pattern for an industrial product or handicraft. To be registrable, the industrial design must be a new or original creation.

A registered industrial design is granted protection for a period of five years from the filing date of the application. The registration of an industrial design may be renewed for not more than two consecutive periods of five years each.

The application for the registration of an industrial design involves the following stages:

1. filing the application;
2. a formality examination;
3. publication of the application; and
4. the issuance of a certificate of registration.

The average processing time taken by the IPOPHL in regard to an application for the registration of an industrial design is five days.

9.6 Intellectual property treaties

The Philippines has acceded to the following intellectual property treaties:

- the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled;
- the Beijing Treaty on Audiovisual Performances;
- the Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks (2012);
- the World Intellectual Property Organization's (WIPO) Copyright Treaty (2002);
- the WIPO's Performances and Phonograms Treaty (2002);
- the Patent Cooperation Treaty (2001)
- the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (1984);
- the Budapest Treaty on the International Recognition of the Deposit of Microorganisms for the Purposes of Patent Procedure (entered into the treaty in 1981);
- the Convention Establishing the World Intellectual Property Organization (1980);
- the Paris Convention for the Protection of Industrial Property Rights (1965);
- the Berne Convention for the Protection of Literary and Artistic Works (1951); and
- the Agreement on Trade-Related Aspects of Intellectual Property Rights (the 'TRIPS Agreement') (1994).

Chapter 10: Financing

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10.1 Regulation of banking and financial services

The Bangko Sentral ng Pilipinas (Philippine Central Bank or BSP) acts as the central monetary authority that regulates money, banking and credit within the Philippines.

The BSP is an independent, government-owned corporation tasked with regulating finance companies, bank operations, non-bank financial institutions engaged in quasi-banking activities and other similar entities, in order to promote and maintain monetary stability.

The BSP exercises regulatory powers over the banking sector by issuing rules and regulations. Absent an authorisation from the BSP, a person or entity cannot legally engage in banking operations or quasi-banking functions in the Philippines.

10.2 General classification of banks

Banks are generally classified into the following categories:

- universal banks, which are banks that have authority to exercise the powers and functions of a commercial bank and also have the power to act as an investment house and the power to invest in non-allied enterprises;
- commercial banks, which are banks that are authorised to engage in commercial banking (ie, issue letters of credits, accept drafts, discounting and negotiation of negotiable instruments, accept and create demand deposits), in addition to having general corporate powers;
- rural banks, which are banks that are created for the purpose of comprehensive rural development by making credit available to those in rural areas;
- thrift banks, which includes savings and mortgage banks, private development banks, and stock savings and loan associations;
- cooperative banks, which are banks that primarily provide financial, banking and credit services to cooperative organisations and their members;
- Islamic banks, which banks with objectives and operations in accordance with the principles of Sharia law;
- digital banks, which are banks that offer financial products and services through digital platforms and electronic channels, without the need for physical branches; and
- other classifications of banks as determined by the Monetary Board of the BSP.

10.3 Modes of entry for foreign banks

The Philippines allows full entry of foreign banks into the Philippine banking system. The Monetary Board may authorise foreign banks to operate in the Philippine banking system through any of the following modes of entry:

- by acquiring, purchasing or owning up to 100 per cent of the voting stock in an existing bank;
- 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
- by establishing branches with full banking powers.

The acquisition of a domestic bank by a foreign individual or a non-bank corporation is subject either to a 60 per cent or 40 per cent limit in terms of the acquisition of stock, depending on the type of bank being acquired.

10.4 Qualification for foreign banks

A foreign bank that intends to operate in the Philippines must be:

- widely owned and publicly listed in its country of origin, unless the foreign bank applicant is owned and controlled by the government of its country of origin; and
- established, reputable and financially sound.

If a foreign bank is owned and controlled by a holding company, the aforementioned requirements may apply to the holding company. Moreover, the BSP will also consider the following factors in selecting the foreign banks that are allowed to enter the Philippine banking system:

- the geographical representation and complementation offered;
- any strategic trade and investment relationships between the Philippines and the home country of the foreign bank;
- the relationship between the applicant bank and the Philippines;
- the demonstrated capacity, global reputation in terms of financial innovation and stability relating to the competitive environment of the applicant bank;
- the reciprocity rights enjoyed by Philippine banks in the applicant's home country; and
- the willingness of the foreign bank to fully share banking technology.

The subsidiary or branch of a foreign bank is also required to comply with the minimum capital requirements applicable to domestic banks within the same category.

10.5 Qualifications of subscribers, directors and officers of banks

All the incorporators, subscribers, directors and officers of the bank, present or proposed, must have the following qualifications:

- be persons of integrity, of good credit and standing in the business community, and must possess technical expertise in the field of banking and finance;
- have adequate financial strength to pay the proposed costs related to the bank and/or infuse additional capital when needed;
- not have been convicted of any crime involving moral turpitude, and unless otherwise allowed under provisions of law, not be officers or employees of government agencies, instrumentalities, departments or offices charged with the supervision or granting of loans to banks;
- not be an appointed or elected public official, full or part-time, and at the same time serving as an officer of a bank, except when such service is incidental to the financial assistance provided by the government or a government-owned or controlled corporation to the bank, or except in cases allowed under existing laws;
- hold the qualifications provided in the Manual of Regulations for Banks; and
- be subject to any the disqualifications detailed in the Manual of Regulations for Banks.

