Global coverage Local **expertise**

MACKRELL
INTERNATIONAL

Doing legal business in **Asia**

. . . think mackrell first www.mackrell.net

TABLE OF CONTENTS

	Page
DOING BUSINESS IN AUSTRALIA, *Hive Legal*	*2-9*
DOING BUSINESS IN INDIA*, Murali & Co.*	*10-15*
JAPAN PROMOTING FOREIGN INVESTMENT, *Kojima Law Offices*	*16-20*
INVESTING AND DOING BUSINESS IN KOREA, *Sojong Partners*	*21-24*
DOING BUSINESS IN MALAYSIA, *RamRais & Partners*	*25-38*
CLENDONS' GUIDE TO BUSINESS IN NEW ZEALAND, *Clendons Barristers & Solicitors*	*39-51*
THAILAND: INVESTING IN THE GOLDEN LAND OF SMILES, *Ploypráthip International Law Office (PILO)*	52-60
SINGAPORE: OPEN FOR BUSINESS, *Affinity Law*	*61-69*
DOING BUSINESS IN HONG KONG – WHAT'S IN IT FOR MACKRELL MEMBER'S CLIENTS? ON THE DOORSTEP OF CHINA – TAX ADVANTAGES, INVESTMENTS, PENSIONS, *Weir Associates*	*70-74*

Updated as at 31 January 2017

DOING BUSINESS IN AUSTRALIA

Hive Legal

I. AUSTRALIA AS A BUSINESS AND INVESTMENT DESTINATION

There are a number of factors that make Australia an attractive destination for global business and investment. These include its:

- strong economy which has recently achieved a record 25 years of economic growth;
- domestic market of 24 million people;
- G20 membership;
- considerable natural resources, with strong mining and agricultural industries;
- strategic location in the Asia-Pacific region;
- low barriers to trade and openness to foreign investment;
- highly educated, skilled and multi-lingual workforce; and
- political transparency and strong commitment to the rule of law.

Foreign investment in Australia has seen significant growth, with total annual foreign investment recently exceeding AU$3 trillion.

II. AUSTRALIAN LEGAL SYSTEM

A. Federal System of Government

Australia has a federal system of government, comprised of six states and two territories, and a central federal government. The federal system is governed by the Australian Constitution, which divides certain powers between the democratically elected parliaments of each jurisdiction.

The federal nature of the Australian system means that laws vary between jurisdictions. However, recent decades have seen increased uniformity of law across jurisdictions, as a product of both inter-governmental co-operation, and the expansion of the federal government's role.

B. Judicial System

Australia has an independent judicial system comprised of courts which interpret and apply laws made by parliaments and apply a system of common law, similar to that of the United Kingdom and the United States.

The judicial system includes the High Court of Australia (the final court of appeal), the Federal Court of Australia, a Family Court, a Supreme Court in each of the six states and territories, and other minor courts at local and district levels. The courts follow a precedent system which means that decisions of higher courts are binding on future decisions of lower courts, unless there is some feature which distinguishes the case at hand from the precedent.

III. BUSINESS TYPES AND FORMS

There are a number of different business types and forms available to companies and other investors wishing to establish a business presence in Australia. These include:

- Australian Registered Company: acquiring or incorporating an Australian registered company is a common way for a foreign investor to establish a presence in Australia. An Australian registered company is a separate legal entity from its owners.
  Incorporating a new Australian registered company is relatively simple and there are no general limits on foreign ownership. However a certain number of the company's directors must ordinarily reside in Australia.
  A common type of Australian registered company is a proprietary limited company, which must have at least one shareholder and one director. Directors must be individuals (not companies) and those individuals are subject to a number of legal duties with regard to governance. The company must also have a registered office in Australia.
- Registered Branch: a foreign company may register itself in Australia and establish a registered branch. The branch must have at least one local agent and a registered office in Australia. Unlike the acquisition or incorporation of an Australian registered company, registering a branch does not create a separate legal entity and the foreign company will be liable for actions taken by its Australian branch.
- Joint Venture: a foreign investor may enter into a joint venture with another party or parties to conduct business in Australia. Joint ventures may be either based in contract (unincorporated) or include the acquisition or incorporation of a jointly-owned Australian registered company (incorporated).
- Partnership: a foreign investor may enter into a partnership agreement with another party or parties to conduct a business in Australia. Partners are generally liable for all debts of the partnership both jointly and individually. However, in some states there are laws permitting limited liability partnerships.
- Trust: a foreign investor may conduct business in Australia through a legal construct called a trust. This requires appointment of a trustee who owns the assets of the business and carries on trading activities on behalf of beneficiaries of the trust. The trustee may be either a company or an individual. The trust itself is not a separate legal entity.
- Sole Trader: an individual may conduct business in Australia as a sole trader, using either their own name or a registered business name. A sole trader is personally liable for any debts they incur.

IV. FOREIGN INVESTMENT REVIEW

Australia is very open to foreign investment. There are, however, some circumstances where approval may be required. These include, for example, acquisitions of:

- any business valued at more than AU$1,094 million by investors from Chile, China, Japan, New Zealand, South Korea or United States, or valued at more than AU$252 million by investors from other countries;
- agricultural land valued at more than AU$50 million by investors from Singapore or Thailand, or valued at more than AU$15 million by investors from other countries (not applicable to investors from Chile, New Zealand or United States, unless the value is more than AU$1,094 million);
- any agricultural businesses valued at more than AU$55 million (not applicable to investors from Chile, New Zealand or United States, unless the value is more than AU$1,094 million)
- mining licences or leases (not applicable to investors from Chile, New Zealand and United States, unless the value is more than AU$1,094 million);
- residential land;
- at least 5% of a media businesses; and
- any nature made by foreign governments.

Where approval may be required, applications are made to the Foreign Investment Review Board (**FIRB**). From the time of application, FIRB has 30 days in which to make a decision, however, this period may be extended by up to 90 days.

V. MERGERS AND ACQUISITIONS

When undertaking mergers or acquisitions of existing Australian companies, different considerations apply depending on whether the target company is a private (unlisted) company with 50 shareholders or less, or a larger entity that is either a public (listed) company or has more than 50 shareholders. Australian competition law may also be relevant, as described below.

A. Private Companies

Acquisitions of the businesses conducted by private companies are generally undertaken by a share sale or an asset sale.

A share sale is a means of purchasing a company as a whole, including all of its assets and liabilities. A general advantage of this type of acquisition is that the transaction is relatively simple, because only one type of asset (shares in the company) needs to be transferred. A general disadvantage is that liabilities of the company are included, whether they have been disclosed or not. This makes it important to undertake careful due diligence (the process of investigating risks associated with the acquisition) before purchasing the shares.

An asset sale involves purchasing specified assets of a company without acquiring all of its liabilities. General advantages include the ability to be selective about what is transferred, and to avoid liabilities of the entity conducting the business. A general disadvantage is that

the transaction can be much more complex, given the need to deal with each asset separately. A due diligence process is still generally advisable to manage the risks involved.

B. Public and Other Large Companies

Specific rules apply to the acquisition of listed public companies or other companies with more than 50 shareholders. Under the *Corporations Act 2001* (Cth), a person cannot legally acquire interests in voting shares beyond a threshold of 19.9% in such a company except by certain means.

Common acceptable means of such acquisitions include takeover bids and schemes of arrangement.

A takeover bid can be made with or without approval of the target company. Certain requirements must be met, including the making of offers to all shareholders on generally equal terms (if the offer is made 'off market') or at a certain minimum price (if the offer is made 'on market'). The offers must also be open for a minimum period of one month.

A scheme of arrangement is a process through which the target company agrees to the acquisition. Requirements include obtaining approval via a shareholder vote (not including votes held by the person making the acquisition or their 'associates') and court approval.

C. Competition Law

In undertaking mergers or acquisitions of existing Australian companies, it may also be necessary to have regard to Australian competition law included in the *Competition and Consumer Act 2010* (Cth). This law prevents mergers or acquisitions which would have the effect, or likely effect, of substantially lessening competition in an Australian market.

Where there is a risk of a transaction being prohibited on this basis, advance clearance may be sought from the relevant regulator, the Australian Competition & Consumer Commission.

VI. TAXATION

Most Australian taxation is imposed by the federal government. Some taxes are also imposed by state, territory and local governments. Common taxes include:

- <u>Income Tax</u>: the most significant tax in Australia is income tax. It is imposed on individuals, companies and other entities. Generally, an Australian-resident individual or company is required to pay income tax on income and capital gains derived worldwide, and a non-resident individual or company is required to pay income tax on income from Australian sources, and capital gains on Australian assets. Income tax for companies or 'company tax' is imposed on net earnings at a current rate of 30% for most companies.
  If a company has paid income tax, it receives 'franking credits' which it can apply to dividends or distribution which it makes to its shareholders. The shareholder then receives an income tax offset to the extent those franking credits are applied.
  Income tax may also be reduced where the earnings would otherwise be 'double taxed' by Australia and one of the 40+ countries with which Australia has a double tax agreement;

- Goods and Services Tax (GST): a consumption tax imposed by the federal government on the supply of most goods and services at a rate of 10%;
- Payroll Tax: a tax imposed by states and territories on wages paid by employers. Calculation methods and rates vary by jurisdiction;
- Stamp Duty: imposed by states and territories on various transactions, including transfers of land and some transfers of other business assets. The relevant transactions and rates vary by jurisdiction. In some instances, a higher rate or additional duty is applicable to foreign purchasers;
- Land Tax: states and territories may impose taxes on land holdings, which vary by jurisdiction. Land on which the owner resides is usually exempt. Surcharge rates apply in some jurisdictions for foreign owners; and
- Customs and Excise Duties: customs duties may be payable on imported goods (usually at a rate between 0-5%), but are generally not payable where there is no competitive domestic industry. Excise duties are charged on some goods such as petroleum, alcohol and tobacco.

Tax offsets may be available for research and development activities conducted by Australian companies and by foreign companies that are Australian resident for income tax purposes.

VI. LAND

Most land in Australia is subject to a system for transfer and registration of legal interests called the Torrens system, under which legal ownership is readily ascertainable. Registration can impact on priority and enforceability of interests.

Common types of interests in land include:

- estate in fee simple: the highest and least restricted type of ownership interest;
- leasehold estate: a right to exclusive occupation for a limited period of time, as granted under a lease agreement;
- licence: a contractual right to enter land for limited purposes;
- strata title: ownership of part of a larger property that may be freely transferred, commonly used in apartment buildings and other shared forms of property;
- mortgage: an interest in land typically created to secure payment of a debt; and
- easement: a right to use land for purposes other than occupation, generally granted to third parties such as neighbouring land owners, local authorities or utility providers

Land purchase and ownership may be subject to taxation and foreign investment review, as described in previous sections.

VII. INTELLECTUAL PROPERTY

Australia recognises and protects various forms of intellectual property, including:

- Copyright: which may exist in original artistic works, audio and visual recordings and other subject matter. There is no requirement to register copyright in Australia. Copyright generally lasts for 70 years after the death of the author, although this timeframe may vary depending on the type of subject matter;

- Trade Marks: which can be 'signs' (including words, shapes, colours, sounds and scents) that are used or intended to be used in relation to goods or services. Trade marks may be registered under the *Trade Marks Act 1995* (Cth) which gives rise to a number of protections and registration is renewable every 10 years;
- Patents: which protect inventions that meet certain requirements including requirements of innovation. Patents are conferred under the *Patents Act 1990* (Cth) and, in most circumstances, last for 20 years;
- Registered Designs: which protect new and distinctive designs relating to the overall appearance of a product, resulting from one or more visual features. Registration is under the *Designs Act 2003* (Cth) and gives rise to a number of protections. Registration lasts for 5 years or up to 10 years if renewed; and
- Trade Secrets: which may refer to various types of business information and knowledge of commercial value (including confidential information). Trade secrets are not recognised as property, but are protected by law if they have been disclosed on the condition of confidentiality and certain other requirements are met.

Intellectual property rights are generally enforced through the courts. Australia is also party to a number of international agreements giving rise to reciprocal protections for intellectual property, including the Trade-Related Aspects of Intellectual Property Agreement, the Berne Convention, the Universal Copyright Convention, the World Intellectual Property Organisation Copyright Treaty, the World Intellectual Property Organisation Performances and Phonograms Treaty, and the Paris Convention for the Protection of Industrial Property.

IX. EMPLOYMENT

Most employment in Australia is governed by the combination of an employment contract and the *Fair Work Act 2009* (Cth). The terms of employment may be negotiated between the employer and the employee, however, the law also requires certain minimum standards in relation to conditions such as wages and leave allowances. The *Fair Work Act 2009* (Cth) also includes collective bargaining processes, through which agreements may be reached between one or more employers and groups of employees.

Employment may be terminated by mutual agreement, expiry of a fixed-term contract, or unilaterally by an employer or employee. Employment law regulates the ability of an employer to terminate a person's employment. Employees who have completed more than 6 months' service may be able to make a claim for unfair dismissal, if their employment has been terminated on certain unlawful grounds. Redundancy is not an unlawful ground for termination by an employer. However, if an employee is made redundant, they may be entitled to certain benefits.

In addition to paying employees their ordinary wage, Australian employers must also make superannuation contributions. Superannuation is a regulated form of retirement saving for employees. The minimum superannuation contribution is currently 9.5% of an employee's ordinary wage.

X. VISAS AND IMMIGRATION

Foreign nationals require a visa to enter Australia. Many different types of visa are available including, tourist or business visitor visas, temporary work visas and long stay visas.

A. Tourist or Business Visitor Visas

For multiple stays of up to three months over a 12 month period, for tourist or business visitor purposes, an Electronic Travel Authority (subclass 601) or eVisitor (subclass 651) visa may be available, depending a person's country of origin. These visas are inexpensive and can be applied for online. Eligible business visitor purposes include:

- making general business or employment enquiries;
- investigating , negotiating, signing or reviewing a business contract, or
- participating in conferences, trade fairs or seminars, provided you are not being paid by the organisers, but they do not include:
- work providing services to a business or organisation, or
- selling goods or services to the public.

B. Temporary Work Visas

A Temporary Work (Short Stay Specialist) visa (subclass 400) or Temporary Activity visa (subclass 408) may be available to persons wishing to visit Australia for short-term work purposes. These visas allow their holders to perform work in Australia, usually for up to three months (or for longer periods in some circumstances).

C. Long Stay Visas

A Temporary Work (Skilled) visa (subclass 457) may be available to persons visiting Australia for longer-term work purposes. This type of visa requires sponsorship by an approved business and allows a person to work in Australia for up to four years. It may be renewed for longer stays.

A number of different permanent resident visas are also available, including for business and investment purposes, where certain requirements are satisfied.

XI. IMPORTS AND EXPORTS

A. Imports

Permits are generally not required to import goods, except for certain items including particular plant, animal and food products, weapons and other sensitive items. Imported goods may also need to satisfy certain safety or information requirements. Most imported goods must be declared to the Australian Customs and Border Protection Service, unless the value is less than AU$1,000. Charges including goods and services tax (GST) and customs duties may be payable, as described above.

B. Exports

Australia does not impose many export controls, other than restrictions and prohibitions applicable to certain items such as drugs, weapons, cultural and heritage items and other

sensitive items. Goods and services tax (GST) is usually not applicable to exported goods or services.

There are a number of government schemes to encourage Australian exports, including through Export Market Development Grants and the provision of finance and insurance.

Disclaimer:

This overview of Doing Business in Australia by its nature cannot be comprehensive and cannot be relied on as advice. This information is provided to assist in clients of Mackrell member firms in identifying legal issues on which legal advice should be sought. Please consult the professional staff of Hive Legal for legal advice specific to your situation.

Hive Legal Pty Ltd
Level 4, 50 Market Street, Melbourne, Victoria 3000
tel: [61] 3 8645 8400
web: www.hivelegal.com.au
contact: Simon Davidson simon.davidson@hivelegal.com.au

DOING BUSINESS IN INDIA

Murali and Co.

I. India

India is the seventh largest country by area and the second-most populous country in the world. Today India is the sixth largest economy in the world measured by nominal Gross Domestic Product (GDP) and the third largest by purchasing power parity (PPP). The country is classified as a newly industrialised country, one of the G-20 major economies and a member of BRICS.

A series of economic reforms in the country since the early 1990s has led to India emerging as a developing economy with an average growth rate of approximately 7% over the last two decades. One of the significant consequences of this growth has been the transformation of a primarily agrarian economy into service and industry oriented economy. Some of the key aspects of the Indian economy in this regard are as under:

1. 100% Foreign Direct Investment ("**FDI**") is allowed under the automatic route in most of the sectors/ economies.
2. Free repatriation of profits and capital investments.
3. India has Double Taxation Avoidance Agreement ("**DTAA**") with several countries.

II. Indian Legal System

The legal system in India is based on English common law and the judiciary is independent as per the powers vested in it by the Constitution of India (the "**Constitution**"). The Constitution is quasi-federal in nature, or one that is federal in character but unitary in spirit.

- **Legislative Powers**

The legislative powers are divided between the centre and state legislature that is through three distinct lists:

(i) the Union List - exclusively reserved for the centre/parliament and includes subjects like, national defence, incorporation of companies, banking and the RBI etc.;

(ii) the State List - exclusively reserved for various state legislatures and includes subjects like, agriculture, land and trade and commerce within the state's territories; and

(iii) the Concurrent List - includes subjects such as contracts, bankruptcy and insolvency, trust and trustees etc., on which both the centre and states legislature may legislate; however, in case of a conflict, the federal law shall prevail.

In addition the Constitution also recognises the delegation of powers.

- **Court System**

The Supreme Court of India is the highest appellate court and adjudicates appeals from the state High Courts. At the State level, the judicial administration is headed by the High Court. There are 24 High Courts in India. These High Courts adjudicate on appeals from lowers courts (only a few have original jurisdiction) and writ petitions in terms of Article 226 of the Constitution. Each State is divided into judicial districts presided over by a district and sessions judge, who is the highest judicial authority in a district.