10.6 Registration of direct foreign equity investment in a domestic corporation

Inward foreign investment must be registered with the BSP within one year: (1) from the date of the actual funding (eg, inward remittance of foreign exchange) or payment for the investment (if in cash) or (2) from the date of the actual transfer of assets to the Philippines or payment for the investment (if in kind).

Registration is necessary if the foreign investor intends to source the foreign exchange requirement needed to service the repatriation of capital and remittance of cash dividends/profits/earnings accrued on a foreign investment from the Philippine banking system (ie, authorised agent banks or their affiliate or subsidiary foreign exchange corporations).

Without the required BSP registration, the foreign investor may source foreign exchange from internally generated revenue or from outside the Philippine banking system, such as from foreign exchange dealers, money changers and remittance agents.

The registration of inward investment must be supported by proof of funding and proof of an actual investment made by the non-resident investor. After complying with the requirements to register the inward remittance, a BSP registration document is issued in the name of the domestic corporation.

10.7 Registration of foreign loans

Foreign loans must be registered with the BSP if the company intends to source foreign currency from the Philippine banking system in connection with the repayment of the principal amount or the interest on the foreign loan.

Without the required BSP registration, the borrower may still source foreign exchange from internally generated revenue or from outside the Philippine banking system, such as from foreign exchange dealers, money changers and remittance agents.

In order to register a private sector foreign loan, the borrower must:

- submit a notice to the BSP supported by a copy of the signed covering agreement, within one month from the date of signing;
- send a notification to the BSP of any changes in the loan's financial terms and conditions or in the event of the cancellation (whether partial or in full) of the loan, commitment or agreement, within 15 banking days from the availability of the information, the signing of the amended or supplemental agreement, effectivity date, as the case may be, for monitoring purposes;
- apply for loan registration with the BSP within one month from the drawdown date for short-term loans and within six months from the utilisation of the proceeds for medium and long-term loans and the submission of a foreign borrowings plan for medium and long-term loans;

- in the event that the signing date and drawdown occur simultaneously, the notice and the application for the loan registration may be filed simultaneously.

After complying with the requirements to register the loan, a BSP registration document is issued in the name of the domestic corporation.

Chapter 11: Privacy and data protection laws

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Rapid advancements in machine learning have led to the increased recognition, by both businesses and consumers, of the importance and commercial value of data, including the ability to control what, when and how personal data is used. The Data Privacy Act (DPA) was enacted with a view to balancing the protection of the right to privacy with the necessity of maintaining the free flow of information that consequently promotes innovation and growth. The DPA governs the collection and processing of personal information in the Philippines.

11.1 Data privacy compliance

The DPA applies to the processing of all types of personal information and to any natural or juridical person involved in personal data processing, regardless of whether they are established in the Philippines, for as long as they use equipment located in the Philippines.

Data processing refers to any operation or any set of operations performed involving personal data including, but not limited to, the collection, recording, organisation, storage, updating or modification, retrieval, consultation, use, consolidation, blocking, erasure or destruction of such data. The processing of personal information is conducted by either a personal information controller (PIC) or by a personal information processor (PIP). PIC refers to a natural or juridical person, or any other body, that processes data, or instructs another person to process personal data on its behalf; and makes decisions in regard to what information is collected, or the purpose or extent of its processing (ie, has control over the processing). PIP refers to any natural or juridical person, or any other body, who processes personal data upon the instruction of a PIC or on the basis of an outsourcing agreement with a PIC.

Personal information refers to information, whether recorded in a material form or not, from which the identity of an individual is apparent or can be reasonably and directly ascertained by the entity holding the information, or could, in conjunction with other pieces of data, directly and certainly identify an individual. Personal information is classified as sensitive when it refers to information: (1) about an individual's race, ethnic origin, marital status, age, colour or religious, philosophical or political affiliations; (2) about an individual's health, education, genetic or sexual life, or to any proceeding for any offence committed or alleged to have been committed by such an individual, the disposal of such proceedings or the sentence issued by any court in regard to such proceedings; (3) issued by government agencies peculiar to an individual, which includes, but is not limited to, social security numbers, previous

or current health records, licences including their denial, suspension or revocation, and tax returns; or (d) specifically established by an executive order or an act of Congress which must be kept classified.

Data subject refers to individuals whose personal information is collected.

PICs and PIPs are required to appoint or designate a data protection officer (DPO), who is accountable for ensuring compliance with the DPA and all laws and regulations relating to privacy and data protection.

11.1.1 Lawful bases for processing

The processing of personal information is permitted unless otherwise prohibited by law. Section 12 of the DPA enumerates conditions that would render the processing of personal information lawful. On the other hand, the processing of sensitive personal information is prohibited except when any of the conditions in Section 13 of the DPA apply.