Foreign Judgement: Agreements where there is choice of foreign governing law is usually upheld by the courts in cross-border transactions. A foreign judgment obtained in a foreign court is usually recognised and is conclusive and enforceable in India, subject to exceptions prescribed under the Indian law. In case of absence of any reciprocal arrangement or treaty, a suit will have to be filed for enforcement of such a judgment.

Arbitrations and Foreign Awards: Arbitrations in India are governed by the (Indian) Arbitration and Conciliation Act, 1996, based on the UNCITRAL model law, which provides for domestic and international arbitration and makes rules for the prompt enforcement of foreign awards. A party who receives a binding award from another country which is a signatory to the New York Convention or the Geneva Convention and is notified as a reciprocating country by India, the award is enforceable as a decree of an Indian court.

III. Foreign Investment

In the year 2009, the Government of India brought in two significant changes in the foreign investment policy. Firstly, if a foreign investor invests up to 49% in an Indian owned and controlled investing company, which in turn makes a downstream investment in a target Indian company, the total foreign investment in the downstream target company will be considered to be nil. Secondly, it was made mandatory to take Government approval for the transfer of ownership and control of Indian companies to non-resident entities in restricted sectors.

As per the current FDI policy, a non-resident can invest in India either, under:

A. Automatic Route:

FDI in sectors permitted under this route are only subjected to the specific sectoral laws and does not require any prior approval either by the Government or Reserve Bank of India (“**RBI**”). However, the Indian Company receiving such inward remittance from a foreign investor is required to notify the Foreign Exchange Department and the concerned Regional office of RBI within thirty days of receipt of inward remittances and file the required documents with that office within thirty days of issue of shares to foreign investors.

B. Approval Route:

FDI in sectors not covered under automatic route requires prior permission of RBI and the Government through Foreign Investment Promotion Board (“FIPB”), which offers a single window clearance for proposals on foreign investment under this route. However, there are a few sectors in India which are not open to foreign investments which include Gambling and Betting, Chit Funds, Real Estate Business, Nidhi Companies and others.

General Budget 2017-18: The Government of India has decided to abolish FIPB to help streamline the process of foreign investment into India through the approval route and to create new investment opportunity for foreign investors. Such abolition of FIPB can be viewed as a further step to improve the ease of doing business in India.

- **Other Foreign Investment**

Besides FDI, non-resident investors who are registered with the Securities Exchange Board of India ("**SEBI**") as a foreign venture capital investor (**"FVCI"**) are also allowed to invest in Indian companies.

Further, portfolio investments are also allowed by the SEBI and RBI to SEBI registered Foreign Institutional Investor ("**FII**") and by certain Qualified Foreign Investors ("**QFIs**") without being subjected to FDI restrictions. Subject to applicable conditions, they can invest in unlisted or listed shares, convertible or non-convertible debentures (listed and unlisted), Indian depository receipts, domestic mutual fund units, exchange traded derivatives and similar securities.

IV. Establishing an Entity

The options available to non-residents intending to set-up business in India are:

1. Un-incorporated Entities:

(i) Branch Office: Foreign companies can conduct their business in India through its Branch office which can be opened after obtaining a specific approval from RBI.

(ii) Project Office: If a foreign company is engaged by an Indian company to execute a project in India, it may set up a project office without obtaining approval from RBI subject to prescribed reporting compliances. As applicable in case of a branch office, a project office is treated as an extension of foreign company and is taxed at the rate applicable to foreign companies.

(iii) Liaison Office: A liaison or a representative office can be opened in India subject to approval by RBI. Such an office can undertake liaison activities on its company's behalf.

2. Incorporated Entities:

(i) Private or Public Companies under the Companies Act, 2013:

(a) Wholly owned subsidiary: Foreign companies can set up wholly owned subsidiary companies in India subject to FDI guidelines. A wholly owned or a subsidiary company has the maximum flexibility to conduct business in India when compared with a liaison or branch office, that is funding can be done via equity, debt (foreign as well as local) and repatriation of dividends is allowed without approvals.

(b) Joint Venture Company: Foreign companies can also set up joint ventures with Indian or foreign companies in India. The extent of permissible FDI in such companies would depend on the relevant sectoral caps as prescribed.

(ii) Limited liability partnerships (LLP): A LLP is an alternative corporate business entity which exists as a legal person separate from its partners. The liability of the partners is limited to their agreed contribution to the LLP, governed by the Limited Liability Partnership Act, 2008a. FDI in LLPs is permitted under the approval route as well as automatic route in permitted sectors.

V. TAXATION

India has a well-developed tax structure. Any entity doing business in India has to take into consideration various taxes levied in a financial year (1st of April to 31st of March). The authority to levy tax is with the Central and the State Government. The following are the list of taxes levied:

➢ **Direct Taxes**

1. **Corporate Income Tax:** Income tax Act, 1961 is the charging statute which levies tax on income in India. For computation of income, income is classified under the five heads which are income from salary, house property, profits and gains of business or profession, capital gains and other sources. The companies resident in India are liable for income tax on their worldwide income whereas, a non-resident entity is taxed only on the income which accrues or arises or which is deemed to accrue or arise in India. The maximum marginal rate for an individual assesse is 30%; for Indian companies is 30%; and foreign companies are taxed at 40%.
2. **Capital Gains Tax:** The gains derived from the disposition of capital assets are subject to capital gains tax. The rate of capital gains tax depends on the period for which the asset is held by the taxpayer. If the asset is held for a period longer than 36 months, then disposal of such asset attracts long term capital gains tax. However, in case of shares, specified securities/ bonds and units of mutual funds the period is reduced to 12 months. Short term gain arises if the period of holding of asset is less than 36 months.
   General Budget 2017-18: In case of transfer of immovable property there has been a reduction in the holding period from 3 years to 2 years.
3. **Withholding Tax:** The person making payment to a non-resident has an obligation to withhold the tax at the applicable rate before such payments are made. The current rate for withholding tax for the payments to non-resident is 20%, in case of dividends – nil; royalties -10%; technical services – 10% and any other services – 40% of net income.
4. **Transfer Pricing:** The transfer pricing provisions in Indian law are in line with the Transfer Pricing Guidelines issued by the Organisation for Economic Cooperation and Development (OECD). The transfer pricing regulations requires any international transaction between two or more associated enterprises to be at an arm's length price. The taxpayers are required to maintain relevant documents/information relating to such transactions.

5. **Minimum alternate tax:** If the tax payable by a company on its total income is less than 18.5% of its book profit, the book profit is deemed to be its total income for the purpose of calculating tax, which is called Minimum Alternate Tax (MAT). Indian companies must pay this tax at 20%, whereas foreign companies pay at 19.4%. The tax can be carried forward to set off against tax payable in the following 10 years. MAT is also payable by the developers of special economic zones as well as by limited liability partnerships.

- **Double Taxation Avoidance Agreements (DTAA)**

India has signed DTAA with more than 80 countries in order to provide the relief on dual taxation. The taxpayer is either taxed under the domestic provisions of law or under the DTAA. The DTAAs provide for concessional tax rates in few cases and makes it possible for the countries that are parties to the DTAA to exchange information and incorporate terms to curtail tax evasion. A non-resident to seeking treaty benefit is required to furnish tax residency certificate certifying its residency to the Indian Government.

- **General Anti Avoidance Rules (GAAR)**

GAAR has been introduced in India with an object to curb avoidance of tax in general. The relevant tax authorities are empowered to deny tax benefits provided for under any transaction or arrangement which are entered into with the intent to procure tax benefits. GAAR shall be effective from 1st April, 2017. With regard to a foreign entity, GAAR would be applicable only when the benefits under DTAA have not been taken.

- **Indirect Taxes**

There are many indirect taxes such as Central Sales Tax (levied on sale of goods between two states in India), VAT (levied on sale of movable goods), Excise Duty (levied on goods manufactured in India), Custom Duty (levied on goods imported into India and exported from India), Service Tax (levied on services) and Stamp Duty (levied on transfer of immovable property) which are applicable.

In order to simplify the existing tax structure and to improve the ease of doing business in India, the Government of India has undertaken steps to unify indirect tax rates throughout India by replacing present indirect system of tax by GST system (w.e.f. 1st April, 2017). GST is a comprehensive tax levy on manufacture, sale and consumption of goods and services at national level which will lead to reduction in cascading effects of the taxes on price of goods and services.

VI. EMPLOYMENT OF FOREIGN EMPLOYEE

In India there are numerous Employment Laws, either enacted by the Central or the State Governments that is subjects ranging from conditions of employment to social security,

health, safety, welfare, trade unions, industrial and labour disputes, etc. Employees who do not fall within the definition of 'workmen' are governed by their employment contracts or letters of appointment. While there is no particular requirement under the Central legislations to have written employment contracts, certain State legislations such as the Karnataka Shops & Commercial Establishments Act, 1961 require an employer to issue an 'appointment order' to employees, within thirty days from the date of appointment. Such documents must still fulfil the essentials of a valid contract and comply with certain provisions of labour statutes.

There is no requirement for anyone who is not an Indian resident or citizen to obtain work permit in order to work in India. However, in order to be eligible to work in India, Indian Immigration Laws requires a foreign national to obtain an employment visa (valid for a period of 1 year and further extendable upto 5 years) and to obtain a certificate of registration from the nearest Foreigners Regional Registration Office within 45 days from the date of arrival in India if he wishes to stay in India for a period longer than 180 days.

VII. CONCLUSION

In light of the aforesaid background it is important to note that FDI or through FPI has been prevalent and that India has often been seen as a good investment platform. The focus in recent times and more particularly of the present Indian government has been to provide relief to investors by making India an investor-friendly destination. The recent *General Budget 2017-18* has been a step forward in this direction to meet the objective of doing away with multiple procedures, rules, regulations and bringing ease, transparency and clarity in policies. Some of the key initiatives undertaken by the Indian (Central) Government for ease of doing business in India are listed on the Make in India website (http://www.makeinindia.com/eodb).

Murali and Co.
102, Haudin House, 5, Haudin Road, Bangalore- 560042, India
tel: [91] 80 4151 5161
fax: [91] 80 4151 0421
Contact: C. Muralidhara murali@muraliandco.com

JAPAN PROMOTING FOREIGN INVESTMENT

Kojima Law Offices

Japan is one of the largest economies in the world, with a population of about 125 million and an enviable number of consumers with high levels of disposal income.

Japan is actively trying to promote foreign direct investment and has taken several initiatives to further this goal. In November 2012, Japan implemented the "Act on Special Measures for Promotion of Research and Development et al. by Certified Multinational Enterprises". This act seeks to attract global enterprises and invite high-value added companies to both conduct research and development and base their Asian headquarters in Japan. It does this by providing eligible enterprises with reduced corporate tax rates, lower patent application fees, less complex investment procedures, and assistance raising funds. Along with these initiatives, the Japan External Trade Organization also provides a number of incentive and subsidy programs aimed at foreign affiliated companies and foreign investors who wish to open an office to conduct business in Japan (for details, see https://www.jetro.go.jp/en/invest/incentive_programs/).

Japan has excellent infrastructure, including high-speed broadband Internet, an extensive system of railways, airports and seaports, as well as strong ties with emerging economies in the Asia region. In short, Japan offers a number of opportunities for foreign companies to expand their business within the Asia region though direct investment.

I. FOREIGN INVESTMENT

The Foreign Exchange and Foreign Trade Act (FEFTA) is the primary law regulating direct investment into Japan. "Foreign investors" under FEFTA include non-resident individuals, as well as companies or other entities that are established or have their principal office in a foreign jurisdiction. Foreign investors also include domestic companies that a non-resident individual or foreign company/entity: (i) directly or indirectly has a controlling interest in due to the shares it owns in the company, or (ii) has control over through its control of the executive positions that have the power to determine how the domestic company/entity operates.

Under FEFTA, foreign direct investment includes acquiring or transferring shares or equity in an unlisted domestic company, acquiring more than 10% of the outstanding shares of a listed domestic company, establishing a branch office, factory or other business facility in Japan, making a loan of over 100 million Japanese yen, and acquiring private placement bonds.

FEFTA does not require foreign investors to follow any governmental procedures unless the contemplated investment falls within certain categories of restricted activities, in which case the foreign investor is required to submit either prior notice or notice after the investment has been made.

Under FEFTA, a foreign investor is required to submit prior notice if the foreign investment is made in relation to industries involving national security, such as the manufacturing of weapons, aircraft, satellites, nuclear plants and nuclear material. Prior notice is also required

for industries such as electricity, gas, railways, pharmaceuticals, and certain industries that have yet to be liberalized, including agriculture, petroleum, and mining.

Foreign investors from Iraq, Iran, North Korea and Libya are subject to the prior notice requirement regardless of the industry. The government has 30 days from the date the prior notice is filed to decide whether to approve the investment. However, the government may extend this period by an additional 4 months. If the foreign direct investment does not involve national security, the 30-day period can be shortened to 2 weeks or even 5 days.

By law, foreign investors can hold only a certain percentage of the total shares in listed companies engaged in the airline industry, shipping, telecommunications, radio, broadcasting, and mining.

II. FORMS OF BUSINESS ORGANIZATIONS

Any foreign entity that engages in transactions on a continuous basis in Japan must have a subsidiary, a branch office, or a resident representative in Japan, and must register certain information with the legal affairs bureau.

(a) Subsidiary

Foreign investors may own a 100% interest in corporations and partnerships in Japan without the need for local partners unless the corporation or partnership is engaged in activities that FEFTA specifically restricts. Foreign investors in Japan most often opt to organize their companies as corporations, because partnerships do not limit partners' liability.

Both Japanese and foreign investors can choose between one of two main types of limited liability companies - a *kabushiki-kaisha* (KK) or a *goudou kaisha* (GK). The GK is a relatively new type of legal entity designed to cater to investors who wish to have more flexibility in how the company is structured and how profits are distributed. While an increasing number foreign investors are opting for GKs, the KK remains the most common because they are familiar to the Japanese business community. As such, organizing as a KK lends the company an air of respectability and trustworthiness, two qualities that are especially important for foreign-affiliated companies. Both KKs and GKs can be incorporated with a minimum capitalization of JPY 1, and both need to be registered with the local legal affairs bureau.

The "representative director" (*daihyo-torishimari-yaku* in Japanese) is akin to a CEO and is responsible for the day-to-day management of a KK. A KK must have at least one director, but that director does not necessarily need to reside in Japan. In practice, however, a resident director is almost a de facto requirement. This is because in order to open a bank account for the foreign subsidiary following incorporation, most banks in Japan require the foreign subsidiary to have at least one director who is a resident of Japan. For this reason, we generally recommend that a subsidiary of a foreign investor appoint at least one director who lives in Japan, and register that director's address with the appropriate governmental entity.

A KK's shareholders must hold a general shareholders meeting at least once a year. A KK must also update its commercial registry whenever it makes any changes that require registration with the legal affairs bureau.

(b) Branch Office

A foreign investor may also choose to establish a presence in Japan by setting up a branch office. A branch office does not have an independent corporate identity, but is permitted to do business at the direction of the foreign corporation. Establishing a branch office requires registration of certain information about both the branch office itself and the foreign company that opened the branch.

(c) Resident representative

The easiest way for foreign entities to conduct business in Japan on a continuous basis is to appoint a resident representative (they do not need to be a Japanese national) and register their address with the legal affairs bureau.

(d) Representative office

A foreign entity may open a representative office to conduct such liaison activities as producing marketing surveys, engaging in PR, and obtaining information. On the plus side, a representative office does not need to be registered. However, a representative office is prohibited from performing business transactions with its customers in Japan, including entering into contracts, and making payments or accepting payments on behalf of the foreign company. Therefore, a foreign investor that wants to engage in any meaningful business activities in Japan should go with one of the options discussed above: (a) incorporate and register a subsidiary; (b) register a branch office; or (c) appoint and register a resident representative with the legal affairs bureau.

III. TAXES

Corporations that foreign investors set up in Japan are treated the same as local Japanese companies, including being subject to Japanese taxes on their worldwide income (under certain conditions, however, the company may avoid double taxation by deducting foreign taxes it has paid).

Foreign companies with a permanent establishment in Japan (including a branch office) will be taxed on the portion of their income attributable to that permanent establishment.

A foreign investor needs to be aware of the following Japanese taxes when setting up a corporation or branch office in Japan:

- Corporate tax - The 2017 corporate tax rate is 23.4% on taxable profits. Certain tax deductions and special tax measures may apply depending on the capital and income tax thresholds.
- Corporate Inhabitant tax - A company with an office in Japan must pay corporate inhabitant tax, which is calculated based on the company's capital, the number of employees, and/or the amount of corporate tax.

- Corporate Enterprise tax – A corporate enterprise tax is levied on a company's income. If a company's capital is JPY 100 million or more, corporate enterprise tax is determined on a pro forma basis using the company's income, added value, and capital as the taxable basis.

The effective corporate tax rate is currently 29.97%, but is expected to decrease to 29.74% in 2018.

Foreign investors should also be aware of the following:

- Income tax withholding - Certain payments are subject to income tax withholding, including interest, dividends, salaries, compensation and fees. If a tax treaty covers payments to a non-resident or a foreign corporation, the company may be exempt from having to withhold income tax or may be permitted to pay a reduced rate. Japan has concluded tax treaties with many countries to avoid double taxation of income.
- Consumption tax – A value-added tax currently set at 8% applies to transactions such as the sale of goods and services performed in Japan, as well as on certain imported goods.

Under the Special Taxation Measures Act, transactions with related foreign companies that are not made at arm's length are subject to transfer pricing regulations.

IV. EMPLOYMENT

There are several categories of visas available under Japanese immigration law that allow certain individual to engage in commercial activities in Japan for an extended period of time. These individuals include investors/business managers, engineers, intra-company transferees, and skilled laborers (manual laborers are rarely able to secure such visas). To obtain a visa for an engineer or intra-company transferee, the employer needs to pay the foreigner at least what a Japanese would receive in the same position.

Both local and expatriate employees essentially enjoy the same protections under Japanese law, including the Labor Standards Act, the Labor Contract Act, the Industrial Safety and Health Act, and the Labor Union Act. Employers are required to pay employees at least the minimum wage under the Minimum Wage Act, which can differ depending on the prefecture and industry.

The Labor Standards Act provides employees with a minimum level of protection in the area of work hours, work days, wages, paid leave, workers' accident compensation, and prohibition of discriminatory treatment. Whatever employment relationships employers and employees enter into must satisfy the minimum standards under the Labor Standards Act unless the relevant labor-management agreement provides otherwise for certain items such as overtime work and the like.

By law, most employees must participate in a variety of public insurance programs, including workers' accident compensation insurance, employment insurance, health insurance, and government pensions, with employers required to bear 50% to 100% of the premiums. Regardless of nationality, employees hired and working in Japan have the same protections

as local employees under the public insurance programs and are generally required to contribute to the premiums.

Japanese labor law does not recognize the concept of “at-will” employment. As a result, employment is supposed to continue indefinitely unless limited by contract to a fixed term. In Japan, an employer is not allowed to dismiss an employee unless there are objectively reasonable grounds to do so, and unless the dismissal is considered to be appropriate under general societal norms. In a conventional employment relationship with a permanent employee, an employer may try and include in the employment agreement the right to dismiss the employee at the employer’s discretion. Even if the employee agrees, however, the employer may not be able to enforce this right. In Japan’s pro-labor legal regime, employers should carefully prepare for a dismissal, even one that may on the surface appear simple and clear-cut. Failure to do so may trigger unexpected legal problems and costly litigation.

An employer of fixed-term employees should also be aware of the legal requirements and restrictions applicable to those employees. Under certain conditions, the employer may be barred from refusing to renew fixed-term employment contracts for employees who have had their contracts renewed multiple times. In addition, employers are required to grant permanent employment status to those employed for more than five years under a fixed-term employment contract.

Kojima Law Offices
Gobancho Kataoka Bldg. 4F, Gobancho 2-7 Chiyoda-ku Tokyo 102-0076
tel: [81] 3 3222 1401
fax: [81] 3 3222 1405
web: www.kojimalaw.jp
Contact: Lynn F. Pickard pickard@kojimalaw.jp
Takeshi Kikuchi kikuchi@kojimalaw.jp.0

INVESTING AND DOING BUSINESS IN KOREA

Sojong Partners

INTRODUCTION

Korea has emerged in recent years as one of the prime investment locations in the Asia Pacific region. As of year-end 2015, more than half of the Fortune Global 500 list of companies had established a foothold in Korea, most multinational manufacturing companies on the Fortune Global 500 list, including automotive, electronics and petrochemical industries, entered the Korean market, making investments in more than 600 domestic companies. Korea is also favorably located at the center of East Asia, a region which is the new focus of the global economy.

Korea occupies a strategic location within East Asia. The East Asian region is home to 22% of the world's population, produces one-fifth of the world's goods, and exhibits some of the world's highest economic growth rates. East Asia is expected to become the world's largest market and production center and the principal growth engine for the world economy. There are more than 61 metropolitan cities with populations of at least 1 million within a three-hour flight radius of Seoul. That makes Korea a gateway to an incredible array of promising investment destinations in East Asia. Companies can easily expand to overseas markets after using Korea as a test bed platform.

Korean GDP was a meagre US$8 billion in 1970. It increased to US$1,378 billion in 2015, a 172-fold increase in about 45 years, and a clear indication of the dynamism of the Korean economy and its potential. Central to the development of the Korean economy is the country's 50-million strong domestic consumer markets, globally competitive industries such as automobiles, shipbuilding, electronics, steel and petrochemicals, as well as those based on information technology, sound macroeconomic fundamentals, cost-competitive workforce and attractive investment incentive packages.

To emerge as a business hub of East Asia, Korea is making efforts to further improve its business environment and attract foreign investment in the financial, logistics and high-tech industries.

I. FORIEGN DIRECT INVESTMENT (FDI)

Foreign direct investment (FDI) is an integral part of the Korean economy. The number of foreign-invested companies in Korea has increased exponentially over the last decade or so. In 2000 the number was less than 5,000, but it reached over 10,000 as of 2015. They now account for approximately 13 per cent of sales, 12 per cent of all exports and 6 per cent of employment in the manufacturing sector.

All current laws and regulations related to FDI have been streamlined and incorporated into a single legal framework represented by the new Foreign Investment Promotion Act (FIPA), which took effect in November 1998. Since its inception, FIPA has enabled foreign investors to take advantage of one-stop service and uniform treatment.

Various incentives, including tax exemptions and reductions, have been instituted to promote FDI. For example, corporate and income taxes are exempted or reduced for high-tech businesses for a period of seven years. Government-owned real estate can be leased to foreign-invested firms for up to 50 years at favorable rates, and for no cost in certain instances. Free Investment Zones have also been established to accommodate large-scale FDI. The Korean government continues to phase out import restrictions, reducing the number of items subject to tariffs.

II. EXCHANGE CONTROLS

All transactions involving foreign exchange in Korea or flows of capital between Korean residents and non-residents are controlled according to the provisions of the Foreign Exchange Transactions Law. The Foreign Exchange Transactions Law applies to all domestic companies, including branches, agencies, representative offices and other offices of foreign companies operating in the Republic of Korea. In essence, inflows and outflows of foreign exchange are regulated. Under the Foreign Exchange Transactions Law, foreign exchange earnings from external transactions are regarded as coming under the jurisdiction of the Republic of Korea. Foreign investors who comply with the notification requirements of the Foreign Investment Promotion Act are guaranteed the right to remit dividends and repatriate capital through a designated foreign exchange bank.

The Foreign Investment Promotion Act guarantees the remittance of royalties, dividends and equity owned by foreign investors, any related proceeds, and any principal and interest paid from long-term loan agreements. Any suspension of foreign exchange transactions due to restrictive measures from critical situations, such as war or domestic economic strife, will not apply to Foreign Direct Investment. Under the Foreign Exchange Transactions Law, confirmation by the head of a foreign exchange bank is required to remit such funds overseas.

III. TAXATION

Korean taxes are composed of national and local taxes. For tax purposes, an individual is defined as either a resident or non-resident of Korea depending on his/her residence or domicile in Korea. A resident is liable for income taxes on the income from sources both within and outside Korea. A non-resident is liable for income taxes on the income derived from sources within Korea

A company established in Korea under Korean law is regarded as a domestic company and liable for tax on the worldwide income whereas a foreign company is only liable for tax on its Korean-source income. A foreign company without a permanent establishment (PE) in Korea is subject to withholding tax as payments are made to it.

IV. CUSTOMS DUTIES

Goods being imported from foreign countries cannot be brought into Korea unless their customs duties are prepaid. Customs duties are calculated by multiplying tax base of the tariff tax base by the tariff rate. The tariff tax base is either the value of the imported goods or the quantity. The tariff rate is provided on the tariff rate table by group of items. As the tax rate applies to each HS Number corresponding to an item or a group of items, the tariff is affected by the decision on which value should be regarded as the taxable value or how the taxable value is decided. If the value is the tax base of the tariff, it is an “ad valorem duty" and if the quantity is tax based, it is called a “specific commercial duty." The value, which is the tax base of the ad valorem duty, is called the “taxable value." Korean customs valuations on taxable values reflect the relevant provisions of the WTO Valuation Agreement and have the same principles of the international tariff valuation.

V. LABOR LAW

The basic law in Korea regulating labor standards is the Labor Standards Act (LSA), which is applicable to an employer with at least 5 employees with certain exceptions. LSA was substantially amended September of 2003 to be more in line with international standards, and the key changes resulting from the amendment include the reduction of work hours per week from 44 hours to 40 hours and abolishment of monthly-leave system, among other things.

The working conditions of employees must be decided by free will, with employers and workers perceived as equal, with standards matching those prescribed by the law. Even if decided by free will, any aspect of working conditions that does not meet the standards set by the law will be deemed invalid.

VI. LEGAL SYSTEM & DISPUTE RESOLUTIONS

The Korean legal system adopts the civil law regime, and their primary sources of law are various codes enacted by the National Assembly as well as the Constitution. Korea‘s judicial system comprises a Supreme Court, appellate courts, the lower trial courts and a Constitutional Court. The judiciary is independent under the Constitution. There is no system of juries in the judicial system of South Korea, although since February 2008 a limited system of juries has been adopted for criminal cases and environmental cases, and all questions of law and fact are decided by judges.

Serious investment disputes involving foreigners are the exception rather than the rule in Korea. The exceptions are cases involving intellectual property rights protection. There exists a body of Korean law governing commercial activities and bankruptcies that constitutes the means to enforce property and contractual rights, with monetary judgments usually levied in the domestic currency.

Although commercial disputes can be adjudicated in a civil court, litigation is not a practical method for foreigners to resolve disputes. Lawsuits in Korea are not very different from those found in other places around the world: they tend to be costly and time

consuming. These difficulties are compounded by the language barrier and lack of understanding about the difference in legal procedure. This is probably why businesses, especially foreign businesses, often contemplate lawsuits only as a last resort.

The Korean Commercial Arbitration Board (KCAB) is perhaps a more practical way to resolve commercial disputes. The Korean Arbitration Act and its implementing rules outline the following steps in the arbitration process: (1) parties may request the KCAB to act as informal intermediary to a settlement; (2) if unsuccessful, either or both parties may request formal arbitration, in which case the KCAB appoints a mediator to conduct conciliatory talks for 30 days; and (3) if unsuccessful, an arbitration panel consisting of one or three arbitrators is assigned to decide the case. If one party is not resident in Korea, either may request an arbitrator from a neutral country.

VII. FREE TRADE AGREEMENTS

Korea has signed free trade agreements with the EU and the U.S., and they went into effect in 2011 and 2012, respectively. As of January 2016, Korea has signed FTAs with 54 countries including ASEAN, the European Free Trade Association (EFTA), China and New Zealand, while FTA negotiations between Korea and six Central American countries are underway.

VIII. IN CLOSING

While this is good a time as ever to invest in Korea, one would be remiss to undertake the investment without a carefully thought out game plan. So long as the foreign investors have the right knowledge and reliable guidance, however, the Korean market and its legal system provide attractive incentives and opportunities to make investing in Korea worthwhile.

Sojong Partners
15F, Woosin Building, 145 Teheran-ro, Gangnam-gu, Seoul 06132
tel: [82] 2 311 1114
fax: [82] 2 311 1115
Contact: Benjamin O. Kim bokim@sojong.com

DOING BUSINESS IN MALAYSIA

RamRais & Partners

Multinational corporations from more than 40 countries have invested in Malaysia.

Malaysia is an attractive location for businesses due to the conducive business environment and business friendly policies.

Strengths of doing business in Malaysia include:

- English speaking, educated workforce
- current weak exchange rate against the US Dollar
- similar business and legal practices to commonwealth countries
- similar technical standards to commonwealth countries
- member of the ASEAN community

That being said, foreign investors must comply with government guidelines and regulations, and obtain licenses when necessary.

Approvals/regulations for:

a) **Foreign Exchange and Investment Controls**

b) **Local Ownership Requirements**

c) **Business Entities and Work Permits**

d) **Capitalisation Requirements**

(a) Foreign Exchange and Investment Controls

There are no Foreign Exchange Administration restrictions and the Malaysian markets are easily accessible by global investors. There is free mobility of inflow and outflow of capital for investments in Malaysia.

- Non-residents are free to invest in any form of ringgit assets either as direct or portfolio investments; and
- They are free to remit out divestment proceeds, profits, dividends or any income arising from these investments in Malaysia.
- There are also no restrictions for the non-residents to convert foreign currency to ringgit or vice versa, with licensed onshore banks, for the purchase of ringgit assets or for repatriation of funds arising from these ringgit investments.

(b) Local ownership requirements

In Malaysia, there is generally no restriction on the equity of a private limited company being wholly owned by foreigners. Investors can now hold 100% equity irrespective of the level of exports. However a wholly foreign owned company may require trading licenses such as the Whole, Retail Trade License (WRT).

(c) Business Entities and Work Permits

In Malaysia a business may be conducted in the following structure:

Sole proprietorship

Sole proprietorship is the simplest and cheapest to set-up. Unlike private limited companies, a sole proprietorship is only required to pay an annual fee to the Companies Commission of Malaysia to keep its business renewed from year to year. There is no audit and annual filing requirement. However, the danger of this set-up is that it has unlimited liability.

Partnership

Partnership is the same as sole proprietorship except there are more than 1 owner. This form of set-up is usually for professional firms such as lawyers and auditors.

Limited Liability Partnership (LLP)

LLP is a hybrid between a private limited company and partnership. It is similar to conventional partnership but with the advantages of a private limited company such as the following:-

1. It is a body corporate and is a separate legal entity from its partners.
2. LLP has perpetual succession.
3. It is capable of suing and being sued, acquiring, owning, holding and developing or disposing of property.
4. LLP has lesser compliance requirements and is therefore a more affordable business vehicle. For example, LLP is not required to audit its accounts annually.

Private Limited Company (SDN BHD)

Private Limited Company is the most common form of companies in Malaysia, with advantages such as Separate Legal Entity, Limited Liability, Perpetual Succession and Credibility**.** The minimum requirement is for one local director.

Public Limited Company (BERHAD)

Public limited company (Berhad) is rather similar to private limited companies except that it may offer its shares to the public and has more than 50 members. A public limited company (Berhad) is govern by the Securities Commission of Malaysia.

Company Limited By Guarantee

A company limited by guarantee is one which the liability of the members are limited to the amount which the members have undertaken or guaranteed to contribute. A company limited by guarantee is usually the type of entity used by non-profit organisations such as charitable bodies, foundations etc.

Foreign Company

A foreign company is equivalent to a foreign branch in Malaysia. A branch office is registered as an extension of the parent company and is not a separate legal entity. The liabilities of a branch office extend to its parent company.

Foreign branch is not allowed to carry out trade related businesses be it retail or wholesale. Wholesale or retail trade businesses with foreign interests are required to operate through a locally incorporated private limited company (see above).

Malaysia's new Companies Act 2016 which come into force on 31 January 2017, is committed to further improve all areas of business environment. The online registration is now more simplified and facilitates a smooth incorporation process together with an improved legal landscape.

Work Permits

For foreigners who wish to start business or be employed and stay permanently in Malaysia, they can apply for work permit, and it comes in 4 different categories as follows:

1) Setting up a Malaysia International Company and get 2 years Business Visa for you and family

For the fastest access in to Malaysian economy with a 2 years' work permit, investors can apply for registration as a Labuan International Company.

Investor will be able retain 100% of their ownership in the company with minimum paid-up capital and without the need of any trade license or registered office set-up.

The time taken from the company registration to the visa endorsement on the passport of the applicant is approximately 60 days.

Corporate tax on net profit for such companies is about 3% and roughly equates to RM 20,000. Depending on the nature of the business, the investor may apply for up to 4 positions for foreigners with the company's work permit.

2) Setting up your own business and apply the Malaysia 2-years work permit under your own Malaysia Sdn Bhd company.

This comes in two forms.

a) Non-resident company where foreigners can own 100% Malaysian Private Limited (Sdn Bhd) Company

This category is meant for foreigners who wish to run his own business in Malaysia. The investors should be aware of the certain types of businesses prohibited by the Malaysian government for foreigners to conduct.

Such a corporation entitles the owners to a 2-year Malaysian work permit. To meet the minimum paid-up capital requirement for registration (RM 500,000), the Malaysian government provides a period of six to nine months for visa endorsement. This provides the business owners with adequate time to arrange the capital.

To apply for Shareholders/Directors Position, you are required to have a minimum shareholding of RM500,000. At such, your company is required to set-up with a minimum authorized capital of RM1 million.

For non-resident companies, trade licenses such as Whole, Retail Trade License (WRT) may be required. The license application will take about 2 to 3 months for approval.

The processing time from incorporating the company, setting up the office, trade license and 2-years (DP10) work permit application until final visa endorsement onto your passport is 6 to 9 months. The time may be longer as you need also to set-up your office/shop as well as bank in your capital into your bank account for filling your paid up capital to be RM1 million.

b) Joint-Venture with Local Malaysian for the Malaysian Private Limited (Sdn Bhd) Company

Under a joint venture arrangement, the investor may enter in to an agreement with Malaysian companies to incorporate a partly owned enterprise in Malaysia.

With a minimum capital requirement of RM 350,000 and a 2-year work permit, this agreement is best suited for business owners aiming to trade without the WRT license. It normally takes 2-3 months for visa processing and the work permit may be extended for such time as deemed reasonable by the government.

3) Be employed by Malaysian Companies, Regional/Representative Office in Malaysia and get work permit for 2 years

Under this category, the business owners and employers can apply the Malaysia DP10 work permit (2-years visa) for the foreigners whom they wanted to hire.

The foreigner will take on a normal employment contract with the company, and the salary has to be minimum RM5,000 in order to qualify under Immigration's guidance.

The positions that can be hired by the companies has to meet approval of the Immigration Department of special skills and education

4) Setting up your own Regional/Representative Office in Malaysia and get work permit for 3 years

If you have a company in your own country and have been established at least 2 years, you may set-up a Regional/Representative Office is Malaysia. The Regional/Representative Office is not allowed to do any commercial transactions (sales) with Malaysian companies. It serves as coordinating centre, fact finding, survey and opportunities sourcing only.