Of these conditions, only consent-based processing has been extensively discussed and elaborated upon by the National Privacy Commission (NPC) in its opinions. In 2023, the NPC released Guidelines on Consent, providing guidance on valid consent, and how consent must be obtained and managed in accordance with the DPA. The NPC also published Guidelines on Legitimate Interest, providing guidance for entities who rely on legitimate interest to justify the processing of personal information.

11.1.2 Registration with the NPC

PICs and PIPs who meet any of the following conditions are required to register with the NPC: (1) have at least 250 employees; (2) process the sensitive personal information of at least 1,000 individuals; (3) process information likely to pose a risk to the rights and freedoms of the data subjects, including those that involve either information that would be likely to affect national security, public safety, public order or public health; information required by applicable laws or rules to be confidential; or vulnerable data subjects (eg, minors, the mentally ill, asylum seekers and elderly patients); or automated decision-making; or profiling; or (4) are government agencies or instrumentalities.

PIC and PIP registration with the NPC is completed by registering the entity's DPO and registering the PIC or PIP's data processing systems.

The DPO is in charge of creating the entity's account on the NPC's Registration System (NPCRS), in order to register their appointment and register the data processing system. It is worth noting that the email address used for registration with the NPCRS must be a specific email address dedicated to the position of the DPO in the entity and not an email personally linked with the person appointed as DPO. After the DPO has successfully created the PIC or PIP's NPCRS account, the DPO may proceed to register, and provide the relevant information on the data processing system, as follows:

- a description of the relevant data processing systems, including the name of the system;

- the manner, basis and purpose of the data processing;
- a description of the category or categories of data subjects and the data relating to them;
- the recipients or categories of recipients to whom the personal data might be disclosed;
- whether the system is outsourced or subcontracted and the details of any such third party;
- any existing policies relating to the data life cycle, data privacy and information security;
- any data processing certifications attained by the PIC or PIP, including related to personnel;
- whether there are any cross-border data transfers or data sharing agreements in existence with other parties; and
- notifications regarding any automated decision-making operations.

11.1.3 Notification of a personal data breach

The DPA defines a personal data breach as a breach of security leading to the accidental or unlawful destruction, loss, alteration, unauthorised disclosure of or access to personal data transmitted, stored or otherwise processed. A personal data breach may be in the nature of: (1) a confidentiality breach resulting from the unauthorised disclosure of or access to personal data; (2) an integrity breach resulting from the alteration of personal data; and/or (3) an availability breach resulting from the loss or accidental or unlawful destruction of personal data.

PICs must notify the concerned data subjects and the NPC of personal data breaches that satisfy all of the following elements: (1) a breach that involves sensitive personal information or any other information that may be used to enable identity fraud; (2) when there is reason to believe that the information may have been acquired by an unauthorised person; and (3) where the PIC believes that a data breach is likely to give rise to a real risk of serious harm to the affected data subject. The NPC's data breach notification management system includes a self-assessment tool that allows PICs to determine whether a notification to the NPC is mandatory.

This obligation to notify remains with the PIC even if the processing is outsourced or subcontracted to a PIP. PICs must notify the concerned data subjects and the NPC within 72 hours from when the PIC gains knowledge or there is reasonable belief that a breach has occurred. Notification may only be delayed to the extent necessary to determine the scope of the breach, prevent further disclosures and restore reasonable integrity to the system. However, if the breach involves ten or more data subjects or the disclosure of sensitive personal information which could harm or otherwise adversely affect the data subject, the PIC must notify the NPC within the 72-hour period based on the available information and submit a full report to the NPC within five days.

PICs and PIPs are required to implement a security incident management policy, which includes a personal data breach response procedure and measures that are intended to prevent or minimise the occurrence of personal data breaches. PICs and PIPs are also required to submit an annual security incident report to the NPC.

11.2 Enforcement

The DPA allows for extraterritorial application and enforcement, as long as the entity collects personal or sensitive personal information from Philippine citizens or residents.

The DPA provides for several types of enforcement action for violations of its provisions, namely the imposition of civil, administrative and criminal penalties, and the issuance of cease and desist orders (CDOs). As a note, while the NPC may directly impose civil and administrative penalties, and issue CDOs, the NPC cannot directly impose criminal penalties and may only recommend prosecution for crimes to the Department of Justice.

11.2.1 Civil penalties

Data subjects are entitled to indemnification for any damages sustained due to inaccurate, incomplete, outdated, false, unlawfully obtained or unauthorised use of their personal information. Restitution is determined in accordance with the provisions of the New Civil Code.

11.2.2 Administrative penalties

PICs or PIPs who fail to comply with the DPA may be subject to administrative fines, depending on the gravity of the infraction. The total imposable fine for a single act, whether resulting from a single or multiple infractions will not exceed PHP 5m. The categories of infractions are as follows:

- grave infractions are subject to a penalty equivalent 0.5 to three per cent of the violating entity's annual gross income for the immediately preceding year from when the infraction occurred. Grave infractions involve the data of 1,001 or more data subjects. Repetition of the same infraction, whether classified as grave, major or other, is also considered to be a grave infraction;
- major infractions are subject to a penalty equivalent to 0.25 to two per cent of the violating entity's annual gross income for the immediately preceding year from when the infraction occurred. Major infractions involve the data of one to 1,000 data subjects; and
- other infractions, such as the failure to register with the NPC when mandatory or provide updated information to the NPC when required, are subject to a penalty that ranges from PHP 50,000 to PHP 200,000. The failure to comply with any order, resolution, decision or implementing issuance from the NPC is subject to a fine not exceeding PHP 50,000.

11.2.3 Criminal penalties

Certain types of violations of the DPA are punishable with imprisonment ranging from six months to seven years and fines ranging from PHP 100,000 to PHP 5m. The imposable penalties are dependent on the type of violation and the type of personal information involved.

If the offender is a juridical person, the penalty will be imposed on the responsible officers who participated in or, by gross negligence, allowed the commission of the crime.

11.2.4 CDO

A CDO is a type of injunction that requires the PIC or PIP to stop the detailed act of processing personal information as stated in the order or the conduct of any act or practice in violation of the DPA. The NPC is authorised to issue a CDO without the necessity of a prior hearing if the NPC determines that the grounds upon which the verified application are based upon exist. CDOs are immediately executory and enforceable upon receipt by the PIC or PIP.

Chapter 12: Competition law

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The Philippine Competition Act (PCA) generally prohibits three practices: anti-competitive agreements; the abuse of a dominant position; and anti-competitive mergers.

12.1 Prohibited activities

12.1.1 Anti-competitive agreements

Prohibited anti-competitive agreements can be classified into the following:

- hardcore cartel agreements, price-fixing agreements and bid manipulation agreements between or among competitors, which are per se prohibited;
- agreements among competitors that have the object or effect of substantially preventing, restricting or lessening competition by: setting, limiting or controlling production, markets, technical development or investment; or dividing or sharing the market, whether by volume of sales or purchases, territory, type of goods or services, buyers or sellers or any other means; and
- other agreements that have the object or effect of substantially preventing, restricting or lessening competition.

12.1.2 Abuse of a dominant position

An entity is considered dominant if it enjoys a position of economic strength that allows it to control the relevant market independently from its competitors, customers, suppliers or consumers. The Philippine Competition Commission (PCC) can also consider other factors in evaluating whether an entity is dominant, and there is a rebuttable presumption of market dominance if the market share of an entity in the relevant market is at least 50 per cent or any other threshold that may be set by the PCC.

When an entity is deemed to be dominant, its performance of certain acts will be considered an abuse of such a dominant position and could subject the entity to penalties. Examples of an abuse of a dominant position include:

- predatory pricing;
- imposing barriers to entry or barriers to growth;
- imposing tying or bundling obligations in transactions;
- discriminating in regard to pricing and terms and conditions;
- imposing unfair prices; and
- limitation in terms of markets, production or technical development.

12.2 Consequences of a breach

The entry into prohibited anti-competitive agreements and the commission of abuses of a dominant position have severe consequences.

12.2.1 Remedies

The PCC may issue behavioural and structural remedies such as injunctions, require divestment and disgorgement of excess profits. However, structural remedies are only imposed where there is no equally effective behavioural remedy or where any equally effective behavioural remedy would be more burdensome than a structural remedy.

12.2.2 Administrative fines

The PCC may impose administrative fines of up to PHP 110m for the first offence, and between PHP 110m and PHP 275m for the second offence, on entities found to have entered into prohibited anti-competitive agreements or committed abuses of a dominant position.

12.2.3 Criminal penalties

Fines of between PHP 50m and PHP 250m may be imposed by the courts on entities that enter into the defined anti-competitive agreements between competitors that are either prohibited per se or that have the object of substantially preventing, restricting or lessening competition by setting, limiting or controlling production, markets, technical development or investment, or by dividing or sharing the market. Directors and management personnel of such entities who have knowingly and wilfully participated in the criminal offences may be sentenced to imprisonment for between two and seven years.

Treble damages may be imposed by the PCC or courts, as the case may be, where the violation involves the trade or movement of basic necessities and prime commodities.

12.3 Pre-merger and pre-acquisition notification

The PCA imposes mandatory notification requirements on covered transactions. Parties to a transaction will be prohibited from closing until the transaction is cleared by the PCC or the lapse of 30 days from the date that the substantive review (or the Phase 1 review) of the transaction commenced, if no action is taken by the PCC. Within the 30-day period, the PCC can request additional information on the transaction, and such a request will have the effect of triggering a Phase 2 review and extending the review period by 60 days, but in no instance will the review period exceed 90 days from commencement of the Phase 1 review unless the statutory periods are waived by the parties.

A favourable recommendation by a governmental agency with a competition mandate, arising directly from its evaluation of the proposed merger or acquisition's potential anti-competitive effects, gives rise to a disputable presumption that the transaction does not violate the PCA or its rules.