Through this path, you and your family can apply for 2 to 3 years work permit. Processing time for approval until final visa endorsement on your passport take about 2 to 3 months.

(d) Capitalisation Requirements

- Import and export controls
- Visas and employment requirements for non-residents
- Banking structure and banking instruments
- Structuring of business, including corporations, partnerships, joint ventures and other business structures used.
- Taxation
- Intellectual Property Protection

1. Import and export controls

All goods imported into and exported out of Malaysia whether payable with duty or not must be declared to the Customs and Excise Department with full particulars including the country of origin of the goods, name and address of the seller and buyer etc. All customs duties /taxes on imported and exported goods must be paid before they are released into or out of the country.

The Customs Order (Prohibition Against Import) 1998, provides a list of goods prohibited from import into Malaysia absolutely and conditionally upon obtaining specific import licenses from the Director General of Customs.

2. Visas and employment requirements for non-residents

A pass is an endorsement in the passport constituting permission to stay for an approved duration. Foreigners who visit Malaysia must obtain the pass at the point of entry besides visa (where required) which allows him to stay temporarily in Malaysia.

All such applications must have sponsorship in Malaysia whereby the sponsors agree to be responsible for the maintenance and repatriation of the visitors from Malaysia if necessary.

Passes granted to foreign visitors upon arrival are as follows:

(i) Visit Pass (Social) Short Term

A Visit Pass is issued to foreigners for the purpose of a social or/and business visit, such as:

- Owners and company representatives entering Malaysia to attend a company meeting, conference or seminar, inspect the company's accounts or to ensure the smooth running of the company
- Investors or businessmen entering to explore business and investment opportunities or setting up manufacturing plant
- Property owners entering to negotiate, sell or lease properties
- Foreign journalist or reporters from mass media agencies entering to cover any event in Malaysia
- Participants in sporting events

These passes cannot be used for employment or for supervising the installation of new machinery or the construction of a factory.

(ii) Visit Pass (Social) Long Term

Long term social visit pass may be issued to a foreigner for temporary stay in Malaysia for a period of not less than six months. Extension may be given based on visitors’ eligibility and upon fulfilling certain conditions.

Foreign spouses to Malaysians, holding a long term social visit pass are allowed to be engaged on any form of paid employment or in any business or professional occupation without converting their Social Visit Pass status to Employment Pass or Visit Pass (Temporary Employment)

(iii) Visit Pass (Temporary Employment)

This is issued to foreigners who enter the country to take up employment for less than 24 months.

(iv) Employment Pass

This is issued to foreigners who enter the country to take up employment for a minimum period of two years. Employment pass is issued after the applicant has obtained the approval for expatriate post from the relevant authorised agencies.

(v) Visit Pass (Professional)

This is issued to foreigners for the purpose of engaging on short-term contract with any agency.

The categories of foreigners who are eligible are professionals / volunteers such as researchers recognised by the Government of Malaysia, members of an international organisations, invited lecturers/speakers, experts in the installation or maintenance of machines, artistes such as those entering for filming or performance or entering for promotion of albums or new products and Missionaries (Islam or other religions).

(vi) Dependant Pass

This facility is accorded to families of expatriates officials. Dependant Pass is issued to spouse and children of the Employment Pass holders. This pass may be applied together with the application for an employment pass or after the employment pass is issued.

3. Banking structure and banking instruments

Malaysia has a fairly wide representation of financial institutions in the form of commercial banks, merchant banks, development banks, representative offices of foreign banks, discount houses, insurance companies, finance companies, housing credit institutions, industrial credit finance institutions, money brokers and investment trust companies.

The Central Bank, Bank Negara Malaysia supervisors the Malaysian Banking and Insurance sectors.

Banking instruments

Banks in Malaysia generally deal with all types of banking instruments utilised around the world. The most common methods of giving and receiving payments other than cash are by cheques, demand drafts, telegraphic transfers, internet transfers, and traveller's cheques. Practically all banks in Malaysia have joined the Society For Worldwide Interbank Financial

Telecommunication (SWIFT), which allows transfer of funds, documentary credits, foreign exchange, deposits, loans, collections securities and other transactions.

Accessibility to domestic financing

1. Borrowing in foreign currency

    a. No restrictions on the accessibility to foreign currency financing by non-residents (banks or non-banks) from licensed onshore banks and such proceeds of the borrowing can be utilised offshore or onshore; and

    b. Non-residents are also allowed to issue foreign-currency denominated sukuk/bonds in Malaysia for use onshore or abroad.

2. Borrowing in ringgit

    - Non-bank non-residents are free to borrow any amount in ringgit from licensed onshore banks to finance real sector activities in Malaysia; and

    - Non-residents may also raise ringgit financing through the issuance of sukuk/bonds in Malaysia. The proceeds can be used onshore or offshore.

    - Banks are permitted to extend ringgit credit facilities to non-residents (other than stockbrokers and banks) up to an aggregate of RM10 million (US$2.653 million) for any purpose other than financing immovable property in Malaysia, in excess of which the approval of BNM is required

    - Onshore banks are permitted to extend overdraft facilities to non-resident stockbrokers and banks up to an aggregate overnight limit of RM200 million (US$53.050 million) to facilitate purchases of securities listed on Bursa Malaysia (Stock Exchange)

4. Structuring of business, including corporations, partnerships, joint ventures and other business structures used.

(i) Joint-Venture Agreement- an agreement to set up a joint-venture company between two or more parties involving locals and foreigners

(ii) Technical Assistance And Know-how Agreement - where one party will provide the technical assistance and know-how for the manufacture or certain products for a certain amount of fee or royalty.

(iii) License Agreement - where the licensor grants a licence/right to the licensee to use its patents, trademarks and other industrial/intellectual properties for the manufacture of certain products for a certain amount of fee or royalty.

(iv) Patent and Trademark Agreement - where one party grants the other the right to use its patents and trademarks for the manufacture of certain products for a certain amount of fee.

(iv) Turnkey Contract - where the contract is awarded to one of the parties to perform all stages form the initial tot he final stage, inclusive of consultancy, managerial, technical and other services until the contractual project is ready for immediate commercial production or final use

(v) Management Agreement - where one party will provide management services to the other for a management fee.

5. Taxation

The income is assessed on a current year basis and the present tax assessment system administered by Inland Revenue Board of Malaysia (IRBM) is a Self-Assessment System (SAS).

(a) withholding taxes

Non-resident individuals are subject to a withholding tax of 10% on special classes of income e.g. use of moveable property, technical advice, assistance or services, installation services on the supply of plant, machinery, etc.; personal services associated with the use of intangible property.

Withholding tax will not be applicable for income received in respect of the services rendered or performed outside Malaysia. There is no withholding tax on dividends paid by Malaysian companies.

In respect of withholding tax not paid, a penalty of 10% is imposed only on the amount of unpaid tax and not on the total payment made to a non-resident.

(b) corporate taxes

A company, whether resident or not, is assessable on income accrued in or derived from Malaysia. Income derived from sources outside Malaysia and remitted by a resident company is exempted from tax, except in the case of the banking and insurance business, and sea and air transport undertakings.

A company is considered a resident in Malaysia if the control and management of its affairs are exercised in Malaysia.

Effective from the year of assessment 2009, the corporate tax rate is at 25%. This rate is also applicable to the following entities:

1. A trust body
2. An executor of an estate of an individual who was domiciled outside Malaysia at the time of his death; and
3. A receiver appointed by the court

A person carrying on petroleum upstream operations is subject to a Petroleum Income Tax of 38%.

Deductions are allowed for contributions made to:

1) The Government, State Government, and local authorities; or
2) Institutions or organisations approved by the Director General of Inland Revenue Board Malaysia; or
3) Sports activities approved by the Minister of Finance or Commissioner of Sports; or
4) Project of national interest approved by the Minister of Finance.

The contributions in respect of item 2, 3, and 4 shall not exceed 10% of the aggregate income of the company in the relevant year of assessment.

A resident individual is taxed on his chargeable income after deducting personal reliefs at a graduated rate from 0% to 26% with effect from the year of assessment 2010.

(c) Indirect taxes

(i) Goods And Services Tax (GST)

During the 2014 Budget Announcement, the Prime Minister of Malaysia has announced the implementation of a goods and services tax (GST) of 6% commencing on 1 April 2015.

The introduction of GST is part of the overall Government tax reform programme towards making the taxation system more efficient, effective, transparent, business friendly and capable of generating a stable source of revenue.

The GST replaces the previous consumption tax comprising of Sales and Services Tax (SST).

(ii) Real Property Gains Tax (RPGT)

Capital gains are generally not subject to income tax in Malaysia. However, real property gains tax is charged on nett chargeable gains (less related costs deductions) arising from the disposal of real property situated in Malaysia or of interest, options or other rights in or over such land as well as the disposal of shares in real property companies.

Effective from 2014, gains from the disposal of residential and commercial properties are taxed following the scale below.

Malaysians & Permanent Residents & Companies	**RPGT**
Disposal within 3 years	30%
Disposal at 4th year	20%
Disposal at 5th year	15%
Disposal at 6th year & beyond	0%
(Malaysian & Permanent Resident)	
Disposal at 6th year & beyond **(Companies)**	5%

Non-Citizens	**RPGT**
Disposal within 5 years	30%
Disposal at 6th year & beyond	5%

Exemption up to RM10,000 or 10% of the net gains, whichever is higher, is given to an individual.

(iii) Import & Excise Duty

Import duty is mostly imposed ad valorem although some specific duties are imposed on a number of items.

Excise duties are levied on selected products manufactured in Malaysia e.g. cigarettes, liquors, playing cards, mahjong tiles and motor vehicles.

(iv) Double Taxation Agreement (DTA)

Malaysia has concluded double tax agreements/treaties with almost 60 countries which include all ASEAN and APAC countries

6. Intellectual Property Protection

Intellectual property protection in Malaysia comprises of patents, trademarks, industrial designs, copyright, geographical indications and layout designs of integrated circuits.

Malaysia is a member of the World Intellectual Property Organisation (WIPO) and a signatory to the Paris Convention and Berne Convention which govern these intellectual property rights.

In addition, Malaysia is also a signatory to the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) signed under the auspices of the World Trade Organisation (WTO).

Patents

The Patents Act 1983 and the Patents Regulations 1986 govern patent protection in Malaysia. An applicant may file a patent application directly if he is domicile or resident in Malaysia. A foreign application can only be filed through a registered patent agent in Malaysia acting on behalf of the applicant.

Similar to legislations in other countries, an invention is patentable if it is new, involves an inventive step and is industrially applicable. In accordance with TRIPS, the Patents Act stipulates a protection period of 20 years from the date of filing of an application.

Trade Marks

Trade mark protection is governed by the Trade Marks Act 1976 and the Trade Marks Regulations 1997

The period of protection is ten years, renewable for a period of every ten years thereafter. The proprietor of the trade mark or service mark has the right to deal or assign as well as to license its use.

Malaysia accedes to the Nice and Vienna Agreements on 28 June 2007 which was enforced on 28 September 2007. Nice Agreement is concerning the International Classification of Goods and Services for the purpose of the registration of marks whereas the Vienna Agreement establishes a classification for marks, which consist of or contain figurative elements. Both agreements are significant to facilitate trade mark registration.

Industrial Designs

Industrial design protection in Malaysia is governed by the Industrial Designs Act 1996 and Industrial Designs Regulations 1999. The Act provides the rights of registered industrial designs as that of a personal property capable of assignment and transmission by operation of the law.

To be eligible for registration, industrial designs must be new and do not include a method of construction or design that is dictated solely by function. In addition, the design of the article must not be dependent upon the appearance of another article of which it forms an integral part.

Local applicants can file registrations individually or through a registered industrial designs agent. However, foreign applicants will need to seek the services of a registered industrial designs agent. Registered industrial designs are protected for an initial period of five years which may be extended for another two 5-year terms, providing a total protection period of 15 years.

Copyright

The Copyright Act 1987 provides comprehensive protection for copyrightable works. The Act outlines the nature of works eligible for copyright (which includes computer programs), the scope of protection, and the manner in which the protection is accorded. There is no registration for copyright works.

Copyright protection for literary, musical or artistic works is for the duration of the life of the author and 50 years after his death. In sound recordings, broadcasts and films, copyright protection is for 50 years after the works are first published or made.

The Act also provides protection for the performer's rights in a live performance which shall continue to subsist for fifty years from the beginning of the calendar year following the year in which the live performance was given.

A unique feature of the Act is the inclusion of provisions for its enforcement. The amendment of the Copyright Act 1987, which was enforced on 1 October 2003 confers power of arrest (including arrest without warrant) to enforcement officers of the Ministry of Domestic Trade, Cooperative and Consumerism (MDTCC) formerly known as Ministry of Domestic Trade and Consumer Affairs. This special team of officers of the MDTCC is appointed to enforce the Act and is empowered to enter premises suspected of having infringing copies and to search and seize infringing copies and contrivances.

Layout Design of Integrated Circuit

The Layout Designs of Integrated Circuits Act 2000 provides for the protection of layout designs of integrated circuits based on originality, creator's own invention and the fact that the creation is freely created. There is no registration for the layout design of an integrated circuit.

The duration of protection is 10 years from the date of its commercial exploitation or 15 years from the date of creation if not commercially exploited. The Act also allows for action to be taken by the owner if such rights recognised under the Act have been infringed. The right can also be transferred either partly or wholly by way of assignment, licence, wills or through the enforcement of law.

Geographical Indications

The Geographical Indications Act 2000 provides protection to goods following the name of the place where the goods are produced, where a given quality, reputation or other characteristic of the goods is essentially attributable to their geographical origin. This protection is applicable to goods such as wine and spirit, or natural or agricultural products or any product of handicraft or industry.

Geographical indications which are contrary to public order or morality shall not be protected under the Act.

The period of production is 10 years and renewable for a period of 10 years thereafter.

Malaysia My Second Home (MM2H) Programme is promoted by the Government of Malaysia to allow foreigners who fulfil certain criteria, to stay in Malaysia for as long as possible on a multiple-entry social visit pass.

The Social Visit Pass is initially for a period of ten (10) years, and is renewable.

Eligibility
It is open to citizens of all countries recognised by Malaysia regardless of race, religion, gender or age. Applicants are allowed to bring their spouses and unmarried children below the age of 21 as dependants.

RamRais & Partners
Level 31, Menara TH Perdana, 1001 Jalan Sultan Ismail
50250 Kuala Lumpur
tel: [60] 3 269 25 266
fax: [60] 3 269 41 703
web: www.ramrais.com
Contact: W.A. Shashila shashila@ramrais.com

GUIDE TO BUSINESS IN NEW ZEALAND

CLENDONS

The New Zealand law firms of Clendons and Clendons North Shore provide legal services in several specialist industries. We apply a modern commercial approach and leading proprietary technology to the delivery of professional services, and are focused on achieving our clients' objectives.

This background paper summarises the requirements for setting up business in New Zealand under New Zealand law and outlines important features of New Zealand law relevant to conducting business in New Zealand.

Corporate Structure

The New Zealand Companies Act 1993 *("the Companies Act")* sets out the main requirements for companies domiciled overseas to operate in New Zealand. This can be achieved by:

- *Incorporation of a new subsidiary company under the Companies Act 1993; or*
- Registering the foreign company as a branch in New Zealand; or
- Acquiring shares in a pre-existing New Zealand company or entering a joint venture with a New Zealand company.

Incorporation of a Subsidiary

The Companies Act requires the following for the incorporation of a new company:

- At least one shareholder and one director (from 1 May 2015, Companies must have at least one New Zealand director, subject to limited exceptions);
- Share capital (there is no required minimum size or par value);
- Where the company chooses to have a constitution, a certified copy of the constitution must be prepared in accordance with the Companies Act and filed with the Companies Office; and
- All the prescribed forms are to be filed with the Companies Office, including the particulars of the directors and shareholders, certified photo identification and proof of address of the directors, and the address of a registered office in New Zealand where correspondence can be sent and official documents can be served.

The ongoing statutory requirements after incorporation include:

- Preparing and filing audited financial statements with the Companies Office in certain circumstances (*see Reporting Obligations* below);
- To file an Annual Return;

- To use its full and correct company name on all its correspondence and legal documents; and
- To prepare an annual report in accordance with the Companies Act unless all shareholders waive their right to have an annual report prepared.

Registering a Branch

The Companies Act requires every overseas company that carries on business in New Zealand to register as an overseas company (referred to as a "branch").

The requirements for registration are:

- Within 10 days of commencing trading, the overseas company must:
    - i. File a reservation of company name; and
    - ii. File all other prescribed registration forms at the Companies Office;
- To lodge a certified copy of the company's Articles and Memorandum of Association or its Constitution; and
- To lodge particulars of a nominee resident in New Zealand to whom documents can be served and communications can be sent on the company's behalf (a resident director is not required).

The continuing requirements for a branch include stating both its full name, and the country in which it was originally incorporated, in all correspondence and legal documents, and in certain circumstances preparing and filing audited financial statements with the New Zealand Companies Office (*see Reporting Obligations below).*

The penalty for failure to register is a fine for the overseas company and each of its directors of up to NZ$10,000.

Reporting Obligations

Whether a branch or a subsidiary is required to prepare and file financial statements with the Companies Office depends upon whether the overseas company or the subsidiary:

(i) Is "large"; or
(ii) Has more than 10 shareholders (on the first day of the relevant accounting period).
A company will be "large" where:

(a) As at the balance date of the 2 preceding accounting periods, the total assets of the entity (including any subsidiaries) exceed $20 million; **or**
(b) In each of the 2 preceding accounting periods, the total revenue of the entity (including any subsidiaries) exceeds $10 million.
Where the company is not "large", but has more than 10 shareholders, the financial reporting obligations are optional and the company may elect to opt out of any or all of the following requirements:

(i) Preparation of financial statements (or group financial statements);
(ii) Audit requirement; and
(iii) Obligation to prepare annual report.