If the PCC determines that the M&A agreement will have an anti-competitive effect, it may prohibit the implementation of the agreement outright; prohibit the implementation of the agreement unless modifications are made to its terms; or prohibit the implementation of the agreement unless the relevant parties enter into other agreements.

Non-compliance with the notification requirement will result in the imposition of a fine of between one and five per cent of the value of the transaction, in addition to the agreement being deemed void.

12.4 *Motu proprio* review

The PCA empowers the PCC to review mergers and acquisitions *motu proprio* (or on its own initiative) if it has reasonable grounds to believe that the merger or acquisition is likely to substantially prevent, restrict or lessen competition, even if the transaction does not fall under the compulsory notification requirement. A *motu proprio* review follows the same process for notified mergers, except for the review periods which are 75 days for Phase 1 and 120 days for Phase 2.

12.5 Pre-notification consultation and letters of non-coverage

Parties to a merger or acquisition subject to the compulsory notification requirement may consult with the Mergers and Acquisitions Office (MAO) prior to notification to seek guidance on the information required by the notification form, discuss the potential relevant markets in terms of the merger or acquisition and clarify any questions relevant to the MAO's processes.

If the parties believe that the transaction is not subject to the compulsory notification requirement in regard to the following grounds, they may ask the MAO for a formal confirmation of the exemption from the compulsory notification requirement:

- transactions that do not breach the notification thresholds;
- internal restructuring when the acquiring and acquired entities have the same ultimate parent entity and the restructuring does not lead to a change in control;

- consolidation of ownership when there is no change in control; or
- land acquisitions that are not for the purpose of obtaining control by one or more entities through a contract or other means.

Chapter 13: Dispute resolution

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13.1 Structure of the Philippine judicial system

The Philippine judicial system has several levels, including the Supreme Court, appellate courts and trial courts.

The Supreme Court is the highest tribunal in the country. Composed of the Chief Justice and fourteen Associate Justices, it has the power of judicial review over judgments and orders by appellate and trial courts. The Supreme Court may also review actions by the Executive Branch.

The Supreme Court has the exclusive authority to promulgate rules concerning the protection and enforcement of constitutional rights, pleading, practice and procedure in all courts, and admission to the practice of law. It oversees the judiciary and ensures the efficient administration of justice.

The appellate courts consist of the Court of Appeals, the Sandiganbayan and the Court of Tax Appeals.

The Court of Appeals is the primary appellate court in the Philippines that has the power to review judgments and orders by regional trial courts and lower courts in criminal, civil and special proceedings cases. On the other hand, the Sandiganbayan (the 'People's Advocate') is a special court with the power to hear graft and corruption cases and other crimes committed by public officials and employees. Meanwhile, the Court of Tax Appeals has limited appellate jurisdiction over tax assessments, customs duties and other tax-related issues.

The trial courts consist of two levels: regional trial courts and other lower courts, consisting of metropolitan trial courts, municipal trial courts in cities and other municipal circuit trial courts.

Regional trial courts are courts with general jurisdiction, similar to courts of first instance in other judicial systems. Metropolitan and municipal trial courts have limited jurisdiction over crimes punished by penalties below six years of imprisonment, violations of local ordinances, collection cases amounting to PHP 2 million or less, civil actions over properties with an assessed value of PHP 400,000 or less, and ejectment cases.

Incorporated in the Philippine judicial system are Sharia district courts and Sharia circuit courts. These courts are stationed in Muslim-dominated provinces in the southern Philippines. Sharia courts deal with cases involving Islamic personal and family laws, such as marriage, divorce and inheritance applicable to Muslim Filipinos.

13.2 Arbitration

Philippine law encourages the resolution of disputes or controversies through arbitration. Through this mechanism, disputing parties agree to submit their dispute for resolution by one or more arbitrators who make the decision binding on the matter. Arbitration clauses are usually stipulated in complex and high-value business contracts. In the case of construction contracts, an arbitration clause is usually stipulated, which refers any dispute or controversy to the Construction Industry Arbitration Commission.

During arbitration, a sole arbitrator or arbitral tribunal may also enforce, upon request, interim measures of protection if it is deemed reasonable and necessary. Also, upon the promulgation of a judgment, the decision by the arbitrator or arbitral tribunal is binding between the parties and is generally considered final and executory.

13.3 Other modes of alternative dispute resolution (ADR)

Through Republic Act No 9285 or the Alternative Dispute Resolution Act of 2004, various ADR mechanisms are now being used, such as mediation, conciliation, arbitration, or any combination thereof, as a means of achieving a speedy and efficient resolution of cases.

Several Philippine government agencies are tasked with the enforcement and promotion of ADR mechanisms, namely:

- the Office of Alternative Dispute Resolution (OADR), within the Department of Justice, is the primary agency responsible for promoting, developing and implementing ADR in the Philippines;
- trial courts are mandated in various civil and criminal cases to utilise systems for court-annexed mediation or a judicial dispute resolution process allowing litigants to first resolve their issues among themselves. The Supreme Court, through the Philippine Mediation Center, oversees court-annexed mediation programmes;
- the Cooperative Development Authority (CDA) is given quasi-judicial power to adjudicate disputes concerning cooperatives: one of its authorities is to conduct conferences held by a hearing officer to determine whether the case falls within its power to be resolved using ADR;
- the Philippine Construction Industry Arbitration Commission (CIAC) is authorised to use arbitration procedures to resolve the rising number of litigation cases involving contractual claims within the construction industry;
- the Department of Agrarian Reform Adjudication Board (DARAB) is mandated to provide a forum for the settlement of agrarian disputes to be resolved through either mediation or arbitration;
- the National Conciliation and Mediation Board (NCMB) is tasked with resolving certain labour disputes involving unionised workers and the management of the employer wherein a conference is conducted for conciliation proceedings;

- the National Labor Relations Commission (NLRC) is mandated to settle or adjudicate, through arbitration, labour disputes involving unfair labour practices, terminations, breach of labour standards with a claim for reinstatement, the legality of strikes and lockouts, money claims arising from employer–employee relationships, and other damages arising from such relationships;
- the Bureau of Labor Relations (BLR) is mandated to resolve, through conciliation, mediation and voluntary arbitration, inter-union and intra-union disputes arising from conflicts in regard to union representation, the cancellation of union registration, the administration of union funds, a petition for election of union officers and the violation of union members' rights;
- the Insurance Commission (IC) is tasked with resolving disputes in the insurance industry using conciliation and mediation as the primary methods of dispute resolution;
- the Bureau of Trade Regulation and Consumer Protection (BTRCP) was created to investigate, arbitrate and resolve complaints from consumers involving violations of the Consumer Act in the Philippines and disputes involving untrue, deceptive or misleading advertisements; the sale of paints and paint materials; fraudulent advertising, mislabelling and misbranding; monopolies and combinations in regard to the restraint of trade; and the importation and disposition of falsely marked articles, price tags and product standards.

At the community level, the barangay justice system, led by the Barangay Captain and the Barangay Justice Committee, uses mediation and conciliation to resolve minor disputes within the barangay (village) before they reach formal judicial processes.

Chapter 14: Public–private partnerships (PPP) and construction law

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14.1 PPP projects

The Philippines recently enacted the PPP Code to provide an enabling environment for the private sector to mobilise its resources to finance, design, construct, operate and maintain infrastructure or development projects.

The PPP Code establishes a more competitive, stable and predictable policy framework that is more conducive of local and foreign investments in PPP projects. It codifies and aligns the rules governing different types of PPP projects, including the Build–Operate–Transfer (BOT) scheme and its variants, such as joint ventures, toll operation agreements, lease agreements and all other contractual arrangements. It institutes reforms to address bottlenecks and challenges in the implementation of PPP projects, while strengthening mechanisms for transparency and competition.

Under the PPP Code, a foreign-owned firm may participate in a PPP project as a private proponent, contractor or facility operator. A foreign contractor to be engaged by the private proponent must be duly licensed by an accreditation institution in the contractor's country of origin equivalent to the Philippine Contractors Accreditation Board (PCAB). Once the private proponent is awarded a PPP project, the foreign contractor must secure a licence from the PCAB.

14.2 Licensing requirements for foreign contractors

The Contractors' License Law was enacted to regulate and ensure that only qualified and reliable local and foreign contractors are allowed to undertake construction in the Philippines.

The said Act created the PCAB, which is vested with the authority to issue, suspend and revoke licences for contractors and to put into effect the classification of contractors in a manner that is consistent with the established usage and procedures relation to the construction industry.

The implementing rules adopted by the PCAB designated and instituted two types of licences that any contractor may apply for, namely:

- a regular licence, which authorises the licensee to engage in general engineering and building construction contracting, but is reserved for and issued only to constructor firms of Filipino sole proprietorship, or partnerships/corporations with at least 60 per cent Filipino equity participation and duly organised and existing under and by virtue of the laws of the Philippines; and
- a special licence, which is required for a joint venture, consortium or foreign contractor and authorises them to only engage in the construction of a single specific undertaking or project.

In a recent decision, however, the Supreme Court struck down the above classification. According to the Supreme Court, the striking down of the restrictions on foreign contractors will encourage healthy competition and open up opportunities for development and innovation, so that domestic industries will be globally competitive. At the time of writing, the PCAB has yet to release the updated licence classifications, which are expected to align with the decision by the Supreme Court.

14.3 Foreign participation in government infrastructure projects

The participation of foreign contractors in government infrastructure projects is regulated by the Government Procurement Reform Act (GPRA) and its implementing rules and regulations.

As a general rule, only local contractors are allowed to participate in government procurement for locally funded infrastructure projects. A local contractor is defined as including a duly licensed Filipino citizen or sole proprietorship; cooperatives duly organised under the laws of the Philippines; and Philippine partnerships, corporations and joint ventures that are at least 60 per cent Filipino owned.