The position may differ where the company is an issuer or is required to prepare financial statements under the Financial Markets Conduct Act 2013.

Branches

Where an overseas company conducting business in New Zealand through a branch is large, the overseas company must prepare and file audited financial statements with the Companies Office.

The company may also be required to prepare separate financial statements for the New Zealand business (as though it were conducted by a company formed and registered in New Zealand) if that New Zealand business is also "large".

If the overseas company is not large, but has more than 10 shareholders it may choose whether it prepares audited financial statements, and is not required to file these with the Companies Office.

Subsidiaries (50% or greater foreign ownership)

Where the New Zealand subsidiary has more than 50% foreign ownership and is large, the subsidiary company must prepare audited financial statements, which comply with generally accepted accounting practice and file those financial statements with the New Zealand Companies Office.

Partial Foreign Ownership (less than 50% foreign ownership)

In addition to foreign-owned subsidiaries (discussed above), a New Zealand company must prepare and file audited financial statements if:

(i) The right to control or exercise 25% or more of the voting power of the company is held by an overseas company or a non-resident: and

(ii) The company has assets which exceed $60 million, **or** turnover which exceeds $30 million.

Overseas Investment Controls

Overseas investment in New Zealand is regulated. The Overseas Investment Act 2005 sets out the circumstances in which the consent of Land Information New Zealand ("LINZ") is required for overseas investment in land (or land owning companies) or significant business assets.

Before an overseas person invests in New Zealand, it is prudent to consider whether that investment will require consent. Whether or not consent is required depends on the amount of money involved and the type of investment being proposed. In granting consent LINZ will take into account a number of factors including such things as the proposed residency of the purchaser and their commitment to New Zealand.

To obtain consent an application must be made to LINZ. There is a range of application fees, depending on the specific consent being sought. Application fees can be up to NZ$12,000 in some cases. The Act also provides for a large range of fines and even imprisonment for failing to comply with its provisions.

In relation to farm land, the Act defines a procedure for the purchase of "farm land". LINZ will not approve overseas investment in farm land unless that land has been first offered for sale or acquisition on the open market to New Zealanders. LINZ will also consider whether the overseas investment in the farm land will, or is likely to, result in substantial and identifiable benefits to New Zealand.

Taxation

In New Zealand taxes are levied under several regimes, including:

- Income tax
- Goods and services tax ("GST")
- Fringe benefit tax
- Withholding tax
- Import tariffs and miscellaneous excise duties.

As a general rule New Zealand capital gains or deceased estates are not taxed.

It should be noted that certain transactions in other jurisdictions that might attract capital gains can be assessed in New Zealand for income tax, for example some capital profits derived from transactions involving land will be treated as assessable income.

Stamp duty was abolished in New Zealand on 20 May 1999.

Income Tax

- The tax rate for resident and non-resident companies is a flat rate of 28%. Persons and companies resident in New Zealand pay tax on their worldwide income. Persons and companies not resident in New Zealand are subject only to tax on any income they derive in New Zealand. For tax purposes a company is resident in New Zealand if:
    - It is incorporated in New Zealand; or
    - It has its head office in New Zealand; or
    - It has its centre of management in New Zealand; or
    - The control of the company by its directors is exercised in New Zealand.
- For individuals, marginal rates are from 10.5% to 33%. Employers deduct income tax on a pay as you earn ("PAYE") basis from wage and salary payments to employees and pay the deductions to Inland Revenue directly. This deduction is made on

account of the employee and at the end of the tax year any necessary adjustments can be made.

- The types of income that are subject to taxation are not precisely defined in the legislation. There are many specific exclusions and inclusions that make up taxable income.

- New Zealand is also a signatory to numerous Double Taxation Treaties with foreign countries. This means that, in general, New Zealand allows a tax credit for foreign tax paid. This tax credit is the lesser of the foreign tax paid or the New Zealand income tax payable. The tax credit available may change depending on the particular Double Taxation Treaty.

- New Zealand also operates a full dividend imputation system. This means that tax paid by resident companies creates imputation credits. These credits can be attached to dividends paid by that company. Where a dividend is fully imputed, it will be tax-free where the dividend is paid to a New Zealand resident.

Non-Resident Withholding Tax

- Dividends, interest and royalties paid to non-residents are subject to non-resident withholding tax. The tax rates are:

  - 30% of the gross amount of dividend payments, except for a number of special types of dividends including fully imputed dividends; and

  - 15% of the gross amount of interest or royalties.

  However, a Double Taxation Treaty between New Zealand and the relevant overseas country may reduce these rates.

- Non-resident withholding tax may not need to be deducted on interest when the non-resident is engaged in business through a fixed establishment in New Zealand, but then resident withholding tax would apply.

- Non-resident withholding tax on interest can be reduced to 0% where the payer is an approved issuer and the interest is paid in respect of a registered security under the Approved Issuer Regime.

Goods and Services Tax

- GST is an indirect tax on most goods and services. Usually GST is charged at a flat rate of 15%. However in some limited situations, for example, when goods are exported or services are supplied to a non-resident outside New Zealand or a business is sold as a going concern, GST is charged at the rate of 0%.

- Financial services and rental paid for private accommodation are two of the major exemptions from GST.

- Businesses are able to register for GST which means they can claim input credits for any GST they incur in conducting business. They must charge GST on goods and services provided, and file returns and pay to the Inland Revenue the net GST collected.

- Although GST Registration is not mandatory until "supplies" exceed NZ$60,000 in any twelve month period (or if there are reasonable grounds for believing that supplies will exceed NZ$60,000 in the following twelve months) most companies will want to register for GST immediately because of the cost of financing the GST while not registered. Businesses may voluntarily register for GST before they are required to do so, and there may be different timing and factual situations where this is advantageous.

- Businesses with annual turnover less than NZ$250,000 may, on application, file returns six monthly, businesses with annual turnover between NZ$250,000 and NZ$24,000,000 must file two-monthly returns, and businesses with annual turnovers of more than NZ$24,000,000 must file monthly returns.

- When goods arrive into New Zealand, they are subject to GST which is calculated and collected by the Customs Department as if it were customs duty. It is normal practice for the GST to be paid on importation. However, if the importer has a deferred payment account with the Customs Department, GST can be paid on a monthly basis. Importers (including foreign companies) who are registered for GST and who intend selling goods in New Zealand can claim back the GST paid on importation.

Fringe Benefit Tax

- Employers who provide non-cash benefits to employees while they are at work must pay fringe benefit tax. This includes interest free loans, company vehicles and discounted goods. The fringe benefit tax rate is 55% (annual filer) or 49.25% (quarterly filer) of the taxable value of the benefit, although an election may be available to pay fringe benefit tax at attributed rates of as low as 43%. This is a tax-deductible expense for employers.

- Superannuation Schemes that have been registered under the Superannuation Schemes Act 1989 are taxed at usually 30 - 33% on the income of the scheme however benefit payments to employees are exempt.

Pricing for Income Tax Purposes

Transfer Pricing Regime

New Zealand has a transfer pricing regime which may regulate the price of transactions between a New Zealand entity and a non-resident "associate". If the price charged has the effect of reducing the New Zealand taxpayer's net income, the tax charged will instead be based on an "arm's length" price (i.e. at the price that would have been charged if there was no association between the parties).

The transfer pricing regime applies in arrangements for supply of goods, services or intangible transfers such as royalties, trademarks, management fees and inter-company

guarantees, where the arrangement is between companies, one of whom has more than 50% voting, ownership or income interest in the other company, and either:

- One (or both) of the companies concerned is non-resident in New Zealand for tax purposes; or
- Both companies are resident in New Zealand, but the purpose of the arrangement is that one of the companies carries on business overseas.

The transfer pricing regime does not directly apply to arrangements within a branch company as there is only one entity, however there are equivalent income apportioning provisions (see below).

There is a high level of responsibility on the company to exercise judgement in determining the correct pricing method for calculating transfer prices, and maintain adequate documentation to evidence that transfer prices for things imported were accounted for at arm's length, and the pricing method chosen to calculate that price complies with the requirements of the regime in respect to accuracy, completeness etc.

The documentation requirements under the transfer-pricing regime place a high level of responsibility on the taxpayers to:

- Exercise judgement in determining the correct pricing method for calculating transfer prices; and
- Maintain adequate documentation.

While documentation is not specifically required by the legislation, the IRD Guidelines suggest that companies should prepare and maintain adequate documentation in case the IRD require proof that:

- The transfer prices for things imported were accounted for at arm's length; and
- The pricing method chosen to calculate that price complies with the requirements of the regime in respect to accuracy, completeness etc.

Non-compliance with the regime is considered by the Commissioner of Inland Revenue to be (at least) a failure to exercise reasonable care or even gross carelessness which brings with it minimum penalties of between 20% and 40% of the underpaid tax.

Apportionment of Branch Income

For income tax purposes, a branch company is not considered an 'associated person' in relation to the overseas parent company therefore the transfer pricing regime does not apply. However, the branch is a resident for tax purposes and it receives taxable income for the overseas company.

The income received by the branch is assessed for New Zealand income tax on an apportionment basis. The amount of apportionment varies depending on the type of goods and services being traded.

An alternative form of assessment of the branch company's taxable income is for the branch to submit a profit and loss account of the business done in New Zealand. This profit and loss account should be accompanied by a certificate from a chartered accountant stating that no charges have been made for interest on capital or reserves or any unusual depreciation or other charges.

The apportionment is calculated to produce a net taxable income or loss that would have been made by a company which carried out business totally independent from its overseas parent. In this respect, the assessable income should be similar to that calculated under the transfer pricing regime.

Foreign Employees

Anyone who is not a New Zealand resident or citizen will require a work permit in order to work in New Zealand. This general rule does not apply to Australian citizens. Australian citizens may work in New Zealand without restriction.

There are five different types of work permits available depending upon the person's circumstances. They are for entry:

- As a skilled migrant;
- For temporary work;
- Under the work to residence scheme;
- As an employee of a relocating company; or
- For a working holiday.

Skilled migrant

This category usually applies to migrants coming to New Zealand of their own accord and without a sponsoring employer. These migrants need to satisfy a number of requirements before applying for residence. These requirements include age, health, character and English language ability.

Temporary work

For a temporary work visa to be available the applicant must:

- Have an offer of a job from a New Zealand employer;
- Be skilled in an occupation that is in demand in New Zealand (a list is available and regularly updated);
- Want to work temporarily for a particular purpose or event such as a tournament, a show or for certain professional reasons;
- Be a student or trainee wanting to gain work experience in New Zealand;
- Be a student who is eligible to work in New Zealand after completing their studies; or
- Be planning to work temporarily while joining their partner in New Zealand.

Work to residence

This category allows a migrant to work temporarily in New Zealand as a step towards gaining permanent residence and is available if a migrant:

- Has an exceptional talent in sports or the arts; or
- Is qualified in a highly specialised or “in-demand” field.

Employee of a relocating company

Key employees of a business that relocates its operations to New Zealand are eligible to apply for a work permit and later a resident permit under this category.

There are requirements for both the employee and employer business.

Employee

- The employee needs to be a key employee of the relocating business.
- The employee must be not eligible for residence under any of our other residence policies.
- Any partner or dependent children coming with the employee need to meet English language requirements.
- All residence applicants must be of good health and character.

Employer Business

- The business is one that will be successful and will trade profitably in New Zealand.
- Industry New Zealand must confirm – when the Immigration Service consults with it – that it supports the relocation of the business to New Zealand.
- The business must operate within all relevant New Zealand employment and immigration laws, including those relating to minimum wage rates, holiday, sick and special leave, and requirements for the occupational health and safety of employees.

Working holiday

Any person aged between 18 and 30 years may be eligible to apply for a working holiday visa.

Employment Contracts

Overseas Employment Contracts

Where an employee is working in New Zealand for a foreign company under contract, that employment contract can state which jurisdiction governs the employment relationship so long as that choice is fair and reasonable to both parties.

Where the contract is silent on which country’s law shall apply, the New Zealand courts have ruled that the country with which the contract has the closest and most real connection is the jurisdiction that will govern the contract.

Once an overseas company becomes a branch or sets up a subsidiary company in New Zealand, any employment contract that it may enter into is subject to the same laws as a New Zealand company, whether the employee is a New Zealander or a foreign national.

New Zealand Employment Contracts

Employment contracts in New Zealand are governed by the Employment Relations Act 2000 and case law. There are also some specific regulations and statutes which govern minimum wages, holidays and working conditions. Since the Employment Relations Act was enacted, employees have had the choice of entering into individual or collective employment agreements.

The employment contract must contain effective procedures to deal with employment relationship problems, including

The employment contract must contain effective procedures to deal with employment relationship problems, including:

- Complaints of unjustified dismissal;
- Unjustified action disadvantaging an employee;
- Discrimination;
- Sexual harassment; and
- Duress; and

The contract must comply with the minimum standards and disclosure requirements as set out in legislation such as:

- The Minimum Wage Act 1983;
- The Holidays Act 2003;
- The Parental Leave and Employment Protection Act 1987;
- The Health and Safety in Employment Act 1992; and
- The Injury Prevention, Rehabilitation, And Compensation Act 2001.

In New Zealand, employees have full protection from unjustified dismissal. A trial period of up to 90 days can be agreed at the outset of the employment relationship.

Trade Practices

There are three principal laws governing trade practices in New Zealand:

1. The Commerce Act 1986;
2. The Fair Trading Act 1986; and
3. The Consumer Guarantees Act 1993.

There are other consumer protection laws which also may have an impact on trade in New Zealand, for example the Sale of Goods Act 1908, the Door to Door Sales Act 1967 and the Credit Contracts and Consumer Finance Act 2003 Act.

1. Commerce Act 1986

This Act deals with issues such as:

- Anti-competitive trade practices;
- Merger and acquisition regulation; and
- Price control.

Approval of the Commerce Commission, which enforces the Act, is required for any business acquisition which has or may have the effect of substantially lessening competition in a market.

2. Fair Trading Act 1986

This Act deals with the way in which businesses interact with consumers and other businesses. Under the Fair Trading Act, conduct in trade which is unfair, misleading or false is illegal. The Act covers conduct of persons "in trade" which may mislead as to:

- The nature, characteristics, suitability for a purpose or quantity of services;
- The nature, manufacturing process, characteristics, suitability for a purpose, or quantity of goods.

3. Consumer Guarantees Act 1993

This is the main piece of consumer protection legislation that is designed to give consumers rights against retailers, manufacturers and importers in relation to faulty and poor quality goods and services.

The Consumer Guarantees Act 1993 is restricted to sales of ordinary household goods and services to ordinary consumers and does not cover transactions with business to business transactions that do not involve consumer goods. There is the ability to expressly contract out of the Act only in situations where the goods and services are purchased for business use.

The Commerce Commission is the government body in charge of administering and enforcing these three pieces of legislation. However, this does not preclude civil actions under these three Acts.

Privacy Act 1993

This legislation places controls on how businesses deal with information about individuals obtained in the course of business. There are specific procedures laid down in the Privacy Act 1993 which must be complied with when obtaining information and in any subsequent use or disclosure of the information.

The major requirements are:

- That any personal information collected is collected for a lawful purpose connected with a function or activity of the collecting "agency" (an agency is broadly defined as any person or body of persons, whether corporate or unincorporated, and whether in the public sector or the private sector);
- That the collection is necessary for that lawful purpose;
- That an agency, in general, must collect personal information directly from the individual concerned;
- To inform the individual concerned that information about them is being collected and the purpose for collecting that information;
- Not to use or disclose information obtained other than for the use specified; and
- The person who the information is about must be given reasonable access to the information to check for errors etc.

The Privacy Act 1993 is enforced by a Privacy Commissioner.

Intellectual Property Laws

Since signing GATT and the Berne Conventions, New Zealand has updated its Intellectual Property laws. Intellectual Property rights are covered by the following statutes:

Copyright Act 1994

The Copyright Act is based on the concept of 'works' which give the copyright owner the automatic exclusive right to (and to authorise any person to) copy, adapt, distribute, perform and broadcast copies of the work. Works which are protected by the Copyright Act include:

- Literary works (this includes computer programs written in code);
- Dramatic works;
- Artistic works (including drawings, moulds, designs etc.);
- Musical works;
- Film and television (including sound bits); and
- Cable programs (including Internet).

There is no requirement for registration of the work to gain protection under this Act, as it is automatic. Generally, the duration of the protection granted for most of the works is 50 years from the death of the creator of the work. There is no longer protection for copyright owners from the importation of protected works.

Patents Act 2013

This statute gives the inventor an exclusive monopoly on the use of the registered invention for 20 years from registration. These rights include the exclusive rights to make, use, sell or import the invention in New Zealand and to authorise others to do the same.

Trade Marks Act 2002

This Act allows the registered proprietor the exclusive right to use the registered trademark in relation to goods and services. There are a number of prerequisites including being non-generic and the continued use and protection of the trademark.

Designs Act 1953

This Act protects the rights of designers in their industrial designs. The Design Act requires the design to be registered. Once registered the protection lasts for 5 years with the right to renew the registration. This protection is rarely used as industrial designs are automatically protected under the Copyright Act for the life of the author plus 50 years.

Common Law

New Zealand has also retained the common law protection against unauthorised exploitation of business goodwill by using the company name, logos, packaging and other marketing tools.

Disclaimer

This Introductory Guide by its nature cannot be comprehensive and cannot be relied on as advice. This guide is provided to assist in identifying legal issues on which legal advice should be sought. Please consult the professional staff of Clendons for legal advice specific to your situation.

Clendons
Level 5, 2 Emily Place, Auckland City
Mailing address: PO Box 1305, Auckland 1140, New Zealand
tel: [64] 9 306 8000
fax: [64] 9 306 8009
web: www.clendons.co.nz
Contact: James Carnie james.carnie@clendons.co.nz

Clendons North Shore
Suite 4, Building F, Apollo Technical Park, 3 Orbit Drive Mairangi Bay, Auckland 0757
Mailing address: PO Box 305 349, Auckland 0757, New Zealand
tel: [64] 9 377 8419
fax:[64] 9 377 8419
web: www.clendonsnorthshore.co.nz
Contact: Brian Joyce brian.joyce@clendons-ns.co.nz

THAILAND: INVESTING IN THE GOLDEN LAND OF SMILES

Ployprathip International Law Office (PILO)

For over a millennium, the land now occupied by Thailand (formerly known as "Siam" and still known as "Suvarnabhumi" or the "Golden Land," and more recently known as the "Land of Smiles"), has welcomed foreign traders and investors to her shores from as far afield as the United States, Europe, the Middle East, South Asia, China, Taiwan, Japan, and much closer from other parts of Southeast Asia. Many foreigners liked the country so much that they stayed and founded business dynasties that still exist today. The Dutch have been in Thailand for about 400 years, the Portuguese and the Persians have been in Thailand for over 500 years, and the Chinese and Indians for over a thousand years. Despite numerous foreign influxes and influences, Thailand has maintained its unique cultural identity. Furthermore, it has never fallen under colonial rule from a Western Power. So while Thailand remains very rooted in and proud of its traditions, it is surprisingly cosmopolitan, open-minded, welcoming towards foreigners, and very confident for a developing country. It is in this context that we introduce what makes Thailand so attractive for foreign direct investment (FDI), a brief overview of its legal system, and a quick summary of the more important legal issues that arise when investing in Thailand.

I. WHAT MAKES THAILAND SO ATTRACTIVE FOR FDI?

Despite the volatility of its political arena over the last decade, Thailand's economy is characterized by a resiliency with which few other countries can compare. Some key features of Thailand are as follows:

- Central Location: Thailand enjoys a strategic location within Asia long serving as a buffer zone between China and India, as well as a convenient trading hub between China, India, Japan, Taiwan and other Southeast Asian nations. Also, economically speaking, it connects emerging economies like Myanmar, Laos and Cambodia with more developed ones like Malaysia and Singapore.

- Size of Market and Economy, Projected Growth & Trade Balance: For 2017, Thailand's domestic consumer market will approach 69.095 million people with a nominal Gross Domestic Product per Capita of USD 5,842, and an adjusted GDP per Capita (based on Purchasing Power Parity) of USD 17,731 according to the International Monetary Fund (IMF) *World Economic Outlook Database* for October 2016. According to the January 2017 *Global Economic Prospects* as published by the World Bank, Thailand's GDP is expected to grow 3.2%, which is very low historically speaking and more on par with developed countries. According to Trading Economics, Thailand enjoyed an average trade balance, where exports exceeded imports, of USD 1.794 billion in 2016.

- Membership in ASEAN, AFTA & AEC: Thailand is one of the founding members of ASEAN (the Association of South East Asian Nations), AFTA (the ASEAN Free Trade Area) and its successor, the AEC (the ASEAN Economic Community). The purpose of the AEC, among other things, is to integrate the economies of Thailand, Malaysia,

Singapore, Brunei, Indonesia, Philippines, Cambodia, Laos, Myanmar and Vietnam. The AEC consists of over 639 million people, which ranks after China and India in terms of population size. Total GDP in 2014 was USD 2.6 trillion, which was the 7th largest in the world and the 3rd largest in East Asia. In that same year, ASEAN attracted USD 136 billion in FDI, which accounts for 11% of global FDI inflows. Investing in Thailand therefore gives foreign direct investors a strategic foothold to a large and still rising economic grouping.

- Ever-Growing, World-Class Infrastructure: A growing highway system connects all 77 provinces in Thailand and neighboring Laos, Cambodia and Myanmar. Also, Thailand has 7 international airports, dozens of domestic airports, 6 deep sea ports and 2 international river ports including containers, tank farms and liquid jetties. Suvarnabhumi Airport is one of the world's busiest ranking in the *global* top 20 (7th in East Asia) according to 2015 figures as provided by the Airports Council International with over 52.8 million passengers handled per year. In terms of railways, Thailand's current network stretches more than 4,000 kilometers linking up with Malaysia and onward to Singapore. Bangkok has 2 mass transit train systems. Upcoming projects include a high speed rail network to connect all parts of Thailand and with Southern China. Bangkok will also expand its mass transit system to include the suburbs. Overall, Thailand is strengthening its air and marine transportation as well.

- Well Ranked Globally: Thailand enjoys very respectable international rankings.
    1. Nominal GDP: 20th out of 188 countries according to the IMF *World Economic Outlook Database* for October 2015
    2. According to latest online figures from *The Economist Pocket World in Figures*, Thailand holds the following rankings:
        a. 11th largest agricultural output
        b. 16th largest manufacturing output
        c. 22nd largest economy by purchasing power
        d. 24th biggest exporter
        e. 25th largest trade in goods
        f. 25th largest industrial output
        g. 31st biggest export volume
        h. 31st largest earnings from services
        i. 31st largest economy
        j. 34th largest services output
    3. According to the latest figures from Thailand's Board of Investment, the country enjoys the following rankings:
        a. #1 exporter of natural and synthetic rubber
        b. #1 producer of hard disk drives

c. #1 exporter of rice
d. #2 exporter of sugar
e. #5 & #7 largest producer of trucks and motorcycles respectively

4. Thailand ranked 49th easiest country in the world (2nd among emerging markets in East Asia) in which to do business as determined by the World Bank's 2016 *Ease of Doing Business Report*.

5. Thailand ranked the 8th most attractive host economy in the world as determined by the UNCTAD (United Nations Conference on Trade and Development) *World Investment Report 2014-2016*.

6. Thailand ranked 32nd out of 140 countries (ranking 4th in Southeast Asia after Singapore, Malaysia and Brunei, and ahead of many developed countries in Europe) in the Global Competitiveness Index as determined by the World Economic Forum.

7. Thailand ranked 6th in the world (ranking 3rd in Southeast Asia after Malaysia and Indonesia) according to A.T. Kearney's 2016 Global Services Location Index.

8. Thailand is competitively ranked 24th in terms of overall expat experience behind Singapore (#1), Hong Kong (#13), Taiwan (#14) and Vietnam (#19), and ahead of India (#26), Malaysia (#28), China (#34) and the Philippines (#37). Thailand also ranked 17th in terms of overall quality of life. Both rankings according to HSBC's 2016 *Expat Experience Report*.

- Competitive Labor Force: Thailand enjoys a 96.7% literacy rate according to the 2016 *CIA World Factbook*. The Thais are characterized as being highly creative, adaptive and friendly people. There is a large, well-educated work force in Thailand. Furthermore, there are large pools of skilled, semi-skilled and non-skilled laborers from which to choose. Overall, Thailand enjoys cheaper operating costs than many comparable nations, and yet the quality of work is up to international standards. In short, Thai labor represents a good value for FDI.

- Attractive Lifestyle: Thailand is a vibrant place to do business, as well as to live. Bangkok ranked 14th and Chiang Mai 2nd in 2016 by Travel & Leisure Magazine's *Annual World's Best Cities*. Mercer HR's 2016 *Costs of Living Survey* ranked Bangkok as one of the cheapest cities in the region ranking at 74th. Bangkok is cheaper than Hong Kong (#1), Singapore (#4), Tokyo (#5), Shanghai (#7), Beijing (#10), Shenzhen (#12), Seoul (#15), Guangzhou (#18), Osaka (#22), Yangon (#39), and Taipei (#43). Bangkok is more expensive than Jakarta (#93) and Hanoi (#106). Again, Thailand offers good value.

- World-Class Healthcare: Thailand is an early, global pioneer in world-class medical tourism. It offers affordable, world-class healthcare from a very hospitable, politically neutral country.

- Remarkably Stable Environment for Foreign Investors: The business environment is friendly and remarkably stable and predictable for foreign investors. Thailand is also remarkably free of violent crimes, as well as ethnic, racial and religious tensions.

- Other Benefits: Tax holidays and numerous other benefits are available for qualified businesses for up to 8 years.

II. OVERVIEW OF THE THAI LEGAL SYSTEM

Thailand is a constitutional monarchy and a civil law country, whose basic laws are enshrined in the constitution and in various civil codes. The four most basic codes are: the Civil and Commercial Code, the Civil Procedure Code, the Criminal Code, and the Criminal Procedure Code. In addition to this framework, there are other laws specifically affecting FDI. Some of the more relevant ones include:

- Foreign Business Act, B.E. 2542 (C.E. 1999), which is commonly abbreviated as the "**FBA**." It came into effect on the 3rd of March 2000. The FBA greatly limits the number of business activities that foreign investors may pursue unless they obtain the appropriate approval or license, or unless they keep their ownership interest in local companies at less than 50% of the registered capital.

- Investment Promotion Act, B.E. 2520 (C.E. 1977) creates Thailand's Board of Investment ("**BOI**"), which provides numerous privileges to qualified FDI including tax holidays lasting up to 8 years. While the BOI formerly focused on heavy industry and manufacturing, a 2015 Announcement revealed that the BOI would now also give preference to projects that involve research and development, biotechnology, vocational training, engineering and product design, software and cloud services, and the development of special economic zones. Overall, greater emphasis is being placed on sustainable growth, enhancing the nation's competiveness and overcoming the middle income trap.

- Treaty of Amity and Economic Relations between the Kingdom of Thailand and the United States of America came into effect in 1966 though it had earlier precedents dating back to 1833. This Treaty technically expired in 2006, but has been extended every 6 months ever since pending a U.S.-Thailand Free Trade Agreement, which has been placed "on hold" since 2006. It effectively exempts American businesses from most of the restrictions on foreign investment imposed by the FBA, and has been a source of much resentment by non-American companies and individuals, who claim that it violates the Most Favored Nation (MFN) status imposed by the WTO of which Thailand is a signatory.

- Bilateral Investment Treaties ("**BITs**"): These treaties promote and protect FDI between member countries. Thailand has entered into BITs with over 41 countries around the world including Argentina, Bahrain, Benelux, China, Egypt, Germany,

Hong Kong, India, Indonesia, Israel, Korea, Myanmar, Peru, Poland, Russia, Sweden, Switzerland, Taiwan, Turkey, UK, and Vietnam among others.

- Free Trade Agreements ("**FTAs**") & Economic Partnerships: Thailand has bilateral free trade agreements and economic partnerships with Australia, Chile, China, India, Japan, New Zealand and Peru. Other pending FTAs include with the EU and Pakistan. By virtue of Thailand's ASEAN membership, it also has Regional Trade Agreements and Economic Partnerships with ASEAN members, Australia-New Zealand, China, India, Japan, and Korea. There is also a pending East Asia Free Trade Area (covering ASEAN, China, Japan and Korea). Thailand also has Economic Cooperation with Bangladesh, Bhutan, India, Myanmar, Nepal and Sri Lanka, and a pending Economic Partnership in East Asia (consisting of ASEAN, China, India, Japan, Korea, Australia and New Zealand). Furthermore, Thailand is a member of APEC (the Asia-Pacific Economic Cooperation) with 20 other Pacific Rim countries and so additional free trade and economic cooperation initiatives at the regional level are possible in the future. Lastly, the country is a member of the WTO (World Trade Organization). Thailand offers a strategic foothold in the global arena.

- Exchange Control Act, B.E. 2485 (C.E. 1942): Thailand has domestic laws dealing with the inward and outward remittances of foreign currency. The various BITs mentioned above also address exchange control as well albeit for the treaty nations.

- Customs Act, B.E. 2469 (C.E. 1926) & Customs Tariff Decrees: Thailand has domestic laws dealing with customs tariffs, though the AEC imposes obligations to reduce tariffs to zero among ASEAN member nations by the end of 2015.

- Revenue Code: This deals with all forms of taxation in Thailand.

- Double Tax Treaties: These address double taxation between countries and take precedence over the Revenue Code when there is a conflict. Thailand currently has 60 such treaties including with Australia, Austria, Bahrain, Belgium, China, Denmark, France, Germany, Hong Kong, India, Indonesia, Israel, Italy, Japan, Korea, Kuwait, Malaysia, Mauritius, Myanmar, Philippines, Poland, Russia, Singapore, Sweden, Switzerland, United Kingdom, United Arab Emirates (U.A.E.), U.S.A. and Vietnam.

- *Immigration Act,* B.E. 2522 (C.E. 1979): This law governs the entry and exit of foreigners into and from Thailand. It remains to be seen how the AEC will streamline immigration into Thailand for certain professionals including engineers, architects, landscape architects, planners, dentists, dental technicians, doctors, nurses, and midwives from other ASEAN member nations.

- Foreign Employment Act, B.E. 2521 (C.E. 1978) & B.E. 2551 (C.E. 2008): This law deals with work permits. Likewise, it is uncertain how the AEC will streamline work permit applications for the professionals mentioned above. These professionals may still need to fulfill licensing obligations in Thailand, and it remains to be seen how the respective professional associations will address this matter.

- Labor Protection Act, B.E. 2541 (C.E. 1998): This Act prescribes minimum work conditions. Employment contracts may of course set higher conditions. In addition, a host of other Thai labor laws also apply. Thai labor law has evolved into a confusing network of regulations, and expert advice should always be sought.

- 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "**NY Convention**"): Thailand ratified the NY Convention in 1959. As a result, Thai courts are bound to honor foreign arbitral awards so long as such awards to not violate Thai law or principles of health, safety and welfare.

The above is just a partial list of the legal framework in place. Other codes exist covering numerous other areas of Thai law. While Thailand's civil code has its roots in ancient Thai and Indian sources, its modern laws are based predominantly on the Japanese and German civil codes. Her commercial laws are influenced by English and U.S. law.

As a general matter, any Act or Code should be read together with any relevant regulations, decrees, and notifications issued by government ministries pursuant to the Act or Code in question to obtain a complete picture of the legal framework affecting any particular area.

As well as legislation, judicial decisions are increasingly becoming a recognized source of law. Thailand has a mature and developed court system with an independent judiciary. There are Courts of the First Instance, Courts of Appeal, the Supreme Court and various Administrative Courts. In Bangkok, there are also several specialized courts including the Central Labor Court, Central Tax Court, Central Intellectual Property and International Trade Court, and the Central Bankruptcy Court.

In Thailand, the prior decisions of earlier courts do not constitute official, binding precedents (i.e., there is no *stare decisis* in Thailand). In practice, however, precedents are becoming increasingly persuasive and commonly cited by lawyers.

III. COMMON LEGAL ISSUES FOR FDI IN THAILAND

There are many legal issues that should be kept in mind by foreign direct investors who wish to invest in Thailand. The following is not intended to be a definitive list:

- Business Entities in Thailand: Thai law recognizes several different forms of business entities including Limited Companies (requiring a minimum of 3 shareholders), Public Companies (having 15 shareholders or more), Publicly Traded Companies (traded on the Stock Exchange of Thailand or SET), Limited Partnerships, General Partnerships, Sole Proprietorships, Branch Offices, Representative Offices and Regional Offices. In addition to these recognized legal forms, joint ventures, which are created by contract, may also be established. Investors should exercise care when deciding which structure to use for their business purposes as the legal requirements, such as the ability to engage in business activities and receive income or the amount of registered capital or investment necessary, can vary according to the business activity proposed to be

undertaken by the investor, and the percentage of foreign ownership and even control.

- Legal Effect of Thailand's Foreign Business Act: The FBA affects the ability of foreign companies registered under the laws of other countries including branch, representative and regional offices set up in Thailand, and companies formed in Thailand where 50% or more of the shares are held by non-Thais (together known as "**foreign-held companies**") to engage in a wide range of business activities without the appropriate approval or license. The 50% threshold has been expanded to 70% for those companies registered in Thailand with shareholders hailing from other AEC member nations and where the company formed intends to engage in certain services.

  The FBA includes 3 lists of business activities that are either completely prohibited to foreigners (i.e., List 1), or that are regulated and require cabinet approval (i.e., List 2), or that require other approval to engage in (i.e., List 3). List 3 is the broadest and consists of activities for which the Thai government deems Thai nationals are not yet ready to compete with foreigners. These activities include all service businesses and wholesaling of all products although an exception applies for foreign companies and stores that meet minimum capital requirements (an exception carved out for hypermarkets and superstores). Notably, brokerage and agency businesses have now been removed from List 3 though separate licensing and approval may still be necessary depending on the industry as is the case in other countries. Foreign Direct Investors may engage in the business activities mentioned in List 3 if they obtain a Foreign Business License, or are granted permission because of BOI promotion, or are exempt via the Treaty of Amity as discussed above, or pursuant to any other approval. Companies that seek recognition under the Treaty of Amity or BOI Promotion must still obtain a Certificate of Business Operation (as distinguished from a Foreign Business License) from the Director General of the Department of Business Development with the approval of the FBA Committee.

- Land Ownership in Thailand: As a general rule, the Thai Land Code does not permit foreigners, including Foreign-Held Companies as discussed above to own land in Thailand. Foreigners may own land provided they receive approval from the BOI or purchase land in an approved industrial estate (i.e., approved by the Industrial Estate Authority of Thailand or IEAT). Such land may only be used for one's business and not as a way to build a house. Foreigners may, however, own outright any buildings and can enjoy 30-year leases over land. Such leases, which must be registered with the relevant Land Department Office if over 3 years, and can be extended for one additional period of up to 30 years. Longer or additional extensions (e.g., a second extension of time) are not enforceable under Thai law. A fifty year lease with one 50-year extension is now possible for land used for commercial and industrial purposes though certain requirements must be met. There are currently no 90 or 99-year leases in Thailand. While foreigners may not own land, they may enjoy security interests on land, and may even inherit land though certain stringent conditions do apply.