As an exception, however, foreign contractors may participate in government procurement of infrastructure projects in the following instances:

- the procurement of infrastructure projects funded by foreign grants and Official Development Assistance (ODA);
- when provided for under any treaty or international or executive agreement; and
- in regard to joint ventures in which Filipino ownership or interest is less than 60 per cent, but greater than 25 per cent, where the structures to be built require the application of techniques and/or technologies that are not adequately possessed by/within the remit of the Philippine partner.

14.4 Construction contracts

Standard forms of construction contracts crafted by the International Federation of Consulting Engineers (FIDIC), which have gained global acceptance by foreign and local contractors, may be adopted during the execution of contracts for government infrastructure projects.

Key revisions to the conditions in standard FIDIC contracts include changes to the conditions of the contracts in order to align with applicable procurement rules, such as, for instance, the GPRA, ODA rules, treaties, international agreements or executive agreements.

Chapter 15: Other

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15.1 Financial consumer protection

Financial products or services refer to products or services developed or marketed by a financial service provider, including savings, deposits, credit, insurance, pre-need and health maintenance organisation products, securities, investments, payments and other similar products or services, regardless of whether the financial product or service is accessed and delivered through traditional offline channels or through digital channels. Under the Financial Products and Services Consumer Protection Act (FPSCPA), the BSP, Insurance Commission (IC) and the SEC are mandated to, in relation to financial service providers within their jurisdiction, (1) formulate standards and rules that govern financial products and services guided by internationally accepted standards and practices; (2) conduct market surveillance and examinations and monitor such markets; (3) enforce the FPSCPA and other laws against non-compliant financial service providers; and (4) provide efficient and effective financial consumer complaints handling mechanisms, among other similar powers.

The FPSCPA places specific obligations on financial service providers, including:

- the continuous evaluation of financial products and services to ensure that these products and services are appropriately designed and delivered to their target markets, including the adoption of clear cooling-off policies for financial products and services identified by the BSP, IC and SEC;
- the adoption of policies on the use of clear and concise language to ensure that their communications with clients are transparent, up to date and accurate;
- the adoption of policies to ensure the fair and respectful treatment of clients, through ensuring that discrimination based on protected attributes does not occur in regard to the selection of clients and abusive collection or debt recovery practices are not employed in respect of financial consumers; and
- compliance with the information security standards and requirements under the DPA in relation to any data collected from clients.

15.2 Regulation of payment systems

A payment system provides channels for the transfer of funds among banks and other institutions to discharge obligations arising from economic and financial transactions across the entire economy. The National Payment Systems Act (NPSA) mandates the BSP to oversee payment systems used in the Philippines and to exercise supervisory and regulatory powers over such payment systems to ensure the stability and effectiveness of the monetary and financial system. The law requires that the operator of payment systems (OPS) register with the BSP. The OPS is defined as person who performs any of the following functions: (1) maintains the platform that enables payments or fund transfers, regardless of whether the source and destination accounts are maintained by the same or different institutions; (2) operates the system or network that enables payments or fund transfers to be made through the use of a payment instrument; (3) provides a system that processes payments on behalf of any person or the government; and (4) any other activities identified as such by the Monetary Board. There are no restrictions on the foreign ownership of OPS.

The BSP has the power to designate payment systems that pose or have the potential to pose systemic risk. Operators of designated payment systems (ODPSs) are required under the NPSA to be incorporated as stock corporations. ODPSs are subject to more stringent reporting requirements and other regulatory controls, such as minimum capital requirements and appropriate governance and risk management systems, due to their importance in the financial system.

Upon a finding that an entity is acting as an OPS without the requisite BSP licence, the Monetary Board will issue a directive to the OPS that it must (1) register as an OPS with the BSP and (2) stop operating as a payment system until it obtains the necessary BSP licence. Should the entity still fail to comply with this directive, the BSP may impose other penalties and sanctions, such as fine of between PHP 200,000 and PHP 2m and/or imprisonment from two to ten years, or the administrative sanctions on BSP-supervised entities detailed in Section 37 of the New Central Bank Act, as amended.

15.3 Electronic money and virtual assets

The BSP defines electronic money or e-money as monetary value represented by a claim on its issuer provided that it fulfils the following conditions:

1. it is electronically stored in an instrument or device;
2. it is issued against the receipt of funds of an amount not lesser in value than the monetary value issued;
3. it is accepted as a means of payment by persons or entities other than the issuer;
4. it is withdrawable in cash or a cash equivalent; and
5. it is issued in accordance with Section 702 of the Manual of Regulations for Banks.

E-money issuers (EMIs) may be banks, non-bank financial institutions or other non-bank institutions registered with the BSP as a monetary transfer agent. Entities that intend to operate as an EMI must first secure the approval of the BSP prior to beginning their operations. There are no foreign equity restrictions applicable to EMIs.