- Condominium Ownership: Foreigners may own condominiums, but the percentage of foreign ownership in a condominium project may not exceed 49% of the total project.

- Use of Nominee Thai Shareholders: It is illegal for Thai nationals, both individuals and companies, to act as nominee shareholders thereby allowing foreigners including Foreign-Held Companies to get around the FBA or the Land Code or any other Thai laws that restrict the activity of foreign investors. Penalties include fines and/or imprisonment. This limitation, however, does not apply to legitimate Thai investors and partners, who actually invest their own funds.

- Revenue Code: Thailand currently observes the following tax rates:

  1. The corporate income tax rate for private and public limited companies is currently around 20%. From our understanding, this will be the lowest corporate tax rate in Southeast Asia right after Singapore.

  2. For personal income tax, the tax rate is currently between 10 – 35%.

  3. Thailand also imposes a Value Added Tax at 7% for each stage of production.

  As mentioned earlier, the BOI can grant tax holidays of up to 8 years for qualified investments. Exemptions or reductions of import duties on machinery and raw materials, as well as tax deductions on certain costs are also possible.

- *Immigration and Work Permits*: The right to immigrate and the right to work in Thailand are two separate rights. These are not combined into one document as is the case in the U.S. and many other countries. To work in Thailand, a foreigner will typically obtain an appropriate "Visa" and "Work Permit" separately. Such visas start out good for 90 days but can be extended for a year. Afterwards, they must be renewed each year. Foreigners may obtain permanent residency after living in Thailand for at least 3 consecutive years and this frees them from having to obtain annual visa renewals, but they still require work permits. Whenever leaving Thailand, expatriates must obtain re-entry permits otherwise they will find on their return that their residency visas have expired.

- Copyright Ownership: Unless stated otherwise in an employment contract, Thai law recognizes the employee as the rightful owner of any copyright including computer software created during the course of employment. This is unlike most other countries in the world where the Employer is the owner.

- Recognition of Foreign Arbitral Awards vs. Foreign Court Judgments: Thailand does not recognize foreign court judgments and will not enforce them. At most, Thai courts may take judicial notice of such foreign judgments including any findings of fact. Thailand will, however, enforce foreign arbitral awards per the NY Convention.

Altogether, Thailand is an extremely attractive country with which to invest and settle, and has been so for hundreds of years. At the same time, however, there is a complex network of laws and legal issues that need to be considered even before entering the country. This paper has introduced readers to a simplified legal framework and an overview of the common legal issues affecting FDI, but it is not intended to be exhaustive nor a substitute for specific legal advice tailored to each client's situation. Local guidance is essential and Ployprathip International Law Office, as a full-service law firm, stands ready to assist foreign direct investors wishing to enter the Thai market in an advantageous and cost-effective way.

CONTACT: For more information or client-specific consultations, please contact:

Edward T. Ploysongsang, Managing Partner

edward@ployprathip.com

Simon Z. Rajan, Senior Associate

simon@ployprathip.com

11/15 – 16 Ratchdaphisek Road; Bangkok 10120, Thailand

Tel: +662-678-1799, Fax: +662-678-1499,

Web: www.ployprathip.com, Email: pilo@ployprathip.com

Affinity Law LLC
Advocates & Solicitors

SINGAPORE
February 2017

SINGAPORE:
A BUSINESS EPICENTER

Singapore has maintained its position as a prominent financial and business centre within the ASEAN region. Being strategically located among several thriving Southeast Asian economies alongside India and China, Singapore offers foreign investors an unprecedented gateway to the Asian market.

Singapore has weathered the turbulence of the global economy due to the quality, transparency and effectiveness of its overall administrative and legal infrastructure. The Singapore Government, in cushioning the repercussions of an evolving market, has adopted a range of commercial incentives to benefit local and foreign businesses. This demonstrates a strong and rigorous commitment in enhancing its competitiveness as the best place to conduct business.

For more information, please contact:

Wendy SL Lee
Joint Managing Director
+65 6586 8154
wendylee@affinitylaw.com.sg

Joshua Chai
Joint Managing Director
+65 6586 8153
joshuachai@affinitylaw.com.sg

The Singaporean Edge

Uncertainties prevalent within the global economy have affected many. Although Asia's growth and development has been set back, it has not been destroyed. Further progress is projected for the region's economies, albeit within differentiated short and medium term time frames.

Singapore will continue to serve the region's growth as global economies recover, particularly in financial services, info-communications and as the regional headquarters for multinationals seeking to carry on business in Asia.

OUR BUILDING BLOCKS

TRUST:

Integrity, quality, reliability, productivity, a strong legal system

KNOWLEDGE:

A knowledge-based economy, knowledge-based manufacturing and services, a thought information hub, commitment to education and skills

CONNECTED:

Physical connectivity as well as people and business networks

LIFE:

An excellent place to live, work, learn and play

(Source: Economic Development Board, Singapore)

Apart from being a globally connected, multi-cultural and cosmopolitan city, global businesses will benefit from Singapore's network of over 76 comprehensive Double Taxation Avoidance Agreements, Free Trade Agreements and a number of Investment Guarantee Agreements.

Thanks to a highly IT-educated workforce and the island's integrated fibre optic network, Singapore is fast emerging as an optimal destination for companies providing centralisation or "shared services".

Singapore is an anchor in Asia where companies can base their key decision makers to spot opportunities and leverage on the network of relationships within the region.

Legal System

Singapore's legal system is derived from English common law. Singapore courts are highly rated in Asia and known for its efficiency in the dispensation of justice. Alternative dispute mechanisms operate through the Singapore Mediation Centre and accredited Singapore International Arbitration Centre.

Singapore leverages on its ability to be in tuned with the needs of foreign investors and businesses, where protection of invention and innovation is key. It recognizes that trust, integrity, quality, reliability, productivity, rule of law and intellectual property rights are essential assets in a knowledge based-economy. Singapore takes a tough stance on the protection and enforcement of intellectual property rights.

Affinity Law LLC
Advocates & Solicitors

Unparalleled Opportunities

Singapore is a global transportation hub. It has built on its advantageous geographical location to become one of the world's top transportation hubs for sea and air cargo. Singapore's internationally renowned airports and container ports are the busiest in the world.

The Republic's extensive trade links provide companies with greater market connectivity through the reduction of tariff and non-tariff barriers.

Singapore currently has the most extensive network of Free Trade Agreements (FTA's) in Asia signed with key economies. Such FTA's allow Singapore-based exporters and investors to enjoy a myriad of benefits like tariff concessions, preferential access to certain industry sectors, faster entry into markets and protection over intellectual property.

In addition, Singapore has signed 40 Investment Guarantee Agreements (IGAs), designed to help protect investments made by Singapore-based companies in other countries against non-commercial risks.

OUR FREE TRADE AGREEMENT PARTNERS

Australia

China

Costa Rica

India

Japan

Jordan New

Zealand

Panama

Peru

South Korea

United States

(Updated as at 2017)

Opening Doors for Foreign Investors

Generally, there are no restrictions on foreign ownership in Singapore. Foreign investors are not required to enter into joint ventures or cede management control to local interests.

Foreign exchange controls are not imposed and the Singapore dollar is fully convertible. There are no restrictions on reinvestment or repatriation of earnings or capital.

Additionally, Singapore's tax laws do not differentiate between foreign or local capital and both foreign investors alike have equal access to Government offered business incentives.

These incentives are designed to improve efficiency, strengthen capabilities and explore new opportunities in business. Some programmes cater to the needs of start-ups and local enterprises, while others are tailored for global companies with large-scale needs. They broadly range from assistance in manpower development, upgrading of technology and equipment relating to research and development.

Business Types

Singapore welcomes all forms of investment and enterprise. All businesses must be registered with the Accounting & Corporate Regulatory Authority (ACRA) before commencing operations.

Save for certain types of restricted businesses such as education, banking and finance, insurance, telecommunications and stockbroking, governmental approval is generally not required to conduct business in Singapore.

Foreign investors who wish to do business in Singapore must set up a business entity, the most common of which are, company incorporation, foreign branch registration and representative office setup. A foreign company which does not incorporate a subsidiary in Singapore can choose to set up a Singapore branch or a representative office.

COMMON BUSINESS ENTITIES

COMPANY:

Can be public/private, limited/unlimited

At least one person and one director resident in Singapore required

Separate legal entity from parent

Whilst a branch is treated as part of its foreign parent, a subsidiary is a separate legal entity and as such the subsidiary is responsible for all debts and liabilities incurred. In the case of the branch however, the foreign parent is responsible.

Alternatively, a flexible approach for a foreign company requiring a base in Singapore to conduct market feasibility studies on whether to set up business in Singapore or the region can consider establishing a Singapore representative office.

It should be noted that the activities of a representative office are restricted to undertaking liaison activities and it cannot conduct business or generate income. The setting up of a representative office requires the approval of International Enterprise (IE Singapore).

In the case of financial institutions, approval has to be obtained from the Monetary Authority of Singapore (MAS). Approval for the set-up is usually valid for a year and renewable upon expiry. Under IE Singapore's current guidelines, only companies in the manufacturing, trading, trade logistics and services sectors can register representative offices.

COMMON BUSINESS ENTITIES

FOREIGN BRANCH:

Extension of parent company – not a separate legal entity

At least one local authorised representative required

Taxed as non-Singapore resident entity and not entitled to local tax benefits

REPRESENTATIVE OFFICE:

Regarded as an administrative structural arrangement – not a separate legal entity

Limited to conducting liaison activities, i.e. market research or feasibility studies

Renewed annually up to three years

Taxation

Tax is governed by the Inland Revenue Authority of Singapore. Singapore enjoys one of the lowest corporate tax rates in the world capped at 17%. The tax year is known as a Year of Assessment (YA) and runs from 1 January to 31 December.

SOME FOREIGN TAX INCENTIVES

International HQ Award:

Encourages companies to use Singapore as an international base. Provides reduced corporate tax rate on incremental income from qualifying activities

Pioneer Development and Expansion Incentive:

Encourages the introduction and growth of new industries in Singapore by granting corporate tax exemption on income from qualifying activities for a specified period of time

Tax is imposed on a preceding year basis. As part of the Singapore Budget 2016, the Government has offered certain tax rebates and schemes for eligible companies to assist Singapore companies to grow their business amidst the bleak economic outlook.

Singapore's tax system is territorial, not global. A Singapore company is subject to tax on its income, i.e. the profits and gains generated from its business activities which are accrued in, or income earned overseas but received in Singapore. Inter-company transactions must be concluded at an arms' length basis. There is no capital gains tax.

Any offshore income including dividends, branch profits and service income received in Singapore is tax exempt, provided the income was remitted from countries with a headline tax rate of at least 15% and that the income was subject to some form of tax in the foreign country.

There is generally no restriction on the repatriation of profits. However, withholding tax applies to income sourced or deemed sourced in Singapore and a non-resident is liable to pay income tax on Singapore-sourced income.

Examples of such Singapore-sourced income include interests or commissions in respect of any loan, royalties, management fees, rents or other payments for the use of any movable property and payment for the purchase of real property from a non-resident property trader. There is no withholding tax on dividend payments.

The tax residence status of a company in Singapore depends on where the control and management of its business is exercised.

A company is therefore tax resident in Singapore if the control and management of its business is exercised in Singapore. Generally, a Singapore branch of a foreign company is not treated as a Singapore tax resident since the control and management is vested with an overseas parent company. However, subject to satisfying certain conditions, a Singapore branch may still be treated as Singapore tax residents.

The basis of taxation for a resident company and non-resident company is generally the same. However, there are some benefits that a resident company can enjoy that a non-resident one would not, including benefits conferred under the Avoidance of Double Taxation Agreements (DTA) that Singapore has concluded with treaty countries.

A Goods and Services Tax (GST) of 7% is levied on the supply of goods and services in Singapore and on the importation of goods in Singapore.

Under certain conditions, relief from GST on imports may be granted. All export of goods and international services are zero-rated if the recipient of the services is located outside Singapore.

SOME FOREIGN TAX INCENTIVES

Research Incentive Scheme

Awards government grants to develop research and development capabilities in strategic areas of technology

Integrated Investment Allowances:

Encourages investment into equipment by granting a further allowance on the basis of approved fixed capital expenditure incurred on placing a productive equipment outside Singapore

Employment

Singapore welcomes foreign talent. Foreigners must ensure that they have valid employment passes or work permits to work in Singapore.

WORK PERMITS/PASS TYPES

Employment Pass:

For foreign professionals, managers and executives

Monthly salary of at least S$3,600 with acceptable qualifications

S Pass:

For mid-level skilled staff

Monthly salary of at least S$2,200

Work Permit for foreign worker:

For semi-skilled foreign workers in the construction, manufacturing, marine, process or services sector

Dependant's Pass:

For spouses and children of eligible Employment or S Pass holders

Long Term Visit Pass:

For parents, common-law spouses, step-children or handicapped children of eligible Employment or S Pass holders

Work permits are required for foreigners taking up blue-collared jobs in Singapore while employment passes are for foreigners whose basic monthly salaries exceed S$3,600/-.

Family members of employment pass holders who intend to reside with them may apply for the Dependant's Pass and/or Long Term Visit Pass. A combination of quota restrictions and imposition of foreign worker levy is used to control the foreign worker population in Singapore.

Additionally, the Central Provident Fund (CPF) is a comprehensive social security savings plan to which both employers and employees are required to contribute. CPF is only applicable to Singapore citizens and Singapore Permanent Residents. The rate of contribution differs over sectors, wages and age groups.

The Singapore Employment Act applies to both local and foreign employees except managerial, executive and confidential employees, domestic workers, seamen and Government employees. The Act stipulates among other things, the number of ordinary working hours per week, public holidays, overtime, annual/sick/maternity leave and other service benefits like termination and retirement benefits.

For those employees who do not fall under the purview of the Act, the terms of employment are negotiated and embodied in their individual employment contracts. Singapore has no minimum wage law.

Affinity Law LLC
Advocates & Solicitors

SINGAPORE
February 2017

Going Global

Singapore's pro-business policies and Government's commitment in promoting trade is globally endorsed with more than 7,000 multinational corporations set up here. More than half of them are using Singapore has their regional headquarters. This includes the likes of global leaders such as Shell, Caltex, ExxonMobil, Daimler Chrysler, Bosch, Bhatia, Noble Group and Peabody Energy.

This small city spans big opportunities and returns for the discerning. Singapore promises dedication to quality, efficient delivery and a relentless pursuit of innovation as your ideal business partner.

www.affinitylaw.com.sg

The House of Eden
4 Robinson Road #10-01
Singapore 048543

Tel: +65 6533 7800
Fax: +6532 4800

Doing Business in Hong Kong - What's in it for Mackrell Members' Clients? On the Doorstep of China & Asia - Tax Advantages, Investments, Pensions,

ECONOMIC FIGURES

1. Economic Freedom - 1st

RANK	COUNTRY	OVERALL	CHANGE
1	Hong Kong	88.6	-1.0

Hong Kong's economic freedom score of 88.6 keeps it on the top of the Index rankings for the 22nd consecutive year. As of January 2017, it was 1st in the world. http://www.heritage.org/index/ranking

2. World Competitive Scoreboard - 1st

Scoreboard 2016

WCY 2016	Country
1	China Hong Kong
2	Switzerland

Hong Kong ranks first in 2016 for competitiveness http://www.imd.org/uupload/imd.website/wcc/scoreboard.pdf

3. The Global Financial Index - 4th

4	–	Hong Kong (SAR)

Hong Kong ranks in the top 4 for the last five consecutive years in The Global Financial Centres Index.

4. Stock Market Size - 6th

6	Hong Kong Stock Exchange	Hong Kong	Hong Kong	3,325
7	Euronext	European	Amsterdam Brussels Lisbon	3,321

The HK Stock Exchange is Asia's 3rd largest (after China and Japan) - opening in 1891. It has a combined sector capitalisation of some US$3.33 trillion. (December 2015) https://en.wikipedia.org/wiki/List_of_stock_exchanges

INTRODUCTION

Hong Kong is spectacularly positioned to take advantage of the world's economic growth engine. Its history and geographical position in the world has opened opportunities that it would have otherwise never been blessed with. This, together with China's view of Hong Kong in the bigger financial and legal picture has led to Hong Kong being the perfect base from which Mackrell members' clients can take advantage of the dynamic regional market - whether traders or investors. Hong Kong is a special administrative region of China and operates under the "One Country, Two Systems" formula.

Hong Kong's government is obsessed with charts, lists and numbers and a look at the statistics on the left underlines how important "doing business" is to Hong Kong. It is **first** in terms of economic freedom and is a unique global business city. It has held this #1 position for an unprecedented 22 straight years. There is simply nowhere else in the world where the economy is as free, liberal, laissez-faire and attractive to overseas companies. It has low tax rates, and simple and straightforward regulations when it comes to the formation of companies. It has transparent financial and services sectors but most importantly is the beneficiary of a special status conferred upon it by China which gives rise to unique benefits that are not given to any other country in the world.

As Hong Kong sits at the foot of mainland China and incorporates a solid banking system, telecommunications, legal system, and a desire for attractive tax policies, the region has achieved an economic growth that it would not have dreamed possible over a century ago. With this in mind, the following information for Mackrell Member firms aims to give them and therefore their clients, a better understanding of the hidden and not so hidden advantages and opportunities of Hong Kong, its tax structure, and foreign investment schemes that have drawn worldwide commendations. The purpose for doing so will be two fold:

1. to shed light on the advantages of Hong Kong as an OECD compliant tax location and its obvious lead position at the front of financial/trading/planning destinations for reasons often overlooked by individuals, corporate entities and their advising professionals; and

2. to provide those who deal with Hong Kong from afar an understanding of the distinctive benefits that such tax structure and investment schemes offer to foreign companies and foreign nationals.

Background

The unique history and geographical location of Hong Kong has helped turn the former British colony into one of the world's most successful economic cities. Starting in 1841 under the British administration, Hong Kong began to develop into a legitimate international port whereby trade flourished between the east and west. By the late 20th century, Hong Kong was the seventh largest port in the world and ranked third behind Rotterdam and New York in terms of container throughput.

Throughout its history, the British administration adopted "positive non-interventionism," as it was perceived that the success of Hong Kong's economy was due largely to the absence of government intervention. This policy was continued successively by each of Hong Kong's Financial Secretaries and continued through the 1997 handover to China.

This non-interventionism approach led to a 1994 World Bank report which stated that Hong Kong's GDP per capita grew in real terms at an annual rate of 6.5% from 1965 – 1989. This consistent 25 year growth percentage is remarkable by any economic analysis.

HONG KONG - The Last True Tax Haven

When Barack Obama was elected as President of the United States of America, he (along with numerous other countries) aimed to crack down on off-shore tax havens throughout the world. Local U.S. businesses have called it a tax hike on companies and have been intensely scouring for advice and locations that offer relief from the harsh negative results that are now equated with traditional tax haven destinations.

With this in mind, one of the most important characteristics of Hong Kong is that it is **not** a member of the Organization for Economic Co-operation and Development (OECD) but is OECD compliant and is thus secure in its position to offer a strongly attractive tax system for individuals and corporations. The result is that Hong Kong offers international companies and individuals a means of legitimate taxation planning opportunities and cross border business facilitation in an economically safe environment, governed by a strong rule of law.

As Hong Kong continues to be a leading global economic hub, international companies and banks have for years established a strong presence in Hong Kong. The reality of setting up "**real businesses**" is the key in avoiding the tax avoidance death knell. The term "tax haven" in the Hong Kong context is actually inappropriate because Hong Kong does not derive its main source of revenue and income from providing tax efficient vehicles and shelters purely to external companies and individuals for the main sake of taxation avoidance. Instead, Hong Kong simply provides a low tax system with attractive tax rules, particularly for those who derive no income in Hong Kong. The structure of taxation in Hong Kong is simple and broadly levied on a territorial basis under three broad categories of tax: 1. Profits tax, 2. Salaries Tax and, 3. Property Tax & Stamp Duty.

HONG KONG has:
No capital gains tax
No wealth tax
No estate tax
No withholding tax
No sales tax
No VAT
No annual net worth tax

The Establishment of An Office in Hong Kong does not make such offices liable to profits tax if the office is not generating profits from business within the territory. In these cases, it is not a question of such companies paying low tax; instead it is a fact that they pay no tax. As such, a Hong Kong company can be utilized in much the same way as many International Business Companies (IBCs) or offshore companies in jurisdictions around the world - however, the key difference is that since Hong Kong is not a member of the OECD, it does not appear on any OECD tax haven watch lists, does not have any foreign exchange controls. Moreover, Hong Kong has a solid layer of confidentiality and privacy protection available to companies and account holders locally, thereby making it attractive to international corporations and individuals.

ADVANTAGES: BUSINESS ESTABLISHMENT

*Located in the center of Asia-Pacific region, part of China and located on its doorstep;
*Closer Economic Partnership Agreement with China;
*Access to China's markets without the Regulations and formalities of establishing offices in China;
*No tax on profits not "derived in" Hong Kong; and
*Hong Kong Company may apply for Representative Office (RO) in China and Wholly Foreign Owned Entity status (WFOE)

Further Benefits can be seen in a wide range of low tax outcomes for corporate entities making Hong Kong one of the premier locations for legitimate tax planning, including:

1. Companies pay a standard rate of 16.5% on assessable 'local' profits;

2. In Hong Kong there are no capital gains taxes, no wealth tax, no estate duty, no withholding taxes, no sales taxes, no VAT, and no annual net worth or capital taxes;

3. Dividend income received by a Hong Kong parent company from either a resident or foreign subsidiary is not deemed income in the holding company's hands and is thus not subject to an assessment to profits tax;

4. Profits remitted to a Hong Kong parent which represent the profitable disposal of its shareholding in a resident or non resident subsidiary are not assessed to tax in the territory;

5. The profitable disposal by a Hong Kong entity of foreign real estate or of a company holding real estate is not assessed to tax in the territory;

6. Rental income from foreign real estate is not assessable income in Hong Kong for profit tax purposes;

7. Interest income received by a resident or non resident business entity on deposits lodged with a financial institution are exempt from profits tax;

8. In addition, the following sources of trading income are exempted from profits tax;

8.1 Interest received or capital gains made on the purchase, retention or sale of a Government bond issued under the Loans (Government Bonds) Ordinance;

8.2 Exchange fund debt instruments;

8.3 Hong Kong dollar denominated multi–agency debt instruments;

8.4 Specified investment schemes which comply with the requirements of a government supervisory authority (Specified investment schemes include investments in unit trusts and mutual funds.); and

9. Individuals in Hong Kong are taxed at up to a **maximum** of 15% on employment income, but investment income or capital gains are not taxed.

An often overlooked advantage of Hong Kong's tax regime comes as a result of the reunification of Hong Kong with mainland China. In 1997, the British Empire lowered the flag that had previously flown over Hong Kong for more than a century and the Chinese government raised theirs in a claim of "reunification". The ever developing relationship between the U.S. and China has helped keep Hong Kong off the "black list" of traditional tax shelter destinations that industrialized countries have been targeting. Thus Hong Kong will remain fully insulated from witch hunts, such as those that have occurred in Liechtenstein, the BVI, the Channel Island, the Caribbean and Switzerland.

PENSION INVESTMENTS IN HONG KONG

In a similar low tax fashion, there are many advantages to having a Hong Kong pension rather than relying on pensions in the traditional economies (i.e. the United States, the United Kingdom/ EU).

Expatriate executives and professionals have a considerable problem with pension provision, since it is often the case that while non-resident they cannot continue with tax-privileged pension investment at 'home', i.e. in their original domicile, to which they probably intend to return in the end. It may well be that offshore investment is the only practicable route, even though the income they eventually receive in retirement is going to be taxed - and they may decide to retire offshore, in which case they will have preserved flexibility by not committing to any particular high-tax jurisdiction.

HONG KONG PENSION ADVANTAGES

- no income, capital gains or inheritance tax;
- greater investment choice;
- no compulsion to buy an annuity;
- freedom to choose the age at and how much pension you take; and
- the ability to pass the whole fund to family members upon death.

As a general principle, investments intended to provide pensions income need to take into account the choice of jurisdiction for eventual retirement. Hong Kong does not tax income from retirement schemes, even for residents. Pensions do not face withholding taxes, and therefore Hong Kong is a highly suitable place in which to create a retirement fund, whether or not you plan to retire there. There is also of course the viability of the entity holding other personally contributed pension assets. In Hong Kong, such assets are held by a trustee who takes no ownership in the assets. As of 2010, a total of 8,212 pensions were established with 492,084 participating scheme members, including 5,129 registered schemes and 2,093 exempted schemes

Weir & Associates

W&A is a full service 'business focussed law firm' with years of experience providing legal services relevant to businesses including:

1. Commercial transactions in Hong Kong, Mainland China or internationally in areas including trading, licensing, manufacturing, entertainment, construction, hospitality, telecommunication, pharmaceutical and information technology;
2. Corporate finance and restructuring for public companies in Hong Kong and North America;
3. Conveyancing and leasing in Hong Kong;
4. Intellectual property;
5. Information technology and telecommunications in Hong Kong and regional matters;
6. Off-shore trusts and estate planning;
7. Immigration for inbound applications (visas, investor programs and work authorization schemes) and overseas to countries including Taiwan, Canada, US, Australia, NZ, and UK
8. Litigation (civil and criminal) in Hong Kong;
9. Arbitration for international commercial matters in Hong Kong and Mainland China.

SIMPLICITY OF COMPANY FORMATION:

✶**ONE** day to set-up a company
✶Costs around US$1,000
✶No requirement to be present in Hong Kong
✶No nationality restriction for directors
✶Minimum 1 Shareholder and Director is required (of which can be the same person or a company)
✶Allows for a nominee shareholder and director structure
✶Winding up company is easy and at a relatively low cost

CONCLUSION & CONTACTS

Hong Kong has found a niche in an otherwise overcrowded market of offshore tax shelters and investment destinations. Its unique history, location, and reunification with mainland China has helped to keep this Special Administrative Region thriving throughout the recent economic downturn. Its strong foundations of British common law and a solid bedrock of banking giants have given economic stability to this once tiny fishing village. The low tax structure for businesses and individuals has also made Hong Kong one of the top regional investment cities in Southeast Asia.

Weir & Associates provides tax planning and corporate services for a large range of individuals and organisations on local, regional and international tax matters. Many corporations already have regional head offices in Hong Kong to utilize the city's competitive advantage and as a base for entering the China Market. Weir & Associates has served many of these corporations in establishing their presence in Hong Kong and developing a nexus into mainland China and Asia.

For more information, please contact Shane Weir, Chris Short, or Dennis Lee on +852 2526 1767, or email weirlaw@weirandassociates.com. Weir & Associates, 16th Floor Tak Shing House, Theatre Lane, 20 Des Voeux Road Central, Hong Kong. Further information is available at www.weirandassociates.com

Q&A

Common Questions and Answers....

Can individuals take advantage of Hong Kong's occupational retirement schemes (ORS)?

On an individual basis, and by way of example, expatriate teachers have grouped together in order to contribute monthly payments out of their pay into individual retirement plan accounts operated by registered custodians in the name of Hong Kong Occupation Retirement Scheme Ordinance (ORSO) Trustees. For any US teachers for example, US tax is deferred on contributions, retirement plan income and gains. There is minimum reporting on Form 8938 (for US citizens) annually.

By way of a further example, an expatriate US citizen who was a hedge fund manager employed in Hong Kong, wished to set up an ORS investing in the hedge fund itself. His employers made universal cash contributions to be paid into a Hong Kong ORS operated by a registered trustee who then invested the contributions in the hedge fund capital. US tax is deferred on the contributions, and on the retirement plan gains on the hedge fund shares themselves and the professional investor rules are answered by the Hong Kong ORSO trustee being the subscriber for the hedge fund shares.

Can Hong Kong's Occupational Retirement Scheme form part of an individual's succession planning?

Yes, a good recent example is a non-US person who was married to a US person owning UK real estate. The UK real estate was contributed to a Hong Kong ORSO scheme already in operation for them. On the death of them both, the Hong Kong ORSO scheme by-passed UK and USA probate because the scheme assets did not form part of their personal assets under probate. No UK or USA estate taxes were payable. The scheme paid out to the succeeding generation free of taxes as the ORSO was based in Hong Kong.

What is the reality of being able to "parachute" expatriate employees into Hong Kong to establish a presence/business/corporation?

The reality is that many countries globally and locally within Asia wish to protect their employment markets. Hong Kong has a laissez-faire approach to business and competition and accepts that expatriate employees are an essential part of business and skills required in Hong Kong. The Special Administrative Region of China recognises that the global movement of employees is essential if multi-national businesses are to be enabled to do business across borders. There are many legal and practical issues that usually confront such organisations, but complying with immigration regulations is probably of greatest concern. Hong Kong has a special migration visa scheme being "Entry for Investment for Foreign Entrepreneurs" who wish to relocate their local businesses offshore in order to operate their own business in Hong Kong. This entrepreneur visa scheme is essentially a type of work permit that is issued to the owner of a business and/or foreign employees of a company, which will allow those individuals to work and take up residency in Hong Kong. Recent typical examples we see are US or European companies expressing a desire to have their own US/European employees on the ground in the early stages of that presence in order to facilitate a successful start. In Hong Kong, the quick and easy setting up of companies and obtaining foreign visas is perhaps one of the most attractive policies in the region and is a system which greatly eases and facilitates the mobility of employees to Hong Kong.

As for applying, the main criteria for grant of the entrepreneur visa is whether you are able to prove that your company maintains a legitimate business and will make a significant contribution to the economy of Hong Kong. The company typically is also required to maintain funds of at least US$70,000 in its company bank account. The business owners or employee applying for the visa are allowed to bring their spouse and unmarried dependent children under the age of 18 to Hong Kong under this scheme. Further to this they are also eligible to apply for Hong Kong permanent residence after 7 years of continuous stay.

What are the rates of Salaries' Tax in Hong Kong?

A person's income from employment, less allowable deductions, charitable donations and personal allowances, is chargeable to salaries tax at the following progressive rates:

The first HK$40,000 earned at 2%, the next HK$40,000 of salary at 7%, the next HK$40,000 at 12% and the remainder at 17%.

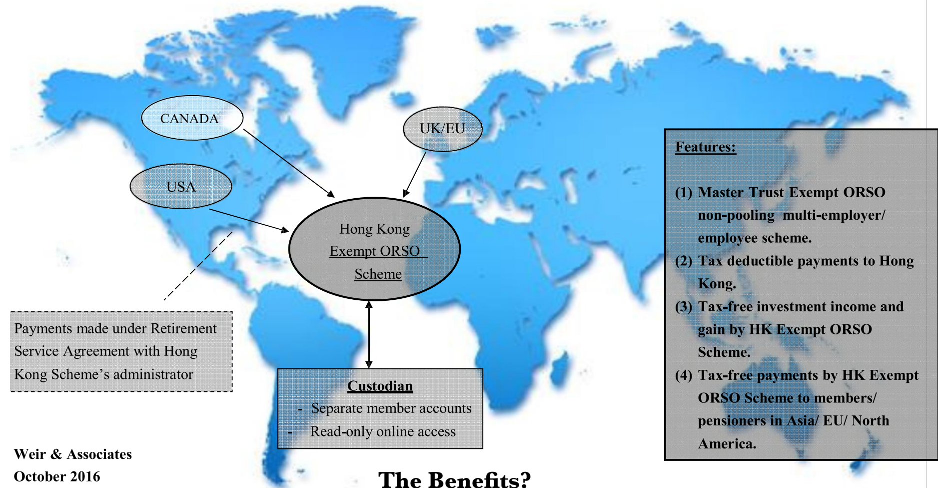
However, if the above calculation yields a sum of tax greater than 15% on the person's income from employment less allowable deductions and charitable donations, but without a deduction for personal allowances (the Standard Rate), then the maximum tax payable is the Standard Rate of 15%.

Q&A

Common Questions and Answers....

What does the setting up of a pension scheme in Hong Kong look like?

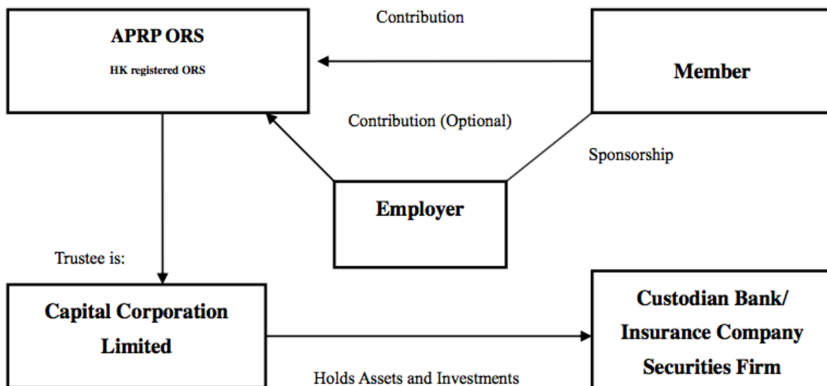
A Hong Kong Retirement Pension Plan (the "Plan") is an on-shore, Hong Kong Registered "Occupational Retirement Scheme" (ORS) typically administered as a trust under the Hong Kong"Mandatory Provident Fund Schemes Authority". The Plan is an all-encompassing pension that is recognized by most governments as a "Qualifying" Recognized Overseas PensionScheme (QROPS in the United Kingdom) and many other jurisdictions worldwide.



Due to the generous HK ORSO Tax regime and favourable use of double taxation agreements around the world, no matter what your nationality, no matter where you are currently resident for tax purposes, either now or in the future, the Plan works as an extremely efficient tax-planning tool not only in Hong Kong but worldwide.

The Plan allows you to defer Income Tax and Capital Gains Tax and it is our belief that "tax deferred is tax saved". It can accept most transferred Pensions and/or 401K's with no limits. Also there is no requirement to buy an annuity on retirement, and it will eliminate pension restrictions for a surviving spouse and secure capital for chosen heirs

OCCUPATION RETIREMENT SCHEME (ORS) SETUP STRUCTURE



The Benefits?

1. No HK salaries Tax on vesting of Employers stocks and 15% tax relief against total remuneration via employer contributions.

2. There is no Stamp Duty Land Tax, Capital Gain or Income tax on the transfer of UK property.

3. Assets in the Plan will by-pass inheritance, death or estate estate as the Plan falls outside Probate, in the event of premature death.

4. It achieves tax-free roll up and distribution in most Organization for Economic Co-Operation and Development ("OECD") countries, combined with appropriate use of the double taxation agreements.

5. The Plan can hold Cash, Property, Land, Mutual Funds, Stocks,Stock Options, Bullion, Private Company Shares, Property Companies and even Hedge Fund Company's own fund investments.

6. It gives 100% protection to you and your assets against claims from creditors, matrimonial affairs and all forms of litigious situations, including subprime lawsuits.

7. It can consolidate your fragmented portfolio to create a greater buying power and potentially better investment opportunities.

8. The Plan is a family trust that never dies.

9. There are no reporting requirements to the Hong Kong regulators, which minimizes costs of administration, enhancing returns on investment, and also assuring client confidentiality.

© 2017 MACKRELL INTERNATIONAL

All Rights Reserved. No part of this book may be reproduced or utilized in any form or by any means, electronic or mechanical, including photocopying, recording, or by any information storage and retrieval system, without permission in writing from the publisher.