A virtual asset, on the other hand, is any type of digital unit that can be digitally traded or transferred; can be used for payment or investment purposes; and are not issued or guaranteed by any jurisdictions nor have legal tender status. Virtual asset service providers (VASPs) are entities who offer services or engage in activities that provide the facility for the transfer or exchange of virtual assets, such as the exchange between virtual assets and fiat currencies; the exchange between one or more virtual assets; the transfer of virtual assets in general; and the safekeeping and/or administration of virtual assets or instruments that enable control over the virtual assets. VASPs are required to secure a licence from the BSP prior to starting their operations. However, the BSP has suspended the granting of VASP licences for a period of three years, beginning from 1 September 2022, in light of the varied risks associated with virtual assets that may undermine financial stability. After the three-year suspension, the BSP will re-evaluate whether continued suspension is necessary or whether there are sufficient market developments to justify the granting of new VASP licences.

15.4 Anti-money laundering compliance

The Anti-Money Laundering Act (AMLA), as amended, explicitly criminalises money laundering in the Philippines. Under the AMLA, the Anti-Money Laundering Council (AMLC) was created and authorised to: require and receive reports on covered and suspicious transactions; initiate investigations of covered or suspicious transactions and other money laundering activities; institute civil forfeiture proceedings through the Office of the Solicitor General; and freeze money instruments or properties alleged to be the proceeds of an unlawful activity, among others. Covered institutions are required to report covered transactions (ie, those that meet certain thresholds) and suspicious transactions (ie, those that are attended by circumstances that lead to a reasonable belief that the funds are the proceeds of a criminal activity) to the AMLC.

Covered institutions or persons refers to natural and juridical persons supervised or regulated by the BSP, IC or SEC. Amendments to the AMLA have resulted in the inclusion of other entities in the definition of covered institutions. These inclusions are referred to as Designated Non-Financial Business and Professions, which include: dealers in precious metals and stones; casinos, including internet and ship-based casinos; real estate developers and brokers; and offshore gaming operators and their service providers; in addition to company service providers and persons engaged in the management of client money and finances, including lawyers, accountants and other professionals.

Covered transactions and their threshold amounts are summarised in the table below.

Type of transaction	Threshold amount
Cash or equivalent monetary instrument	More than PHP 500,000 in one banking day
Transactions associated with jewellery dealers, dealers in precious metals and dealers in precious stones, in cash or another equivalent monetary instrument	More than PHP 1m
Casino cash transaction	More than PHP 5m or equivalent in another currency
Cash transactions involving real estate developers or brokers	More than PHP 7.5m or its equivalent in another currency

'Suspicious transactions' refer to transactions, regardless of the amount involved, where any of the following suspicious circumstances exist:

- there is no underlying legal or trade obligation, purpose or economic justification for the transaction;
- the client is not properly identified;
- the amount involved is not commensurate with the business or financial capacity of the client;
- taking into account all the known circumstances, it may be perceived that the client's transaction is structured in order to avoid being the subject of reporting requirements under the AMLA;
- any circumstance relating to the transaction that is observed to deviate from the profile of the client and/or the client's past transactions with the covered institution;
- the transaction is in any way related to an unlawful activity or offence under the AMLA that is about to be, is being or has been committed; or
- any transaction that is similar or analogous to any of the foregoing.

Notwithstanding the provisions set out in Republic Act No 1405, or the Bank Secrecy Law, and other laws, the AMLC has the authority to inquire into or examine any particular deposit or investment, including related accounts, with any banking institution or non-bank financial institution upon the order of any competent court based on an *ex parte* application in cases of violations of the AMLA, provided that probable cause has been established that the deposits, investments or related accounts are involved in a money laundering offence.

15.5 Anti-financial account scams

The Anti-Financial Account Scamming Act (AFASA) was passed as a response to the increasing incidence of cybercrime schemes employed by criminals for fraudulent activities. Financial accounts, as defined under the AFASA, include typical deposit, trust, investment or credit card accounts with banking institutions; transaction accounts maintained with banking and non-banking financial institutions; e-wallets; and any other account used to avail financial products or services as defined under the FPSCPA. Money mules and the use of social engineering schemes are explicitly punished under the law.

Money mules refer to the following acts undertaken for the purpose of receiving, depositing or withdrawing proceeds that are known to be derived from crimes, offences or social engineering schemes:

1. using, borrowing or allowing the use of a financial account;
2. opening a financial account under a fictious name or the identity of another;
3. buying or renting a financial account;
4. selling or lending a financial account; or
5. recruiting or inducing another to perform (1) to (4).

Social engineering schemes refer to schemes undertaken to obtain sensitive identifying information (such as usernames, passwords, bank account details, etc) of another, through deceit or fraud, for the purpose of unauthorised access and control over such person's financial accounts. This includes situations where the criminal misrepresents themselves as acting on behalf of an institution, such as a bank, or making false representations to solicit sensitive identifying information; and using electronic communications to obtain another's sensitive identifying information.

Additionally, the BSP is authorised to investigate and inquire into financial accounts that may be involved in an AFASA violation, notwithstanding the bank secrecy laws. Furthermore, only injunctions issued by the Court of Appeals and the Supreme Court may curtail investigations initiated by the BSP.

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